IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOSEPH L. CARBONARO,

Respondent.

_____/

Supreme Court Case

No. 64,228

COMPLAINANT'S INITIAL BRIEF

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PREFACE

For purposes of this brief, The Florida Bar will be referred to as the "Complainant" or the "Bar" and Joseph L. Carbonaro will be referred to as the "Respondent". Abbreviations utilized in this brief are as follows:

"T."	refers to the Transcript of Final Hearing held on March 16, 1984, to be followed by page numbers.
"COMPL. EX."	refers to Complainant's exhibits admitted into evidence, to be followed by exhibit number.
"D."	refers to the Deposition taken on February 21, 1984 by Complainant and admitted into evidence at the Final Hearing, to be followed by page number or exhibit number.
"R.R."	refers to the Report of Referee, to be followed by paragraph of report.

STATEMENT OF THE CASE

A formal complaint was filed against Respondent on September 12, 1983 and was assigned Supreme Court Case No. 64,228. The Honorable Fredricka G. Smith was appointed as Referee on September 22, 1983.

The final hearing on the Bar's complaint was conducted on March 16, 1984. The Referee signed the Report of Referee on April 10, 1984 and mailed same to the Clerk of the Supreme Court on April 11, 1984. Counsel for Respondent filed a Motion for Rehearing or for Clarification of Report of Referee on April 13, 1984. The matter was set for hearing on May 7, 1984 and the Referee entertained argument of counsel at that time. The Referee determined it would be appropriate to submit a Clarification of Report of Referee and same was signed on May 30, 1984 and mailed on May 31, 1984..

The Referee has recommended that Respondent be found guilty of violating Fla. Bar Code Prof. Resp., D.R. 1-102(A)(1), 1-102(A)(3) and 1-102(A)(6) and Fla. Bar Integr. Rule, art. XI, Rule 11.02(3)(a) and (b). The Referee recommended, as a disciplinary sanction, that Respondent be suspended for a period of three (3) years, effective August 13, 1983, and continuing thereafter until proof of rehabilitation. The Board of Governors of The Florida Bar considered the Referee's findings of fact and disciplinary recommendation at their meeting held May 16-19, 1984. The Board determined that review of the Referee's disciplinary recommendation should be initiated and that the appropriate disciplinary sanction to be sought was disbarment.

ISSUE PRESENTED FOR REVIEW

WHETHER THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE DISBARMENT.

STATEMENT OF FACTS

On or about February 25, 1982, a confidential informant with the Drug Enforcement Administration contacted a special agent with said agency. It was reported that the confidential informant had been in contact with one David Casterline and that Casterline had indicated that, through an individual known to him as Joe, he could obtain five (5) kilograms of cocaine. The individual known as Joe was subsequently identified as Respondent (D.6)

A meeting was thereafter held on or about February 26, 1982 which was attended by the confidential informant, Casterline and Respondent (D.6). The special agent, named Cox, monitored and recorded this meeting (D., March 4, 1982 Report of Investigation appended as part of Composite Exhibit one (1)). Respondent agreed to sell the special agent five (5) kilograms of cocaine at a price of Fifty-Six Thousand Dollars and No Cents ($56,000.00) per kilogram for a total purchase price of Two Hundred Eighty Thousand Dollars and No Cents ($280,000.00) (D.6,7).

The actual transaction occurred on or about March 2, 1982. Special agent Cox met with Respondent at Casterline's apartment in Broward County, Florida. An individual named Patrick Lombardo was present and indicated that they had recently lost Five Hundred Thousand Dollars and No Cents ($500,000.00) in proceeds from a cocaine transaction and as a result they wanted to protect themselves by doing the current transaction one kilogram at a time (D.7).

Lombardo departed from the apartment to obtain a sample of cocaine to show the special agent. In his absence, Respondent offered to sell the special agent Ten Thousand (10,000) quaalude tablets and discussed the government's

ability to seize assets. Lombardo eventually returned with a sample of cocaine but it was determined that various chemicals were needed to perform the necessary tests (D.8). Respondent made a telephone call to an unknown party and instructed them to bring certain equipment to the apartment so that the substance could be tested for cocaine (T.179, 180; D.8).

Lombardo, the special agent, and Respondent left the apartment, with Casterline remaining behind, to effect delivery of the first kilogram of cocaine which was being brought up from Miami, Florida (D.8). Special Agent Cox and Respondent walked over to a vehicle in which Special Agent Michael Garland was seated while Lombardo walked west on Davie Boulevard. (D. 8,9). Agent Garland and Agent Cox were working as a team (D.17). Agent Cox was posing as Agent Garland's girlfriend and doing all the negotiations, ostensibly to insulate him from the ongoing criminal activity (D.29). Agent Garland showed Respondent Two Hundred Eighty Thousand Dollars and No Cents ($280,000.00) in United States currency whereupon Respondent entered Garland's vehicle. Prior to her joining Lombardo, Respondent gave Agent Cox the telephone number to his telephone page beeper and instructed her to call him on said number after she had viewed the cocaine. Respondent further advised that upon receiving said call, Agent Garland and himself would go to a pay phone and Garland could then confirm the quality of the cocaine and turn the money over to him (D.9).

During the time that Agent Garland and Respondent sat alone in the vehicle awaiting the call from Agent Cox, Respondent told Garland that he had recently

been cheated out of the proceeds of a cocaine transaction that he and an individual he referred to as Fatty had concluded in New Jersey. Respondent also related to Agent Garland that the individual bringing the cocaine from Miami was Fatty. It was later determined that Fatty's real name was Charles Brosius (D.9).

Brosius arrived and parked his vehicle next to the vehicle occupied by Agent Garland and Respondent. Respondent spoke with Brosius briefly and then Brosius proceeded up the street and delivered a kilogram of cocaine to Lombardo. Lombardo, in turn, showed the cocaine to Agent Cox. After determining the substance was, in fact, cocaine, Agent Cox gave the arrest signal. Drug Enforcement Administration agents converged and attempted to arrest Brosius and Lombardo. Lombardo grabbed for a gun and was disarmed by the agents. A fully loaded weapon was also found in Brosius' car. Agent Garland and another agent arrested Respondent without incident (D.10).

On August 13, 1982, Respondent entered a plea of guilty, in the United States District Court for the Southern District of Florida, to the felony charge of conspiracy to possess with intent to distribute quantities of cocaine. Respondent was found guilty of the aforementioned offense and placed on probation for a period of four (4) years. (R.R. II.1). It was further ordered that Respondent participate in a program of community service, said program to be determined by the Probation Office, as a special condition of probation (COMPL. EX. 1). Arrangements were made for Respondent to perform said service with Legal Services of Greater Miami (T. 107).

ARGUMENT

THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE DISBARMENT

The Referee recommended that Respondent be suspended for a period of three (3) years, effective on August 13, 1983, and continuing thereafter until proof of rehabilitation (R.R.IV) .The Bar believes that the Referee's disciplinary recommendation was erroneous. While a referee's findings of fact enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding pursuant to Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a), the Court has stated that it is not bound by the referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). Accordingly, the Court has imposed greater discipline than recommended to it by referees when deemed appropriate. The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983); The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982); The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); and The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981).

It is the Bar's position that Respondent's misconduct was wholly inconsistent with the high professional standards of the legal profession. Disbarment is, therefore, more appropriate than the disciplinary sanction of suspension recommended by the Referee. The criteria established by the Court in determining appropriate discipline and the circumstances resulting in Respondent's arrest and conviction fully support the Bar's position.

The Court has established three (3) criteria for determining the proper disciplinary sanction to be imposed against attorneys in actions brought pursuant

to Article XI of the Integration Rule of The Florida Bar. The Court has mandated that:

> (F)irst, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970) Accord, The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982), and The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979).

Mindful of the foregoing criteria, the Board of Governors of The Florida Bar has directed that Bar Counsel seek Respondent's disbarment. The circumstances justifying the disciplinary sanction of disbarment have been articulated in The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966):

> (D)isbarment is the extreme measure of discipline that can be imposed on any lawyer. It should be resorted to only in cases where the person charged has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards. To sustain disbarment there must be a showing that the person charged should never be at the bar. It should never be decreed where punishment less severe, such as reprimand, temporary suspension, or fine will accomplish the desired purpose. Accord, The Florida Bar v. Davis, 361 So.2d 159 (Fla. 1978); The Florida Bar v. Dodd, 195 So.2d 204 (Fla. 1967); The Florida Bar v. Carlson, 183 So.2d 541 (Fla. 1966); The Florida Bar v. King, 174 So.2d 398 (Fla. 1965); State v. Dunham, 134 So.2d 1 (Fla. 1961): State v. Ruskin, 126 So.2d 142 (Fla. 1961); State v. Murrell, 74 So.2d 221 (Fla. 1954).

While imposition of the disciplinary sanction of disbarment is the severest sanction available, the nature of Respondent's offense dictates that said sanction be imposed. It is axiomatic that an attorney, by virtue of his position, must not take any action in either his professional or personal life that would be violative of duly enacted laws. Respondent's guilty plea to the felony charge of conspiracy to possess with intent to distribute quantities of cocaine, in violation of a federal statute, clearly places him in violation of his sacred trust as an attorney and subject to the harshest available disciplinary sanction.

The Referee found Respondent's actions to be violative of all rule violations charged by the Bar including Fla. Bar Code Prof. Resp., D.R. 1-102(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude) (R.R.III). There was ample evidence presented to the Referee to support such a conclusion. Agent Garland testified that in his professional opinion, having been a Drug Enforcement Administration agent for thirteen years, the Respondent was in charge of the drug transaction by virtue of the fact that he was to be the recipient of the money used to purchase the cocaine, he handled communications, and others took all the risks associated with such a transaction (D.11, 23, 31, 34 and 35). The seriousness of the transaction is amplified by the disarming of one of Respondent's confederates and the discovery of a fully loaded weapon in another confederate's car (D.10). Further, during the course of the cocaine transaction, Respondent offered to sell Agent Cox 10,000 quaalude tablets (D.8) and stated to Agent Garland that he had recently been cheated out of the proceeds of a sale of five (5) kilograms of cocaine in New Jersey (D.9). Finally, Respondent

offered no cooperation in helping to find the other four (4) kilograms of cocaine involved in the subject transaction (D.11, 27).

The aggravating circumstances of Respondent's involvement in criminal activity were reinforced by his own testimony before the Referee at the final hearing Much of this testimony occurred during cross examination and included matters not previously charged. This evidence was admissible, however, because it was relevant to the question of Respondent's fitness to practice law and thus relevant to the discipline to be imposed. The Florida Bar v. Stillman, 401 So.2d 1306 (1981). Respondent testified that he engaged in a course of drug experimentation beginning in July, 1978 (T.154,155). Respondent began his use of illegal drugs by smoking marijuana (T.154). Respondent then progressed to "acid", "uppers", and "downers" subsequent to his starting a legal position with Eastern Airlines on February 1, 1979. (T. 156, 157). Respondent acknowledged that his possession of these controlled substances was a violation of the law (T.158). Respondent also resorted to using sedatives and stimulants in connection with his work with Eastern Airlines (T.126, 153, 154).

The drug use engaged in by Respondent while he was employed by Eastern Airlines was not without incident. While on a business trip and going through a routine customs check at Toronto National Airport, unlabeled pills and two or three marijuana cigarettes were found in Respondent's suitcase (T.128). The unlabeled pills consisted of Seconals, amphetamines, and other non-pharmaceutical drugs (T. 160). Respondent acknowledged that had the contents of his suitcase been discovered at Fort Lauderdale International Airport or Miami International Airport, their possession would have constituted a criminal

offense (T.161). Respondent pled guilty to a civil infraction in Canada to resolve this incident (T.128). The publicity generated by the incident, however, resulted in his forced resignation from his position with Eastern Airlines (T.129).

Respondent left his position with Eastern Airlines on November 10, 1980 and ceased looking for another position in July, 1981 (T. 133). Respondent testified that his involvement in the drug transaction that resulted in his eventual arrest began in late January or February, 1982 (T.136) and that his motivation was a desire to do something to help somebody by bringing two friends together in the drug transaction (T. 141, 142). Respondent would have this Court believe that his mental processes were so impaired and that his state of depression was such that it constituted a satisfactory explanation for his involvement in this drug transaction (T. 132, 133, 166, 167, 178). While Respondent's circumstances were regrettable, he has acknowledged that he knew his acts were criminal acts in violation of the criminal laws of the United States (T. 141) and that he knew the difference between right and wrong (T. 178). Respondent's psychiatrist similarly testified that Respondent knew the difference between right and wrong and was competent when he became involved in the cocaine transaction but had impaired judgment (T. 41, 42).

It is the Bar's position that Respondent had a pecuniary motive for his involvement in the cocaine transaction which was a further aggravating factor in his knowing involvement in a criminal act. As heretofore mentioned, Agent Garland's professional opinion was that Respondent was the person in charge of the transaction. This testimony was buttressed by Respondent's own testimony that he had

ceased looking for employment by July, 1981 (T. 133); that he had come to the realization he had no prospects for legal employment, was finished in the profession, and couldn't face looking for legal jobs (T. 166); that he had been a superstar all his life and now had no prospects for the future (T. 167); and that this was the first time in his life he had been rejected (T. 131). Respondent further testified that other than a small legal fee, he had no income from employment in 1982 and earned one $11,000 fee for doing an acquisition in 1981 (T. 165). By January, 1982, Respondent realized that he had substantially depleted his assets so he listed his home for sale or rent (T. 167). Respondent responded in the affirmative when asked whether his expenses prior to his arrest exceeded his monthly income and whether he had no prospects of gainful employment (T. 165). Respondent had been trying to keep up a facade that he didn't need his parents' help and was doing fine in private practice (T.171). Also, subsequent to his discharge from Eastern Airlines, Respondent was forced to take in roommates to share house expenses (T. 174). Respondent was aware that, if he was acting only as a contact person as he claimed, it was common for a commission to be paid (T. 150).

Based upon the foregoing, the Bar posits that the facts compel the conclusion that Respondent was motivated to become involved in the cocaine transaction by the need to obtain a source of income. He had no prospects for employment and had already borrowed a substantial amount of money from his parents to enable him to buy his house (T. 168) prior to his arrest in the cocaine transaction. Respondent didn't like to look to his parents for financial support and prided himself on being able to enhance their lifestyle (T.168). Respondent

chose a way out of his dilemma based on the exigencies of his financial situation. Respondent should suffer the consequences of his actions and those consequences in this proceeding should be disbarment. There is ample case authority in this jurisdiction to support such a proposition despite Respondent's contention that he should not be subjected to disbarment.

The Court, for example, has not hesitated to disbar attorneys for their felonious conduct. The Florida Bar v. Penrose, 413 So.2d 15 (Fla. 1982); The Florida Bar v. Coburn, 368 So.2d 47 (Fla. 1979); The Florida Bar v. Whiting, 157 So.2d 77 (Fla. 1963); and The Florida Bar v. Jackman, 145 So.2d 482 (Fla. 1962).

Felonious conduct, similar in nature to that engaged in by Respondent, has resulted in disbarment. In The Florida Bar v. Wilson, supra, The Florida Bar alleged that respondent had engaged in illegal conduct involving moral turpitude by inducing an incarcerated client to make arrangements for one and one-half ($1\frac{1}{2}$) pounds of cocaine to be delivered to him. The delivery was consummated whereupon the respondent was arrested by undercover agents. Respondent was thereafter tried and convicted of the offenses of Solicitation to Traffic in Cocaine and Attempted Trafficking in Cocaine and sentenced to five (5) years in the Clay County Jail with the special condition that he be placed on probation for four (4) years and six (6) months after serving six (6) months in Clay County Jail. Disciplinary proceedings were instituted by The Florida Bar. The referee appointed by the Supreme Court of Florida found that respondent was guilty of the two (2) offenses he had been convicted of and was therefore guilty of violating Fla. Bar Code Prof. Resp., D.R. 1-102(A) (3) (a lawyer shall not engage in illegal conduct involving moral turpitude).

(The Respondent in these proceedings has been charged with this rule violation and found guilty of same). The referee recommended that respondent be suspended from the practice of law for a period of three (3) years.

The Florida Bar, however, petitioned the Court for review of the referee's disciplinary recommendation and sought disbarment as the appropriate disciplinary sanction. The Court considered the various criteria that it had established for the purpose of formulating appropriate disciplinary sanctions and ordered respondent's disbarment. In considering whether a mere suspension would be just to the public, the Court stated that:

> In the case of a conviction of two felonies, the ultimate penalty, disbarment, should be imposed to insure that an attorney convicted of engaging in illegal conduct involving moral turpitude, who has violated his oath and flagrantly breached the confidence reposed in him as an officer of the court, can no longer enjoy the privilege of being a member of the bar. A suspension, with continued membership in the bar, albeit without the privilege of practicing, is susceptible of being viewed by the public as a slap on the wrist when the gravity of the offense calls out for a more severe discipline. The Florida Bar v. Wilson, supra at 3.

Further, the Court noted that respondent was engaged in illegal drug trafficking which was a troublesome and serious crime and that it had not hesitated in the past to disbar an attorney for similar acts even though a referee recommended less severe discipline. Accordingly, the Court ordered that respondent be disbarred, effective immediately.

Similarly, in The Florida Bar v. Beasley, 351 So.2d 959 (Fla. 1977), the respondent arranged for a client to purchase approximately four (4) pounds of marijuana from a third party. The respondent was found guilty

of delivery of cannabis and received a judgment and sentence of one (1) year in the County jail which he appealed. The referee recommended that the respondent be found guilty of violations of Fla. Bar Code Prof. Resp., D.R. 1-102(A)(3) and 1-102(A)(6) and Fla. Bar Integr. Rule, art. XI, Rule 11.02(3)(b). (The Respondent in the instant proceedings has also been charged with these same rule violations and found guilty of same.) The Court overturned the referee's recommendation that the respondent be suspended from the practice of law for a period of twenty-four (24) months and thereafter until proof of rehabilitation and ordered his disbarment.

The Respondent will undoubtedly seek to advance various arguments that he should not be subjected to disbarment. Any argument made that the Respondent's actions were somehow less serious or not subject to disciplinary sanctions because they did not involve the attorney-client relationship should be dismissed as specious. Fla. Bar Integr. Rule, art. XI, Rule 11.02(3)(a) provides that:

> (T)he commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline (emphasis added).

The argument will also no doubt be made that other cases involving felonious conduct and felony convictions did not result in disbarment. Such cases are, however, clearly distinguishable. For example, in The Florida Bar v. Pettie, supra, the referee found that the respondent was involved in a criminal conspiracy to import marijuana. The Court found that the referee properly

found respondent guilty of violating Fla. Bar. Code Prof. Resp., D.R. 1-102 (A) (3) and Fla. Bar Integr. Rule, art. XI, 11.02(3) (a). (Both rule violations are charged against Respondent in the instant matter and he was found guilty of same). The Court suspended respondent rather than disbar him (as was recommended by the referee) because of his cooperation with law enforcement authorities. It is noteworthy that the cooperation factor is not at all present in the instant proceedings as testified to by Agent Garland and the Court stated that absent the cooperation of Pettie, his direct and knowing participation in serious felonies warranted disbarment. The Florida Bar v. Pettie, supra at 736.

Additionally, in The Florida Bar v. Kennedy, 439 So.2d 215 (Fla. 1983), the respondent was suspended from the practice of law for the period of his federal court-ordered probation and until he shall have passed all parts of the Florida Bar Examination and had his civil rights restored. The respondent transferred funds from a savings and loan association, that he served as vice president, into an account he had established under a fictitious name. He was indicted by a federal grand jury for devising a scheme to obtain money by false and fraudulent pretenses. A plea of guilty resulted in a sentence of probation for a period of three (3) years. While this breach of trust was egregious, it pales in comparison with knowingly engaging in a conspiracy to possess with intent to distribute quantities of cocaine. The deleterious effects of drug trafficking on the very fabric of our society requires neither elaboration nor editorializing.

In determining the appropriate disciplinary sanction to be imposed in this matter, it is necessary to revisit the criteria established by the Court in

The Florida Bar v. Pahules, supra. The Florida Bar submits, in light of the serious rule violations charged in this case and found by the Referee, that disbarment is the only punishment that will be fair to society, sufficient punishment, and severe enough to deter others. Imposition of a lesser sanction in a case where an intentional violation of law has been committed would indeed raise the spectre of the slap on the wrist punishment referenced by the Court in The Florida Bar v. Wilson, supra at 3. It would indeed be incongruous for Respondent to have been disbarred in New York for his felony conviction (T. 152, 153) and suffer a lesser fate in this jurisdiction. An attorney simply cannot be allowed to maintain his privileged position as an officer of the court after violating the very laws he was sworn to uphold. Such an attorney should be deemed to have forfeited his position at the Bar.

Further, disbarment imposes the more appropriate process of readmission rather than reinstatement for the errant attorney who wishes to rehabilitate himself and become, once again, a member in good standing of The Florida Bar. Such readmission is possible since disbarment in this jurisdiction is not permanent. The Florida Bar v. Mattingly, 342 So.2d 508 (Fla. 1977). As the Court stated in The Florida Bar v. Wilson, supra at 3.

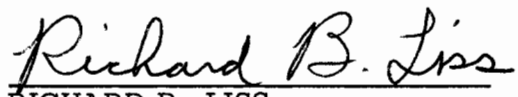
> ... suspension and disbarment may very well have a similar effect toward the correction of a convicted attorney's anti-social behavior, but disbarment insures that respondent could only be admitted again upon full compliance with the rules and regulations governing admission to the Bar. In the case of a felony conviction, this additional requirement is significant, as it would better encourage reformation and rehabilitation.

CONCLUSION

For the foregoing reasons, the Bar respectfully requests this Honorable Court to uphold the Referee's recommendation as to guilt and recommendation as to disciplinary violations but to reject the Referee's disciplinary recommendation. To do otherwise would place this Court's imprimatur on a course of conduct totally inimical with Respondent's professional obligations. Any mitigating circumstances presented by Respondent are clearly outweighed by the aggravating factors presented to this Court for review.

Accordingly, the Bar respectfully requests this Honorable Court enter an order that the Respondent be disbarred from the practice of law and assess costs against Respondent in the amount of One Thousand Four Hundred Twenty-Five Dollars and Seventy-Four Cents ($1,425.74).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Initial Brief was sent by U.S. Mail to Nicholas R. Friedman, Attorney for Respondent, at Suite 1022, Alfred I. duPont Building, 169 E. Flagler Street, Miami, Florida 33131 and to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226, this 7th day of JUNE, 1984.

Richard B. Liss

RICHARD B. LISS