IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

MARIO A. LAMAR,

Respondent.

_____/

Supreme Court Case
No. SC18-1600

The Florida Bar File
No. 2013-70,887(11N)

FINAL REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Chief Judge Bertila Soto, under the authority of the Florida Supreme Court, having appointed me as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On September 24, 2018, The Florida Bar filed its Complaint against Mario Lamar as well as its Request for Admissions in these proceedings. On October 28, 29, and 30, 2019 I held a final evidentiary hearing in this matter. All items properly filed including pleadings, recorded testimony (if transcribed), notices, motions, orders and exhibits in evidence are forwarded with this report and the foregoing constitutes the record of the case. The following attorneys appeared as counsel for the parties:

For The Florida Bar: William Mulligan
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, FL 33323

For the Respondent: Brian Lee Tannebaum
1 S.E. Third Avenue, Suite 1400
Miami, FL 33131

II. FINDINGS OF FACT

A. Jurisdictional Statement. Mr. Lamar is and was at all pertinent times a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case. I have considered the testimony of the witnesses called by the Bar and Mr. Lamar, as well as the documents placed into evidence by both parties, and find the following facts by clear and convincing evidence:

1. In December 2007, the United States government arrested and charged Franklin Duran ("Duran") and his then business partner, Carlos Kauffmann ("Kauffmann") with the crime of acting as unregistered agents of a foreign government, and conspiracy to do so.

2. Kauffmann's family had a long-standing relationship with Mr. Lamar, with Kauffmann's father having first met Mr. Lamar at boarding school in 1959.

3. Shortly after the arrest, Kauffman's mother contacted Mr. Lamar requested that Mr. Lamar assist their son who was detained in the Federal Detention Center in Miami.

4. In or around March 2008, Mr. Lamar undertook the joint representation of both, Kauffmann and Duran. The representation was not related to the criminal prosecution – it involved the untangling of the parties' numerous joint financial interests.

5. Mr. Lamar's representation of Kauffmann and Duran involved all commercial-civil, non-litigious matters relating to their financial involvements in the State of Florida and elsewhere.

6. Essentially, it amounted to a massive business divorce between Kauffmann and Duran. As Kauffmann testified during these proceedings, he viewed it as a game; both he and Duran were each maneuvering to get a little bit more than the other.

7. On or about March 8, 2008, Duran and Mr. Lamar executed an "Authority to Represent and Fee Agreement." Likewise, Kauffmann entered into a similar agreement with Mr. Lamar.

8. Kauffmann and Duran each paid Mr. Lamar a retainer of $125,000.00 for his representation.

9. Additionally, Kauffmann's mother paid an additional sum of less than $40,000.00 on behalf of Kauffmann.

10. By Mr. Lamar's own admission, his representation of Duran continued until July 2011.[1]

11. Duran declined to take a plea in his criminal case and took the case to trial. Kauffmann instead pleaded guilty, and signed a plea contract requiring him to testify truthfully as the government's witness in Duran's criminal case.

12. In October of 2008, Kauffmann testified against Duran at his criminal trial.

13. Duran was convicted at trial.

14. Mr. Lamar testified during these proceedings that he did not become aware that Kauffmann would be testifying against Duran until the day that Kauffmann testified.

15. Upon becoming aware that Kauffmann was testifying against Duran, Mr. Lamar was presented with a clear, unwaivable conflict of interest, yet he continued to represent both of them.

[1] Respondent made this admission in paragraph no. 7 of his Answer to Amended Complaint in *Duran v. Mario A. Lamar, P.A., et al*.; Miami-Dade Circuit Court case no. 12-00306 CA (10). (The Amended Complaint and Answer to Amended Complaint were admitted into evidence as The Florida Bar's exhibit nos. 5 and 6, respectively.)

16. While this presented an unwaivable conflict, Mr. Lamar didn't even attempt to discuss this issue with Duran to obtain informed consent (neither was it confirmed in writing nor was it clearly stated on the record at a hearing) and he didn't relinquish any of his fees.

17. It's evident that Kauffmann and Duran did not see eye to eye on a number of their business arrangements.

18. Mr. Lamar testified in these proceedings how exasperating it could be dealing with Kauffmann and Duran.

19. The conflict of interest clearly manifested itself in the manner in which Mr. Lamar handled the distribution of funds he received from a company in which both Kauffmann and Duran claimed an interest, Oceanika Yachts, Inc. ("Oceanika").

20. Kauffmann testified at Duran's criminal trial that the Oceanika investment was shared 50/50 between him & Duran.

21. Additionally, Kauffmann testified during these proceedings that a portion of the funds invested in Oceanika came from a bank account that was jointly held by him and Duran.

22. Duran repeatedly inquired of Mr. Lamar about the status of the investment in Oceanika and Mr. Lamar was evasive in his answers. Duran made

these inquiries both before and after Mr. Lamar began receiving payments from Oceanika.

23. Mr. Lamar acknowledged that Duran was insistent that he held an interest in Oceanika.

24. Mr. Lamar met with Duran on numerous occasions while he was incarcerated at the Federal Detention Center in Miami. Mr. Lamar took contemporaneous notes at the meetings and the notes clearly indicate that Duran frequently inquired about the status of Oceanika.

25. Additionally, on numerous occasions, paralegal Sandra Centeno ("Centeno") attended the meetings with Mr. Lamar and Duran. Her contemporaneous notes also indicate that Duran frequently inquired about Oceanika during those meetings.

26. On March 4, 2010, the day after one of the aforementioned meetings, Centeno sent an email to Mr. Lamar and others confirming that one of the pending issues involved Oceanika.

27. Approximately one week after Centeno's email, Mr. Lamar began receiving funds into his trust account from Oceanika.

28. In July 2011, after Duran was released from prison, he went to the Oceanika office and discovered that Oceanika had sent substantial sums of money to Mr. Lamar. Days later, Duran went to Mr. Lamar's office. At that time,

Duran inquired as to the Oceanika funds and Mr. Lamar failed to acknowledge that any funds had been received into his account. Once Duran confronted Mr. Lamar that he knew otherwise, Mr. Lamar showed Duran information on his computer screen reflecting that he had approximately $400,000.00 from Oceanika in his trust account.

29. During the period from March 2010 through February 2012, Oceanika deposited $1,901,649.01 into Mr. Lamar's trust account.

30. Despite all the claims and inquiries from Duran, Mr. Lamar disbursed all the Oceanika funds at the direction of Kauffmann. Mr. Lamar did not distribute any of the Oceanika funds to Duran, or hold them in trust until the dispute was resolved.[2]

31. Mr. Lamar even went as far as to distribute some of the Oceanika funds after Duran filed a civil lawsuit against him, alleging legal

[2] During these proceedings, Mr. Lamar contended that Duran had released any interest in the Oceanika funds through a Release and Covenant Not to Sue executed by Duran on or about September 10, 2009. As discussed in more detail in the Analysis section, I give this release no evidentiary weight in these proceedings for the following reasons:

- Pursuant to rule 5-1.2(f) of the Rules Regulating The Florida Bar, Mr. Lamar could not disburse the Oceanika funds to Kauffmann as they were under dispute;
- After the execution of this release, Mr. Lamar continued to represent Duran for over a year and a half, and by Mr. Lamar's own admission, never once advised Duran that he waived his interest in the Oceanika funds as he executed a release;
- The referenced release was not all inclusive as there were a number of business matters involving Duran and Kauffmann that were not covered by the release.

malpractice based on the breach of fiduciary duty, fraud and conversion of trust monies related to Oceanika.

32. In that civil suit, a jury found in favor of Duran, and on October 10, 2017, the circuit court awarded Duran a total of $876,319.42 as follows:

- $50,000.00 for breach of fiduciary duty;
- $475,000.00 for fraud and conversion regarding Oceanika;
- $125,000.00 for return of attorney's fees; and
- $226,319.42 in pre-judgment interest.

33. While both Mr. Lamar and Duran filed notices of appeal in the civil case, ultimately Mr. Lamar chose not to proceed with the appeal and entered into a settlement.

III. ANALYSIS

I write in more detail to address a few key issues raised by Mr. Lamar.

A. Mr. Lamar was Duran's attorney: not his mediator, messenger, or facilitator.

One of Mr. Lamar's themes throughout this dispute (including the civil litigation with Duran and before that), is that he was "merely" acting as a "messenger" or a "mediator" between Kauffman and Duran. Indeed, he argues that his "role was solely to act as a **facilitator** for the winding down of the business

interests of Kauffman and Duran." (emphasis added). Mr. Lamar also testified that he engaged in "shuttle diplomacy" between Kauffman and Duran.

All of these characterizations are plainly an unsuccessful attempt by Mr. Lamar to minimize his role as it relates to Duran. These statements are also very revealing insofar as they reflect Mr. Lamar's state of mind and how he viewed his relationship with Duran.

It is simply indisputable that Duran hired Mr. Lamar to be his **attorney**. The March 8, 2008 Authority to Represent and Fee Agreement in evidence signed by Duran and Mr. Lamar expressly states that Duran employs and retains Mr. Lamar and his law firm "to represent me in all commercial-civil, non litigious matters relating to my financial involvements in the State of Florida and elsewhere." This defined Mr. Lamar's scope of representation of Duran as his attorney, and no evidence was presented of any further limitations on the objectives or the scope of the representation.

"The relation of attorney and client is one of the most important as well as one of the most sacred relations known to the law." *Deal v. Migoski*, 122 So. 2d 415, 417 (Fla. 3d DCA 1960).

An attorney (as opposed to a mediator, messenger, or "facilitator") has "a fiduciary relationship of the very highest character" with his client. *See Elkind v. Bennett*, 958 So. 2d 1088, 1091 (Fla. 4th DCA 2007). Black's Law Dictionary

defines a "fiduciary" as: "Someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure . . . . FIDUCIARY, *Black's Law Dictionary* (11th ed. 2019). Comment a. to section 874 of the Restatement (Second) of Torts provides that: "A fiduciary relation exists between two persons when one of them is under a **duty to act for or to give advice for** the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts § 874 cmt. a (1979).[3]

Thus, in all matters relating to Duran's financial involvements, Mr. Lamar had a duty to act for Duran's benefit. He had a duty to give Duran beneficial advice relating to his financial involvements. Mr. Lamar was required to act with due care and good faith towards Duran, and to be loyal. Of equal significance, Mr. Lamar had an affirmative duty of disclosure to Duran, that is, a duty to disclose to Duran facts material to Duran's financial involvements.[4] The fact that Mr. Lamar viewed himself as a "messenger" or "mediator," is itself powerful evidence of Mr. Lamar's state of mind; and that he was not acting in the utmost good faith and in the best interests of Duran.

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3 The Florida Supreme Court relied on this Restatement comment for its holding in *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

4 "A fiduciary's deliberate withholding of material information the fiduciary has a duty to disclose constitutes fraudulent concealment." *First Union Nat. Bank v. Turney*, 839 So. 2d 774, 778 (Fla. 1st DCA 2003).

This is an excerpt of Mr. Lamar's sworn deposition testimony given on September 4, 2014 in the civil suit brought against him by Duran:

> Q. Mr. Lamar, before you came to Mr. Duran with a written retainer agreement, did you consult with any third parties such as the Florida bar, or anybody that might have some knowledge of legal ethics to determine what limitations might be placed on your ability to represent two people jointly where one had agreed to plead guilty or possibly testify against the other?
>
> Did you consult with any third parties whatsoever?
>
> It calls for a yes-or-no answer.
>
> A. No, because **I was not going to be giving any legal advice** or getting involved in the legal case.
>
> **I was supposed to act on behalf of Franklin, take his money out of the United States**, act on behalf of Carlos, take his money out of the United States. **That's what my retainer was for** and that was my understanding at the time.
>
> * * *
>
> Q. When did Mr. Kauffman say to you that he doesn't guarantee the Pinano matter?
>
> A. On numerous occasions – no, no, I relayed it in numerous occasions that he would not guarantee Pinano matter.
>
> Q. Did you say to Franklin Duran here within a matter of a couple of weeks of his signature on the general release, Franklin, the general release means you cannot claim any interest in the Pinano matter against Mr. Kauffman?
>
> Did you say that to him when you told him, Kauffman won't guarantee it?
>
> A. If his attorneys, that he paid $128,000 to did not advise him of that **it was not my position to advise him**.
>
> Q. When you went to the jail and were the only attorney visiting with Mr. Duran on October 6, 2009, who were you representing there?
>
> A. **I was just being a messenger** as to the things that were talked about over here.
>
> Q. Did you enter this time on your time sheet?

A. I don't see it in your records, but then again these records were October 6, '09.

Q. 10/6/90 [sic].

Let me show you this October 6, 2009, Franklin Duran, Miscellaneous matter, visited at FDC one hour and – one and three-quarters hours.

Do you see that, sir?

And read the Bates page at the bottom, if you would?

A. 3622?

Q. Do you see the entry for October 6, 2009, "visit to FDC with Franklin Duran"?

A. September – yeah, it's here, "Miscellaneous Matters."

Q. So you charged Mr. Duran for your time meeting with him on October 6, 2009, but you weren't representing him; is that what you are saying?

A. That was a request that I go and visit him.

(Mario Lamar Dep. Tr. of 9/4/2014 at 99, 368-70) (emphasis added).

This is just one stark example of how Mr. Lamar viewed his relationship with Duran, and how he breached his fiduciary obligations to him. He billed Duran for his professional services as his attorney, yet called himself a mere messenger, and thought it was not his "position to advise him" as to the consequences of a general release Duran had signed. Indeed, the evidence is overwhelming that Mr. Lamar's actions and inaction went way beyond the scope of the unilateral unwritten limitation he imposed on his representation of merely "taking Franklin's money out of the United States."

"Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Comment to R. Regulating Fla. Bar 4-1.7. "Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an

appropriate course of action for the client because of the lawyer's other responsibilities or interests." *See id*.

Based on the evidence presented and my observations during the trial of this case, the evidence is clear (and convincing) that Mr. Lamar's loyalty was always with Kauffman, to the detriment of Duran. Mr. Lamar went to boarding school with Kauffman's father when they were adolescents. Mr. Lamar had been friendly with the Kauffman family for many years. In his testimony before me, Kauffman referred to Mr. Lamar as "Mayito." This is a nickname and a term of endearment for someone whose proper name is "Mario." It reflects the level of closeness and familiarity between Kauffman and Mr. Lamar.

The closeness between the Kauffman family and Mr. Lamar is further evidenced by the fact that the first person Kauffman's mother called when the government arrested her son was Mr. Lamar. Indeed, Mr. Lamar attended Kauffman's first appearance in the federal criminal case against him. During the trial before me, it was clear that Kauffman was sitting with Mr. Lamar's supporters and was there to render assistance and encouragement.

Additional evidence presented at the trial of this case indicated that Mr. Lamar considered himself a "mediator" between Kauffman and Duran. He argues that he was simply a "glorified mediator" to wind down the business interests of Kauffman and Duran. Indeed, contemporaneous notes taken at meetings with

Duran indicate that Duran himself was under the misimpression that Mr. Lamar was a "mediator" and not his attorney.

Mr. Lamar was plainly not Duran's mediator. A mediator or (as described in the Rules Regulating the Florida Bar) a "third-party neutral" is expressly defined as someone who assists persons who are **not clients**.

> (a) Definition. A lawyer serves as a third-party neutral when the lawyer assists 2 or more persons **who are not clients of the lawyer** to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) Communication With Unrepresented Parties. A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. **When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.**

R. Regulating Fla. Bar. 4-2.4 (emphasis added).

What is so damning about this description of Mr. Lamar as a mediator, is that it presupposes the existence of a dispute that existed between Kauffman and Duran which needed to be mediated. Of course, a lawyer cannot represent two clients at the same time regarding the same matter where there is a dispute between them. Moreover, to the extent Duran did not understand Mr. Lamar's role in the matter, Mr. Lamar was under an obligation to explain the difference to him

between being a mediator and being his lawyer. Zero evidence was presented that Mr. Lamar gave Duran such an explanation.

Mr. Lamar referred to himself as engaging in "shuttle diplomacy" between Kauffman and Duran. Black's Law Dictionary defines "shuttle diplomacy" in pertinent part as follows:

> Diplomatic negotiations assisted by emissaries, who travel back and forth between negotiating countries. • **In legal contexts**, the term usu. refers to a similar approach used by a **mediator** in negotiating the settlement of a lawsuit. The **mediator** travels back and forth between different rooms, one of which is assigned to each side's decision-makers and counsel. The **mediator** relays offers and demands between the rooms and, by conferring with the parties about their positions and about the uncertainty of litigation, seeks to reach an agreed resolution of the case. The **mediator** does not bring the parties together in the same room.

DIPLOMACY, *Black's Law Dictionary* (11th ed. 2019). As I've noted, Mr. Lamar was not Duran's mediator; nor was he a shuttle diplomat.[5]

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5 In a related vein, a leading treatise on Legal Malpractice addresses the significant problems posed by a lawyer purporting to act as an "intermediary" or "scrivener."

> Lawyers undertaking to assist multiple persons have sometimes described their function as a "scrivener" or "intermediary." Some believe that this means they are not rendering legal services. Being a "scrivener," however, does not preclude an attorney-client relationship. The lawyer who holds such a belief or believes that consent solves all problems **may fail to assure that the multiple clients' legal needs are served**. The lawyer needs to caution and document that the services are being rendered as a scrivener or mediator, and not as a lawyer.

It is fair to characterize Duran and Kauffman's separation of their intertwined business interests as a "business divorce." To the extent that Mr. Lamar was attempting to fashion his own version of a collaborative law business divorce,[6] his efforts to do ethically, including but not limited to his written representation agreement with Duran, fell far short of the mark. *See generally* Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. Am. Acad. Matrim. Law. 141, 151 (2008). "In a typical collaborative case, each party hires **separate legal counsel**, both of whom agree to limited representation. That is, the attorneys and parties sign an agreement, sometimes called a participation agreement or disqualification agreement, to settle the legal issues solely through cooperative negotiation and without litigation." Alexandria Zylstra, J.D., LL.M., *Collaborative Law and Business Disputes: A Marriage of Equals*?, 17 Atlantic L.J. 1, 3 (2015).[7]

Ronald E. Mallen, The lawyer as intermediary, *2 Legal Malpractice* § 17:15 (2020 ed.) (internal footnotes omitted) (emphasis added).

6 "Collaborative law can be especially useful in negotiating the resolution of a **business divorce**." Heather L. King, WHAT EVERY BUSINESS ATTORNEY NEEDS TO KNOW ABOUT FAMILY LAW, SY010 ALI-CLE 141 (2016).

7 Counsel, as well as accountants, should be aware that beyond the ethical implications, in some circumstances giving advice and representing one of the partners in the **business divorce** may result in civil liability for damages in favor of the other partner and even the business. Being a lawyer or a CPA

B. Beyond Any Doubt, Duran Had a 50% Ownership Interest in Oceanika.

In this proceeding, Mr. Lamar has argued that the evidence fails to establish that Duran had an interest in the Oceanika business; or that Duran's interest was limited to any "profit" which Oceanika may have generated. I find that the evidence is clear and convincing that Duran had a 50% **ownership interest** in Oceanika, as he did with every other business venture he entered into in his partnership with Kauffman. And that he was thus entitled to 50% of any property or money that came out of Oceanika; without regard to whether or not it was classified as "profit."

At the trial of this case, Kauffman testified before me that he met Duran in 1996. Kauffman was a Forex[8] trader and Duran was a customer. They decided to

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> does not bestow any immunity from suit for breach of fiduciary duty, negligence, tortious interference with prospective business advantage, aiding and abetting the commission of a tort, civil conspiracy, and on and on.

Neal A. Jacobs, *Breaking Up Is Hard to Do What Are Your Rights When Business Partners Decide to Split?*, Bus. L. Today, AUGUST 1998, at 8.

8 "Foreign Exchange Trading, more colloquially known as "Forex," is a worldwide decentralized over-the-counter (OTC) financial market for the trading of currencies, wherein financial centers around the globe serve as anchors of trading between a wide range of different types of buyers and sellers 24 hours a day, five days a week." David T. Ackerman, *What Is Forex and Is More Regulation Necessary? This Is the Short and the Long of It*, Banking & Fin. Services Pol'y Rep., September 2016, at 11.

create a partnership. They invested in oil and real estate. "We did a 50-50 deal." It was a "handshake agreement." At their height, they were invested in more than 20 businesses together, worth hundreds of millions of dollars in value.

The Federal Government arrested Kauffman and Duran. Kauffman decided to plead guilty, and as part of his plea agreement, he was required among other things to testify truthfully in Duran's Federal criminal trial. Failure to do so, of course, could result in a much higher sentencing recommendation, and additional penalties. As a result of all of this, according to Kauffman: "We agreed that we were going to split our interests."

For the reasons I've already expressed, and based on my observations, I give no weight to that portion of Kauffman's testimony before me regarding whether or not Duran was entitled to any of the money that came out of Oceanika. It was apparent to me that he shaded his testimony on this issue as best he could to help Mr. Lamar.

Instead, I credit the testimony of Kauffman himself in October of 2008, when he testified in Duran's Federal criminal trial under his plea agreement. The Florida Bar's exhibit 24 in evidence is the pertinent excerpt of Kauffman's testimony relating to this issue:

> Q. Mr. Kauffman, I want to talk for a minute about Oceanica Yachts. Okay? I think I heard you yesterday tell the jury that you were an investor but, as of the time you were arrested, had not obtained an ownership interest in Oceanica Yachts.

A. Yes.
Q. And I think I already – I heard – obviously, since you've been arrested, you have not obtained an ownership interest in Oceanica Yachts. Correct?
A. No, sir.
Q. Okay.
A. Neither me or Franklin. **He's the owner of half of that**.
Q. I'm sorry?
A. Neither me or Franklin, **because he's half owner of that, too**.

* * *

Q. You basically told the jury that you split everything with Frank up until the events of this case. You split – your deal with Frank was to split pretty much all of your business deals 50/50. Correct?
A. Yes, sir. Correct.
Q. And would it be accurate to say that there were some business deals that you were – that Frank had that you were not directly involved in, that you are very passive, you didn't have much personal activity? Correct?
A. Correct.
Q. And there were some business deals that you were involved in that Frank didn't have a real active role in. Correct?
A. Correct.
Q. And wouldn't Oceanica Yachts be described in that category, one that was really your deal, but Frank was not actively involved?
A. Yes.

* * *

Q. Mr. Kauffman, and yachts were not really Franklin Duran's thing. They were your thing. Correct?
A. My thing. Yes.
Q. Okay. And when you say just a minute ago that Franklin would have gotten a piece of that deal, too, you mean that, under your agreement with Franklin, had you obtained an ownership interest, he would have been more or less a de facto owner with you. Correct?
A. No. **Actually, half of that money that is invested there is Franklin's money**.
Q. And it came from accounts that you had jointly?

A. Part of it. Part came from my accounts. Yeah. We just – I paid and then he owed me. Then he pays and he owes me. Then we sit down and we – just on a paper we put, we put that. And then, **at the end, it's 50/50**.
Q. What you're saying is that your financial relations with Frank over time were very informal and trusting?
A. Yes.
Q. And you would just many times just keep records in your head of what – who owed what and what was done and then you'd sit down and reconcile them at some point. Correct?
A. Well, the money always – most of the time in our joint accounts. But, yes, you can say that's accurate. Yes, sir.
Q. In this case, as you've told us, **some of the money came out of an individual account, yet, Frank would get credited with half of the investment?**
A. **Yes, sir**.
Q. **50 cents on every dollar you invested. Correct**?
A. **Yes. Correct**.
Q. And as I think I just heard you say, that's pretty much the way it worked across the board between you and Frank. You would use the money as you felt appropriate and settle up, when appropriate, with Frank.

When you needed to settle up, you'd settle up?
A. Yeah.
Q. And you didn't need to ask Frank's permission to invest in Oceanica Yachts?
A. Yeah. **We agreed to invest in Oceanica**.
Q. So you discussed it with him in advance?
A. Yes. We traveled together to Houston to see the offices, to see the boats, to see how the investment was going. We'd come to the United States to several boat shows.

(TFB Ex. 24, Trial Tr. of 10/2/08 at 40-41, 43-45) (emphasis added).

The overwhelming weight of the evidence, beyond any doubt (and beyond clear and convincing), is that Duran and Kauffman were each entitled to 50% of anything that came out of any of their investments worldwide. Oceanika was

plainly one of those investments. Kauffman swore to it in October of **2008**. Mr. Lamar's protestations to the contrary - most (if not all) of such protestations **after** this 2008 testimony from Kauffman – are shocking and insupportable.

In his September **2014** deposition testimony in the civil suit Duran filed against him, Mr. Lamar testified regarding Oceanika Yachts that "[t]he **only one** who claimed it was a joint investment was Frank." (at 278.) Mr. Lamar's sworn testimony is obviously flatly contradicted by Kauffman's 2008 testimony. Indeed, the remainder of Mr. Lamar's deposition testimony in the civil suit overwhelmingly demonstrates that he took "Kauffman's side," or accepted his version of events, whenever a disagreement arose. The evidence from multiple sources also clearly establishes that Duran consistently and unwaveringly claimed an interest in any monies that came out of Oceanika; both before and after the notorious "general release."

C. No Weight to Be Given to the Release.

Mr. Lamar has consistently argued that in this proceeding and others, that the release signed by Duran on September 10, 2009 absolves him of any responsibility for disbursing to Kauffman the entirety of the funds transferred by Oceanika to his trust account. As the finder of fact, I give this release no weight. "Once evidence is admitted, it is uniquely the province of the [finder of fact] to

determine its weight and credibility." *Allison Transmission, Inc. v. J.R. Sailing, Inc.*, 926 So. 2d 404, 407 (Fla. 2d DCA 2006).

The release itself makes no mention of Oceanika. It is a release by Duran of Kauffman from "all manner of" listed items. It is not, however, a release by Duran of Oceanika. In other words, Duran was not releasing Oceanika from any obligations it had to him, including the return of capital or any other monies from the Kauffman-Duran 50/50 investment.

In addition, Kauffman signed a mirror image of the same release in favor of Duran. As a result, one could make the same argument in reverse: that by signing that same release, Kauffman was releasing any interest he had to any Oceanika funds. Such an interpretation of the release simply doesn't make sense. Instead, as testified to by Duran in the civil suit, these mutual Kauffman-Duran releases were exhibits to – and required by – a principal business contract related to the Venoco business.

In the civil suit brought by Duran against Mr. Lamar, Duran testified extensively about Oceanika, the release, and his relationship with Mr. Lamar. His testimony was consistent with the contemporaneous notes taken of meetings held between Mr. Lamar and Duran, and with other documents prepared in connection with their business dealings. In sum, Duran testified that he at first trusted Mr. Lamar as his attorney; that the September 10, 2009 was not a release of his interest

in Oceanika; and that Mr. Lamar lied to him and failed to disclose Oceanika's financial status. (Duran Dep. Tr. of Sep. 1, 2, and 3, 2014 at 182:10, 406-09, 420-22, 432-33, 438, 447-53, 562-63, 626, 660-62, 695, 708-09, 728, and 731-33).

At a bare minimum, as with the dispute over who had an ownership interest in the money from Oceanika, even if Duran and Kauffman disagreed as to whether the release covered Oceanika, it was **not** for Mr. Lamar to side with Kauffman over Duran; it was not for Mr. Lamar to accept which client's version of events he was going to accept as true.

Lastly, I reject the argument that because Duran had other attorneys representing him whose scope of representation overlapped with that of Mr. Lamar, somehow that relieved Mr. Lamar of his own independent obligations as an attorney to his client. No legal authority was cited for this proposition.

Mr. Lamar and Duran never limited the original scope of their attorney-client relationship ("all commercial-civil, non litigious matters relating to my financial involvements"). The Oceanika investment and the releases clearly fell within that scope. Mr. Lamar's attempts to shift blame or relieve himself of responsibility because other lawyers were also involved is unavailing. It is analogous to a local counsel relationship between a lawyer and a client, where the local lawyer's scope is not limited, with deference to the lead out-of-state counsel.

> The designation of "local counsel" is not a phrase of precise meaning. The description connotes a lawyer, who is physically at the situs of

> the litigation and who possesses knowledge of local rules, procedures and circumstances. The other counsel usually is the one primarily responsible for the handling of the litigation. The precise relationship, however, is subject to the understanding between the client and the two law firms.
>
> * * *
>
> [In one case a federal court] said that local counsel is a lawyer for the clients, with greater responsibilities than merely to sign and file documents. Local counsel is counsel of record and provides local knowledge that an out-of-state law firm may not have.
>
> A Louisiana federal action concerned the duty of local counsel to inform the client of sanctions and, consequently, the penalty of striking defenses. The law firm had a duty to inform the client of lead counsel's misconduct, though the firm's role was minimal and it was instructed by lead counsel not to deal directly with the client.

Ronald E. Mallen, *Other counsel: consultation, delegation, association and referral—Local counsel or special appearance*, 1 *Legal Malpractice* § 5:53 (2020 ed.). In other words, unless a lawyer expressly limits their scope of representation with informed consent by their client, a lawyer has all of the duties attendant to the client for the matter for which they were retained.

IV. RECOMMENDATIONS AS TO GUILT

Finding Mr. Lamar guilty of violating Bar rules is not something I do lightly. Indeed, it is very sad. Mr. Lamar has been a member of The Florida Bar since 1973; almost 47 years. In his appearances before me he was respectful, and seemed like a nice man. In fulfilling my job as the finder of fact, however, my

focus is on the evidence, and it demonstrates clearly and convincingly that Mr. Lamar violated the rules in his dealings with Duran, as alleged by the Bar.

As a result, I recommend that Mr. Lamar be found guilty of violating the following Rules Regulating The Florida Bar: 3-4.3 (Misconduct and Minor Misconduct); 4-1.1 (Competence); 4-1.4 (Communication); 4-1.5(d) (Enforceability of Fee Contracts); 4-1.7 (Conflict of interest; general rule); 4-1.15 (Safekeeping Property); 4-1.16 (Declining or Terminating Representation); 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation…); and 5-1.1(f) (Disputed Ownership of Trust Funds).

V. SANCTIONS RECOMMENDATION

A. FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

Before I recommended discipline, I considered in their entirety the following from the Florida Standards for Imposing Lawyer Sanctions ("Standards"):

4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

4.6 LACK OF CANDOR

7.1 DECEPTIVE CONDUCT OR STATEMENTS AND UNREASONABLE OR IMPROPER FEES

The Standards for Imposing Lawyer Sanctions sets forth the purpose of lawyer discipline. The primary purpose is to protect the public. The evidence

overwhelmingly demonstrates that Mr. Lamar has had a distinguished career over 47 years, and I give great weight to the character witnesses that testified on his behalf, as well as Mr. Lamar's own testimony during the sanctions hearing. Other than the incident before me, I find that Mr. Lamar has been a stupendous advisor to his clients, in particular as it relates to real estate matters and very significant, complicated real estate transactions.

Given his 47 years as a member of the Bar, Mr. Lamar undoubtedly has significant experience as a lawyer. Yet he had never been involved in any Federal criminal litigation, especially a case where one former business partner testified against another.

As evidenced by the testimony of Mr. Lamar's clients, I do not find that the public needs protecting by altering - or in any way negatively affecting - Mr. Lamar's ability to continue to practice law. This purpose of discipline is not served by impairing his ability to practice law.

The second purpose of lawyer discipline is the need to protect the integrity of the legal system and to ensure the administration of justice. It is clear to me, and I find by clear and convincing evidence, that Mr. Lamar's conduct was negligent and not intentional.

He may have thought that he was acting as a mere messenger. He may have thought that he was simply helping them to unwind their business affairs. But I

think that there was more that was going on there, and that this was a highly unusual situation that took place. I do not doubt his good faith belief that he thought he was trying to help and that he thought he could rely on certain documents.

I am recommending an admonishment because it is: “The lowest form of discipline which declares the conduct of the lawyer improper," but it does not limit the lawyer's right to practice. I do not find that the integrity of the legal system and the administration of justice requires that Mr. Lamar be unable to continue to practice law.

The third purpose of lawyer discipline is to “deter further unethical conduct and, where appropriate, to rehabilitate the lawyer." This experience for Mr. Lamar, beginning with the civil lawsuit and now the Bar disciplinary proceeding, and the pain that it has obviously caused him and those close to him, has already deterred him. Since this underlying conduct, Mr. Lamar has had no issues and I don't expect he will again. There is no need for anything more than an admonishment to deter Mr. Lamar from any further unethical conduct.

I give credit to Mr. Lamar’s testimony that he understands the problem, and find that he is a well-known, well-regarded lawyer in what he does.

There was an issue with the scope of representation in this case, and the scope was broader than what Mr. Lamar thought it was. However, nothing more

than an admonishment is warranted, as rehabilitation is not needed. Mr. Lamar understands how he found himself in this situation, and he testified that things are now done differently in his office.

A final purpose of lawyer discipline is to educate other lawyers and the public, deterring unethical behavior among all members of the profession. An admonishment is appropriate here, as this situation is akin to an unfortunate law school hypothetical regarding the problems of representing two people who were in business together and then became highly adverse to each other, to the point where one was testifying against the other in federal criminal matter. An admonishment would be more than enough to educate other lawyers and the public.

Notably, each of the Standards begins by providing that "absent aggravating or mitigating circumstances and on the application of the factors to be considered, the following are generally appropriate." Therefore, as written, these recommendations as to disbarment, suspension, public reprimand, or admonishment are appropriate *without* consideration of aggravating or mitigating circumstances.

B. AGGRAVATING AND MITIGATING FACTORS

Before recommending discipline, I also considered all the aggravating and mitigating circumstances contained in sections 3.2 and 3.3 of the Standards and find as follows as to the aggravating and mitigating circumstances:

Aggravating Factors

3.2(b)(1) Prior disciplinary offenses.

None.

3.2(b)(2) Dishonest or selfish motive.

Not applicable.

This is one of the main factors that distinguishes this case from so many of the other cases cited, where the respondents received more severe sanctions for trying to benefit themselves personally, either through creating a competing business or at the expense of a client.

3.2(b)(3) There was no pattern of misconduct.

This is not a case where there's been a demonstrated pattern of misconduct. This all arose out of the business divorce between Mr. Duran and Mr. Kauffmann, and Mr. Lamar's unfortunate decision not to have Mr. Duran find other counsel.

3.2(b)(4) Multiple offenses.

Because I found more than one Rule violation, this aggravating circumstance applies.

3.2(b)(5) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency.

Not applicable.

3.2(b)(6) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process

Not applicable.

3.2(b)(7) Refusal to acknowledge the wrongful nature of the conduct.

Not applicable.

3.2(b)(8) Vulnerable victim.

Not applicable. Both Mr. Kauffman and Mr. Duran were very sophisticated, and Mr. Duran had other counsel in addition to Mr. Lamar, which although it does not lessen Mr. Lamar's obligation to his client (depending on the scope of the representation), it can't reasonably be said that Mr. Duran was a "vulnerable victim."

3.2(b)(9) Substantial experience in the practice of law.

Forty-seven years is substantial, but no evidence was presented that Mr. Lamar had ever handled a case like this one. There was no evidence that he had ever handled a "business divorce" between partners.

3.2(b)(10) There was no indifference to making restitution.

3.2(b)(11) Obstruction of fee arbitration awards by refusing or intentionally failing to comply with a final award.

Not applicable.

Mitigating Factors

3.3(b)(1) Absence of a prior disciplinary record.

There is no prior disciplinary record.

3.3(b)(2) Dishonest or selfish motive.

As explained in the aggravating circumstance portion above, Mr. Lamar had no dishonest or selfish motive.

3.3(b)(3) Personal or emotional problems.

Not applicable.

3.3(b)(4) Timely good faith effort to make restitution or to rectify the consequences of the misconduct.

Not applicable

3.3(b)(5) Full and free disclosure to the Bar, and a cooperative attitude towards the proceedings:

Mr. Lamar provided full and free disclosure to the Bar and displayed a cooperative attitude towards the proceedings.

3.3(b)(6) Inexperience in the practice of law.

Mr. Lamar was inexperienced in a matter like this one, that is, a "business divorce" where one client is a cooperating federal criminal witness against the other.

3.3(b)(7) Character or Reputation:

Mr. Lamar has an impeccable character and reputation, as set forth by all his clients and some of the people who continue to trust him with very significant, complicated real estate matters. I have no reason to believe that he would not continue to handle those in an excellent way.

3.3(b)(8) Physical or mental disability or impairment or substance-related disorder.

Not applicable.

3.3(b)(9) Unreasonable delay in the disciplinary proceedings if the respondent did not substantially contribute to the delay and the respondent demonstrates specific prejudice resulting from that delay.

Not applicable

3.3(b)(10) interim rehabilitation.

Not applicable.

3.3(b)(11) Imposition of other penalties or sanctions.

There were other penalties or sanctions that Mr. Lamar has paid out of his own pocket in the form of significant monies to Mr. Duran. Mr. Lamar received a release and satisfaction upon payment to Mr. Duran.

3.3(b)(12) Remorse.

I find that Mr. Lamar is genuinely remorseful, and he has accepted responsibility for his conduct.

3.3(b)(13) Remoteness of prior offenses.

Not applicable.

3.3(b)(14) Prompt compliance with a fee arbitration award.

Not applicable.

Mr. Lamar engaged in negligent conduct. A public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. That is the recommended sanction, absent aggravating or mitigating circumstances.

When the aggravating and mitigating circumstances are included, I find this case is appropriate for an admonishment. My findings, by clear and convincing evidence, are based on the vast evidence and testimony in this case, my review of the case law and Standards, and that Mr. Lamar paid money out of his own funds to rectify the disbursement of Oceanika funds, over Mr. Duran's objection.

Considering the purposes of lawyer discipline, the public does not need to be protected from Mr. Lamar. His clients can still rely on him, and wish to continue to rely on him, with respect to their very significant real estate transactions and development matters.

While Mr. Lamar was mistaken in relying on the release, and the waiver of conflict that was put in the retainer agreement before one client decided to testify against the other, he did not intend to deceive anyone.

C. CASE LAW

I considered the following cases prior to recommending discipline:

The Florida Bar v. Kinsella, 260 So.3d 1046 (Fla. 2018);

The Florida Bar v. Frazier, Supreme Court Case No. SC11-819;

The Florida Bar v. Adorno, 60 So.3d 1016 (Fla. 2011);

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

The Florida Bar v. Herman, 8 So. 3d 1100 (Fla. 2009);

The Florida Bar v. Rodriguez, 959 So. 2d 130 (Fla. 2007);

The Florida Bar v. Patterson, 257 So.3d 56 (Fla. 2018);

The Florida Bar v. Parrish, 241 So.3d 66 (Fla. 2018);

The Florida Bar v. Silver, 788 So. 2d 958 (Fla. 2001);

The Florida. Bar v. Tropp, 112 So.3d 101 (Fla. 2013);

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

The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997);

The Florida Bar v. Polk, 126 So.3d 240 (Fla. 2013);

The Florida Bar v. Brown, 978 So.2d 107 (Fla. 2008);

The Florida Bar v. Roberts, 770 So.2d 1207 (Fla. 2000);

The Florida Bar v. Batista, 846 So.2d 479 (Fla. 2003).

I find that the cases cited by the parties, particularly *Frazier, Rodriguez, Parrish*, and *Kinsella*, are distinguishable from this case.

D. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

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

Admonishment.

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

E. 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: 74

Date admitted to the Bar: May 1, 1973

Prior Discipline: None

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

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

Administrative Costs	$1,250.00
Court Reporter Costs	$1,500.00
Investigative Costs	$525.00
Bar Counsel Costs	$126.30
TOTAL	$3,401.30

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 1st day of December, 2020.

/s/Thomas J. Rebull_____
Judge Thomas J. Rebull, Referee
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Miami, Florida 33125

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