33.443

IN THE SUPREME COURT OF FLORIDA

HAL H. McCAGHREN,

~~Petitioner~~, RESPONDENT

vs.

THE STATE OF FLORIDA
ex rel. THE FLORIDA BAR,

~~Respondent~~. COMPLAINANT

BRIEF OF ~~PETITIONER~~ Respondent
IN SUPPORT OF
PETITION FOR REVIEW

FARISH & FARISH
Denco Building
316 First Street
West Palm Beach, Florida
Attorneys for Petitioner

INDEX

AUTHORITIES CITED

I

PREFACE

For the purposes of this Brief the parties will be referred to as they were in the proceedings below. The Petitioner, Hal H. McCaghren, will be referred to as the Respondent and the Respondent, herein, The Florida Bar, will be referred to as the Complainant. The following symbols will be used:

"A"	Appendix of Petitioner's Brief in Support of Petition for Review
"TR"	Transcript of Proceedings before the Referee

II

STATEMENT OF THE CASE

A Complaint was filed by The Florida Bar against the Respondent, Hall H. McCaghren, on May 28, 1962. Respondent was charged with professional misconduct in four Counts:

(a) Respondent connived to have an adulterous act committed between William De Sarro and Pearl R. Daly on or about October 13, 1959, at 258 Mira Flores Drive in Palm Beach, Florida, for the purpose of obtaining evidence to be used in a divorce proceeding on behalf of his client, Francis A. Daly, the husband of the said Pearl R. Daly.

(b) In the alternative, respondent passively allowed or permitted his client, Francis A. Daly, to connive with one William De Sarro to have said William De Sarro commit an adulterous act with Pearl R. Daly, wife of the said Francis A. Daly, said adulterous act having been committed on or about October 13, 1959, at 258 Mira Flores Drive in Palm Beach, Florida, for the purpose of obtaining evidence to be used in a divorce proceeding on behalf of respondent's client, Francis A. Daly.

(c) Respondent, having obtained photographic evidence of an apparent adulterous act between one William De Sarro and the said Pearl R. Daly, used such evidence in a chicane manner in order to obtain an advantageous property settlement on behalf of respondent's client, Francis A. Daly, as against his wife, Pearl R. Daly, at which time respondent knew or should have known that such evidence was obtained by connivance.

(d) Respondent paid to the said William De Sarro, the person respondent alleged committed the adulterous act with his client's wife, a sum of money totalling $3,750.00 between October 23, 1959, the date respondent filed complaint for divorce on behalf of his client, and November 23, 1959, a few days following the

granting of a Final Decree of divorce, which said payments were made under such circumstances that showed deceit, misconduct and a lack of candor and fairness on respondent's part.

Based upon these four Counts, violations of the Canons of Ethics, Nos. 15, 16, 22, 31 and 41 were charged.

Respondent filed an answer and motion to dismiss in reply to the Complaint. The answer filed denied the allegations of misconduct contained in Counts (a), (b), (c) and (d) and the violations of the Canons based thereon.

Final hearing was held on January 3, 1963, before a Referee appointed by the Board of Governors of The Florida Bar. At the Hearing, the Complainant and the Respondent were both represented by Counsel.

The testimony of several witnesses was produced by both parties and evidence concerning the matter was introduced. After hearing the arguments of Counsel for Complainant and Respondent, the Hearing was concluded pending a decision by the Referee.

On January 9, 1964, the Report of Referee was filed, finding the Respondent innocent of Counts (a) and (b) of the Complaint, but finding the Respondent guilty of Counts (c) and (d) of the Complaint. Numerous findings of fact were also included in the Report of the Referee. In conclusion, the

Referee recommended that the Respondent be suspended from the practice of law for a period of three months.

The Respondent filed a Statement in opposition to Findings and Recommendations of the Referee on January 24, 1964.

On May 1, 1964, the Board of Governors of The Florida Bar entered a Judgment adopting the findings of fact and conclusions contained in the Report of Referee and found the Respondent guilty of violating Canons 15, 16, 22, 31 and 41, based on his guilt as to Counts (c) and (d) of the original Complaint.

The Judgment and sentence imposed by the Board of Governors exceeded the Referee's recommendation and the Respondent was ordered suspended for three months and thereafter until he shall demonstrate to the Court and to the Board that he is entitled to be reinstated to the practice of law.

A Petition for Review of the Judgment was filed in this Court on May 28, 1964.

III

POINTS ON REVIEW

POINT I

WAS ANY CONNIVANCE PROVEN?

POINT II

COULD THE RESPONDENT HAVE KNOWLEDGE OF ANY CONNIVANCE?

POINT III

WAS THE "KNOWLEDGE" IMPUTED TO THE RESPONDENT BY THE REFEREE SUFFICIENT KNOWLEDGE TO HOLD RESPONDENT LIABLE?

POINT IV

WAS THERE ANY PROOF OF RESPONDENT HAVING KNOWLEDGE OF ANY CONNIVANCE?

POINT V

WAS THE EVIDENCE OF THE CIRCUMSTANCES SURROUNDING THE DISBURSEMENTS TO DE SARRO SUFFICIENT EVIDENCE TO SUPPORT THE JUDGMENT AGAINST RESPONDENT?

POINT VI

WERE THE PROCEEDINGS HELD IN THIS ACTION AND THE DELAY THEREIN CONSISTENT WITH JUSTICE AND THE LAW?

IV

STATEMENT OF THE FACTS

Respondent, Hal H. McCaghren, is an attorney practicing law in West Palm Beach, Florida. He received degrees in Chemical Engineering and Law at the University of Florida and was admitted to practice in the State of Florida in 1940 (TR 113, 114).

Though Respondent's practice has been almost exclusively within Florida, he has been admitted to practice in several other states and before numerous Federal agencies and Courts. Respondent has been married nineteen years and has two children. His practice has been general in nature with some specialization in industrial property rights (TR 114, 115).

In the course of Respondent's practice, he was approached by Mr. F. A. Daly during the Summer of 1959 in regard to the Respondent's representing Daly in divorce proceedings against Daly's wife, Pearl Daly (TR 81). Respondent had previously represented Daly's daughter and the family having been satisfied as to his representation there, Mr. Daly had then contacted Respondent (TR 116).

Prior to accepting employment by Daly, the Respondent conducted a summary investigation of Daly's background and the status of the marital relationship between Mr. and Mrs. Daly. Mr. Daly was a man of some years with a severe speech impediment and apparently a man of some wealth, and Respondent was cautious of undertaking to represent him without having some knowledge of the circumstances.

The investigation by Respondent was devoted to determining the merits of the case involved and of being sure that Daly was a Florida resident since Mr. Daly often traveled out of the state for medical treatments (TR 89).

The investigation revealed that Mr. Daly was a bona fide resident of Florida, living in Palm Beach, and subsequently in August of 1959, the Respondent undertook to represent Daly (TR 116).

The investigation as to the merits of the case and the marital relationship of the parties revealed that Mr. and Mrs. Daly had apparently lived together as man and wife for some two years before any formal marriage ceremony had taken place (TR 117). And though it was well established that the marriage was consummated, Respondent was never shown a marriage certificate (TR 117).

As to Mrs. Daly, an investigation revealed that her background was replete with instances of misconduct in the form of promiscuity, adultery and alcoholism (TR 117, 118). And before the Respondent ended his relationship with the Dalys, Mrs. Daly was sent to a Federal hospital for drug addicts (TR 118).

One of the items of misconduct turned up by Respondent's investigation revealed that Mrs. Daly, at times when Mr. Daly was away from home for a short period, would be seen with other men in her home and at the home of a friend (TR 117). A man with Latin features was often seen with Mrs. Daly and a certain automobile, colored gold and white, would appear at the Daly residence or at the residence of a friend of Mrs. Daly's

whenever Mr. Daly would be away (TR 117). Mrs. Daly had even revealed her adulterous conduct to her daughter-in-law, Mrs. Elizabeth Ann Allison, who was prepared to testify in the divorce proceedings concerning Mrs. Daly's adultery and other misconduct (TR 189).

As a result of these observations and knowledge of the misconduct of Mrs. Daly, the Respondent undertook to have the Daly residence watched whenever Mr. Daly was away.

One such occasion took place on or about October 13, 1959 when Mr. Daly informed the Respondent that it would be necessary for Daly to receive treatment in a Fort Lauderdale Hospital for several days (TR 100). Daly actually called Respondent from Fort Lauderdale, after he had arrived at the hospital (TR 100, 101).

Subsequently, upon learning of Mr. Daly's absence, Respondent contacted a local private detective agency and arranged to have the Daly residence in Palm Beach put under surveillance (TR 100, 101). The detectives were instructed to attempt to take photographs if the woman of the house, Mrs. Daly, was seen with any men (TR 101). The detectives were also alerted to secure pictures of any automobile seen at the home (TR 101).

The detectives began their surveillance around 9:00 P.M. of the first night Mr. Daly was absent from his home. After arriving at the home the detectives observed figures of a man and woman in the house apparently drinking (TR 33). After watching the figures for some two or three hours, the detectives

observed that they retired to a bedroom of the house (TR 30, 31).

At that time, early in the morning hours on October 15, 1959, the detectives gained entrance to the house through a kitchen door, after trying several other doors, and proceeded to the room where the man and woman were last seen (TR 31). Hurriedly, the detectives took two quick flash pictures of a man and woman in the room in bed and then fled (TR 30). Before leaving the premises, another picture was taken of an automobile parked in the driveway of the home (TR 30).

On October 15, 1959, the detectives furnished Respondent a report of their surveillance and the photographs of the man and woman and the car (TR 31). The car was identified by the detectives as belonging to a man named William De Sarro (TR 34, 35).

De Sarro turned out to be a man whom Mrs. Daly had met earlier in the Summer of 1959, and whom subsequently was employed by Mr. Daly, at the request of Mrs. Daly, as a handyman and chauffeur (TR 41). Respondent did not know De Sarro, but had seen him on a few occasions when De Sarro had brought Mr. Daly to Respondent's office (TR 90, 91).

Shortly after receiving the photographs and report from the detectives, the Respondent received a phone call from Mrs. Daly's attorney, Mr. Ronald Sales. Mr. Sales told the Respondent that he had received a call from Mrs. Daly informing him of the events of the prior evening and requested that Respondent delay a filing of complaint for divorce until further word from Sales (TR 94, 95).

In a subsequent discussion, Respondent disclosed to Mr. Sales that he, Respondent, had a large amount of evidence of Mrs. Daly's adultery and misconduct, including the photographs of the prior nights activities (TR 98).

Upon a discussion of the photographs, Mr. Sales asked Respondent if he knew the man involved in the pictures. Respondent said he had seen the man but did not know his name (TR 45). Mr. Sales then proceeded to give Respondent a large amount of information concerning the questionable background and character of De Sarro (TR 45).

Shortly thereafter, the firm by which Mr. Sales was employed decided not to represent Mrs. Daly due to her history of adultery (TR 56, 57).

After Mr. Sales notified the Respondent of his withdrawal, a complaint for divorce was filed on October 23, 1959, by the Respondent for Mr. Daly against Mrs. Daly, alleging multiple acts of adultery and misconduct on the part of Mrs. Daly and asking that Mr. Daly be granted a divorce (TR 102).

Mr. Paschal Reese became the attorney for Mrs. Daly soon after the divorce suit was instituted (TR 60, 61). Mr. Reese was informed by his client, to some extent, of her adulterous conduct, and subsequently he entered into negotiations with Respondent as to a settlement agreement (TR 61).

Mr. Reese was never able to ascertain the exact value of the property holdings of Mr. Daly, and depended to a large extent on what Mrs. Daly told him (TR 63). Upon the basis of

the information he had however, he offered to settle for $25,000.00 (TR 63). After Respondent made a full disclosure to Reese of the evidence of Mrs. Daly's adultery and misconduct, including the photographs, supra, Reese lowered the figure to $15,000.00 for Mrs. Daly plus some jewelry bringing the total up to about $20,000.00, and $2,500.00 for Reese in attorney's fees (TR 63). This figure proved acceptable to Mr. Daly and an agreement was entered into on that basis by the parties involved (TR 64).

Subsequently, a hearing was held on the divorce suit, and a final decree of divorce was entered on November 19, 1959, which approved the settlement agreement (TR 69).

During the time of these divorce proceedings, Respondent had been handling a great amount of Mr. Daly's legal and financial matters. Some $6,000.00 had been placed with Respondent by Mr. Daly for the specific purpose of handling any expenses in regard to the divorce, and also for any other expenses or disbursements made on Mr. Daly's account (TR 154, 155). Among the disbursements made was a sum of $3,750.00, reflected in Respondent's receipts and accounting as being paid to William De Sarro, the handyman chauffeur employed by the Dalys (TR 151, 152).

De Sarro had called Respondent and informed him that Daly had promised to pay him $3,500.00, enough for a new automobile, but Respondent had been skeptical of De Sarro's assertion, especially since Mrs. Daly's attorney had informed Respondent of De Sarro's background (TR 105). So, Respondent

checked with Mr. Daly and Daly confirmed that he had indeed promised to give De Sarro $3,500.00. Daly instructed Respondent to give De Sarro $1,500.00 out of the funds Respondent held for Daly then, and to tell him he would pay him the remainder later (TR 105).

Thereupon, Respondent, not wanting a man of De Sarro's reputation in his office, directed De Sarro to meet him in his parking lot while he was on his regular trip to the Post Office at noontime. De Sarro did meet Respondent and was paid and Respondent obtained a receipt from De Sarro noting that the remainder of $2,000.00, as agreed by Mr. Daly, was to be paid later (TR 105).

Subsequently, the remainder was paid to De Sarro, at the order of Daly, by Respondent, after Mr. and Mrs. Daly were divorced and De Sarro had apparently been discharged. Again, Respondent obtained a receipt from De Sarro, only this time De Sarro claimed Daly owed him an additional $250.00. Respondent checked with Daly again and this was confirmed, so another $250.00 was paid to De Sarro at the order and direction of Daly from the funds of Daly held by Respondent (TR 107, 108).

This was the last contact Respondent had with De Sarro, though Respondent continued to represent Mr. Daly in other legal matters up until November of 1960 (TR 128).

V

ARGUMENT

This action began when The Florida Bar lodged a complaint against the Respondent for his alleged participation in a connived adulterous act alleged to have taken place between William De Sarro and the wife of Respondent's client (A 1).

Respondent was charged with direct participation in the connivance, passive participation in the connivance, use of evidence of the connivance in a chicane manner, and making payments to the third party in the connivance, William De Sarro (A 1, 2).

The Complaint was based on the alleged connivance and Respondent's participation in or knowledge of the connivance. If there was no connivance, then all of Respondent's conduct was entirely proper and was normal procedure for an attorney in his situation. If there was connivance, then the question of Respondent's knowledge or participation still remained. The Referee stated the issue in these words:

> "First, did the Respondent participate directly in a connived adulterous act? Second, did he passively but knowingly allow his client to connive such adulterous act or did he, knowing that an adulterous act had been connived, take advantage of it for his client, Mr. Daly, over Mrs. Daly." (A 9).

The entire case against the Respondent relied and was predicated on the existence of a connived adulterous act between

William De Sarro and the wife of Respondent's client. In order to be guilty of any of the four charges contained in the complaint lodged by The Florida Bar, Respondent had to be proven to have either participated in the connivance, directly or passively, or to have had knowledge that the connivance existed (A 8, 9).

By the Judgment of the Board of Governors and the Report of Referee adopted by the Judgment, Respondent was found innocent of any participation in any connivance either directly or passively (A 16, 22). But Respondent was found guilty of having knowledge of a connived adulterous act and using evidence of the act to obtain a favorable property settlement for his client (A 22, 25).

The point apparently overlooked by the Referee and the Board of Governors was that Respondent could not be held responsible for knowledge of any connivance that has not been proven to have taken place. If there was no connivance, then there could be no knowledge by Respondent of said connivance and Respondent's conduct would be entirely proper. The Referee even stated this, substantially, early in his Report.

> "In other words, therefore, there is nothing improper in anything the Respondent did unless he participated directly in the connivance or proceeded to gain an advantage for Mr. Daly over Mrs. Daly, knowing that the adulterous act had been connived." (A 8, 9).

POINT I

THERE WAS NO CONNIVANCE PROVEN.

Of course, the next question is the first question that should have been answered in the proceeding, was there any connivance proven or established to have occurred? The answer to this question must be in the negative, and for that reason the Respondent must necessarily be held free of any misconduct concerning the alleged connivance.

Let us examine the Referee's Report and the testimony presented at the Hearing on the Complaint against Respondent. The Referee found that there were three (3) possibilities indicated by the evidence as to the circumstances surrounding the adulterous act:

> "/FIRST/ It is recognized that Mr. Daly and/or Respondent could have hired or encouraged De Sarro to commit the act. /SECOND/ On the other hand, it is equally recognized that Mr. Daly and/or Respondent might have had sufficient knowledge of Mrs. Daly's past activities to expect that the adultery would be committed that particular evening while Mr. Daly was away from his home and in the hospital. /THIRD/ It is further recognized that Mr. Daly could have connived to employ De Sarro to commit the act and then could have requested the Respondent to get the evidence, without giving the Respondent any reason to know that the expected act had been connived." (A 7, 8).

The FIRST of these possibilities was eliminated when Respondent was found innocent of any participation in the alleged connivance (A 16).

The THIRD possibility required that Daly be the one

who arranged the connived adulterous act. But of this possibility the Referee concluded:

> "(T)here is no proof that Mr. Daly himself participated in any connivance * * *." (A 10).

It must be concluded, therefore, that the THIRD possibility was not proven, and that there was no proof that either Respondent or Daly participated in the connivance (A 10, 16).

That leaves the SECOND possibility as the only explanation of the circumstances surrounding the adulterous act that is consistent with the evidence and proof. And the SECOND possibility means that the Respondent was entirely free from any misconduct in obtaining and utilizing evidence of the adultery to obtain a favorable property settlement for his client since there was no connivance involved (A 7).

The fact is, that there was no proof offered at the Hearing that the adulterous act in question had been connived. Throughout the Report of the Referee, this term is used in referring to the connivance:

> "* * * if such connivance actually occurred." (A 7, 8)
>
> (Emphasis supplied)

The only persons who could have arranged the connivance were the Respondent and Daly, and the Referee concluded that there was no proof that either so connived. The Referee finally concluded that the connivance was "* * * a fact itself not positively proved * * *." (A 9) (Emphasis supplied)

In spite of having concluded, correctly so, that the connivance was never proven, the Referee went on to find

the Respondent guilty of having knowledge of the connivance.

The Judgment of the Board of Governors declared:

> "The referee found that the respondent * * * knew that the adultery and proof thereof were brought about by the connivance of his client." (A 25)
>
> (Emphasis supplied)

"His client" was Daly and the Referee said of Daly:

> "(T)here is no proof that Mr. Daly himself participated in any connivance * * *." (A 10).

The Judgment and the Report are entirely inconsistent and the finding against Respondent is error because it is predicated upon the existence of an unproven fact.

POINT II

THE RESPONDENT COULD NOT HAVE HAD KNOWLEDGE OF ANY CONNIVANCE.

The Referee concluded that Respondent was guilty of having knowledge of the connivance and using evidence of the connived adulterous act to gain his client a favorable property settlement (A 16). In so doing, the Referee admittedly made up his own definition of the word "knowledge", apparently realizing that the proof did not exist as to the actual knowledge of the Respondent, especially since the connivance was never proven to exist (A 19, 20). This is the language used by the Referee:

> "It is the undersigned's [Referee's] opinion that the 'knowledge' required to prove Respondent guilty of charges (c) and (d) of the Complaint is not * * * personal knowledge * * *. The 'knowledge' that is required, and for which Respondent as a lawyer is held responsible, is practical, commonsense knowledge." (A 20).

Based on this special definition of knowledge, Respondent was found guilty of charges (c) and (d) of the Complaint (A 20). What the Referee leaves unexplained is how the Respondent could be guilty of having <u>any kind</u> of "knowledge", personal or practical, of any connivance <u>not proven to have taken place</u> (A 9, 10, 16).

Now there are no reported decisions directly on this question, but the Respondent would like to demonstrate the unreasonableness of the Referee's findings by drawing an analogy.

In a prosecution for the crime of Receiving Stolen Goods, it is necessary that the State prove that the property received by the accused was actually stolen i.e. that the accused did, in fact, receive stolen goods. 28 Fla. Jur. Receiving Stolen Goods, § 6 and cases cited. So in this case, it was incumbent upon the Complainant to prove that the adulterous act of which Respondent had knowledge was actually connived i.e. that the Respondent did, in fact, have knowledge of a connived act. Having failed to prove that the adulterous act in question was connived the Complainant has failed to sustain its burden of proof and the Referee and the Board of Governors were in error in adjudging the Respondent guilty of having knowledge of an unproven act.

POINT III

THE "KNOWLEDGE" IMPUTED TO THE RESPONDENT BY THE REFEREE WAS NOT SUFFICIENT KNOWLEDGE TO HOLD RESPONDENT LIABLE.

As noted, supra, the Referee used his own definition of "knowledge" in adjudging the Respondent guilty (A 19,20). The Referee quoted the Respondent's testimony:

> "In fairness to Respondent it must be noted that he claims (Record page 112) that when he made the $1,500 payment to De Sarro he had the suspicion that it was for services rendered by Mr. De Sarro to Daly for going to bed with Daly's wife, but Respondent said (page 112):
>
> > 'I had the suspicion, yes; yes, but no proof, no knowledge of it, suspicion; yes, suspicion of a lot of things.'
>
> "It is the undersigned's [Referee's] opinion that the 'knowledge' required to prove Respondent guilty of charges (c) and (d) of the Complaint is not * * * personal knowledge * * *." (A 19, 20).
>
> (Emphasis supplied)

By these few words expressing the Referee's "opinion", (A 20) the quantum of proof required to convict the Respondent has been drastically lowered and "suspicion" has been substituted for "knowledge".

There is no doubt but that an attorney must be held to a strict standard of conduct in his dealings with his clients, but the protection afforded an attorney when his honor and professional integrity are put on trial is no less than that afforded to any man. The Courts have declared:

> "(A)nd while the individual attorney is entitled to no greater judicial protection under these circumstances than the law affords to those who follow other professions and occupations, he is, in all justice, entitled to no less."
>
> Toft v. Ketchum, 18 N.J. 280, 113 A. 2d 671, 52 A.L.R. 2d 1208.

So here, the Referee, or the Board of Governors, cannot substitute an "opinion" in place of the standard by which the Respondent is entitled to be judged. The word "knowledge" is not a synonym for the word "suspicious" or "guess" or any other word of lesser integrity, and the Respondent cannot be held liable until it is proven that he had honest-to-goodness knowledge of connivance. If the proof doesn't support such a conclusion then the charge must fail and the charge cannot be altered to fit the proof.

The Referee, himself, apparently recognized this earlier in his Report when he stated:

> "An attorney's suspicions are not enough, and an attorney, because he may realize that something could be connived as well as genuinely happen, is not obligated to put his client on trial and proceed to interrogate his client by leading and possibly embarrassing questions challenging the actions or situations the client takes or reports to him. If the attorney observes and knows that something is wrong, he would be a participant in it. In the absence of such knowledge, the attorney is privileged to carry out the lawful requests of his principal." (A 7).

By his own language, the Referee has established a standard of conduct and proof in one instance and has completely varied from that standard in the next, by adjudging the Respondent guilty.

It is respectfully submitted that the Complainant has completely failed to prove that the Respondent had sufficient knowledge of any alleged connivance to support a finding against the Respondent.

POINT IV

THERE WAS NO PROOF OF RESPONDENT HAVING KNOWLEDGE OF ANY CONNIVANCE.

The measure of proof which must be met by a Complainant in a Disciplinary Proceeding such as is here involved, demands that the charges alleged must be proven by a clear preponderance of the evidence. Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

An attorney is entitled to every judicial protection that any other person would be given. Toft, supra. As to the quality of proof required the Florida Supreme Court has stated:

> "It goes without saying that the power to disbar or suspend a member of the legal profession is not an arbitrary one to be exercised lightly, or with either passion or prejudice. Such power should be exercised only in a clear case for weighty reasons and on clear proof."
>
> (Emphasis supplied)

State v. Bass, 106 So. 2d 77 (Fla. 1958).

Besides the Respondent, himself, the only witnesses presented by the Complainant were two attorneys (TR 36, 59) who previously represented the wife of the Respondent's client and a private detective (TR 25) who obtained evidence of the adulterous act in question.

The only testimony given by the two attorneys consisted of the admitted usage by Respondent of evidence of the adulterous act in question in settlement negotiations between Respondent's client and the client's wife (TR 43, 66).

But there was no issue as to Respondent's use of the evidence of the adulterous act. The Referee, himself, stated that the use of the evidence was entirely proper, in itself, and that Respondent would have been derelict in his duty to his client had he not utilized the evidence (A 8). The Referee noted:

> "The Respondent * * * and the detectives did not bring about the drastic results for Mrs. Daly. The Florida law forfeited her alimony for adultery, and it was she who committed the act. There was also nothing improper in Respondent's forcing a very favorable property settlement for his client as a result of the damaging evidence." (A 8).

The private detective testified to a matter not in controversy also, as he merely related that he was employed by Respondent to surveil the home of Mrs. Daly when Mr. Daly was away and to take pictures if Mrs. Daly should be seen with another man (TR 25-36). Again, the Referee noted that there was no improper conduct by the Respondent in his use of the private detectives:

> "Securing the services of detectives to take pictures to obtain evidence for a client's cause is in itself perfectly legitimate. The Respondent could even have been derelict in his responsibilities to his client had he not done so * * *." (A 8).

So, as to the three witnesses presented by the Complainant, there was no testimony by any of them which, in itself, was proof of Respondent's knowledge that the adulterous act involved was connived.

The Referee recognized that the evidence against the Respondent was lacking and commented throughout his Report

on this lack of proof. The Referee especially noted the absence of any testimony from Mr. or Mrs. Daly or De Sarro. The Report noted:

> "Mr. Daly, had he either personally or through his attorney committed the suggested connivance, probably would be reluctant to admit it. Mrs. Daly's testimony might also be of little benefit. Nevertheless, these guesses as to their testimony do not fill the existing void in the establishment of a case against the Respondent." (A 11).

As to the fact that Complainant had not presented the deposition of De Sarro, now deceased, the Report noted:

> "There is opportunity under the instant proceedings for taking depositions for use in evidence and/or for discovery. There is no reason why Petitioner /Complainant/ could not have followed such procedures. Had same been done, the deposition of De Sarro, now dead, could have been introduced into evidence." (A 12)

The Report is replete with declarations as to the lack of evidence against the Respondent. At one point the Referee went right to the heart of the matter:

> "The real problem comes in determining * * * whether or not there are sufficient items in evidence to prove the charges. Stating the problem differently, one finds that there is no direct evidence pointing to the guilt of the Respondent. All the evidence, except for Respondent's own testimony, is circumstantial." (A 9).

And as to the circumstantial evidence, the Report said:

> "(I)t is recognized from a number of circumstances that the Respondent's conduct is suspicious * * *." (A 10).

But as to the value of a conclusion that conduct is suspicious the Referee stated:

> "Persons, whether they are Mr. Daly or the Respondent, cannot be judged on guess or suspicion." (A 10).
>
> (Emphasis supplied)

In spite of these conclusions as to the lack of and the flimsy nature of the evidence presented against Respondent, the Referee went on to find Respondent guilty of charges (c) and (d) of the Complaint (A 13). Respondent was made to suffer for Complainant's failure to present a complete case of proof.

However, the Referee found that the Respondent was not guilty of any direct or passive participation in the alleged connivance (A 16). The Referee stated that the Respondent's guilt began when he made a payment to De Sarro, for and at the direction of his client, Daly, and recognized De Sarro as being the same man who appeared in the pictures of the adulterous act with Mrs. Daly (A 21).

Hence, the Referee found that the Respondent's conduct was entirely proper up until the time he made a payment to De Sarro at Daly's direction (A 21, 22).

Earlier in this Brief the Referee is quoted when he notes that the Respondent testified that he (Respondent) was suspicious of something being not quite right when he paid De Sarro (A 19, 20). But as to Respondent's liability for suspicion the Referee declared:

> "An attorney's suspicions are not enough, and an attorney, because he may realize that something could be connived as well

> as genuinely happen, is not obligated to put his client on trial and proceed to interrogate his client * * *. If the attorney * * * knows that something is wrong, he would be a participant in it. In the absence of such knowledge, the attorney is privileged to carry out the lawful requests of his principal." (A 7)

By this language, the Referee recognized that the Respondent was "* * * privileged to carry out the lawful requests of his principal". (A 7). Yet, when Respondent carried out these requests and only had a <u>suspicion</u> that anything was improper, and made payments to De Sarro at the order of his principal, Daly, then the Referee abruptly changes his rules and finds the Respondent guilty of knowledge of connivance. The patent unreasonableness and injustice of such action is obvious.

The Record in this action is entirely lacking in any proof that the adulterous act itself was connived, much less that the Respondent had knowledge of such connivance. The law requires proof that the violation of the Canons of Ethics was deliberate and conclusive and that there be a clear showing of bad faith; otherwise, the accused must be exonerated. <u>State v. Nichols</u>, 151 So. 2d 257 (Fla. 1963).

It must be remembered that the Respondent had ample evidence of the adultery and promiscuity of his client's wife, and the act of adultery involved here came as no surprise to the Respondent (TR 66, 116, 117, 189). This act was not an isolated event which would provoke shock and suspicion as to its authenticity, considering the background of the client's wife, but rather was just one of many instances of Mrs. Daly's adultery (TR 116, 117, 189).

The reasoning of the Referee, in concluding that Respondent must have "known" at that time that the adulterous act was connived, goes astray because it is presupposed that the connivance did exist, a fact which was never proven.

This is the essence of the entire case against Respondent. There could be no wrongdoing by Respondent absent the existence of connivance. The Referee's finding of guilt apparently concludes that Mr. Daly connived with De Sarro in the adulterous act, and that Respondent should have realized this when Daly ordered De Sarro paid at the time of the divorce proceedings. The Judgment of the Board of Governors expressly makes this finding (A 25). But of this connivance by Daly, the Referee correctly concluded:

> "A further difficulty in the case is that there is no proof that Mr. Daly himself participated in any connivance to bring about his wife's act of adultery * * *." (A 10).
>
> (Emphasis supplied)

It is respectfully submitted that the Respondent's conduct was entirely proper in the proceedings which were the subject of the Complaint by the Bar and that there has been no showing made by the Bar that the Respondent had any knowledge whatsoever of any connivance or that any connivance did, in fact, exist.

POINT V

THE EVIDENCE OF THE CIRCUMSTANCES SURROUNDING THE DISBURSEMENTS TO DE SARRO WAS NOT SUFFICIENT EVIDENCE TO SUPPORT A JUDGMENT AGAINST RESPONDENT.

In finding the Respondent guilty as to charges (c) and (d) of paragraph four of the Complaint, the Referee relied entirely on evidence of certain payments made by Respondent at the order of his client to William De Sarro who was also an employee of Respondent's client (TR 105).

The only testimony and evidence on these payments was given by the Respondent, himself (TR 80-182).

That testimony, as well as the testimony of Mrs. Daly's attorney, revealed that De Sarro had been employed by Daly to assist Daly, a man of some physical infirmity, and to chauffeur Mr. and Mrs. Daly around the area (TR 41, 51, 120). It was established that Daly had promised to pay De Sarro for this chauffeuring around, (TR 120) and De Sarro, himself, had told the Respondent that Mr. Daly promised to buy him (De Sarro) a Chevrolet Impala automobile (TR 104).

The circumstances concerning the payment of some $3,750.00 to De Sarro by Respondent from Daly's funds and at Daly's order were completely free of any connection with the divorce proceedings going on at the time or the adulterous act which De Sarro and Mrs. Daly had participated in. The Referee, himself, stated:

> "There was no direct testimony connecting the payments with any connived adultery. Respondent testified that he was instructed by his client to pay the amounts to De Sarro, that he did not question the motives of his client, and that he had no belief that they were for any connived adultery." (A 13).

The Respondent paid De Sarro $1,500.00 at the order of his client, Daly, after De Sarro had told Respondent that Daly promised him $3,500.00 (TR 105). Respondent had telephoned Daly, and Daly stated that he had promised to pay De Sarro $3,500.00; to give him $1,500.00 and tell him the rest would be paid later (TR 105). So, Respondent took a receipt from De Sarro for the $1,500.00 and marked the receipt to show that there was a balance due De Sarro as agreed by Daly (TR 105).

Later, Respondent paid De Sarro, at Daly's order, an additional $2,000.00 which was the remainder of the amount promised De Sarro by Daly (TR 107). It is shown that Respondent did not actually know what these payments were for or even how much in total they were to be, by the second receipt taken by Respondent which noted that there was a disputed balance due De Sarro from Daly (TR 107). Originally, Daly had told Respondent he was going to give De Sarro $3,500.00, (TR 105) but upon the payment of the last $2,000.00 to De Sarro, he (De Sarro) claimed that Daly promised him $3,750.00, (TR 107) so Respondent checked this with Daly and subsequently, at Daly's order, paid De Sarro an additional $250.00 (TR 107).

This money could have been for services performed by De Sarro for the Dalys as well as for any alleged connived adultery. It could have been payment to buy the automobile

Daly had promised De Sarro for working for him. It "could" have been for almost anything. This was of no concern to Respondent, as he was merely carrying out his client's orders, and he knew that De Sarro had worked for Daly and that Daly had promised to pay him.

As to Respondent knowing that these payments were to be paid for the alleged adultery, this was beyond Respondent's knowledge. Respondent knew that De Sarro and others had slept with Daly's wife (TR 116, 117, 121). The Respondent had a great amount of evidence as to Mrs. Daly's adultery, not just the instance with De Sarro which is the basis of this Complaint (TR 66).

As to the fact that payments were made outside Respondent's office, it has been established that Mrs. Daly's attorney informed Respondent of the questionable character of De Sarro after the adultery incident (TR 44, 94, 95). For that reason, Respondent directed De Sarro to meet him in his parking lot, during Respondent's <u>regular</u> lunch-time trip to the Post Office, where Respondent took receipts for each of the payments (TR 105, 147). It may be that Respondent was overly cautious in protecting his good name, but surely this is not evidence of misconduct.

The fact that the payments to De Sarro were made at the conclusion of the divorce proceedings is also noted by the Referee to be "suspicious" conduct. But when else, than when directed by his client, was Respondent to make these payments? The relationship between De Sarro and Daly was apparently closing at the time of the divorce, because of the work usually done by

De Sarro i.e. chauffeuring Mrs. Daly from place to place (TR 41, 51, 120).

Further, the Referee erroneously concluded that the payments were made immediately after the final decree of divorce was obtained or Respondent obtained knowledge of the decree (A 17). In fact, Respondent was present in the Court's chambers on the date the decree was entered, and the payments were not made until four or five days afterwards (A 17).

The Referee relies heavily on the word, "agreement" contained in the receipts from De Sarro. It is evident that the agreement referred only to Daly's agreement to pay De Sarro $3,500.00 or $3,750.00 as it later turned out to be (TR 104, 105).

Yet, the Referee infers only one meaning to the term and concludes the "agreement" must have been an agreement by De Sarro to sleep with Mrs. Daly on one occasion and allow pictures to be taken thereof (TR 104, 105).

The law is clear that evidence of a violation of the Canons of Ethics must be clear and conclusive. State v. Nichols, 151 So. 2d 257 (Fla. 1963). Surely the evidence relied on by the Referee falls far short of such standard.

As to the payments to De Sarro being paid out of some $6,000.00 furnished the Respondent by Daly for defense of the divorce suit, the Respondent adequately explained that this was the only money held by him for Mr. Daly at that time (TR 148).

It was the Respondent, himself, who showed on his accounting sheets that the payments to De Sarro came out of the

$6,000.00 furnished by Daly. Surely, if Respondent had been intending any wrongdoing, he would not have gone to the trouble to make up evidence against himself (TR 153, 154).

The payments were made at the order of Daly and out of the only funds of Daly's held by the Respondent (TR 105, 148). The evidence shows that money was used out of this same fund for various things other than defense of the divorce suit (TR 155).

The point that must be remembered throughout these events, is that the Respondent had already collected a great amount of evidence concerning the adultery of Mrs. Daly before the adulterous act in question took place. The photographic evidence was merely an affirmance of previous investigation, and provided pictorial proof of a fact already well established (TR 136).

The Respondent knew De Sarro only from the few times he had seen De Sarro chauffeuring Mr. Daly around (TR 90). He knew nothing of De Sarro's background until Mrs. Daly's attorney informed him of such (TR 44, 94, 95). When he found out about this he states that he became suspicious of De Sarro, not merely because of the adultery but also because of De Sarro's possible ultimate motives in regard to Mr. Daly (TR 110, 111).

Respondent had no connection with De Sarro except to pay him when Daly so ordered. Knowing the questionable character of De Sarro, Respondent arranged to pay him outside his office, but Respondent did obtain receipts which he voluntarily produced (TR 137).

It is inconceivable that Respondent, himself, would produce receipts if they were made under any circumstances where they could be considered evidence of a "pay-off". The Respondent obtained receipts just as he would in making any other disbursements (TR 137).

Once again it must be reiterated that the reasoning of the Referee in finding that the Respondent must have had knowledge of the connivance at the time of the payments to De Sarro, fails because such reasoning presupposes the existence of connivance, a fact never proven as demonstrated earlier in this Brief. This basic fact not being proven, all of the suspicion in the world is not enough to condemn the Respondent for conduct recognized to be perfectly proper absent the existence of any connivance.

POINT VI

THE PROCEEDINGS HELD IN THIS ACTION AND THE DELAY THEREIN WERE NOT CONSISTENT WITH JUSTICE AND THE LAW.

The Complaint in this action was filed on May 28, 1962, by The Florida Bar. Hearing on the cause was held on January 3, 1963, before the Referee appointed by the Board of Governors of the Bar (A 1, 4).

The Report of the Referee was not handed down until the 8th day of January, 1964, (A 4) over twelve months after the Hearing. The Judgment, which adopted the findings contained in the Report of the Referee was not issued until May 1, 1964, (A 24) almost two years after the original Complaint was filed against Respondent.

This enormous and completely inexcusable delay was a serious breach of Respondent's right to a prompt and speedy adjudication of the charges filed against him.

The Supreme Court has had occasion to remark and condemn unjustified delay in disciplinary proceedings of the Bar:

> "Disciplinary proceedings should be handled with dispatch. While they are pending, the Defendant is suspended in limbo * * *."
> State v. Oxford, 127 So. 2d 107 (Fla. 1961).

From the first time this matter was brought up and Respondent was accused of wrongdoing, sometime before the Complaint was filed, the Respondent has had to live with this threat against his personal and professional reputation. Like the sword of Damocles, these proceedings have hovered over

Respondent, ever threatening to destroy the good name and respect which were created only by long years of serious toil in his profession.

The late Justice Glenn Terrell recognized the seriousness of a disciplinary proceeding and in an eloquent opinion declared:

> "To cite a lawyer to be reprimanded for violating the Canons of Ethics creates a stain on his escutcheon that, like the emblem of ownership impressed on a range cow with a branding iron, never wears away. True, there are extreme cases that merit it, but it should not be imposed except in those cases where showing of violation of the canon is deliberate and conclusive. In Othello, Act iii, Scene 1, Shakespeare prompts Iago to say, 'Who steals my purse steals trash, * * * But he that filches from me my good name, Robs me of that which not enriches him, And makes me poor indeed.' A lawyer's integrity and his good name are his most precious assets and they should not be smutted in a case like this absent a clear showing of lack of good faith and good taste."
>
> State v. Nichols, supra.
>
> (Emphasis supplied)

The nature of the evidence presented against the Respondent has been completely inconclusive and evasive. The conclusions drawn by the Referee and the Board of Governors have been nothing more than inferences based on suspicions of circumstances never proven to have existed. Take away the accusations made against the Respondent in the Complaint, and there is nothing left to create the slightest inference of wrongdoing on the part of the Respondent.

Not one witness at the proceedings in this cause has accused the Respondent of any wrongdoing. Not one witness has even revealed that he was suspicious that Respondent was guilty of wrongdoing and no testimony was given which would show that Respondent was guilty of wrongdoing. To convict an attorney on the basis of the bare accusations contained in the Complaint would be a travesty of justice.

Where is the accuser in this action? Not one of the witnesses at the Hearing testified as to Respondent's participation in or knowledge of any wrongdoing. Where were the parties involved? Where was Mrs. Daly, the person who was supposedly the victim of the alleged connivance? Where were the voices of Mr. Daly or De Sarro? Neither of the two attorney's who represented Mrs. Daly accused the Respondent of any wrongdoing (TR 128).

Even in the trial of a person for the most trivial offense the right to face one's accuser is recognized. But no accuser has come forward here. But surely someone must have complained of Respondent's conduct.

Hovering in the background throughout these proceedings is the ghostly appearance of a fellow member of The Florida Bar. What his purpose or motives might have been in unjustly causing the Respondent to be put on trial is left open, but a few excerpts from the testimony of the witnesses illustrates his presence even though his "bravery" in attacking the Respondent stopped short of his presenting himself as a witness at the Hearing.

Testimony of Donald G. Ehrler:

"Q Mr. Ehrler, I believe that pursuant to a subpoena, you have testified previously in a deposition conducted by Mr. Burdick, an attorney locally, haven't you?" (TR 32)

Testimony of Hal H. McCaghren:

"Q Who has been representing him?

A Mr. Sylvan Burdick.

Q Is he the same one who caused this Mr. De Sarro to come in on a John Doe warrant to the County Solicitor's office?

A From the records that are available to us, yes, he did the interrogation for the Solicitor's office, although he was not a part of the Solicitor's office, we have the Solicitor - I hope - still under subpoena this year." (TR 130)

Testimony of Elizabeth Ann Allison:

"Q Now, I believe you are related to a Francis A. Daly, is that correct?

A I am his daughter.

Q Just very briefly, now, but not in detail, did someone come and try to poison your mind or your father's mind against Mr. McCaghren as a lawyer?

A Well, on a Thanksgiving day back in 1960, of course, I think everyone is disturbed trying to get a Thanksgiving dinner, Mr. Burdick came to my home and my sister was there also, as well as Mr. Allison and the children, and I shooed the children out and he said he came on business and that he would make it brief, and he had announced, and I didn't know it - but he had announced that he was going to take over my father's legal affairs, and he told me that and then he told me I had very poor representation in having Mr. McCaghren and - -

Q You, yourself?

A He told me, yes, and then he said that he would be glad to handle my affairs and he wanted me to go into

a state of bankruptcy because after this divorce and whatnot, believe me, you know you get so many bills to pay out and whatnot, and he said his office - to go into his office and he would handle my affairs, and I don't think it is a very secure thing to leave a person dangling when they say your attorney isn't any good, it left me a nervous wreck, it really did.

Q Did he make any statement about Mr. McCaghren's ability, that he wasn't an acceptable attorney and wasn't successful?

A He did tell me that Mr. McCaghren wasn't a - I don't know what is the name you call your book in law, I just assume it was as a doctor's rating, and he said Mr. McCaghren was not rated in that book and I said, well, are you, and he said, yes, that he had a rating in the book and a very good rating, he said that he had gone to Fordham and then the University of Miami.

* * * * *

Q Had you ever seen him or knew him at all prior to that occasion?

A No, Sir.

* * * * *

Q Did you recall him making a statement that if you didn't fire Mr. McCaghren and hire him that you would end up in jail?

A Yes * * *.

Q Had your father ever told you that he had changed lawyers or anything like that?

A I didn't know it and I was quite shocked that it came, especially, on a holiday to me, because Mr. Mr. McCaghren had been very fair to Dad.

* * * * *

Q And Mr. Burdick came out completely unsolicited on your part?

A On my part, yes.

Q And he solicited or offered to undertake your legal affairs?

A Yes, sir, he said he would be glad to help me because I had had trouble and I would go to jail.

Q Did you ask him to assist you?

A No, I did not, he came and he said that Mr. McCaghren was poor legal representation and I did not ask him; he came to announce that he was taking over my father's legal affairs." (TR 182-195)

Testimony of Mrs. Emily Davis:

"Q Yes, mam. Now, do you know an attorney by the name of Sylvan Burdick?

A Yes.

Q Did he at any time come to your house and level any accusations regarding Mr. McCaghren and he wanted you to come into court and testify against him?

A No, he called me up and told me that I wasn't to divulge any information as to the patient that he would have my registration taken away from me if I would betray the patient's confidence in me with anyone. When I was taking care of him that was my duty as a nurse to keep that confidence and I told him that I betrayed no confidences, that no one had asked me anything.

* * * * *

A One morning I was coming out of the Lord's (sic) to mail a letter and I ran into Mr. - -

Q Mr. Langbein?

A Yes, Mr. Langbein.

Q That is Mr. Burdick's partner isn't it?

A That's right, * * * and I don't know how Mr. McCaghren's name came up but he did say that Mr. McCaghren handled a case for him and he had no use for him and that is all he said, and I said, Oh, and I walked away." (TR 196-204)

* * * * *

VI

CONCLUSION

One question stands paramount and runs throughout this Brief, and that is whether any misconduct on the part of Respondent or anyone else took place in regard to the marital problems between Mr. and Mrs. Daly.

The most elementary appraisal of the case against the Respondent reveals that the first fact that had to be established before Respondent could be deemed guilty of wrongdoing was that wrongdoing took place.

Even the Referee admitted that there was no proof of wrongdoing either on the part of Respondent or Mr. Daly or anyone else in conniving the adultery of Mrs. Daly.

The failure of Complainant to produce proof on this vital element must in itself defeat the prosecution, for if there were no wrongdoing, then Respondent could not be a party to it, either before or after the fact of its occurrence.

The evidence relied on by the Referee and the Board of Governors was of the meagerest nature and when so much is at stake, surely guesses and suspicions cannot prevail over right and reason.

Respondent has attempted to present the most dispassionate view of these proceedings as possible, and begs the Court's indulgence if at the last a reminder is made of the grave and serious consequences these proceedings may have on the Respondent's future.

In conclusion, it is respectfully submitted that the Judgment finding Respondent guilty of violations of the Canons of Ethics is in error and should be reversed and the Respondent exonerated.

Respectfully submitted,

Jos. D. Farish, Jr.
Of Counsel

FARISH & FARISH
Denco Building
316 First Street
West Palm Beach, Florida
Attorneys for Petitioner

I HEREBY CERTIFY that a copy of the above and foregoing Brief of Petitioner has been furnished Honorable Marshall R. Cassedy, Executive Director, The Florida Bar, Supreme Court Building, Tallahassee, Florida, by mail, this 3rd day of June, A. D. 1964.

Jr. S. Farish, Jr.
Attorney