Supreme Court of Florida

No. SC17-585

THE FLORIDA BAR,
Complainant,

vs.

CHARLES PAUL-THOMAS PHOENIX,
Respondent.

January 28, 2021

PER CURIAM.

We have for review a referee's report recommending that Respondent, Charles Paul-Thomas Phoenix, be found guilty of professional misconduct and suspended from the practice of law for ninety days. We have jurisdiction. *See* art. V, § 15, Fla. Const. We approve the referee's findings of fact and recommendation as to guilt. We also conclude that the referee considered the right aggravating and mitigating factors in applying the standards for imposing sanctions. Yet we disapprove of the referee's recommended sanction and order instead that Respondent be suspended from the practice of law for two years.

I

This case arises from Phoenix's involvement with Cay Clubs Resorts and Marinas (Cay Clubs), a company that pitched to investors the opportunity to buy and profit from the management of vacation rental units. Phoenix was Cay Clubs's lawyer, in one way or another, from 2005 until 2007. The trouble is, Cay Clubs turned out to be a Ponzi scheme: it made so-called "leaseback" payments to initial investors using money from new investors and failed to disclose this practice on federal mortgage loan documents. As Senior Vice President and General Counsel of Cay Clubs, Phoenix knew about and participated in Cay Clubs's Ponzi scheme. When the scheme collapsed, the U.S. Attorney's Office for the Southern District of Florida (USAO) investigated and prosecuted Cay Clubs's executives and legal representatives. Phoenix cooperated with the USAO in exchange for its agreement that he would not be prosecuted. He never told The Florida Bar (Bar) about that agreement. Years later, the Bar found out and initiated disciplinary proceedings against Phoenix for his role in Cay Clubs's Ponzi scheme. Phoenix has repeatedly denied any wrongdoing. He challenges virtually all elements of the proceedings as improper and specifically alleges that the referee's findings of fact are not supported by competent evidence.

A

Nobody disputes that Phoenix entered into a non-prosecution agreement

with the USAO on March 10, 2014 (NPA), so that seems to be a good place to begin our analysis. As it turns out, in determining whether Phoenix's conduct merits a longer suspension, we need consider nothing else.

On its face, in its first paragraph, the NPA provides that the USAO will "not criminally prosecute [Phoenix] for any crimes related to [his] participation in the criminal conduct set forth" in an attachment to the NPA. There is no ambiguity about whether the conduct it recounts is criminal in nature. It is. Phoenix may have avoided prosecution for his involvement in that criminal conduct, but by entering into the NPA, Phoenix "admits, accepts, and acknowledges responsibility for the conduct set forth" in the agreement.

Among the things Phoenix admits in the agreement is the fact that Cay Clubs "did not heed his advice at times with regard to the sale and marketing of the investment" and that he "continued to work as a lawyer for the company despite the principals ignoring his advice, because he enjoyed his generous remuneration and other benefits associated with his role at the company." Phoenix "received and commented on marketing materials where fixed rates of return and leaseback payments were promised to potential investors well after he had advised the Cay Clubs principals to halt this practice and had obtained opinions from outside counsel concerning whether the investment was a security."

What is more, Phoenix knew that the "leaseback payments made to investors were concealed from lenders on [real estate] closing documents, including by not listing the payment on the Settlement Statement or HUD-1,[1] when closings were conducted and lender financing was obtained." Phoenix "was also aware that if the leaseback payments were disclosed . . . that some or all of the transactions would not have been approved by the lender without more information." The closings "took place in Phoenix's law office" and "at no point during these closings were the leaseback payments listed" on the HUD-1 closing statements.

Phoenix was also aware that Cay Clubs was "teeter[ing] on the edge of insolvency" yet continued to use "false and misleading" marketing that "promis[ed] a rosy financial picture." Indeed, in Phoenix's own view, "there came a time during the course of the operation of Cay Clubs where it could be fairly described as a 'Ponzi Scheme' due to its inability to pay existing leaseback obligations without new investor money." Investors began to complain that leaseback payments were not being made, yet Phoenix did not disclose Cay Clubs's "inability [to] make leaseback payments . . . to lending institutions or future investors when ongoing marketing and financing activities took place." Further, when Cay Clubs sought outside legal advice, Phoenix was aware that

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1. A HUD-1 Settlement Statement is a federal mortgage lending form on which creditors or their closing agents disclose all charges imposed on buyers and sellers in consumer credit mortgage transactions.

"significant aspects of the Cay Clubs business and marketing efforts were not disclosed to the outside lawyers." In accordance with the advice from that counsel, Cay Clubs "put into place certain policies or procedures on paper," yet Phoenix knew that the "ongoing marketing activities . . . were contrary to the representations made to outside counsel."

Phoenix "actively participated in the effort to try to incorrectly characterize the nature of the business." "The Cay Clubs principals made great efforts to avoid regulation under the securities laws, and Phoenix assisted in these efforts." Phoenix knew that "Cay Clubs operated in a fraudulent manner, and that investors and others were defrauded through the making of false and misleading promises concerning the safety of the investment." "Phoenix was aware that [Cay Clubs's] practices constituted a fraud on the lending institutions involved and these practices could be fairly described as mortgage fraud."

Finally, Phoenix agreed that he had "not always been forthcoming" with federal regulators "because he did not want to be held accountable for the misconduct at Cay Clubs, or the fraud that took place against the investors and the lending institutions." Phoenix agreed that in the federal investigation he had "minimized his role and knowledge of the events, and ha[d] sought to avoid his own liability."

B

Knowing all this, and knowing that he had admitted it, Phoenix nonetheless did not report the NPA or his work with Cay Clubs to the Bar. In March 2017, the Bar filed a complaint with this Court against Phoenix for his role representing Cay Clubs. The complaint alleged that Phoenix's conduct violated two Rules Regulating the Florida Bar (Bar Rules): 4-1.16 ("[A] lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or law; . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believe is criminal or fraudulent . . . or the client has used the lawyer's services to perpetrate a crime or fraud. . . .") and 4-4.1 ("[I]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person; or . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . ."). The complaint also alleged a lack of honesty by Phoenix.

This Court referred the Bar's complaint to a referee for a hearing and recommendation.[2] The original referee did not make findings of fact or

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2. Later, during the original proceedings before a referee, the Bar additionally argued that Phoenix violated Bar Rule 4-8.4(c) ("[A] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . .").

recommendations as to guilt. Instead, the referee recommended that Phoenix attend a diversion program. The Bar challenged the original referee's report. This Court disapproved the report and sent the case back to the referee for additional proceedings. We required the referee to issue findings of fact and determined that Phoenix was not eligible for diversion because his alleged misconduct was not "minor."

On remand, the chief judge of the Twelfth Judicial Circuit appointed herself as referee; the original referee had retired and was not eligible to serve as a senior judge. The successor referee reviewed all pleadings, exhibits, transcripts, and briefs filed; afforded each side ninety minutes to present any relevant arguments, testimony, or evidence for her consideration; and conducted a sanctions hearing where Phoenix presented live testimony from sixteen character witnesses, the testimony of two witnesses by telephone, and testified on his own behalf.

In her report and recommendation, the successor referee recommended that Phoenix be found guilty of violating the Bar Rules charged in the complaint and proceedings. She found that, as counsel for Cay Clubs, Phoenix failed to withdraw as counsel despite knowing that he aided his client in committing fraud, concealed the true nature of Cay Clubs's business, and failed to be truthful in statements to others. The successor referee based these findings on the "Non-Prosecution

Agreement and supporting evidence." As a sanction, the referee recommended that Phoenix be suspended for ninety days.

II

On review, Phoenix challenges the appointment of a successor referee, alleges that the statute of limitations has expired, disputes the legality of the Bar Rule 4-8.4(c) charge, challenges the lack of evidentiary hearing before the successor referee, alleges that the burden of proof was improperly shifted, challenges the successor referee's findings of fact and recommendation as to guilt, and challenges the successor referee's recommended sanction as too harsh. The Bar filed a notice challenging the referee's recommended sanction as too lenient.

A

Phoenix's first five claims do not amount to much, so we address them briefly.

First, we find the appointment of a successor referee was proper. Phoenix cites no authority to support his claim that the same referee must handle a case on a remand for further proceedings. The Bar Rules contain no such requirement. Nor did Phoenix object to the appointment of a successor referee until his appeal to this Court, and therefore he did not preserve this issue for review as we have held he must. *Fla. Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016).

Second, the statute of limitations had not run when the Bar initiated its proceedings in this matter. The Bar is required to open an investigation "within 6 years from the time the matter giving rise to the investigation is discovered or, with due diligence, should have been discovered." Bar Rule 3-7.16(a)(1). Phoenix's misconduct occurred from 2005 to 2007. The Bar received the NPA in 2014 and initiated this matter in 2017. It is true that the NPA was not a "determination or judgment of any criminal offense" that would, under the Bar's rules, have clearly required Phoenix to have reported his admitted misconduct. Bar Rule 3-7.2(e). And yet this would have been a different case had Phoenix acted more forthrightly, as an officer of the court, and brought the NPA to the Bar's attention. He did not. On these facts, we cannot say the Bar failed to exercise due diligence in discovering Phoenix's participation in criminal misconduct, and we find that its complaint was timely filed in 2017 after its 2014 discovery of the NPA.

Third, Bar Rule 4-8.4(c) was properly charged. Generally, as a matter of due process, the Bar's complaint must allege all rule violations the Bar seeks to prosecute. *In re Ruffalo*, 390 U.S. 544, 552 (1968) ("[A]bsence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."). However, the violation of specific Bar Rules not named in the complaint may be considered if such misconduct is "within the scope of the Bar's accusations" and the attorney was "clearly notified of the

nature and extent of the charges pending against him or her." *Fla. Bar v. Townsend*, 145 So. 3d 775, 781 (Fla. 2014). Bar Rule 4-8.4(c) involves "engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Bar's complaint clearly accuses Phoenix of engaging in such conduct both when he represented Cay Clubs and during the federal investigation of Cay Clubs. Further, the Bar argued that Phoenix violated Bar Rule 4-8.4(c) in the original proceedings and in all subsequent appeals. For years Phoenix has been on notice that the Bar's charges include a violation of Bar Rule 4-8.4(c).

Fourth, the successor referee acted permissibly when she decided not to conduct a second evidentiary hearing. "Due process in Bar disciplinary proceedings requires that an accused attorney be given a full opportunity to explain the circumstances of an alleged offense and to offer testimony in mitigation regarding any possible sanction." *Fla. Bar v. Baker*, 810 So. 2d 876, 879 (Fla. 2002). Phoenix had a full opportunity to explain, with ninety minutes of oral argument and presentation of eighteen character witnesses to the successor referee. What is more, Phoenix consented to shorter proceedings before the second referee based on her review of the prior proceedings's transcript. A party cannot invite supposedly improper proceedings and later complain that the proceedings were improper. *See, e.g., Lowe v. State*, 259 So. 3d 23, 50 (Fla. 2018) (a party may not invite error and then be heard to complain of that error on appeal).

And fifth, the burden of proof did not improperly shift from the Bar to Phoenix. The Bar must prove by "clear and convincing evidence" that Phoenix violated each Bar Rule charged. *Fla. Bar v. Rayman*, 238 So. 2d 594, 597 (Fla. 1970). Phoenix's own admissions in the NPA are the heart of the Bar's case. We find Phoenix's admissions in that agreement to have been clear and convincing evidence of his violations within the meaning of our cases.

B

Competent and substantial evidence supports the successor referee's findings of fact, which in turn support the referee's recommendations as to guilt. This Court's review is limited to determining whether the factual findings are "supported by competent, substantial evidence in the record" and does not include "reweigh[ing] the evidence." *Fla. Bar v. Alters*, 260 So. 3d 72, 79 (Fla. 2018) (citing *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)). For recommendations of guilt, this Court's review is equally limited only to determining if the referee's factual findings support the recommendations. *Id.* (citing *Fla. Bar v. Shoureas*, 913 So. 2d 554, 557-58 (Fla. 2005)). The referee based her findings of fact almost entirely on the NPA. Though Phoenix's testimony later attempted to downplay these admissions, they are in fact competent and substantial evidence. The referee's factual findings support the successor referee's recommendations of guilt.

Bar Rule 4-1.16 requires attorneys to decline or terminate a representation if the representation results in a violation of the Bar Rules or law, if a client refuses to stop acting in a criminal or fraudulent manner, or a client has used the lawyer's services to perpetrate a crime or fraud. The record demonstrates that Phoenix should have terminated his representation of Cay Clubs for all three reasons. Phoenix was aware that Cay Clubs "did not heed his advice at times with regard to the sale and marketing of the investment" and "continued to work as a lawyer for the company despite the principals ignoring his advice." Phoenix "received and commented on marketing materials where fixed rates of return and leaseback payments were promised to potential investors well after he had advised the Cay Clubs principals to halt this practice and had obtained opinions from outside counsel concerning whether the investment was a security." Beyond the marketing materials, Phoenix knew that the "leaseback payments made to investors were concealed from lenders on [real estate] closing documents . . . when closings were conducted and lender financing was obtained." These closings "took place in Phoenix's law office" and "at no point during these closings were the leaseback payments listed" on the required documents. "The Cay Clubs principals made great efforts to avoid regulation under the securities laws, and Phoenix assisted in these efforts." Phoenix knew that Cay Clubs was committing fraud and that his

services were assisting in that fraud, yet he continued to represent Cay Clubs in violation of Bar Rule 4-1.16.

Bar Rule 4-4.1 requires attorneys to be truthful in statements to others when representing a client. Failing to disclose information is considered untruthful if "disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." Phoenix's actions led directly to misleading investors about Cay Clubs's "inability [to] make leaseback payments . . . to lending institutions or future investors when ongoing marketing and financing activities took place." When Cay Clubs hired outside counsel to determine their potential liabilities under securities law, Phoenix was aware that "significant aspects of the Cay Clubs business and marketing efforts were not disclosed to the outside lawyers." Phoenix failed to disclose information in order to assist Cay Clubs in criminal and fraudulent acts, thereby violating Bar Rule 4-4.1.

Bar Rule 4-8.4(c) prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Phoenix violated this rule both through his actions representing Cay Clubs and in the subsequent federal investigation. As Cay Clubs's counsel, Phoenix "actively participated in the effort to try to incorrectly characterize the nature of [Cay Clubs's] business." Closings completed in Phoenix's law office did not disclose the leaseback payments to lenders. During the investigation of Cay Clubs, Phoenix admitted that he had "not

always been forthcoming" with federal regulators "because he did not want to be held accountable for the misconduct at Cay Clubs, or the fraud that took place against the investors and the lending institutions." Phoenix agreed that in his testimony for the federal investigation he had "minimized his role and knowledge of the events, and ha[d] sought to avoid his own liability." Phoenix was dishonest about the nature of Cay Clubs's business, helped Cay Clubs commit fraud, was deceitful towards lending institutions about leaseback payments, and misrepresented his unlawful actions to federal investigators. That violates Bar Rule 4-8.4(c).

C

In light of all this, we cannot say that a ninety-day suspension has a sufficient basis under our cases. "The purposes of attorney discipline are: (1) to protect the public from unethical conduct without undue harshness towards the attorney; (2) to punish misconduct while encouraging reformation and rehabilitation; and (3) to deter other lawyers from engaging in similar misconduct." *Fla. Bar. v. Dupee*, 160 So. 3d 838, 853 (Fla. 2015). The successor referee correctly relied on Florida Standard for Imposing Lawyer Sanctions (Bar Sanction Standard) 7.2 (2015) to determine that suspension is the correct sanction in this case. ("Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential

injury to a client, the public, or the legal system."). Because the standards do not provide recommendations of suspension length, we look to factually similar cases to determine the appropriate length. *Dupee*, 160 So. 3d at 853.

The referee did not err in her assessment of aggravating and mitigating circumstances. To impose a sanction commensurate with the misconduct, the referee determines what, if any, mitigating and aggravating factors apply. "[A] referee's findings in mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record." *Alters*, 260 So. 3d at 82 (quoting *Fla. Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007)). The successor referee found one aggravating factor, Bar Sanction Standard 9.22(g) (2015) (refusal to acknowledge wrongful nature of conduct), and five mitigating factors, Bar Sanction Standards 9.32(a) (absence of a prior disciplinary record), 9.32(f) (inexperience in the practice of law), 9.32(g) (character or reputation), 9.32(i) (unreasonable delay), and 9.32(j) (2015) (interim rehabilitation). The successor referee rejected the other mitigating factors that Phoenix offered.

The aggravating factor is supported by the record because, despite having signed an NPA admitting participation in criminal conduct, Phoenix still argued that he did not commit misconduct. Further, Phoenix argued that he repeatedly "tried to right the ship" to prevent Cay Clubs's fraud, that "as soon as he knew

[about the Ponzi scheme], he sprung into action" to stop it, and claimed that he was "the one man who told Cay Clubs [to] shut it down." The successor referee characterized Phoenix's narrative as casting "other Cay Clubs executives in the role as villain, and himself in the role of hero. Essentially, he argues that he alone tried to thwart the illegal practices, did so valiantly, and singlehandedly shut down the sales operations when [his] attempts were ultimately thwarted." We cannot square that description of his role with his admissions in the NPA or with his decision not to bring the NPA to the Bar's attention.

The mitigating factors are likewise supported by the record. The Bar does not specifically contest any of the mitigating factors, but highlights that the character witnesses presented by Phoenix generally did not know him at the time of the misconduct, so the mitigating testimony is about Phoenix's current character or reputation, rather than character or reputation at the time of the misconduct.

Notwithstanding this correct assessment of aggravating and mitigating circumstances, we find a suspension of ninety days to be so brief as to be without basis in our law as it has been articulated in similar cases.

Consider the case of Phoenix's former colleague, who might have been his codefendant under slightly different circumstances. *Fla. Bar v. Callahan*, No. SC17-539, 2017 WL 1409677 (Fla. Apr. 20, 2017). Callahan also worked for Cay Clubs for a similar length of time and entered into a non-prosecution agreement.

The Bar alleged that Callahan violated three Bar Rules, the same three as Phoenix, and Callahan agreed to a consent judgment for a one-year suspension. A more severe sanction for Phoenix is warranted because key factual differences exist between the cases, including Callahan's consent judgment. Callahan, through his law firm, only served as outside counsel to Cay Clubs, while Phoenix worked directly for Cay Clubs, holding the positions of "Senior Vice President and General Counsel." Beyond differing formal titles, Phoenix knew more about, and was more deeply involved in Cay Clubs's Ponzi scheme. Unlike Phoenix, Callahan "was not involved in the internal operation of Cay Clubs or aware of the fraud being committed in the marketing, sales or financing by the principals." Conditional Guilty Plea for Consent Judgment at 2, *Callahan*, 2017 WL 1409677 (No. SC17-539). Callahan received a one-year suspension for knowing about the leaseback payments, one element of Cay Clubs's Ponzi scheme, yet "fail[ing] to obtain additional legal opinions and to withdraw from further representation." *Id.* at 4. In contrast, Phoenix admitted that he was aware of and participated in multiple facets of Cay Clubs's Ponzi scheme. Further, Callahan accepted responsibility by entering into a consent judgment for a one-year suspension, while Phoenix has consistently refused to acknowledge before the Bar what he acknowledged in his NPA.

Phoenix's case is also similar to *Fla. Bar. v. Dupee*; the attorney there argued that she did not know that her client was hiding funds during a divorce proceeding. 160 So. 3d at 845. We suspended Dupee for one year, primarily because Dupee knowingly allowed her client to submit incomplete financial information to the court and opposing counsel. *Id.* at 854. While the Bar here did not charge Phoenix with dishonesty towards a tribunal, we find that Phoenix failed on numerous occasions to act as an officer of the court, including when he knowingly allowed numerous fraudulent HUD-1 statements to be prepared in his office—statements without which, he knew, the scheme could not continue.

Fla. Bar v. Hall, 49 So. 3d 1254 (Fla. 2010), is another case that tells us the suspension recommended here is too light. Hall falsified real estate documents and, in one important distinguishing episode, forged signatures. Hall admitted to having committed criminally fraudulent conduct in a deferred prosecution agreement; the charges against her were ultimately dismissed because she complied with the agreement. *Id.* at 1256. We nonetheless found that Hall "engaged in ongoing, continuous misrepresentations for several years," and that disbarment was the appropriate sanction despite the referee's recommendation of a ninety-day suspension. *Id.* at 1261, 1263. There, as here, we do "not look favorably on those who use their standing as an officer of the court to deliberately

harm others—especially when they intentionally hurt members of the public for their own personal gain." *Id.* at 1259.

For these reasons, we conclude that Phoenix ought to be suspended from the practice of law for two years. The suspension will be effective thirty days from the filing of this opinion so that Phoenix can close out his practice and protect the interests of existing clients. If Phoenix notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Phoenix shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). Further, Phoenix shall accept no new business from the date this opinion is filed until he is reinstated. Respondent is further directed to comply with all other terms and conditions of the report.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Charles Paul-Thomas Phoenix in the amount of $8,569.96, for which sum let execution issue.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.
GROSSHANS, J., did not participate.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS SUSPENSION.

Original Proceeding – The Florida Bar

Joshua E. Doyle, Executive Director, Patricia Ann Toro Savitz, Staff Counsel, Tallahassee, Florida, and Kimberly Anne Walbolt, Bar Counsel, The Florida Bar, Tampa, Florida, and Chris W. Altenbernd of Banker Lopez Gassler P.A., Tampa, Florida,

for Complainant

Patrick John McGinley of Law Office of Patrick John McGinley, P.A., Winter Park, Florida,

for Respondent

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CHARLES PAUL-THOMAS PHOENIX,

Respondent.

_____/

Supreme Court Case No. SC17-585

The Florida Bar File No. 2014-10,980 (20A)

FINAL REPORT OF REFEREE (AFTER REMAND)

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On March 31, 2017, The Florida Bar filed its Complaint against Respondent in these proceedings. On April 12, 2017, the Honorable Judith Goldman was appointed as referee. On May 9, 10, and 23, 2018, a final hearing was held in this matter, and at the conclusion of the final hearing, Judge Goldman orally pronounced a recommendation of diversion to a practice and professionalism enhancement program. On July 20, 2018, Judge Goldman issued a report of referee

recommending diversion to 1) Ethics School, 2) Professionalism Workshop, and 3) Stress Management Workshop/CLEs focusing on stress/work-life balance.

The Florida Bar filed its Notice of Intent to Seek Review of the report of referee on September 20, 2018. The parities filed briefs with the Supreme Court of Florida, and by Order dated March 7, 2019, the case was submitted to the Court without oral argument. On July 11, 2019, the Supreme Court issued an order disapproving the report of referee and referring the case back to the referee for additional proceedings in accordance with the Rules Regulating The Florida Bar. The Court's Order directed the referee to file an amended report containing findings of fact within 90 days. The Court's July 11 Order also noted that this case does not meet the type of case eligible for diversion.

The undersigned, as Chief Judge for the Twelfth Judicial Circuit, appointed herself as referee for further proceedings as Judge Goldman had recently been placed on retired status and is ineligible to serve as a senior judge until 2020. The parties held two case management conferences on July 25, 2019, and August 15, 2019, and the undersigned reviewed all pleadings, exhibits, transcripts, and briefs filed in this matter. On September 16, 2019, the parties were each afforded 90 minutes to present any relevant arguments, testimony, and/or evidence from the record to the referee for consideration and assistance in making findings of facts and complying with the Supreme Court's July 11 Order. On September 23, 2019,

the referee entered the Initial Report of Referee (After Remand), making findings of fact and recommendations as to guilt, finding Respondent guilty of violating Rule 4-1.16, Rule 4-4.1, and Rule 4-8.4(c).

A sanctions hearing was held on September 27, 2019. At the sanctions hearing, the Respondent presented 16 live character witnesses, 2 telephonic character witnesses, and testified on his own behalf. The Bar did not present any witnesses; only argument as to the recommended discipline. All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary Of Case. The undersigned made the following findings of fact in the Initial Report of Referee (After Remand) dated September 23, 2019:

In March 2014, Respondent signed a Sworn Declaration under penalty of perjury as part of a Non-Prosecution Agreement executed with the United States Attorney's Office for the Southern District of Florida. The Sworn Declaration and Non-Prosecution Agreement attached and incorporated a Statement of Facts in

Appendix A to the agreement. In the Statement of Facts, Respondent made admissions related to his involvement with Cay Clubs Resorts and Marinas ("Cay Clubs") while acting as their legal counsel. Respondent entered into the Non-Prosecution Agreement while certain Cay Clubs executives and other related individuals were being prosecuted by the U.S. Attorney's Office for the Southern District of Florida, and the agreement required Respondent's cooperation with the U.S. Attorney's investigation and prosecution of others for the conduct described in the Statement of Facts in exchange for the U.S. Attorney's agreement not to prosecute Respondent.

The Non-Prosecution Agreement, which was signed by both Respondent and his counsel, specifically stated that Respondent admits, accepts, and acknowledges responsibility for the conduct set forth in the Statement of Facts. The Non-Prosecution Agreement also stated that Respondent voluntarily and knowingly adopts the factual basis set forth in the Statement of Facts as his own statement. Respondent stated at his deposition taken in this matter that it was in his best interest at the time to agree to the statements in the Sworn Declaration, Statement of Facts, and Non-Prosecution Agreement. Although several Cay Clubs principals and related individuals were successfully prosecuted, no charges were ever filed against Respondent and he was never called by the government as a witness to testify.

Although the conduct outlined and admitted to in the Statement of Facts occurred between 2005 and 2007, the Bar did not learn of the conduct until March 2014, soon after the Non-Prosecution Agreement and Sworn Declaration were executed. Respondent did not report himself or the Non-Prosecution Agreement to the Bar. The Statement of Facts also noted that Respondent attempted to minimize his role and knowledge of events in order to avoid his own liability and accountability.

The conduct detailed in the Statement of Facts pertained to Respondent's actions while acting as counsel for Cay Clubs, which was a company in the business of selling vacation rental properties. Cay Clubs main enterprise was offering potential investors the opportunity to purchase vacation rental units, together with a package of commitments and services offered by Cay Clubs, that would generate profits for its investors. Respondent served as outside counsel and then in-house general counsel and Senior Vice President of Cay Clubs during some portions of time between 2005 and 2007. An email dated December 1, 2005, toward the beginning of Respondent's employment as counsel for Cay Clubs was the Florida Bar's Exhibit 7d and shows an exchange between Respondent and Cay Clubs staff. Respondent's duties as counsel included advising Cay Clubs and its principals, handling real estate closings, and reviewing marketing materials, among

other things, and Respondent received a salary of $50,000.00 per month during certain periods between 2005 and 2007.

With respect to real estate closings, part of Respondent's arrangement with Cay Clubs after becoming in-house counsel was to bring closings in-house into Respondent's office. Respondent formed Cristal Clear Title Agency, LLC, of which Respondent was a part-owner and was housed in Respondent's law office located in Fort Myers, Florida. While Respondent did not have direct involvement with the actual processing of closings for Cay Clubs, Respondent was aware of Cay Clubs' offering of certain incentives to investors for purchasing a Cay Clubs unit. This included leaseback payments, which were an incentive that promised a fixed rate of return of up to 15% of the purchase price of the unit. The leaseback payments were a significant inducement to investors and were typically paid at or near the time of closing.

Many of Cay Clubs sales were made by purchasers who required lender financing, and in some instances, Respondent was aware that lender financing was used to make the leaseback payments to the investors. However, oftentimes the leaseback payments were concealed from lenders and not disclosed on the HUD-1 settlement statements. Failing to disclose the leaseback structure to lenders called into question whether properties were being overvalued when borrowers were going to receive a fixed percentage cash payment at closing. Paragraphs 7 and 8 of

the Statement of Facts discusses this issue, stating that Respondent was aware that listing the leaseback payments on the HUD-1s could have prevented the closings from occurring or would have required additional information to be provided to the lending institutions.

Respondent testified at trial that he had no specific awareness that leaseback payments were being concealed from lenders and that the practice of failing to disclose the leasebacks on the HUD-1s did not occur in his office. However, it is evident from the Florida Bar's Exhibit 8, which contained settlement statements and loan applications from three closings completed by Cristal Clear Title Agency, LLC, shows otherwise. At the final hearing in this matter, Agent Joseph Perrera, a special agent with IRS criminal investigations, testified about these three loans and discussed that these were three examples of closings completed in Respondent's office where the leasebacks payments were concealed from lenders. The failure to disclose the true nature of the leaseback payments to lender constituted a failure to disclose a material fact to a third party.1

As part of his duties as general counsel, Respondent also reviewed the marketing materials and sales presentations of Cay Clubs. Respondent advised the Cay Clubs principals and sales staff to make changes to their marketing materials,

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1 The court has considered and rejected the Respondent's contention that at least one lender, Chase, was actually aware of the leasebacks by virtue of its general solicitation letter, in which it offered financing for enterprises including hotel condos. (Respondent's Exhibit C) Knowledge that a hotel condo exists is a far different proposition than knowledge of the leasebacks at issue

specifically that they should not use materials that promised a fixed rate of return because this could amount to the sale of a security under securities law. Cay Clubs had previously been operating under advice from a memorandum drafted by attorneys at Greenberg Traurig, presented as the Florida Bar's Exhibit 6e, which advised Cay Clubs of a plan to sell condominium hotel units bundled with club memberships and property management agreements in order to avoid violation of federal securities laws. The memorandum predated Respondent's retainment as in-house counsel, but Respondent knew or should have known that the legal advice in the memorandum was faulty. Respondent advised Cay Clubs principals and sales staff to change their practices and remove the promise of a fixed rate of return from their marketing literature, however oftentimes the principals ignored his advice.

Respondent made efforts to have the principals and sales staff of Cay Clubs change their practices, as seen throughout the Florida Bar's Exhibits 6 and 7, however, Cay Clubs only made changes to their policies on paper, and the practice of tying the leaseback payments to the marketing of Cay Clubs properties and promising a fixed rate of return continued in Cay Clubs marketing efforts. Cay Clubs' principals failed to implement Respondent's conservative advice in the company's sales efforts, yet Respondent continued representing Cay Clubs and performing closings. Respondent was aware that Cay Clubs principals and sales

staff ignored his advice, yet Respondent failed to withdraw from the representation and continued to reap substantial profits from these practices.

The Respondent's narrative casts other Cay Clubs executives in the role as villain, and himself in the role of hero. Essentially, he argues that he alone tried to thwart the illegal practices, did so valiantly, and singlehandedly shut down the sales operations when he attempts were ultimately thwarted. At best, the record reflects that he gave sound, conservative, advice at first, was frustrated at times with the lack of follow through, but ultimately looked the other way, knowing the practices were continuing, until the enterprise simply became unprofitable and collapsed. He did not dramatically shut down the operation in an ethical victory; it simply stopped making money and he resigned his position.

In the Respondent's own words:

"Phoenix actively participated in the effort to try and incorrectly characterize the nature of the business and continued to work as a lawyer for the company despite the principals ignoring his advice, because he enjoyed his generous renumeration and other benefits associated with this role at the company." (TFB Exhibit #1, paragraph 6).

In his statement, Phoenix acknowledged that he became aware that Cay Club's venture was actually a Ponzi scheme and that the company was unable to meet its financial obligations to its investors. This statement under oath from 2014

belies his contention in 2019 that he singlehandedly shut down a fraudulent enterprise.

Respondent ultimately withdrew from his representation of Cay Clubs in August of 2007. Respondent testified that at two points during his employment with Cay Clubs he attempted to resign from his position due to disagreements with one of the Cay Clubs principals, but he ultimately decided to withdraw because he felt a newly-hired sales executive, Ricky Stokes, would not follow his advice on the changes necessary to the marketing materials and sales practices.

Respondent admitted in the Statement of Facts that he was not always forthcoming to federal regulators. An example of this was seen in the Florida Bar's Exhibit 4, which is an affidavit signed by Respondent that was sent to the Federal Home Loan Mortgage Corporation on behalf of William Scott Callahan, another attorney involved with Cay Clubs. Respondent was not forthcoming with respect to the time period of his representation of Cay Clubs in this affidavit, and he used vague language and timeframes to describe his actions while at Cay Clubs.

The record shows that Respondent admitted in the Statement of Facts to certain conduct in violation of the Rules Regulating The Florida Bar while acting as an attorney licensed to practice law in the State of Florida. Respondent admitted that Cay Clubs leasebacks were not being disclosed to lenders on the HUD-1 Settlement Statements. Respondent admitted he knew the very sales practices and

marketing literature he had advised the principals of Cay Clubs to stop using were still being used. Yet, Respondent failed to withdraw from the representation. Further, Respondent failed to be truthful in his statements to others, in connection with his affidavit to Freddie Mac (TFB Exh. 4), and with respect to the disclosure of the leaseback payments to lenders. Respondent admitted in the Statement of Facts to "incorrectly characterizing the nature of Cay Clubs business," conduct which involved dishonesty and misrepresentation. The Non-Prosecution Agreement and supporting evidence presented in these disciplinary proceedings demonstrated Respondent's failure to timely withdraw from his representation of Cay Clubs and his lack of truthfulness, a basic essential requirement under the Rules of Professional Conduct.

The Respondent denies any wrongdoing whatsoever, instead contending that his actions should be commended, not vilified. The court does not agree with this conclusion. This conclusion is likewise not dictated by the initial referee's inclination to impose diversion sanctions, nor the Florida Supreme Court's remand.

The initial referee's "unbridled enthusiasm" for diversion was not and is not an acquittal. Simply put, the initial referee clearly believed several mitigating circumstances existed and recognized the more egregious conduct of other involved in the Cay Clubs scheme. She erroneously believed that diversion would be available to the Respondent is she explicitly did not make findings of fact on the

record. The Florida Supreme Court's remand reflects only that this sanction is not available for the type of conduct alleged. It is in no way a finding that the Respondent did not actually engage in the misconduct alleged.

The Respondent did engage in the misconduct alleged. He admitted such under oath, and his after-the-fact parsing of words cannot absolve him of this conduct.2

III. RECOMMENDATIONS AS TO GUILT.

In the Initial Report of Referee (After Remand) dated September 23, 2019, I recommended that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

Rule 4-1.16 (Declining or Terminating Representation);

Rule 4-4.1 (Truthfulness in Statements to Others); and

Rule 4-8.4(c) (Misconduct – A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation)

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

7.0 Violations of Other Duties Owed as a Professional

2 The parties conducted two case management conferences, and the record of these will reflect that both the Bar and the Respondent agreed that the Referee after remand would make findings of fact based on review of the record and then conduct a sanctions hearing, if applicable, without a full re trial. The Respondent now raises a disingenuous due process issue based on this stipulated procedure.

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

9.2 Aggravation

9.22 (g) Refusal to acknowledge wrongful nature of conduct: Respondent has continued to assert throughout these proceedings that he did not engage in the conduct he admitted to in the Statement of Facts and that he did not violate the Rules Regulating The Florida Bar. He did provide context to his personal and professional struggles that were happening at the time he signed the NPA. He gave a heartfelt, and what the court considers a genuine, explanation for why he chose to sign the NPA instead of risking criminal prosecution. His signed admission is analogous to an *Alford* plea, in which a criminal defendant enters a guilty plea while maintaining his innocence. The difference is that a defendant entering an *Alford* plea accepts the sentence imposed as a consequence of the plea.

This Respondent, even years later, does not accept any agency whatsoever for the Ponzi scheme that happened on his watch. He refuses to accept even an inference of negligence, much less misconduct. Essentially, he believes he was entitled to the benefit of avoiding criminal prosecution by virtue of making sworn admissions while later denying the veracity of, and questioning the degree of specificity in, the admissions. This is the single aggravating factor and leads the

court to conclude that the minimal sanctions proposed by the Respondent are inadequate.

On balance, however, I conclude that the Respondent's unwillingness to acknowledge his own shortcomings does not flow from arrogance or disregard of the law so much as embarrassment and regret at having not vetted the NPA before choosing to sign it or considering its potential impact on his career. Even so, a Referee cannot and should not simply ignore the Respondent's admissions in the NPA, notwithstanding his aggressive, if tone deaf, defense of this complaint.

9.3 Mitigation

9.32 (a) Absence of prior disciplinary record.

9.32 (f) Inexperience in the practice of law: At the time of his representation of Cay Clubs, Respondent had only been licensed to practice law in Florida for approximately 4 years.

9.32 (g) Character or Reputation: The Respondent has, in the years since the Cay Clubs representation, acquired a stellar reputation both in the legal community and in the community at large. He has obtained two additional degrees. He is respected by his colleagues and opposing counsel, and is an asset to his community as well as being devoted to his family. He provides pro bono services and is a trusted advisor to several clients.

9.32 (i) Unreasonable Delay: The Referee has carefully considered whether this factor should be included in the analysis. The "fault" for the delay does not appear to fall squarely upon the Bar or the Respondent, although it must be noted that the Respondent did not self report the existence of the NPA. The Bar took timely action once it was made aware of the NPA, which unfortunately, did not occur until years later. Because the Respondent is now so far removed from the misconduct, and has since built an unblemished record of legal service, the delay has arguably resulted in a specific prejudice, because the sanction is so far removed from the conduct and the Respondent's circumstances have changed as well. Despite this, I conclude that these factors are more accurately reflected in factor (j), below.

9.32 (j) Interim Rehabilitation: The Referee is convinced beyond any doubt that the Respondent is currently a highly competent attorney who takes no shortcuts, deals absolutely within the confines of the law, and holds himself to the highest ethical standards. There is a zero percent likelihood that he will engage in future misconduct and he poses no current risk to the community or to his clients.

The Referee finds that other mitigating factors argued by the Respondent do not apply.

V. CASE LAW

I considered the following case law prior to recommending discipline:

It is well-settled that there are three objectives for attorney discipline as detailed in *Florida Bar v. Lord*, 433 So. 2d 983, 986 (Fla. 1983). First, fairness to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer. Second, fairness to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, deterrence to others, being severe enough to deter others who might be prone or tempted to become involved in like violations.

The undersigned notes that in recent years the Florida Supreme Court has moved toward imposing stronger sanctions for attorney misconduct. *Florida Bar v. Rosenberg*, 169 So. 3d 1155 (Fla. 2015). However, it should also be noted that the Respondent's culpability in the Cay Clubs scheme was far less than the other principals, and that he was often at odds with the principals over their business practices. His sanction should reflect that.

I considered the following cases presented by the Bar:

Florida Bar v. Callahan, 2017 WL 1409677 (Fla. 2017)

Florida Bar v. Bresler, 160 So. 3d 899 (Fla. 2015)

Florida Bar v. Scott, 39 So. 3d 309 (Fla. 2010)

I considered the following cases presented by the Respondent:

Florida Bar v. Forrester, 818 So. 2d 477 (Fla. 2002)

Florida Bar v. Varner, 780 So. 2d 1 (Fla. 2001)

Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000)

Florida Bar v. Schultz, 712 So. 2d 386 (Fla. 1998)

Florida Bar v. Walker, 672 So. 2d 21 (Fla. 1996)

Florida Bar v. Burkich-Burrell, 659 So. 2d 1082 (Fla. 1995)

Florida Bar v. Cox, 655 So. 2d 1122 (Fla. 1995)

Florida Bar v. Weidenbenner, 630 So. 2d 534 (Fla. 1993)

Florida Bar v. Kaplan, 576 So. 2d 1318 (Fla. 1991)

Florida Bar v. Rousseau, 219 So. 2d 682 (Fla. 1969)

Florida Bar v. Titone, 522 So. 2d 822 (Fla. 1988)

To address the purposes of sanction, fairness to society would not be best served in this case by a lengthy suspension because to do so would neither protect against unethical conduct and it would deprive the public of the services of a competent, qualified lawyer who poses no risk to the community.

Second, fairness to the Respondent requires that he both be held accountable for his admitted actions while recognizing that his conduct in the decade since the violations has been above reproach.

Finally, deterrence is accomplished by this sanction because all attorneys must be on notice that their client's misdeeds can become their own, regardless of their good intentions or good character.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BEAPPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. A ninety day suspension from the practice of law; and

B. Payment of The Florida Bar's costs in these proceedings.

C. Further, Respondent will eliminate all indicia of Respondent's status as an attorney on social media, telephone listings, stationery, checks, business cards office signs or any other indicia of Respondent's status as an attorney, whatsoever. Respondent will no longer hold himself out as a licensed attorney.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following:

Personal History of Respondent:

Age: 50

Date admitted to the Bar: December 20, 2001

Prior Discipline: None

Respondent is Board Certified by The Florida Bar in Real Estate

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Fee	$1,250.00
Bar Counsel Costs	$654.26
Court Reporters' Fees	$6,405.70
Investigative Costs	$260.00
TOTAL	$8,569.96

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 10 day of October, 2019.

Honorable Kimberly C. Bonner, Referee

Original To:

John A. Tomasino, Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

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Patricia Ann Toro Savitz, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399, psavitz@floridabar.org

Supreme Court of Florida

THURSDAY, JULY 11, 2019

CASE NO.: SC17-585
Lower Tribunal No(s).:
2014-10,980 (20A)

THE FLORIDA BAR vs. CHARLES PAUL-THOMAS PHOENIX

Complainant(s) Respondent(s)

Upon consideration of the report of the referee, and the briefs, it is the judgment of this Court that the Report of Referee, filed with this Court on July 25, 2018, is hereby disapproved. Accordingly, the Court hereby refers this case back to the referee for additional proceedings in accordance with the Rules Regulating the Florida Bar. The referee shall file an amended report containing findings of fact within 90 days from the date of this order. Disciplinary cases eligible for diversion to practice and professionalism enhancement programs involve either a finding of minor misconduct or a finding of no probable cause with a letter of advice. *See* R. Regulating Fla. Bar 3-5.3(b). This case does not meet the type of case eligible for diversion.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, LAGOA, LUCK, MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

ca
Served:

ALLISON CARDEN SACKETT
HON. JUDITH MIRIAM GOLDMAN, JUDGE
CHARDEAN MAVIS HILL
PATRICK JOHN MCGINLEY

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CHARLES PAUL-THOMAS PHOENIX,

Respondent.

_____/

Supreme Court Case
No. SC17-585

The Florida Bar File
No. 2014-10,980 (20A)

REPORT OF REFEREE RECOMMENDING DIVERSION TO A PRACTICE AND PROFESSIONALISM ENHANCEMENT PROGRAM

I. SUMMARY OF PROCEEDINGS:

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules Regulating The Florida Bar, the following proceedings occurred:

On March 31, 2017, The Florida Bar filed its Complaint against Respondent in these proceedings. The undersigned was duly appointed as Referee April 17, 2017. Trial was held all day on the days of May 9, May 10 and May 23, 2018. The Florida Bar's case in chief included live witness testimony from Brian Tannebaum, Joseph Perrera, David Capizola, and the Respondent. The Respondent's case in chief included testimony from Vincent Citro, Holly McFall, Jason File, and the Respondent. The Florida Bar's and the Respondent's documents that were admitted into evidence are listed in the Trial Exhibit Checklist. After the close of all evidence, Bar Counsel advised Referee that Diversion was an option so long as recommended prior to making any factual findings; whereupon, closing arguments were heard from both counsel for The Florida Bar and counsel for the Respondent, and making no findings of fact, the undersigned Referee found that Diversion was appropriate under Rule 3-5.3 of the Rules Regulating The Florida Bar.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Chardean Mavis Hill, Esq.

For Respondent: Patrick John McGinley, Esq.

II. FINDINGS OF FACT: NONE

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary of Case. Although I made no factual findings, this is a summary of the evidence before me:

In March 2014, Respondent signed a sworn declaration and a Non-Prosecution Agreement executed with the U.S. Attorney's Office for the Southern District of Florida. Under penalty of perjury, Respondent made admissions relating to his involvement in some Cay Clubs transactions. See Appendix A Statement of Facts contained in the Non-Prosecution Agreement for further details. While the conduct outlined and admitted to in the Statement of Facts occurred over 9 years ago, the conduct was not brought to the Bar's attention until March 2014, soon after the NPA, Statement of Facts, and Declaration were executed.

Respondent represented Cay Clubs Resorts and Marinas (Cay Clubs) and related entities which sold vacation rental properties in Florida, during some portions of time between late 2005 through late summer 2007; and further assisted thereafter in "wrapping up" pending matters for several months after his resignation as in-house counsel.

All agree leaseback payments not included on HUD-1 settlement statements would or could have prevented closings from occurring or would have required additional information to be provided to the lending institutions. Although Respondent stated he consistently informed the company that parties to a transaction involving a loan must disclose all economic items associated with the transaction so that the lender could evaluate whether the loan fit the loan program, he eventually came to realize his advice was being ignored by Cay Clubs' principals, and withdrew in summer, 2007.

Prior to resigning, Respondent reviewed marketing materials and consistently advised Cay Clubs' principals, management and others that they should not use marketing literature that promised a fixed rate of return. Instead, he advised them to follow the SEC's Intrawest No-Action Letter approach rather than the loosely-based interpretative guidance that outside counsel, Greenberg Traurig, provided to Cay Clubs in an opinion memorandum based on Cay Clubs' sales practices and materials in order to not violate securities laws. Respondent advised the company that it should not offer financial benefits in the sales process so that the sale could not be considered a securities transaction. Respondent continuously advised the company that leaseback payments could not be promised to any buyer in order to comply with securities regulations. While Cay Clubs' principals ultimately failed to implement Respondent's conservative advice to adhere to the SEC's Intrawest No-Action Letter approach in the company's sales efforts, Respondent continued to apply his legal skills to get the client to create a just result instead of furthering a wrong one, until his resignation.

Respondent contends that it was in his best interest to agree to the statements in the sworn Declaration/Non-Prosecution Agreement which did not contain specific dates for when he ultimately came to know about certain conduct of Cay Clubs and its principals after his resignation. However, by the time he executed the Non-Prosecution Agreement and Declaration, he had become aware of the conduct. Although the principals and others involved in Cay Clubs were successfully prosecuted, no charges were ever filed against Respondent and he was never called to testify as a witness.

Former Greenberg Traurig attorney Michael R. Casey was a member of The Florida Bar before jumping bail, failing to appear in federal criminal court for his arraignment, and being disbarred for committing felonies including violating federal securities laws. Before disbarment, Mr. Casey wrote the March 10, 2005 Memorandum of Law that was admitted into evidence as Respondent's Exhibit A. It outlines a plan of operation for the sale of condo hotel units by Crystal Clear Management LLC, the management company of Cay Clubs. Mr. Casey opines in his March 2005 Memorandum that his plan for how to sell those condo hotel units while bundled with club memberships and Property Management Agreements would not violate federal securities law.

Cay Clubs sold condo hotel units and club memberships following Mr. Casey's plan from his March 2005 memo. About a year or more thereafter, Cay

Clubs hired Charles P.T. Phoenix, first as one of several of its outside counsel. Later, Mr. Phoenix became Corporate Counsel, and Cay Clubs gave Mr. Phoenix the title "In-House Counsel" even though Mr. Phoenix maintained his own separate law firm in another city and never worked in-house.

All agree condo hotels, club memberships and Property Management Agreements, even as part of a Sale-And-Leaseback Agreement are not illegal under federal securities laws unless bundled and requiring the condo buyer to close the purchase of all three on the same day in the same transaction without first registering the bundle as a security and complying with federal securities laws. Similarly, it is illegal to finance such a bundled security with a mortgage unless the bank writing the mortgage is aware and consents to finance such a purchase.

After becoming "In-House Counsel," Mr. Phoenix took it upon himself to request a copy of Mr. Casey's March 10, 2005 memorandum and determine its accuracy. Cay Clubs had several attorneys at the time, and none of them other than Respondent were questioning Mr. Casey's memorandum.

The basis of Mr. Casey's memorandum was his interpretation of a No Action Letter issued by the U.S. Securities and Exchange Commission to a company called Intrawest Corporation. Mr. Phoenix did independent legal research and concluded that Mr. Casey's advice did not comply with the SEC's opinion in *Intrawest*. To convince Cay Clubs that Mr. Phoenix was right and Mr. Casey was wrong, Mr. Phoenix presented Cay Clubs with statutes, rules and case law precedent. He also accompanied Cay Clubs executives to visit an Intrawest Property in Colorado and observe for themselves how that property was using sales tactics different than as prescribed in Mr. Casey's memorandum. He then accompanied them to their annual Cay Clubs Salesperson Training Seminar to personally educate the sales staff how to stop doing it Mr. Casey's way and start complying fully with *Intrawest*. Respondent's counsel published in open court over an hour of videotape of that sales meeting where Respondent advised executives to separate the sales of condo units from Property Management Agreements so as to comply with *Intrawest*. At one point in the video, the sales staff can be heard to literally cheer and applaud the new system where they need only sell the condo hotel and need not also sell the Property Management Agreement contemporaneously.

Ultimately, Mr. Phoenix said he concluded that a subsequent, newly-hired Cay Clubs Sales Manager was not heeding his advice, or was "off the reservation"

as he put it, and that Cay Clubs was not acting quickly enough to correct the new Sales Manager and was treating Mr. Phoenix poorly, whereupon Mr. Phoenix quit his job as In-House Counsel.

After withdrawing, Mr. Phoenix testified he then learned things he did not or could not know prior to withdrawing because Cay Clubs actively and successfully hid this information from him. For example, one of Cay Clubs co-owners and outside counsel, William Scott Callahan, knew from Mr. Phoenix that the leasebacks had to be entered into post-closing, so that the transaction would be exempt from federal and state security regulations. But Mr. Callahan's leaseback payments were not shown on his law firm's closing settlement statements, and Mr. Callahan's closing documents did not fully inform the mortgage lenders of the relevant details of the transactions. After withdrawing and eventually learning of wrongful activity like this, he was questioned by the Federal Housing Finance Agency Office of Inspector General and other government officials, including eventually the United States Attorney. After cooperating, Mr. Phoenix entered into the Non-Prosecution Agreement which the United States Attorney proposed and sought, reflecting Mr. Phoenix's knowledge at the time of signing same, not at the time of withdrawing as counsel for Cay Clubs years before. Cay Club principals were put on trial for securities violations, but Mr. Phoenix's testimony was never used by the U.S. Attorney in those trials.

The Florida Bar's pleadings asks this Referee to find Charles P.T. Phoenix guilty of violations of the Rules Regulating The Florida Bar, including allegedly violating Rule 4-1.16 (Declining or Terminating Representation) and Rule 4-4.1 (Truthfulness In Statements to Others). In addition to the pleadings, The Florida Bar verbally adds that I should consider violations of Rule 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and violations of any other Rule Regulating The Florida Bar that I might find to have been violated. I did not adjudicate Charles P.T. Phoenix to be guilty of violating any of these rules, and I do not make any findings whatsoever that Charles P.T. Phoenix has violated any Rules Regulating The Florida Bar.

RECOMMENDATION AS TO GUILT: Pursuant to Rule 3-5.3(h)(2), Rules Regulating The Florida Bar, I make no finding as to the guilt of Respondent.

III. RECOMMENDATION OF DIVERSION: Pursuant to Rule 3-5.3(h), Rules Regulating The Florida Bar, I recommend that Respondent be diverted to a practice and professionalism enhancement program. The following programs are recommended: (a) Ethics School, (b) Professionalism Workshop, and (c) Stress Management Workshop/CLEs focusing on stress/work-life balance. The programs are to be completed within six months of the Order approving this diversion recommendation.

IV. PURPOSE AND PROGRAMS WHICH ARE RECOMMENDED: The purpose of diversion is to assist Respondent in the future avoidance of the situations outlined in the facts above. The following programs are recommended: (a) Ethics School, (b) Professionalism Workshop, and (c) Stress Management Workshop/CLEs focusing on stress/work-life balance. The programs are to be completed within six months of the Order approving this diversion recommendation.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD: Prior to recommending discipline pursuant to Rule 3-7.6(m), I considered the following personal history and prior disciplinary record of Respondent of Respondent, to wit:

Age: 49

Date admitted to the Bar: December 20, 2001

Prior Discipline: None

Respondent is Board Certified in Real Estate since August 1, 2009

VI. FEES FOR DIVERSION PROGRAMS: Respondent shall pay the following costs for the diversion program within 30 days of the Court's order approving this diversion.

Workshop Expenses – Professionalism Workshop, Ethic School, and Stress Management Workshop	$1,000.00
CLEs in Stress/Work-Life Balance	Out of pocket

If not paid, Respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

VII. COSTS: I find the costs set forth in The Florida Bar's Motion to Assess Costs and Statement of Costs filed in this cause were reasonably incurred and were not unnecessary, excessive, or improperly authenticated. Respondent shall pay the costs of this matter which are:

A.	Administrative Costs Pursuant to Rule 3-7.6(q)	$1,250.00
B.	Bar Counsel Costs	$ 566.29
C.	Court Reporter Costs	$3,392.70
D.	Investigative Costs	$ 260.00
TOTAL FEES AND COSTS:		**$5,468.99**

It is recommended that the costs itemized in The Florida Bar's Motion and Statement of Costs in the total sum of **$5,468.99** be charged to Respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar. If not paid, Respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

VIII. EFFECT OF DIVERSION: Diversion to a practice and professionalism enhancement program shall close this disciplinary file without imposition of a disciplinary sanction and diversion shall not constitute a record of professional misconduct. If respondent successfully completes the diversion recommended hereunder, this disciplinary file shall remain closed.

IX. EFFECT OF FAILURE TO COMPLY WITH DIVERSION RECOMMENDATION: If you fail to fully comply with all requirements of this diversion, the Bar may reopen its disciplinary file and conduct further proceedings under Rule 3-5.3(k). Failure to complete the practice and professionalism enhancement program shall be considered a matter of aggravation when imposing a disciplinary sanction. If you do not pay the costs assessed against you within 30

days of acceptance of this diversion recommendation, you will be declared a delinquent member pursuant to Rule 1-3.6 and you will become ineligible to practice law in Florida.

DATED this 20 day of July, 2018.

Honorable Judith Miriam Goldman, Referee

Original to:

Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and via electronic mail to e-file@flcourts.org

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Chardean Mavis Hill, Bar Counsel, The Florida Bar, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607; chill@floridabar.org; vserralta@floridabar.org

Adria E. Quintela, Staff Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323; aquintel@floridabar.org

Supreme Court of Florida

TUESDAY, MARCH 9, 2021

CASE NO.: SC17-585
Lower Tribunal No(s).:
2014-10,980 (20A)

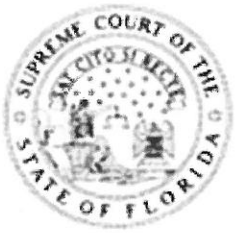
THE FLORIDA BAR	vs.	CHARLES PAUL-THOMAS PHOENIX
Complainant(s)		Respondent(s)

Respondent's "*Amended* Motion for Rehearing and for Reconsideration of the Court's 1/28/2021 Order" is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court



ca
Served:

KIMBERLY ANNE WALBOLT
PATRICK JOHN MCGINLEY
CHRIS W. ALTENBERND
CHARLES PAUL-THOMAS PHOENIX
HON. KIMBERLY C. BONNER, CHIEF JUDGE
PATRICIA ANN TORO SAVITZ