THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
vs.
JEFFREY E. LEHRMAN,
Respondent.

CASE NO. 63,270

On Petition for Review of
the Referee's Report in a
Disciplinary Proceeding.

MAIN BRIEF OF RESPONDENT SUPPORTING PETITION FOR REVIEW
(INCLUDING ANSWER TO BAR'S PETITION AND BRIEF ON COSTS)

HOPPING BOYD GREEN & SAMS
Robert P. Smith, Jr.
Kathleen Blizzard
Post Office Box 6526
Tallahassee, Florida 32314
904/222-7500

Attorneys for Respondent

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MAIN BRIEF OF RESPONDENT SUPPORTING PETITION FOR REVIEW[1]
(INCLUDING ANSWER TO BAR'S PETITION AND BRIEF ON COSTS)

Statement of the Case

Jeffrey E. Lehrman, a member of The Florida Bar, seeks review of a referee's report recommending his suspension from The Bar for six months and other discipline (A. 35).

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[1] The Bar's petition for review and brief on costs were filed one day prior to respondent's petition, though respondent's counsel did not receive copies through the mails, or know they were forthcoming, until later. Technically, therefore, respondent's petition may well be a cross-petition, though it goes to the merits and The Bar's does not. Integr. Rule 11.09(3)(c). In this brief "A" references are to the accompanying Appendix, and "Tr." references are to the transcript of hearing July 21, 1983, which respondent's counsel deemed not susceptible of abbreviation to the Appendix.

The referee's report, delayed 14 months after the hearing, recommends that respondent be found guilty of misconduct in performing legal services for his client, Waddington, N.V., and its German principal, in arranging a loan to Ronald Guiking of Amsterdam, The Netherlands, whom the referee concluded was also respondent's client (A. 35-38).

The referee found that respondent arranged a loan of $6,000 for six days at "usurious" interest, $500, and thereafter "continued upon a course of activity representing the lender-client to the detriment of the borrower-client" in attempting to collect the debt (A. 39). This conduct, the referee concluded, violated Disciplinary Rules 7-102(A) and 1-102(A) and various "Ethical Considerations" cited independently of Disciplinary Rules.

The referee recommends (A. 42) that respondent be suspended from the practice for six months; that he be required to take a law school course in professional responsibility before reinstatement to "The Florida Bar Association"; that he be required to return to the "rightful owner" the mortgages assigned as security for the loan; and that respondent be assessed certain costs.

Respondent contests the referee's cornerstone "conclusion" - (there being no factual finding of this) - that in this transaction Mr. Guiking, the defaulting borrower, was respondent's client. Respondent also contests the referee's conclusion that Waddington's loan was usurious, that respondent is subject to discipline for having arranged it, and that respondent improperly assisted his client the lender, after Mr. Guiking's default, in another "attempt to extract a usurious sum of money" from Mr. Guiking (A. 38). Respondent urges that the discipline recommended is unwarranted.

The Bar likewise has petitioned for review of the referee's denial of certain costs to The Bar when assessing others against respondent.

The Facts

Events preceding the loan transaction.

In 1978, Ronald Guiking, a Dutch citizen residing in Amsterdam, engaged respondent Jeffrey Lehrman, a member of The Bar with offices in Miami, for legal services in the purchase of 46 acres in Martin County (Tr. 20-22, 102-05). Title was taken by Vizcaya, S.A., a Panamanian corporation, which immediately conveyed at a considerable paper profit to

Euro-Holland Vastgoed, B.V., a Netherlands corporation, to whose interest Loftano, N.V., a Netherlands Antilles corporation, succeeded. Vizcaya's profit in the transaction was represented by Euro-Holland's notes secured by four third mortgages on the land (Exh. 4, Tr. 105-06), prepared by Mr. Lehrman (Tr. 23, 106). The beneficial owners of Loftano were four foreign investors, Mr. Guiking being one of them, who referred to themselves as the "Chalet Group" (Tr.170-172).[2]

Two years later, in September 1980, the "Chalet Group" met in Holland and Mr. Guiking conveyed to the others his

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[2] Mr. Lehrman insisted that Mr. Guiking represented himself at the outset as one of four foreign investors, the "Chalet Group," who beneficially owned Vizcaya and Euro-Holland, consequently that his, Mr. Lehrman's, professional relationship was to the Group's corporations (Tr. 22, 23), never to Mr. Guiking individually except in his purchase of a house in Florida (Tr. 21, 61). Mr. Guiking was in fact the sole beneficial owner of Vizcaya and, he testified, of Euro-Holland (Tr. 103). Quite unaccountably, the referee also found that "Mr. Lehrman was well aware," in 1978, that Mr. Guiking owned all the stock in Vizcaya (A. 36). In 1984 the Dade County circuit court entered judgment, in an action by Loftano against Guiking, that Guiking's ownership of Vizcaya was in fact "undisclosed," as Lehrman testified in this disciplinary proceeding, and that Guiking secured a "secret profit" at the expense of his principal, Loftano, in the sale by Vizcaya (A. 46). The circuit court entered judgment for Loftano against Mr. Guiking for that profit and invalidated the notes and mortages that secured it (A. 46). Respondent Lehrman asked the referee to reopen the proceedings to receive that evidence (A. 39), and the referee declined to do so (A. 51).

interest in the Group's holdings (Tr. 171), including Loftano (Tr. 60, 184-86).[3] It was then that Mr. Lehrman "told him to seek other legal counsel," that "I could no longer and would no longer represent him in connection with any of the real estate activities" (Tr. 60). That testimony was not contradicted by Mr. Guiking at the hearing, indeed his Bar complaint corroborated it in terms uncomplimentary to Mr. Lehrman.[4]

Mr. Guiking described himself at the hearing as "director of an export and import company" in Amsterdam (Tr. 101). He holds an economics degree conferred in Holland (Tr. 161-64), and he arrived at the referee's hearing from

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[3] Mr. Guiking testified that "[t]o my knowledge" he was still a member of the "Chalet Group" (Tr. 186) after September 1980, though he admitted selling his interest in stock associated with the Group at that time.

[4] Mr. Guiking's complaint to The Florida Bar dated May 12, 1981, is part of the record. It tells of the September 1980 "Chalet Group" meeting in Holland and of Mr. Lehrman's statement to Mr. Guiking that, in that apparent parting of ways of the participants, he would represent the "three other investors" and not Mr. Guiking. "I felt hurt," Mr. Guiking wrote, "that my lawyer was suddenly sitting with investors to protect their interests and not mine anymore. At least he could tell me this before." (Complaint Form, p. 2). Mr. Guiking at least did not deny that Mr. Lehrman told him then, in September 1980, that he would no longer represent Mr. Guiking in his business affairs (Tr. 60) and would not protect "mine any more." Guiking's complaint goes on to say that Lehrman later said he would "protect my interests," but Guiking did not so testify at the hearing.

Africa. He not only had conventional business in Africa, he said, he had also confidentially advised "the government of Togo" on matters of international finance (Tr. 164).

The January 1981 loan transaction.

In early January 1981 Mr. Guiking was struck with a sudden inspiration to invest in a gambling casino operation on the Columbian island of San Andreas, off the coast of Nicaragua (Guiking, Tr. 106-07; Lehrman, Tr. 80). His own money, he said, was "in Holland" (Tr. 113, 134). So Mr. Guiking went around Miami asking acquaintances to lend him a sum ranging from $5,000 to $6,500 for a few days. Mr. Guiking solicited $6,000 from realtor Ethel Snyder, who said No (A. 17). Realtor John Austin said No (Tr. 107-08). A Miami dentist, Dr. Grussmark, whom Mr. Guiking asked for $5,000, said No (Tr. 107-08). He also asked Samuel Rose for $6,500, and realtor Martin Tabor as well, and they too said No.[5]

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[5] Whether Mr. Guiking wanted $6,500 or only $6,000 bears on the question of what he solicited and got from Mr. Lehrman on January 13. Mr. Guiking testified that his $6,500 solicitation of Messrs. Rose and Tabor came later, on January 19, in his search for funds to repay the loan from Mr. Lehrman's client (Tr. 112). Those witnesses testified, however, that Mr. Guiking's stated need for $6,500 was not to redeem his assigned mortgages, or to pay a debt, but to . . fn. cont'd . .

So Mr. Guiking went to Mr. Lehrman, saying he did so "[b]ecause Mr. Lehrman was all the time before my lawyer and the man who knows my business" (Tr. 108). Lehrman, who held available funds in his trust account for a foreign corporate client, Waddington, N.V., a Netherlands Antilles corporation (Tr. 30), asked Mr. Guiking how he could secure payment of a loan, and Guiking said "I can pledge the Vizcaya mortgages" (Tr. 94). Mr. Lehrman telephoned his German client, Mr. Pawlitzek, the owner of Waddington, N.V., and asked whether Waddington would be willing to lend Guiking $6,500 for six days (Tr. 24, 30, 41, 94-95). Lehrman proposed that Mr. Pawlitzek "forego what would have been very nominal interest on a $6,500 amount for a period of six days" (Tr. 67)[6] and explained that the loan would be secured by assignment of mortgages valued at $200,000 or more (Pawlitzek affidavit, Resp. Exh. 10, A. 25). Bar counsel cross-examined Mr. Lehrman at the hearing about Pawlitzek's motives (Tr. 42):

"buy some gambling equipment" (A. 20) or "a crap table" at "some casino" (A. 24), which was of course Mr. Guiking's need as expressed through January 13, not his need on January 19 to repay the Waddington loan obtained through Lehrman.

[6] Interest for six days at, say, 18 per cent per annum, would have been $19.50. That was the maximum legal rate, Sec. 687.02(2), Florida Statutes (1981), for loans below $500,000. See Sec. 687.01.

> Q. Mr. Lehrman, your client loaned $6,500 to Mr. Guiking for six days interest free and you stated he doesn't even know Mr. Guiking.
>
> Could you explain why he should do Mr. Guiking this favor of loaning him $6,500 interest free for six days?
>
> A. I asked the client if he would accommodate me so that I could accommodate someone else and he said yes.

The referee, too, posed an incredulous question, or rather a characterization, on this point.[7]

So with Mr. Pawlitzek's approval (A. 25, Tr. 94-95), on January 13 respondent Lehrman prepared and Mr. Guiking signed, individually and for Vizcaya, S.A., a promissory note for $6,500, bearing no interest before maturity, payable

> IN FULL ON OR BEFORE MONDAY, JANUARY 19, 1981, NOT LATER THAN 5:00 O'CLOCK P.M., IN CASH OR LOCAL CASHIER'S CHECK ONLY. (A.7).

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[7] At Tr. 78:

> THE REFEREE: So you as B go to C and say, "Look, A is a good guy. He needs $6,500 for a week. I don't happen to have that in my pocket or in my account. Would you lend that to him. I can tell you he is a good risk."
>
> THE WITNESS: I didn't characterize the man, sir; I characterized the transaction and asked Mr. Pawlitzek if he would accommodate me under these circumstances.

Mr. Guiking also signed a conventional assignment of the four Vizcaya third mortgages (A. 8) to Lehrman as Trustee; he delivered his power of attorney to act for Vizcaya; and he signed a written receipt for "this loan of $6,500" (A. 9).

Mr. Guiking wanted cash, respondent testified, so he gave Mr. Guiking $500, all the currency "I had in the office" (Tr. 59), and his trust account check for $6,000 drawn upon Waddington's funds (Tr. 59):

> Mr. Guiking asked if I had any cash available. I told him the most that I had in the office was $500 and he asked if I could please give him that and he would take a check for the balance. He said he had an immediate need for cash in hand.

Though Waddington's trust account balance was sufficient to reimburse Lehrman the $500 cash advanced, Lehrman did not so reimburse himself because "it was my expectation that the money was going to be repaid on the following Monday" (Tr. 217). After Mr. Guiking defaulted on the loan, Mr. Lehrman did not reimburse himself from the trust account because "I just didn't want to do anything more than I had to do to try to resolve it at that time" (Tr. 223). Pawlitzek later reimbursed Lehrman the $500 (Tr. 75).

Mr. Guiking negotiated the check at his bank (A. 10), but from January 27, 1981, onward (A. 28, 30) and in testimony at the hearing, he denied receiving $500 in currency from Mr. Lehrman (Tr. 110). The referee indeed found that Mr. Guiking received no currency, only the $6,000 check, and that "the remaining $500 was an assessment of patently usurious interest" (A. 38).

The referee also concluded that in this Mr. Lehrman was acting all the while as Mr. Guiking's attorney, as well as attorney for the lender: that "[i]n the condemned loan transaction, one of Mr. Lehrman's clients loaned $6,000 to another of Mr. Lehrman's clients" ("REFEREE'S CONCLUSION DRAWN FROM FINDING OF FACT," A. 39). The referee made no finding of fact that in this transaction Guiking was Lehrman's client in fact, rather he found as a "fact" (A. 37):

> It was the testimony of Mr. Guiking that he still considered Mr. Lehrman to be his personal attorney as well as the attorney for his business interests.

Mr. Guiking's testimony was that he solicited a loan from Mr. Lehrman, after being rebuffed by realtors Snyder and Austin and dentist Grussmark, because "Mr. Lehrman was all the time before my lawyer" (Tr. 108). In much the same

terms as his complaint to The Bar described his "hurt" that Lehrman withdrew from his representation in September 1980, supra n. 4, Mr. Guiking described his "shock" and "surprise" (Tr. 119), when he did not repay any part of the loan, that Mr. Lehrman conveyed to him the lender's demands (Tr. 119):

> [H]e [Mr. Lehrman] was the person to protect my interests here in the United States. He was my lawyer all the time.
>
> If I had any problem, I explained the problem to him if it was a legal problem for somebody who is not used to things here in the United States. I explained my problems and he was giving me then the advice how to handle it.

Mr. Guiking's testimony did not explain how his desire to borrow money for investment in an island gambling operation beame "a legal problem," nor how Mr. Lehrman's obtaining the loan from a client constituted legal "advice [to Mr. Guiking] how to handle it" or some other legal service to Mr. Guiking. Nor is that explained by the referee's report (A. 39).

Mr. Lehrman denied that Mr. Guiking was his client in this affair, saying only the lender Waddington was his client, (Tr. 24, 30, 60), and he testified without contradiction that he told Mr. Guiking, on the day he gave him the money, "that his mortgages were totally at risk" should Mr. Guiking not repay the loan (Tr. 79-80). The

receipt for $6,500, signed by Mr. Guiking (A. 9), acknowledged that risk.

Mr. Guiking's default.

Mr. Guiking testified at the hearing that he did not repay the loan on January 19, when due, because his casino venture went sour. For this, he said, his partner was to blame: "The problem that I had was with Mr. Stuart Siegal (phonetic), who was my partner. I don't know anything about casinos" (Tr 111). But, he said, that he always had money "in Holland" to repay the loan (Tr. 113). Mr. Guiking never tendered the "in Holland" money, or any other, at any time (Tr. 142).

So on January 19 Mr. Guiking telephoned Mr. Lehrman and "I told him that I did not have the money available, to give me just a couple of days . . . ." (Tr. 113). "He told me that he could not give me more than just until the next day at 12 o'clock. I told him that was not sufficient for me to transfer money from Europe to America" (Tr. 113; see also Lehrman, Tr. 33). Mr. Guiking therefore said he solicited a $6,500 loan from an unnamed "realtor in Miami," who declined (Tr. 112). Mr. Guiking also said it was then, after his

default, that he asked Samuel Rose and realtor Martin Tabor for $6,500, and both refused (Tr. 112). Contrast fn. 5, supra.

Shortly after noon on January 20, when Mr. Guiking still had not tendered payment (the money, he said, was "in Holland" (Tr. 127), Mr. Lehrman recorded the assignment of mortgages in the public records of Martin County (A. 11-12, Tr. 33) and wrote a registered letter to Mr. Guiking, saying (A. 11-12):

> I am dictating this letter at 12:30 o'clock p.m. on January 20, 1981, not having heard from you since approximately 9:00 o'clock a.m. this morning at which time, I advised you that the assignment would be recorded if the note was not satisfied by noon. I have not heard from you since and have done what I am obligated to do.

On January 26, as the referee found (A. 38) on Mr. Guiking's conflicting testimony (Tr. 116, 133), Mr. Guiking called Mr. Lehrman and "told him that if he would wait a couple of days more, I would pay him $7,000" (Tr. 116, 133). The $7,000 was "in Holland available" (Tr. 134), he said. Mr. Guiking testified that Lehrman's "reaction was that $7,000 was not doing any good to him" (Tr. 116).

Lehrman testified that he called his client, Mr. Pawlitzek, and advised him (Tr. 85-86):

> that Mr. Guiking had defaulted, that I had recorded the assignments of the mortgages and Mr. Guiking had offered $7,000 for the return of the mortgages before foreclosure. I told him that we had no obligation to accept that money unless it was physically tendered; it was nothing more than conversation, and that if he cared to counter, he could or go directly to foreclosure.

Mr. Pawlitzek's instructions were to reject the $7,000 "offer," which Mr. Lehrman did on January 28, speaking to Mr. Guiking by telephone (A. 13). Because Mr. Lehrman "refused to accept it" (Tr. 134), Mr. Guiking said, he did not send to Holland for the $7,000 (Tr. 134). And on January 29, acting on Mr. Pawlitzek's instructions (Tr. 87, A. 27), Lehrman wrote a letter to Mr. Guiking conveying Pawlitzek's counter-offer to accept $25,000 in lieu of foreclosure or other alternatives (A. 27), and saying (A. 14):

> Whatever it is that you plan to do about this situation, I recommend that you do it swiftly before the principals decide to negotiate the mortgages elsewhere.

Nine days previously, on the afternoon of January 20, Mr. Guiking had retained a lawyer, Mr. Chernoff of Hollander

and Associates, of Hollywood, Florida (Tr. 131-132). On January 27, two days before Lehrman wrote his January 29 letter to Mr. Guiking (Tr. 52-56), Guiking filed a civil action against Lehrman, prepared by Mr. Chernoff, alleging "usury" and other claims in the Circuit Court of Dade County. Guiking's complaint, which he personally signed, alleged (A. 29) that Mr. Guiking had not signed the receipt for $6,500 on January 13, which of course he had (A. 9). Mr. Guiking's suit was later dismissed by the Court for lack of prosecution (Tr. 194).

Mr. Guiking's circuit court complaint (A. 28) was offered in evidence by Mr. Lehrman's counsel at the hearing, but Bar counsel objected on grounds of relevancy (Tr. 56), as he did concerning proof of another circuit court judgment (A. 32) exonerating Lehrman on Mr. Guiking's complaint (Tr. 63, 64) of "breach of attorney/client relationship and breach of a fiduciary duty" (A. 33):

> MR. KRAUSE (respondent's counsel): . . .
>
> This is to establish, Your Honor, that there was no legal duty and there was no professional relationship existing since 1980. As a matter of fact, that very point was litigated in front of Judge Silver in this lawsuit [No. 82-1129] and there has been a decision on that very point.

> MR. GROSS (Bar counsel): Your Honor, we never alleged an attorney-client relationship.
>
> THE REFEREE: I agree.[8]
>
> MR. GROSS: We submit that this information is irrelevant and immaterial and has no bearing on the Florida Bar case.
>
> MR. KRAUSE: If the duty referred to is not that of a lawyer, then this [proceeding] is not appropriate. . . . He [Mr. Guiking] was not in fact Mr. Lehrman's client.
>
> MR. GROSS: We are not alleging that.
>
> (Tr. 64, emphasis added.)

The referee took note "that these lawsuits existed" and allowed them to be marked (A. 28, 32), but said "I don't yet see the materiality or relevancy" (Tr. 66).

Fourteen months later, the referee filed the report here to be reviewed, stating repeatedly that Mr. Guiking was Mr. Lehrman's client, to whom as his client in this transaction Mr. Lehrman owed a lawyer's fiduciary duty (A. 35).

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[8] The Bar's complaint against Mr. Lehrman (A. 1) indeed does not allege that Mr. Guiking was his client in the transaction complained of, nor even that Mr. Guiking thought he was.

Summary of Argument

Respondent Lehrman had no lawyer-client duty to Mr. Guiking in this transaction. The referee's contrary "conclusion" is without a necessary finding of fact and is without support by substantial competent evidence. On that erroneous premise, however, the referee reversed the burden of proof on all "usury" issues and effectively required respondent to disprove his guilt on "usury." But proving "usury" was The Bar's burden, by clear and satisfactory evidence, and the evidence adduced was by that standard insufficient.

This Complaint should therefore be dismissed. Should the Court reach The Bar's petition to assess additional costs, that petition should be denied.

ARGUMENT

I. Guiking was not Lehrman's client in this transaction

As a predicate for all his other judgments about this case, the referee posited a lawyer-client relationship between Lehrman and Guiking in the loan transaction that did

not exist. That premise infected the referee's consideration of all other issues.

That grave error was directly responsible, for example, for the referee's conclusion that when Guiking defaulted in payment, six days after the loan, "Mr. Lehrman was immediately placed in a position of conflicting interests between clients but he failed to expeditiously withdraw from further representation of either of the involved clients . . . ." (A. 39).

The referee's quoted conclusion about Lehrman's post-default pursuit of the lender's interests hardly exhausts the ethical implications of the antecedent relationship, if it existed as the referee assumed. For in truth, had Lehrman received and acted upon Guiking's initial solicitation of money within a lawyer-client relationship pertaining to that transaction, Lehrman by lending Guiking money, either his own or his client Waddington's, would then and there have offended acceptable standards of lawyerly conduct.

No good lawyer would lend his client his own money, let alone lend it for shadowy gambling activities in the Caribbean, if he is engaged to render professional advice

and services in connection with that matter. Florida Bar Code of Professional Responsibility, DR 5-104.[9] But the referee, who was to conclude that Lehrman and Guiking were then in a lawyer-client relationship, suggested by questions to Lehrman that transacting a bank loan for Guiking, on Lehrman's own credit, is precisely what Lehrman should have done for his supposed "client."[10]

Nor would any lawyer sensitive to ethical standards and common sense put himself in the position of advising one

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[9] **DR 5-104. Limiting Business Relations with a Client.**

> (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

[10] The referee inquired (Tr. 77):

> THE REFEREE: For what reason did you not utilize the facilities of a commercial financial institution for such a short term loan, with you acting as the endorser or guarantor of the loan so that Mr. Guiking could get his money as expeditiously as possible?
>
> THE WITNESS: That's a tough question, Judge. I really didn't think of it on one hand and I would really be surmising as to my reluctance to do that on the other.

client to release trust account funds to another client whose resources are said to be "in Holland," a mere bank-wire away, for an emergency investment in a gambling venture. No good lawyer would vouch to his lender-client for the repayment prospects of his borrower-client within six days. But that, too, was how the referee, later to find a lawyer-client relationship between Lehrman and Guiking, characterized Lehrman's initial telephone call to Pawlitzek. Supra, n. 7. Lehrman did not accept the referee's version: "I didn't characterize the man, sir; I characterized the transaction" (Tr. 78), which Pawlitzek was to judge for himself.

No prudent lawyer would advise a borrower-client, to the enormous potential advantage of a lender-client, to pledge valuable mortgages against the contingency of being able in six days to pay a small sum the borrower-client did not then have and could not then get from a bank, a dentist, or realtor friends. To become involved in such an arrangement between two clients, given the dubious purposes of the one client and the presumed acumen of the other, reeks of the dangers prudent lawyers sum up as "conflict of interests." A prudent lawyer would be out of that function before he was

in it, if for no other reason than to avoid the real possibility of losing both clients in six days.

Jeffrey Lehrman put himself in no such position. He represented Waddington, N.V., and its principal, Pawlitzek. He was not Guiking's lawyer and Guiking was not his client. He told Guiking in September 1980 that he, Lehrman, would no longer represent Guiking in his business affairs, and to "seek other legal counsel" (Tr. 60) Guiking's complaint to The Bar all but confirms this, supra n. 4, and his hearing testimony did not contradict Lehrman's concerning the September 1980 conversation.

Finding no probable cause to believe it was so, The Bar made no charge in its Complaint (A. 1-4) predicated on a lawyer-client relationship between Lehrman and Guiking. Even The Bar's pre-hearing submission to the referee (A. 5-6) avoided such a predicate, saying Lehrman's alleged duties "do not require the existence of an attorney-client relationship" (A. 6). Guiking was "a member of the public," said The Bar (A. 5).

And in the course of the hearing The Bar successfully excluded Lehrman's proof of a court judgment that he had no lawyer-client relation to Guiking in the loan transaction

(A. 28, 29). Bar counsel objected to its relevancy because "we never alleged an attorney-client relationship." (Tr. 63, 64.) The referee sustained The Bar's position: "I agree," he said (Tr. 64).

Even Guiking, who managed to be convincingly outraged that his creditor's attorney did not turn his friendship with Guiking to Guiking's advantage, recognized that not everyone who begs an indulgence from a lawyer is, by that such solicitation, that lawyer's client. "If I had any problem, I explained the problem to him if it was a legal problem," he said (Tr. 119), "and he was giving me then the advice how to handle it." But Guiking's determination to fling someone else's money at a casino operation was not "a legal problem." Guiking did not solicit the realtors or the dentist to solve "a legal problem," nor was it "a legal problem" that he brought to Jeffrey Lehrman.

See Silverman v. Turner, 188 So.2d 354, 355 (Fla. 3d DCA 1966), approving a circuit court's order compelling disclosure despite an asserted attorney-client privilege of confidentiality:

> The order cited as authority 97 C.J.S. Witnesses [secs.] 280, 283, which hold in essence that where the attorney acts in any other capacity than as an attorney, such as a depository, or trustee, the

> attorney-client relationship does not obtain, and that the subject matter must relate to the subject matter of the attorney's employment. See: Tillotson v. Boughner, N.D.Ill.1965, 238 F.Supp. 621.

This proposition also is beyond dispute:[11]

> Although an attorney-client relationship does not depend for its existence on a formal agreement, it does depend on a showing that legal advice or service is sought and that the attorney undertakes to provide such professional advice or service. Brusseaux v. Girouard, 214 So.2d 401 (La. App.), cert. denied, 253 La. 60, 216 So.2d 307 (1968); Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813 (1951).

There are several reasons, then, why it must be concluded that no lawyer-client relationship existed between Lehrman and Guiking in this transaction.

°Lehrman's testimony shows without contradiction that in September 1980 he terminated any professional relationship

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[11] We are in somewhat of a quandry to cite the source of this quotation. It was uttered by the Court and made public in The Florida Bar v. Shapiro, No. 61,368, 9 FLW 5, 6 (Jan. 5, 1984), but after argument on rehearing, the Clerk informs us, the opinion was withdrawn and therefore is not published in Southern Reporter. There is no official public record, therefore, of any disposition of the charges against Mr. Shapiro. We rely not upon the Court's public utterance of the principle quoted, but upon the principle itself, and the case citations that support it.

to Guiking in his business affairs. Only Guiking's incompetent and self-serving conclusion, "He was my lawyer all the time," is counterposed.

°Guiking did not consult Lehrman in January 1981 for legal advice or services in connection with his gambling venture, but to solicit a loan as he had from laymen.

°The Bar "never alleged an attorney-client relationship" in this transaction.

°The referee considered irrelevant a judgment offered by respondent which negated the existence of such a relationship.

°The referee made no specific finding of fact that a lawyer-client relationship existed (A. 36-39), but only announced a precipitous "conclusion" (A. 39), from what Mr. Guiking said "he considered" from his litigious viewpoint (A. 37), that Lehrman was in this transaction Guiking's attorney (A. 36-39). Guiking in this transaction neither asked for or was given legal advice or services by Mr. Lehrman. See The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984), reversing a disciplinary order for want of such a finding of fact.

II. The Bar failed to prove by clear and convincing evidence that the Waddington-Guiking loan was "usurious."

Only the referee's unsubstantiated attribution of a lawyer-client relationship to Lehrman and Guiking accounts for the referee's finding that Lehrman did not deliver $500 cash to Guiking, as he said he did. Positing that nonexistent relationship effectively placed on Lerhman the grievous burden of establishing by "clear and convincing evidence" that Lehrman's transaction with his supposed client, Guiking, "was made upon full and adequate consideration." Gerlach v. Donnelly, 98 So.2d 493, 498 (Fla. 1957), and cases cited. That, as is usually the case given diametrically opposed testimony by two persons who dealt alone with each other in an office, was a burden impossible to carry.

There is no reason in law for the referee to have addressed Lehrman's testimony, that he delivered $500 in currency to Guiking as requested, from an attitude of suspicion and disbelief.

There is every reason to credit Lehrman's testimony.

First, there is The Bar's burden to prove, by clear and convincing evidence, that Lehrman was guilty of any

professional impropriety. The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); State ex rel. The Florida Bar v. Bass, 106 So.2d 77 (Fla. 1958). That burden of proof requires evidence all the more convincing because the charge is that Lehrman assisted his client, Waddington, N.V., in committing a crime. Florida Bar Code of Professional Responsibility, DR 7-102(A). The Florida Bar v. Thomson, 271 So.2d 758 (Fla. 1972); The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). Even in civil usury trials the burden on a party alleging usury is to establish his case with "clear and satisfactory evidence." River Hills, Inc. v. Edwards, 190 So.2d 415, 424 (Fla. 2d DCA 1966).

Beyond that, and beyond Lehrman's presumptively truthful testimony, Guiking receipted for $6,500 not only by his promissory note ("FOR VALUE RECEIVED," A.7) but also in a separate written receipt he signed on the day of the transaction (A. 9). That Guiking within two weeks signed and filed a complaint in the Dade County circuit court denying that he signed that receipt (A. 29) - distancing himself from the receipt in that manner, not by contesting its acknowledgement of $6,500 - reinforces the importance of Guiking's receipt. Guiking's false allegation should bear heavily in this Court's determination of whether The Bar

proved by clear and convincing evidence that the receipt is untrue or has some meaning other than that Guiking received $6,500.

Beyond that, Pawlitzek's affidavit, received in evidence below (A. 25), confirms that Lehrman asked him to lend Guiking $6,500 not $6,000.

And the depositions and affidavits of Tabor and Rose, whom Guiking also solicited to fund his casino venture, verify that Guiking did not ask them for $6,500 to repay his defaulted note and rescue his mortgages, as Guiking later said, but to invest in "some gambling equipment" or "some crap table" at "some casino" (A. 29, 33, supra n. 5).

Finally, the circuit court of Dade County dismissed for want of prosecution, after a year of no activity, Guiking's January 27, 1981 complaint that the loan was usurious because he received $6,000 not $6,500 (A. 28, Tr. 194); and the same court later dismissed with prejudice, after a nonjury trial, Guiking's claim that Lehrman was his lawyer and had breached a fiduciary obligation to Guiking (A. 33).

The contrary hypothesis, that Pawlitzek set out to extract $500 in interest, would seem silly if the implications for Lehrman were not so grave.

Consider the principals in this loan transaction. The borrower, the outraged Mr. Guiking, was "sophisticated" (the referee's term, A. 36) if not slick in international finance. He was sufficiently adroit in financial affairs to defraud sophisticated colleagues in the "Chalet Group" by taking a "secret profit" from the Loftano transaction (A. 46). The government of Togo paid for his advice on how to get an unsecured loan from the International Monetary Fund (Tr. 167), which loans, Mr. Guiking agreed (Tr. 168), "are most frequently not paid back" (Tr. 167).

Mr. Guiking is something of an expert in borrowing money and not paying it back.

He is bold as well. To finance his investment in a casino gambling operation, requiring only $5,000 to $6,500, Mr. Guiking did not blush to solicit those funds from acquaintances: various realtors, a dentist, a lawyer. Mr. Guiking's money remains, through it all, "in Holland" (Tr. 113, 134).

Of the lender, Herr Pawlitzek of Waddington, N.V., we know less. We know principally that he had funds in Lehrman's trust account and that he was willing to accommodate Lehrman by lending Mr. Guiking, on strict terms,

the small sum Mr. Guiking said he could and promised he would repay in six days.

Considering the transaction and the venturesome purpose Mr. Guiking had in mind for the borrowed money, despite his funds "in Holland available" and so forth, Mr. Pawlitzek may well have doubted that Mr. Guiking would make good his word to repay the loan in six days. Hence Pawlitzek's instructions that Lehrman nail down some substantial collateral (A. 25). Hence, to remove any ambiguity from the transaction, the assignment of mortgages and the memorandum to be signed by Guiking, acknowledging the lender's purpose to record the assignment instantly upon default (A. 9). Mr. Pawlitzek, who later demanded $25,000 for release of the assignment in lieu of foreclosure proceedings (there still being no tender by Mr. Guiking), may not have lent the money entirely to accommodate Mr. Lehrman.

Because the referee could imagine no other reason for Pawlitzek to make an interest-free loan to Lehrman's "client," he found as a fact that Pawlitzek through Lehrman advanced Guiking only $6,000 of the $6,500 debt. But the referee thought too small.

Pawlitzek did not trouble himself with intercontinental telephone calls to make $500. Such a lender would regard $500 as he would $19.50, supra n. 6: de minimis. Pawlitzek's interest was not in interest but in Mr. Guiking's mortgages, in the likelihood that Guiking's money "in Holland available" would not timely materialize, in the possibility that Guiking would concede a great deal more than $500 to avoid formal foreclosure or Pawlitzek's further negotiation of his assigned security interest in the Vizcaya mortgages.

In this assessment of Mr. Guiking's purposes and prospects, Mr. Pawlitzek was of course correct.

In these circumstances, then, the presumption of correctness usually attending a referee's findings[12] cannot obtain. The referee's foundation for those findings, the fictitious lawyer-client relationship that cast upon respondent the burden of disproving Guiking's claims, cannot stand scrutiny. Fairly reviewed, the evidence of "usury" was not clear and convincing.

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[12] Fla. Bar Integr. R., art. XI, Rule 11.09, Rule 11.06(9)(a).

We know of only two decisions of this Court in the last 25 years or more in which an attorney was held to have acted dishonestly or fraudulently in a "usury" transaction. A third case, involving "usury" charges that were abandoned in a negotiated plea, is described below.[13] In both those "usury" cases a lawyer was disciplined not for his part in arranging a client's "usurious" loan to a borrower but for pleading usury as a defense to an action on the lawyer's own promissory note, prepared by the lawyer. The Florida Bar v. Pitts, 219 So.2d 427 (1969); State ex rel. The Florida Bar v. Delves, 160 So.2d 114 (Fla. 1963).

This Bar prosecution is therefore somewhat unprecedented. We respectfully suggest that the evidence in this

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[13] The Florida Bar v. Harper, 318 So.2d 398 (Fla. 1975): The Bar charged in five counts that Harper (1) committed a felony by lending, individually or for a client, a sum of money to Hemmerle, Inc., at felony-level interest rates; (2) he later did the same again in another loan to Hemmerle individually; (3) he later did the same again in another loan to Hemmerle, Inc; (4) he later undertook representation of Hemmerle, Inc., in its dispute with Cassuba Corp., despite Hemmerle, Inc. being in default on its notes and Harper standing to gain fees in any collection effort; (5) he sold to his client Hemmerle, Inc.'s adversary, Cassuba, without Hemmerle's knowledge, the stock Hemmerle had given to secure payment of one of the prior notes, thereby divesting 20 percent of his client's corporation.

Harper and The Bar agreed to a conditional guilty plea on counts 4 and 5, on condition that The Bar not prosecute counts 1 through 3. Harper was suspended for six months.

record does not warrant this prosecution becoming a precedent for others.

III. Pawlitzek's settlement demand for $25,000 was not "usurious," and Lehrman's delivery of that demand was not unethical.

The referee conceived that Lehrman's delivery of Pawlitzek's $25,000 demand to Guiking, after Guiking defaulted and sued to avoid his obligation entirely, was yet another "attempt to extract a usurious sum of money" from Lehrman's supposed client (A. 38).

In this the referee was wrong as a matter of law. "Usury" is not determined by what the creditor demands when the debt contracted is not paid; usury is determined by the amount of interest reserved at the inception. Home Credit Corp. v. Brown, 148 So.2d 257, 260 (Fla. 1962):

> [C]omputations under the usury law must be based on a determination of the scope of acceleration rights which a note or contract purports to give a lender or holder and not upon the sums actually claimed by him. This follows necessarily from the principle that the vice of usury is one which inheres in the parties' agreement itself.

See also First Mortgage Corp. of Vero Beach v. Stellmon, 170 So.2d 302, 305 (Fla. 2d DCA 1965), cert. den. 174 So.2d 32 (Fla. 1965):

> [T]he usurious nature of the contract depends upon the liability of the borrower under its terms, or, to put it another way, upon what may be demanded of the borrower, under the terms of the contract, rather than what is demanded from him.

Mr. Pawlitzek's demands, conveyed by Lehrman, were therefore perfectly legitimate expressions of a creditor's proposals in lieu of foreclosure or negotiation of the security interest he held. Mr. Guiking was of course at liberty to "offer" $7,000, which he did. Mr. Guiking was at liberty to sue for cancellation of the debt as "usurious," which he did on January 27 (A. 30). And Mr. Guiking was of course at liberty to tender payment of the debt from his funds "in Holland available," reclaiming his collateral and eliminating the possibility of either foreclosure or negotiation. That Mr. Guiking never did.

The referee laboriously inquired of Lehrman how a $25,000 demand could be justified in terms of the creditor's expenses that would be awarded in a foreclosure proceeding (Tr. 43-46, 81-83). This inquiry was entirely miscon-

ceived. Had Pawlitzek chosen to institute foreclosure proceedings, the expenses recoverable by Waddington would of course have been determined. But absent a tender of payment by Guiking, which was never made, Pawlitzek was free to pursue other alternatives to foreclosure; he could sell to someone else Waddington's interest in the mortgages,[14] that being the dread possibility of which Lehrman warned, which Guiking sought to block by his January 27 lawsuit, never prosecuted. Or Pawlitzek could attempt to negotiate the purchase of Guiking's interest in the mortgages.

Pawlitzek was free to propose to Guiking any resolution of the matter, in lieu of those mentioned, that he chose. He chose to begin by demanding $25,000 for release of his assigned interest in the mortgages. The referee's conception that it was more "usury" for Lehrman to deliver Pawlitzek's $25,000 demand in settlement of a matter in dispute, which even then Guiking had put in litigation, is wholly unwarranted. A lawyer cannot be disciplined,

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[14] Guiking's security assignment of the mortgages was in effect a mortgage on the mortgages. Sec. 697.01(1), Fla. Stat. (1983). As such the assignment could itself be assigned or negotiated to another, perhaps for a considerable sum, whereupon the other would stand in Waddington's position, vainly awaiting Guiking's tender of payment, or foreclosing, or seeking some other resolution.

suspended from the practice, for conveying a client's settlement demand that some judge, after the fact, thinks was extravagant.

The referee's conception of these events is attributable to his assumption that foreclosure was Pawlitzek's only alternative to waiting endlessly for Guiking to pay (Tr. 81), and to the referee's threshold error in supposing that, because Guiking chose to say he was, Guiking was Lehrman's client whom Lehrman was obliged to protect from the consequences of his own folly.

IV. The referee's 14-month delay and his misplaced fervor grievously prejudiced Lehrman.

The Court need only examine the transcript and the introductory paragraphs in the referee's report to sense the attitude brought to bear in consequence of the referee's presumption, and his erroneous finding, that in this transaction Guiking was Lehrman's client.

The referee cross-examined Lehrman from an attitude of disbelief. Before Lehrman's counsel was permitted to cross-examine Guiking, the referee intervened to reconcile Guiking's direct testimony with documented facts (Tr. 121-125).

And the referee, after acknowledging any lawyer's anguish in such a proceeding as this, and promising his report within 30 days, then delayed his report for 14 months, violating Integration Rule 11.06(9)(a). He said he did so to let his "idealism" dissipate, and to gain more experience at judging (A. 35).

Unfortunately for respondent, the referee's conception of this case did not improve with age. The referee's moral indignation, arising from his misconception that in this transaction Guiking wanted and Lehrman gave legal advice and services, became more entrenched.

Fourteen months of rumination on the evidence were not required for the proper conclusion: Guiking's charges against Lehrman were not proved by "clear and convincing" evidence.

Answering The Bar's petition and brief:

V. No costs should be assessed against respondent

The referee's order contemplated (A. 42) that

> Jeffrey Lehrman, upon appropriate motion

> and hearing thereupon, pursuant to due notice, be assessed the costs of these proceedings.

There was no "hearing pursuant to due notice." But the referee entered an order assessing as costs chargeable to respondent each item specified in the motion to tax costs filed by The Bar (Bar's A.1).

After rehearing on respondent's motion, the referee entered an order (A. 49) granting the motion for rehearing to the extent of ordering that the cost of transcribing the grievance committee proceedings be paid by The Bar.

The referee concluded that the Integr. Rules 11.04(5)(b) and 11.06(9)(a)(5) do not specify transcript costs, as distinguished from court reporter's attendance fees, as chargeable to a respondent at any level of proceedings. "[T]hese are lawyers responsible for drawing these rules. We deal with words in their exact sense." (Tr. of hearing, p. 18). So the referee assessed respondent transcript costs for the referee's hearing and declined to assess the grievance committee's transcript: "I have cut it both ways. . . ." (Tr. 22).

Respondent respectfully suggests that he should be exonerated, with no costs assessed against him. But the distinction drawn by the referee between court reporter's

attendance fees, and the transcription costs, especially for grievance committee proceedings, seems sound.

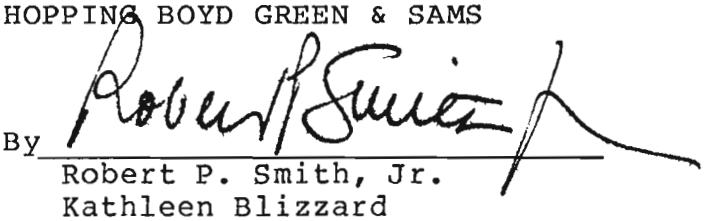
Respondent is content to submit that question without further argument, acknowledging that the question is one of policy, more than rule-interpretation, for determination by the Court.

CONCLUSION

Respondent has labored under the burden of Mr. Guiking's claims for four years. Various charges were made, and The Bar found "probable cause" to prosecute only this one. This one too should now be dismissed. The record does not support the recommendation that respondent be found guilty on this charge.

Respectfully submitted,

HOPPING BOYD GREEN & SAMS

By 

Robert P. Smith, Jr.
Kathleen Blizzard
420 Lewis State Bank Building
Post Office Box 6526
Tallahassee, Florida 32314

Attorneys for Respondent

Certificate of Service

I DO CERTIFY that a copy hereof was mailed this 18th day of February, 1985, to:

Paul A. Gross, Esquire
Attorney for Complainant
The Florida Bar
211 Rivergate Plaza
444 Brickell Avenue, Suite 211
Miami, Florida 33131

John T. Berry, Esquire
Director, Legal Division
The Florida Bar
Florida Bar Center
600 Apalachee Parkway
Tallahassee, Florida 32301-8226

Kathleen Blizzard
Attorney