IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

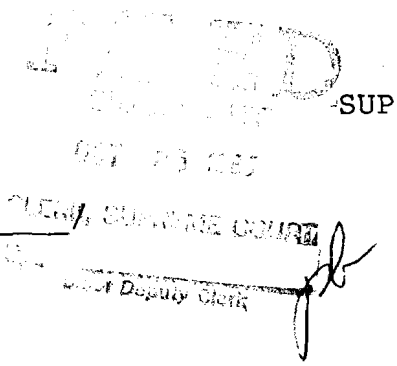
JOHN P. FITZGERALD,

Respondent.

CONFIDENTIAL

TBS FILE NOS 15E82F11 & 15D83F06

SUPREME COURT NO 65,336



BRIEF IN SUPPORT OF PETITION FOR REVIEW

Respectfully submitted by:

WATTERSON & DICKENSON, P.A.
Attorneys for Appellant
105 South Narcissus Avenue
Suite 810, Citizens Building
West Palm Beach, Florida 33401
(305) 832-6122

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STATEMENT OF THE CASE

On October 3 , 1985, JOHN P. FITZGERALD, the Petitioner herein, and Respondent in these disciplinary proceedings filed his Petition for Review. A motion was filed requesting an extension of time in which to file the brief in support of the Petition for Review, and on October 4 , 1985, this Court granted that Motion for Extension of Time.

THE FLORIDA BAR, as Complainant, filed a complaint pursuant to Article XI of the Integration Rule of The Florida Bar, as amended, against JOHN P. FITZGERALD, in May of 1984. The complaint was in three (3) counts, alleging misconduct of JOHN P. FITZGERALD arising out of two separate representations. In TFB File No. 15E82F11 the local grievance committee found probable cause based upon a complaint filed by Nancy Molina and John Pierre Molina, and which is the subject of Count I and Count II of THE FLORIDA BAR's complaint.

In TBF File No. 15E83F06, the local grievance committee found probable cause based upon the complaint of Nathaniel J. Orr. The matters complained of in the Orr representation are set forth in Count III of THE FLORIDA BAR's complaint. FITZGERALD filed his answer to the complaint and also a Response to Request for Admissions which had been filed by The Florida Bar.

On January 17, 1985, and August 15, 1985, this matter was tried before The Honorable W. Clayton Johnson, Referee. The referee has submitted his report to this Court dated September 9,

1985, finding the accused attorney guilty of five (5) of the six violations cited and recommending a thirty (30) day suspension with automatic reinstatement. That report also assessed costs in the amount of $3,205.88 against FITZGERALD.

Throughout this Brief the Petitioner herein, FITZGERALD, will be referred to as "FITZGERALD". THE FLORIDA BAR will be referred to as "THE BAR". References to the testimony before the referee will be shown as (T-), with the number representing the page that the testimony appears at in the transcript.

STATEMENT OF FACTS

As the Referee's Report finds, FITZGERALD is an attorney admitted to the bar in 1975, and who is thirty-nine years old. He has no prior disciplinary record.

Counts I and II of THE BAR's complaint deal with FITZGERALD's representation of Nancy Molina and John Pierre Molina. Count III deals with FITZGERALD's dealings with Nathaniel J. Orr.

A. The Molina Case (Counts I and II)

As alleged by THE BAR and admitted by FITZGERALD, Nancy Molina and John Pierre Molina retained FITZGERALD to represent them on or about July 13, 1981 in connection with a certain grand jury investigation. Nancy Molina was the chief complainant against FITZGERALD. She was the only one of the Molinas to testify before the referee. She has been a legal secretary or a paralegal since 1968 (T-225). She currently identifies herself as being a legal assistant (T-158).

In February of 1981 she came to Florida to be with John Pierre Molina (T-159). Her purpose in coming to Florida was to be a crew member on a boat owned by Arnold Katz (T-160). When she came to Florida she brought with her her life savings of $2,000.00 (T-161).

She married John Pierre Molina on June 13, 1981 (T-200). Later that month, on June 30, 1981, her employer, Arnold Katz, was arrested (T-200). In July of 1981 the Drug

Enforcement Administration confiscated the boat that they were crewing on (T-201). It was a 50-foot sailboat (T-203).

At the time that the boat was confiscated it was being refitted at a marina and she and her husband were staying in a hotel (T-164). She claimed that they kept money on board the boat during this time and that they removed $18,000.00 in cash from the boat after it had been seized (T-165).

The Molinas were requested to stay in Florida for two weeks (T-167) and had been contacted by the Drug Enforcement Administration for purposes of being invited to testify before a federal grand jury (T-172).

Mrs. Molina knew FITZGERALD as they had been friends during the time that they both lived in Minnesota (T-169). Mrs. Molina contacted FITZGERALD, and after some social visits she made an appointment to see him at his office (T-174). The Molinas wanted FITZGERALD to go with them to Fort Lauderdale to talk to Mr. Mazzeli of the Drug Enforcement Administration (T-175).

According to Mrs. Molina, FITZGERALD quoted them a fee of $500.00 for everything and that there were no additional fees discussed (T-176). FITZGERALD received a $500.00 retainer for which he gave a receipt which is THE BAR's Exhibit No. 1.

Mrs. Molina had $18,000.00 in her possession and she was concerned about the money being seized (T-177). According to Mrs. Molina, at the initial conference on July 13, 1981, no additional fees were discussed beyond the $500.00 retainer (T-176). Further, Mrs. Molina testified that FITZGERALD told her

that they could put the money into a safety deposit box at a bank or put it into his trust account. According to Mrs. Molina they decided to put it into FITZGERALD's trust account (T-178). THE BAR's Exhibit No. 2 shows a receipt for the $18,000.00 as being for the payment of Muldoon's, Inc. stock.

According to FITZGERALD, the initial meeting with the Molinas lasted from 3½ to 4½ hours (T-235). Mrs. Molina specifically requested that they enter into an attorney-client relationship for confidentiality purposes, and they agreed upon a $500.00 retainer (T-235).

Mrs. Molina told him that she had $30,000.00 in her bag and that their employer, Mr. Katz, had given them large sums of money (T-238). They wanted him to hold $18,000.00 in a way that there would be no record of its deposit into a bank (T-239). Mrs. Molina had brought up the cash reporting requirements relating to the deposit of $10,000.00 or more (T-240).

Mrs. Molina testified that all of her and her husband's dealings were in cash and that they had never maintained a bank account for the money (T-209,210). The cash, which was kept on the boat (T-165) was used by Mr. Molina to pay the expenses relating to the boat, such as dock fees (T-201) and was being used for the payment of the cost of refitting the sailboat (T-208). According to Mrs. Molina, Mr. Katz would pay them back (T-209) but they never asked Mr. Katz whether they could use his money for the outfitting of the boat rather than having to advance their own (T-209). Indeed, when the boat

needed a dinghy, Mr. Molina supposedly purchased it with his own money (T-202).

Mrs. Molina wanted FITZGERALD to hold $18,000.00 (T-239). FITZGERALD discussed with the Molinas the use of the corporation Muldoon's, Inc. as being a depositor of the funds into a bank account, hence, the reason for the receipt in the form of THE BAR's Exhibit No. 2 (T-240). But, as the conversation with the Molinas went on, with them describing their involvement with Mr. Katz and his activities, FITZGERALD realized that the deposit of the monies under Muldoon's, Inc. might involve him in some criminal wrongdoing, and he changed his mind. (T-244). FITZGERALD said they were going to have to do it some other way and it was agreed that he would hold the money in his office safe (T-245). FITZGERALD testified that the Molinas were deathly afraid that the government was going to seize the money as part of Mr. Katz's funding for his drug business (T-245). FITZGERALD testified that by simply holding the money there would be no record of its being deposited in any institution and that the only way a government official could find out whether the Molinas had any monies deposited with him would be to ask him and then for him to reveal whether he had it or not (T-273).

As an aside, during the time that the Molinas were represented by FITZGERALD, they were staying at a condominium in Tequesta, Florida, owned by a mutual friend, an attorney in Minnesota by the name of Koch (T-170). Koch had counseled her to contact FITZGERALD in order to get representation in the

matter with the Drug Enforcement Administration (T-257). Also during the time of the representation, Mr. and Mrs. Molina were driving an automobile owned by FITZGERALD (T-194).

FITZGERALD represented them in dealing with the Drug Enforcement Administration, the United States Attorney's Office, spoke with customs special agents. He was able to obtain immunity for the Molinas in exchange for their testimony (T-250). He accepted the subpoena for their testimony before the grand jury, accompanied them on the day that they testified (T-183) and dealt with all the government lawyers. FITZGERALD also dealt with Mr. Katz's lawyers who were concerned about the Molinas becoming witnesses for the federal government against Katz (T-263). Mrs. Molina also didn't want the $18,000.00 deposited because she was concerned that Mr. Katz or his lawyers would be looking for the cash that was on board the boat at the time it was seized (T-263).

To this day Mrs. Molina doesn't believe that she did anything to warrant the position that she found herself in during the summer of 1981 with the Drug Enforcement Administration (T-227,228). Yet, this sophisticated woman, who has been associated with the legal profession since 1968, and as a legal assistant since 1974 (T-15), with experience in substantial litigation, including Dalkon Shield litigation (T-225), and with 4 years of experience working for tax lawyers (T-229) admitted to engaging in serious wrongs before the referee. She, Mr. Molina and another admitted currency violations by taking cash and

stuffing it in their clothing and taking it to the Bahamas (T-204,205). The sum taken was $202,000.00 in twenty and fifty dollar bills (T-241). Mrs. Molina witnessed Columbians coming to the boat and dropping of packages for Mr. Katz and other people coming by with large amounts of cash for Mr. Katz (T-208). They allowed Katz to purchase Mercedes automobiles and title them in their name (T-206). The dinghy boat had been purchased by Katz and titled in their name (T-263).

According to Mrs. Molina, no final agreement was reached with regard to FITZGERALD's fee (T-190). They had a meeting at FITZGERALD's office on a Friday evening, no agreement was reached, and on the next Monday they received THE BAR's Exhibits Nos. 3, 4, and 11, and were told to get a check in the amount of $8,000.00 from FITZGERALD's bank at the time that they dropped off the keys to his car (T-192,194,223). FITZGERALD testified that at the time that he was retained, at the initial meeting, it was discussed that fees in this case would be difficult to determine and that they would set a fee at the end of the case on a reasonable basis (T-255,256). Mrs. Molina indicated that she had spoken with Mr. Koch about what to expect to pay for the legal services (T-256).

At the end of the representation, on July 30 or 31, FITZGERALD met with the Molinas at his office and told him that he had consulted with other lawyers in town as to what a reasonable fee would be (T-258). FITZGERALD's testimony was that a $7,500.00 to $10,000.00 per person fee would be reasonable

but agreed to charge only $5,000.00 per person as his fee (T-259). Mrs. Molina did not initially agree to the fee, but instead desired to make a phone call and returned in 45 minutes to an hour later and indicated that she had spoken with Mr. Koch in Minnesota about the fee and that they were in agreement as to $5,000.00 per person being a reasonable fee (T-260). At that time, Mr. Molina asked FITZGERALD whether he would buy the Boston Whaler, and FITZGERALD agreed to buy it for $2,500.00 (T-261,262). FITZGERALD agreed to do it as a favor, even though he doesn't like boats (T-262).

After the meeting in FITZGERALD's office, the Molinas, FITZGERALD, his wife and child, went to dinner across the street from FITZGERALD's office (T-265). The dinner started off happily, but during dinner Mr. Molina twice got up and walked out with Mrs. Molina explaining that he was upset because he didn't feel that he had done anything wrong that he needed to pay a lawyer for (T-266). At one point FITZGERALD felt that Mr. Molina was insulting his wife and family, paid the bill and took his family home (T-266). At no time did Mrs. Molina disagree with the fee at dinner (T-267).

Over the weekend FITZGERALD decided not to buy the boat (T-268), dictated statements and a letter to the Molinas (THE BAR's Exhibits Nos. 3,4 and 11) and left instructions for the Molinas to drop off the keys to his car (T-269).

Neither Mr. or Mrs. Molina had any further communication with FITZGERALD after the date that they received their

money, $8,000.00 of the original $18,000.00 (T-233). The date they received the money was August 3, 1981 (T-223). In January of 1982, the Molinas made a claim on The Florida Bar's client security fund, and when that didn't result in a favorable outcome to the Molinas they decided to file a grievance (T-224). The purpose of the filing of the grievance against FITZGERALD was to get their money back (T-224). Mrs. Molina knew the seriousness of filing a grievance from her past experiences in working for lawyers (T-226).

It should be noted that FITZGERALD has always offered to arbitrate any fee dispute (T-225).

It was agreed at the trial of this matter that this is not a fee dispute hearing and THE BAR does not question the validity of FITZGERALD's services for the Molinas or claim that the fee charged was excessive. Instead, FITZGERALD is accused of violating DR9-102(A) by not depositing the $18,000.00 into an identifiable bank or savings and loan association account and DR9-102(B)(3) by not maintaining complete records of all funds coming into his possession and rendering appropriate accounts to the client. FITZGERALD was found guilty of both those violations and also found guilty of the violation of Integration Rule 11.02(4)(c) and by-laws promulgated thereunder prescribing minimum trust accounting procedures. FITZGERALD was found not guilty of violating 9-102(A)(2).

B. <u>The Orr Case (Count III)</u>

JOHN FITZGERALD represented Davis Place, Inc.,

whose principal was William Cordani (T-82). Davis Place was developing a townhouse subdivision whose original plans were for twenty units. Only eight of the twenty units were built before construction ceased in November of 1981 (T-56,58). The construction loan held by Fidelity Federal Savings and Loan Association went into default and there were in excess of $200,000.00 in filed mechanics' liens (T-58).

FITZGERALD was retained in order to work out an arrangement for the sale of the units and payoff of the mortgage and lienholders. The principal, Cordani, promised to FITZGERALD that he would put his own funds into the development to pay off liens (T-60). Cordani had personally guaranteed the loan and was in a solid financial condition in the opinion of the lender (T-98).

Davis Place, Inc. set a minimum sales price which would pay off all the creditors (T-61). FITZGERALD thereafter went and started closing units, collecting the money and dealing with creditors, including the lienholders and construction lender (T-65). During the course of closings it was realized that Mr. Cordani's accountant hadn't figured in the interest that was being carried on the construction loan in setting the sales price for a break-even (T-68) and that information came to FITZGERALD during the time that he was already in the middle of closing the transfers of the units. At that point, Cordani gave FITZGERALD further assurances that he would cover all shortfalls, and would also sell some vacant

property that was part of the subdivision (T-69). The client put the property up for sale and Mr. Cordani was able to obtain three different contracts, each of which fell through and did not result in a closing (T-91). However, the property had a sufficient value that the construction lender never felt in jeopardy on the loan (T-97,99).

Nathaniel Orr had contracted to buy one of the units. His son also purchased a unit and there were no problems in that closing (T-44). Mr. Orr is a real estate appraiser who knew of the financial troubles of the development and obtained a contract to purchase his unit at a low price (T-44). He had someone at his office check the public records for liens before the closing (T-53,70).

Orr inquired at the time of closing as to whether there would be enough money to pay off all liens (T-46) and was told by FITZGERALD that there would be enough money obtained from closing the transaction on his unit and some others from which to pay the liens and the mortgage off (T-47). Orr wasn't sure exactly what FITZGERALD said about how many closings were necessary to occur in order to pay off all liens and mortgages (T-47), but he felt secure that when the other closings took place the liens would be paid off (T-48).

Orr was aware that there was certain vacant land across the street from the unit that he had purchased and that it could be valued at $120,000.00 (T-49,50). He admitted that he was instrumental in getting one of the contracts

for the sale of the vacant land turned down by refusing homeowners association approval of a plan to build slightly smaller units (T-51,74).

FITZGERALD admitted that Orr would have left the closing with the impression that with the money from Orr's closing and subsequent closings all liens and mortgages would be paid off (T-71). FITZGERALD was able to close the remainder of the units, but not get a closing on the vacant land and was unable to pay everything off (T-71). He was able to get a release of all of the lienholders' claims (T-71), but was unable to get a release of Orr's unit from the construction loan. A closing on the sale of the vacant land would have paid off the construction lender, Fidelity Federal, but it kept failing to close because of contract financing contingencies (T-73).

At the time that FITZGERALD closed the sale of the unit to Orr, he believed that there would be enough money to pay everyone off (T-75). FITZGERALD told Orr that he needed to close the other transactions in order to pay everyone off (T-76). Orr's money went into a fund that he used to pay off liens and get mortgage releases (T-78). When Orr subsequently called him about the pending foreclosure on his unit, FITZGERALD told him that he had a contract on the unbuilt land with no conditions and it would close (T-80). That contract did close, the construction lender was paid off (T-81).

William Sned, the attorney for the construction lender, Fidelity Federal, testified that at no time did the

lender feel in jeopardy, "We felt we would get every dime we were entitled to" (T-99). The reasons for this was that the lender had a low ratio of loan to market value (T-96) and the person guaranteeing the loan, Cordani, had a strong financial condition (T-98). Sned described his dealings with FITZGERALD as FITZGERALD's always doing what he said he would do (T-100).

Attorneys' Title Insurance Fund eventually had to take an assignment of the mortgage from Fidelity Federal (T-101,102). The sale of the vacant land took place and Fidelity Federal was paid off (T-102). According to Sned, who represented The Fund in the assignment of the mortgage, The Fund was never at a risk of loss (T-103).

THE BAR has accused FITZGERALD of being in violation of DR1-102(A)(4), accusing him of engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. THE BAR has further accused FITZGERALD of knowingly making a false statement of law or fact and thus, violating 7-102(A)(5). The referee found FITZGERALD guilty of both charges.

POINTS ON REVIEW

I. THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING DR9-102(A), DR9-102(B)(3) AND INTEGRATION RULE 11.02 (4)(c) RELATING TO THE MATTERS CHARGED IN COUNT I OF THE BAR's COMPLAINT IN DEALING WITH THE MOLINAS' $18,000.00.

II. THE REFEREE ERRED IN FINDING THE RESPONDENT IN VIOLATION OF DR1-102(A)(4) AND DR7-102(A)(5) DEALING WITH COUNT III OF THE BAR's COMPLAINT AND INVOLVING THE RESPONDENT's TRANSACTIONS WITH ORR.

III. THE STATEMENT OF COSTS AND MANNER OF TAXATION FILED BY THE REFEREE IS EXCESSIVE.

IV. THE RECOMMENDATION OF THE REFEREE AS TO DISCIPLINARY MEASURES IS TOO HARSH IN LIGHT OF THE PAST DISCIPLINARY RECORD AND THE FACTS OF THE COMPLAINTS.

POINT I

THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING DR9-102(A), DR9-102(B)(3) AND INTEGRATION RULE 11.02(4)(C) RELATING TO THE MATTERS CHARGED IN COUNT I OF THE BAR'S COMPLAINT IN DEALING WITH THE MOLINAS' $18,000.00.

The MOLINAS gave FITZGERALD $18,000.00 in cash. He did not deposit it into a bank or savings and loan association but instead kept it in his office in its original form. MRS. MOLINA testified that it was agreed it would be deposited to FITZGERALD's trust account, although she also testified that her concern in the first place was that the money would be seized by government officials. FITZGERALD testified that she was indeed concerned about the seizure of the money by the government, or by Mr. Katz's lawyer, and that it was agreed that he would hold the money in kind in his office. A receipt for the money was furnished to the MOLINAS.

The Referee made no finding on the issue as to whether it was agreed that the $18,000.00 would be held in a trust account, or whether it was to be held in its original form in FITZGERALD's office. It is submitted here that the agreement not to deposit the money was consistent with the way the MOLINAS had always acted and consistent with their expressed fears. An agreement to deposit the money would be inconsistent with the way they had acted in the past and there would be no logical reason why they would have it deposited into an attorney's trust account rather then simply depositing it into a bank account that they could open up anywhere else. There is no dispute between the

testimony of MRS. MOLINA and the testimony of FITZGERALD that when the money was entrusted to him, it was not an advance on fees and costs, but rather personal property of the MOLINAS to be held by FITZGERALD.

DR9-102(A) provides as follows:

> "(A) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the State in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows: ..." (emphasis supplied)

There is no issue alleged by THE BAR or evidence presented, that FITZGERALD is in violation of this provision after the $18,000.00 was split between the MOLINAS and FITZGERALD. In other words, there is no allegation of a violation or evidence presented that FITZGERALD didn't later deposit that portion of the $18,000.00 taken as fees to his own bank account. The issue, instead, is whether a lawyer is required to deposit funds of a client to an identifiable bank or savings and loan association account even though the client requests the funds to be held in cash by the lawyer.

No disciplinary rule prevents a lawyer from holding personal property belonging to a client. Lawyers ordinarily safeguard personal property belonging to clients. DR9-102(A) cannot be interpreted as preventing a lawyer from safeguarding another form of personal property, cash, for a client who requests same. Strictly speaking, rare coins, or money having a value in excess of its face value (such as Krugerrands) would

be required to be deposited by the lawyer under DR9-102(A) if the Referee's finding is valid. Such a result would be ludicrous.

Clearly, DR9-102(A) only requires funds that are paid to a lawyer to be deposited. The code of professional responsibility does not specifically define the word "paid". According to Webster's New Collegiate Dictionary, 1980, pay or paid is defined as:

> "1 a: to make due return to for services rendered or property delivered. b: to engage for money: hire (you couldn't pay me to do that) 2 a: to give in return for goods or service (pay wages) b: to discharge indebtedness for: settle (pay a bill) c: to make a disposal or transfer of (money) 3: to give or forfeit in expiation or retribution (pay the penalty) 4 a: to make compensation for. b: to requite according to what is deserved (pay him back)..."

Here, it is undisputed that the MOLINAS did not pay the $18,000.00 to MR. FITZGERALD. Therefore, under DR9-102(A) he had no duty to deposit it into his bank account or savings and loan association account. To do so would have been without the clients consent and directly opposite to what the client wanted.

The Referee determined that MR. FITZGERALD was guilty as to violating DR9-102(B)(3). Such provision provides as follows:

> "(B) a lawyer shall:
> (3) maintain complete records of all funds, securities, and other properties of a client coming into the the possession of the lawyer and render appropriate accounts to his client regarding them."

The Referee made no specific finding that MR. FITZGERALD had failed to maintain complete records of the funds or other properties of the MOLINAS coming into his possession. It can only be assumed from the report of the Referee that since the funds were not deposited into a bank account or savings and loan association

account then there would be no records of the deposit and consequently there would be incomplete records of the funds coming into the possession of the lawyer.

Firstly, it is the Respondent lawyer's position that the deposit was not requested by the client nor required under DR9-102(A) as argued above. If there is a violation it is of DR9-102(A), not subdivision (B)(3). Secondly, a receipt for the $18,000.00 was provided the MOLINAS at the initial retaining conference, statements were presented to the MOLINAS showing the disposition of the funds when they were split up between the clients and the lawyer, and such would be the normal records provided a client who entrusts personal property to a lawyer. No other evidence was submitted by THE BAR that MR. FITZGERALD failed to provide any other record of the funds, or failed to keep any other record.

The Referee found MR. FITZGERALD guilty of violating integration rule 11.02(4)(C). Subdivision (4)(C) is too lengthy to set out herein, but merely deals with the right of the Florida Bar to promulgate by-laws prescribing minimum trust accounting records which shall be maintained and minimum trust accounting procedures which must be followed by all attorneys practicing in Florida who receive or disperse trust money or property. The by-laws for 11.02(4)(C) effective until June 30, 1984 define what are the minimum records which must be kept by a member of the Florida Bar. There is no evidence that MR. FITZGERALD failed to keep minimum records in his practice of law. The by-law requires the opening of a separate trust account and the keeping of cancelled checks, ledgers and journals and requires a

reconciliation of trust accounts. MR. FITZGERALD kept these records as a regular part of his practice and there is no evidence to the contrary. He just didn't deposit the MOLINAS' $18,000.00 into his trust account, and the failure to do that is not a violation of 11.02(4)(c) or its by-laws. If there is a violation, it is of DR9-102(A) only.

It should be noted that with regard to the Complaint of the MOLINAS, the Fifteenth Judicial Circuit Grievance Committee found probable cause in its "notice of finding of probable cause for further disciplinary proceedings" only for 9-102(A) and 9-102(B)(3). A transcript of the Grievance Committee hearing shows that the Grievance Committee found probable cause under 11.02(4)(C). The Hearing Officer determined that the transcript shown to Respondent's attorney at the hearing before the Referee was sufficient notice of the finding of probable cause and denied Respondent's Motion to Strike the Allegations Relating to 11.02(4)(C) (T-156).

Counsel for THE BAR admits that the Complaint relating to the MOLINAS refers to improper maintenance of records dealing with a lack of deposit to the trust account (T-147). It was also the position of THE BAR that the allegation of misconduct under integration rule 11.02(4)(C) was duplicitous of the conduct described in DR9-102(A) and (B) (T-154). The Respondent, your Petitioner herein, agrees that the MOLINA matter solely relates to the issue of whether or not an attorney is required to deposit all funds entrusted to him into one or more identifiable

bank or savings and loan association accounts under DR9-102(A). There is no other issue. The finding of guilt on DR9-102(B)(3) and Integration Rule 11.02(4)(C) and its by-laws is solely dependent upon the finding of guilt on DR9-102(A).

It is respectfully submitted that under the evidence presented, the Molinas wanted the funds to be held in kind and that was what was agreed upon with their lawyer, Mr. FITZGERALD. That is the only conclusion that is consistent with the actions of the parties, and with logic. DR9-102(A) does not require personal property to be deposited into a trust account, merely because it also happens to be cash. That disciplinary rule only requires funds which are paid to a lawyer to be deposited. A finding that monies must be deposited to a trust account, regardless of the client's wishes, would be an unwarranted extension of the disciplinary rule and one that is not consistent with the usual and customary practice of law allowing lawyers to safeguard their clients' possessions in kind.

POINT II

THE REFEREE ERRED IN FINDING THE RESPONDENT IN VIOLATION OF DR1-102(A)(4) AND DR7-102(A)(5) DEALING WITH COUNT III OF THE BAR's COMPLAINT AND INVOLVING THE RESPONDENT's TRANSACTIONS WITH ORR.

The referee found FITZGERALD guilty of having violated DR7-102(A)(5) and DR1-102(A)(4) relating to his dealings with Nathaniel Orr.

Disciplinary Rule 7-102 provides:

> "(A)In his representation of a client, a lawyer shall not: (5) Knowingly make a false statement of law or fact."

Disciplinary Rule 1-102(A)(4) provides:

> "(A) A lawyer shall not:(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The referee has noted FITZGERALD's "alleged lack of intent to defraud or harm." Mr. FITZGERALD's lack of intent to defraud or harm anybody is not just alleged, it's clearly proven.

The evidence in this case is undisputed. Mr. Orr testified that he knew that the development was in trouble and that there were liens on the property. He had had someone from his office check the title to the property prior to closing. He inquired of Mr. FITZGERALD as to whether he had enough money to pay off all the liens. Mr. FITZGERALD replied that he would have enough money after closing Mr. Orr's transaction and other closings from which to pay everybody off. While Mr. Orr was

uncertain of the exact words spoken at the closing, Mr. FITZ-GERALD admits that he would have left with the impression that when the closings were complete there would be enough money to pay everyone off. Mr. FITZGERALD can testify to that because that was his impression also.

When Mr. FITZGERALD told Mr. Orr that there would be enough money to pay everyone off, he believed it. Indeed, when a closing finally did take place on the vacant parcel, the only remaining lienor who was unpaid, Fidelity Federal, was paid off.

Mr. FITZGERALD had the assurances of his client to make up any shortfalls in the amounts necessary to pay off indebtedness. When the units that did close did not yield the necessary funds to pay everything off, a shortfall developed that resulted in an inability to get a release of Mr. Orr's unit from the lien of the Fidelity Federal mortgage. Thus, Mr. Orr's title was at risk in a foreclosure proceeding. Title was not lost due to the intervention of Attorneys' Title Insurance Fund, which obtained the assignment of the Fidelity Federal mortgage and held the mortgage during the time necessary for the sale of the vacant land to close. The closing proceeds were applied to the payoff of the mortgage. Everything that was supposed to happen ultimately did, but not in proper order or form.

It is not argued here that the fact that Mr. Orr suffered no ultimate harm is an excuse for what happened. However,

it is not irrelevant, especially as it may relate to the discipline imposed. What is important is that Mr. FITZGERALD did not knowingly make a false statement of law or fact to Mr. Orr. Additionally, in his dealings with Mr. Orr, he was not dishonest, had no intent to defraud, did not deceive Mr. Orr or misrepresent to him the fact that he believed that there would be sufficient funds from the closings, including the vacant land, to pay everyone off. That is what Mr. Orr was told and that is what he believed. At the time of the statements to Mr. Orr, that is what Mr. FITZGERALD believed. The referee finds that "Respondent did not pay off the $40,000.00 mortgage and did not satisfy and discharge various other liens against the condo unit. . ." This is not true. The testimony was clear that all liens had been paid off but the Fidelity Federal mortgage, which FITZGERALD was unable to obtain the release for Mr. Orr's unit without the payoff of the entire indebtedness. Mr. FITZGERALD could not get the release for Mr. Orr's unit from the lien of the mortgage, as he had obtained the release for other units, because he was unable to get the funds from a closing of the vacant parcel from which to pay the mortgage off in full.

The attorney for Fidelity Federal, Mr. Sned, testified that Mr. FITZGERALD always did what he said he would do (T-100) and that he worked daily with Mr. FITZGERALD during the foreclosure (T-94) and that the Federal and Attorneys' Title Insurance Fund, were not at risk of loss. Mr. FITZGERALD

described for the referee how he was able to pay off lienholders, and his method of doing so (T-65). He also testified that at the time he closed the Orr transaction he believed there would be enough money to pay everyone off (T-75). It is submitted, that as far as Mr. FITZGERALD's dealings with Mr. Orr, he did not knowingly make a false statement of law or fact to Mr. Orr, nor did he engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Mr. Orr accepted the information provided by Mr. FITZGERALD as to the payoff of the liens, which Mr. FITZGERALD honestly gave him. As it turned out, the information provided by Mr. FITZGERALD, that he would have enough money from the closings to pay everyone off, was untrue. Yet, that did not make Mr. FITZGERALD's representations in the first instance to Mr. Orr "knowingly false" or "dishonest, fraudulent, deceitful or involving a misrepresentation with an intent to achieve a fraud or deceit."

Admittedly, a problem exists with the fact that the lawyer herein involved issued a warranty deed reciting the land to be free and clear of all encumbrances and issued a title policy which did not disclose the continuing lien of the Fidelity Federal mortgage. It should be again noted at this juncture, that the referee's reference to other liens not being disclosed by the title policy, or that "liens" were paid off by the title insurer are not correct. The only lien that was not paid off was the Fidelity Federal construction loan. Mr. FITZGERALD was unable to obtain a release of Mr. Orr's unit (T-71).

It is, of course, common practice to receive funds at a closing from the purchaser and issue the purchaser a warranty deed free and clear of liens prior to actually paying the liens off. In other words, a normal closing entails the delivery of the warranty deed to the purchaser for recording, and the use of the funds to subsequently pay off liens associated with the seller. The fact that in this case a warranty deed was issued to Mr. Orr showing no lien in favor of Fidelity Federal Savings and Loan Association is not abnormal. What is abnormal is that the lien to the lender was unable to be paid off shortly after the closing or contemporaneously with it. Additionally, the closing statement noting a $40,000.00 pay off to the lender is the seller's closing statement, not the buyer's.

The issuance of a title policy is explained by Mr. FITZGERALD in that the company that loaned money to Mr. Orr required the issuance to them of a title policy free and clear of all encumbrances prior to the use of the funds. In other words, Mr. Orr's funds could not be used to pay off anything until such time as a title policy was first delivered insuring against claims against any lienholder associated with the seller. Mr. FITZGERALD's testimony is at pages 75-81. It describes the current state of affairs regarding the use of monies delivered by purchasers from mortgage companies through bank drafts and instructions for use of the funds. It is a dilemma faced by all real property lawyers in this state.

Mr. FITZGERALD's dilemma, or any other lawyer's dilemma,

in going ahead and closing transactions, issuing deeds and policies without first having paid off the seller's liens, may be of no significance to the referee or this Court. If the issuance of the deed prior to actual payoff of the Fidelity Federal mortgage and issuance of the policy prior to actual payoff of a seller's mortgage is conduct subjecting the lawyer to discipline under 7-102(5) or 1-102(4), then so be it. It will, however, result in a harsh and impractical application of those disciplinary rules. It is submitted that DR7-102 and DR1-102 deal with intentional conduct reasonably calculated to harm another person or the legal profession, and they are not intended for a case such as this.

It is respectfully submitted that even if the two disciplinary rules that Mr. FITZGERALD was found guilty of in the Orr matter have application to the facts herein, then the recommendation of the referee of a thirty day suspension is excessive.

POINT III
THE STATEMENT OF COSTS AND MANNER OF TAXATION FILED BY THE REFEREE IS EXCESSIVE.

THE BAR flew MR. & MRS. MOLINA down from Minnesota, lodged them in an expensive hotel for 4 nights, with meals. Of course MR. MOLINA did not testify. Still, the necessity to fly the MOLINAS down on a Friday, because the hearing was set for a Monday morning for the Referee is not reasonable.

To the extent that this Court finds that the Referee's report erronous, unlawful or unjustified, this Court should adjust the statement of costs and manner of taxation accordingly. The Florida Bar vs. Davis, 419 So. 2nd 325 (Fla. 1982).

POINT IV

THE RECOMMENDATION OF THE REFEREE AS TO DISCIPLINARY MEASURES IS TOO HARSH IN LIGHT OF THE PAST DISCIPLINARY RECORD AND THE FACTS OF THE COMPLAINTS.

Mr. FITZGERALD has no prior disciplinary record. He is a single practioner who will be greatly impacted by the imposition of a 30-day suspension. A suspension is a severe penalty and should not be imposed lightly, but only in a clear case for weighty reasons and on clear proof. The Florida Bar vs. Wendel, 254 So. 2nd 199 (Fla. 1971).

The referee's recommendation as to a suspension versus other available forms of discipline is not contained in his report. A private reprimand would be appropriate for either of the two complaints against Mr. FITZGERALD. A public reprimand, even combined with terms of probation would be harsh and meaningful punishment to this attorney.

Mr. FITZGERALD finds himself a respondent in a grievance matter brought by the Molinas because months after they obtained immunity from prosecution they determined that they had no guilt and they didn't like the fee they were charged. It was the specific purpose of their grievance to get their money back. As a consequence of their filing a grievance against Mr. FITZGERALD, it was discovered that Mr. FITZGERALD held $18,000.00 in cash in his office. Because of this, THE BAR's position is, and the referee so holds, that he is guilty of DR9-102(A) and two other violations simply duplicitous of DR9-102(A). If the failure to deposit the funds to the trust account is a violation

it is hardly a violation which should subject the lawyer to disbarment for 30 days and the consequent economic harm for those 30 days and beyond, not to mention the public ridicule and the effect on his reputation among members of his profession.

Mr. FITZGERALD is found guilty of violating DR7-102 and DR1-102. Yet, there was clearly no intent to harm, no intent to deceive and at worst, Mr. FITZGERALD was guilty of poor judgment and stupidity. It is likewise not grounds for his suspension from the practice of law. Both complaints, taken together, should not result in his suspension.

In The Florida Bar vs. Wendel, 254 So. 2nd 199 (Fla. 1971), this Court held:

> "Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him." (State ex rel. Florida Bar v. Murrell, Fla. 1954, 74 So. 2nd 221,223)

Here, in the Orr case, Mr. FITZGERALD has been given no benefit of any doubt. In the Molina case, there is no clear and convincing evidence of misconduct on the behalf of Mr. FITZGERALD, and if he is guilty of anything, it is just such an

isolated act for which suspension is not appropriate.

An attorney received a public reprimand for engaging in the same conduct that has earlier earned him a private reprimand and involving the representation of adverse parties in a dissolution matter. The Florida Bar vs. Ethier, 261 So. 2nd 817 (Fla. 1972).

A public reprimand and probation were sufficient for an attorney who has misappropriated monies from his trust account in The Florida Bar vs. House, 303 So. 2nd 15 (Fla. 1974).

An attorney received a private reprimand in a case of attempting to bribe a police officer in The Florida Bar vs. Craig, 261 So. 2nd 138 (Fla. 1972).

An attorney received a three month suspension instead of the referee's recommendation of a public reprimand where the attorney had a previous disciplinary history which included similar misconduct. The Florida Bar vs. Bern, 425 So. 2nd 526 (Fla. 1982). Here, there is no previous disciplinary history.

A public reprimand and probation were sufficient punishment for a lawyer who had failed to close an estate entrusted to him for a period of 12 years, despite having been ordered to do so on three occasions by the county court. The Florida Bar vs. Weil, 373 So. 2nd 659, (Fla. 1979).

A public reprimand was justified where an attorney had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and where in the representation of a client he knowingly made a false statement of fact. The Florida Bar vs.

Bratton, 389 So. 2nd 637 (Fla. 1980).

It serves no useful purpose to go on. A review of this Court's prior decisions indicates that the referee's recommended discipline is excessive. In this case, a private or public reprimand, even coupled with probation, would be sufficient to punish the lawyer herein involved and at the same time encourage his rehabilitation. It would be severe enough to deter others who might be prone or tempted to become involved in a like violation. The Florida Bar vs. Lord, 433 So. 2nd 983 (Fla. 1983).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Support of Petition for Review has been furnished by U.S. Mail to DAVID M. BARNOVITZ, ESQ., The Florida Bar, Galleria Professional Building, 915 Middle River Drive, Suite 602, Fort Lauderdale, Florida 33304, this the 24th day of October, 1985.

WATTERSON & DICKENSON, P.A.
Attorneys for Appellant
105 South Narcissus Avenue
Suite 810, Citizens Building
West Palm Beach, FL 33401
(305) 832-6122

BY: 
TERENCE J. WATTERSON

/lf