IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY E. WAGNER,

Respondent.
_____/

Case No. 66,037
(05A83C65 - Naylor)
(05A84C08 - Simon)

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF THE CASE

This matter involves two cases. In Count I (05A83C65), Nancy Naylor (formerly Bennett) complained to The Florida Bar in May 1983 and in Count II (05A84C08), Robert L. Simon complained in September, 1984. Grievance Committee hearings were held on January 12, 1984 (05A83C65) and April 12, 1984 (05A84C08), resulting in findings of probable cause. The Bar's complaint was filed with this Count on October 19, 1984. The Honorable J. R. Parker, Judge in the Sixth Judicial Circuit was appointed Referee. Hearings were held on April 23, 1985, June 26, 1985 and August 29, 1985. After continuances requested by respondent, Referee's Report was thereafter forwarded to this court on September 18, 1985 and an Amendment to the Report of the Referee on September 27, 1985.

In his report, the Referee made recommendations as to several violations of Article XI of The Florida Bar's Integration Rule and the Disciplinary Rules of The Florida Bar's Code of Professional Responsibility. In Count I (05A83C65), the Referee recommends findings of not guilty of violating Rule 11.02(3)(a) for conduct contrary to honesty,

justice or good morals, 11.02(4)(c) for improper trust accounting procedures and Disciplinary Rule 1-102(A)(3) for engaging in illegal conduct involving moral turpitude. He recommends findings of guilty of violating Integration Rule 11.02(4) for mishandling the trust account and funds and Disciplinary Rules 1-102(A)(4) for conduct involving dishonesty, fraud, deceit or misrepresentation; 1-102(A)(6) for other misconduct adversely reflecting on his fitness to practice law; 5-101(A) for accepting employment when his professional judgment on behalf of his client would be affected by his own financial, business, property or personal interests; 5-104(A) for improperly entering into a business transaction with a client; 7-101(A)(3) for intentionally prejudicing and damaging his client; 9-102(B)(3) for failing to maintain proper client records of property coming into his possession on behalf of that client; and 9-102(B)(4) for failing to pay over trust funds promptly after proper demand by a client.

In Count II (05A84C08), the Referee recommends findings of guilty of violating Disciplinary Rules 5-101(A) for accepting employment when his professional judgment on behalf of his client would be affected by his own financial,

business, property or personal interests; 5-104(A) for improperly entering into a business transaction with a client and 5-105(B) for continuing multiple employment when the exercise of his independent professional judgment on behalf of a client was likely to be adversely affected by his representation of another client, without full disclosure.

As discipline, the Referee recommends respondent be suspended for a period of eighteen (18) months with proof of rehabilitation and until he makes restitution to Nancy Naylor in the amount of $35,000 and Robert L. Simon in the amount of $69,000, and pay costs of these proceedings. Any subsequent reinstatement is to be followed by completion of an Ethics course within 180 days and three years probation with quarterly trust account accountings. At their November 1985 meeting, the Board of Governors of The Florida Bar considered the Referee's Report and recommendations. The Board approved the Referee's findings of fact and recommendations of guilt but voted to appeal the Referee's recommended discipline as erroneous and unjustified given respondent's actions. Instead, the Board of Governors of The Florida Bar seeks review by this Court and urges it to

enter an order of disbarment with restitution to Nancy Naylor in the amount of $35,000 and to Robert L. Simon in the amount of $69,000 prior to any future application for readmission. It is further requested that any subsequent readmission be followed by three years probation with the conditions set out by the Referee. Additionally, costs should be taxed to respondent now totalling $4,597.56 with interest accruing at the legal rate beginning thirty days after this Court's order becomes final.

The Bar's petition for review was filed on November 26, 1985.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S RECOMMENDED 18 MONTH SUSPENSION WITH PROOF OF REHABILITATION AND FULL RESTITUTION PRIOR TO TO REINSTATEMENT FOLLOWING BY THREE YEARS PROBATION AND PASSAGE OF AN ETHICS COURSE AS WELL AS PAYMENT OF COSTS IS ERRONEOUS AND UNJUSTIFIED IN THESE TWO CASES WHERE MISHANDLING OF TRUST ASSETS, MISREPRESENTATION, IMPROPER MULTIPLE REPRESENTATIONS AND BUSINESS TRANSACTIONS HAVE OCCURRED WITH SUBSTANTIAL LOSSES AND WHETHER THE BOARD OF GOVERNORS RECOMMENDED DISBARMENT WITH FULL RESTITUTION PRIOR TO SUBSEQUENT READMISSION FOLLOWED BY THREE YEARS PROBATION WITH CONDITIONS AS RECOMMENDED BY THE REFEREE AND PAYMENT OF COSTS IS THE APPROPRIATE DISCIPLINE.

STATEMENT OF FACTS

In Count I, 05A83C65, respondent received $124,783.44 as trustee for his client Betty Bennett Holt in June and July 1979 from a bank in Tampa, Florida. $10,000.00 of the transferred funds was never deposited in respondent's trust account. Respondent has provided no reasonable explanation or accounting for these funds. As noted by the Referee, respondent has limited recollection of where the money went. (Referee report, Section II paragraph 2 - hereinafter, R.R. II CI para 2)

Respondent was to invest these funds to earn a higher rate of interest than previously realized by a former trust arrangement. No formal trust documents were executed. However, it was verbally agreed Respondent would manage the funds and forward certain monthly payments to Mrs. Holt. Respondent made payments to Mrs. Holt until her death in September 1979.

Following Mrs. Holt's death, monthly payments were made to Nancy Bennett (now Naylor), Mrs. Holt's daughter and joint tenant with right of survivorship in the trust funds. Mrs.

Naylor began receiving payments on an irregular basis after several months and subsequently requested an accounting from respondent. She never received a satisfactory accounting and ultimately sued respondent for termination of the trust and an accounting in 1980. (R.R II CI para 3). Respondent failed to comply with the December 8, 1980 court order for an accounting and delivery of all liquid assets of the trust but did finally provide an accounting on January 14, 1981 following the filing of a motion for a show cause order which the Referee styled as only half way accurate. (R.R. III CI para 6).

Various questionable "loans" were made to corporations owned or held as a principal by Horace "Bud" Allen, totalling at least $83,000 and one to Paul K. Osborne listed as $1,500.00 but in fact for the amount of $45,000. One Allen corporation, A & R Contractors, Inc., was not a functioning corporation at the time. Allegedly respondent loaned $45,000 to Mr. Osborne for a condominium sale but one week later these funds were returned, less $1,500.00, with the remainder later purportedly loaned to Mr. Allen. The loans were made soon after the money was transferred in 1979.

Respondent received no written or verbal authorization for these "loans" from either Mrs. Holt or Mrs. Naylor. Respondent was fully aware of Mr. Allen's poor financial position. He was a friend, client and respondent kept his books. (R.R. II CI para 5(a)). However, he did not disclose this information to either Mrs. Holt or Mrs. Naylor. The latter became aware of the loans only after her mother's death. (Referee Hearing p.12-15 hereinafter R.H. p.___). Furthermore, these "loans" were made without securing adequate collateral.

In loaning Allen the money, respondent ran it through his own business so Allen could accomplish creditors avoidance (R.R. II CI para 5(a)). The Referee specifically noted he could find no justification for respondent's action in "laundering" these loans to Mr. Allen. (R.R. III CI para 2). Respondent's practice was to issue a check on the trust account payable to Crystal Properties, Inc., cash it and deliver some of the cash to Mr. Allen. From June through September 1979, respondent loaned about $76,500 from the trust to three Allen Corporations. Although Mr. Allen signed promissory notes covering this amount, he is not certain how much he actually received.

The Referee found respondent's "investment" of the trust funds totally ignored the best interests of the trust beneficiary and caused substantial loss of monies to Nancy Naylor. (R.R. III CI para 3).

Respondent's trust records for this matter are totally inadequate and incomplete. Figures on work papers concerning disbursements and deposits to and from the three Allen corporations are not contained in the corresponding trust account records. The work papers and trust account records concerning the Osborne loan do not correspond as to disbursements and receipts. In fact, respondent was so irresponsible in handling the trust funds he was unable to render a proper accounting when requested to do so.

The Referee specifically noted that respondent's record keeping of the trust funds is a continuing example of an attorney's office accountings out of control. Notice was taken by the Referee of the $45,000 loan to Paul K. Osborne which was supposedly returned one week later, less $1,500.00. This does not correspond, by any records, to the condominium purchase for which respondent claims the funds were to have been used. Furthermore, it was admitted by

respondent that trust monies did not necessarily flow on the dates alleged but were "parcelled out" when needed. (R.R. III CI para 4 & 5).

In Count II, 05A84C08, respondent represented Robert L. Simon in various transactions during the years 1975 to 1978. Sometime in 1974, Mr. Simon sold Sportsman's Bowl to respondent and Terry Chlanda on a contract for deed. Respondent handled the transaction. (R. H. p. 169).

To finance construction on another bowling alley, Crystal Bowl, Ms. Chlanda and respondent pledged Sportsman's Bowl as collateral. Upon respondent's advice, Mr. Simon subordinated his $150,000.00 mortgage. It subsequently became necessary for Mr. Simon to foreclose, however, and Sportman's Bowl was returned to him. (R.R. II CII para 2).

In May 1977, Mr. Simon executed a construction loan agreement between Crystal Properties, Inc., Sportman's Bowl and a local bank in the amount of about $366,000.00. To clear the mortgage on his home and to finish construction of Crystal Bowl, this amount was later increased to approximately

$501,000.00. Throughout these transactions, respondent represented Mr. Simon and prepared the documents. Mr. Simon signed the documents as president of both Sportsman's and Crystal Properties. Crystal Properties, Inc. listed all shares owned by respondent, making him sole owner of the new bowling alley. Mr. Simon and his wife were listed as guarantors and the mortgagors listed were Sportsman's Lanes, Inc. and Crystal Properties, Inc. (R.R. II CII para 4, 5, 10). Respondent advised Mr. Simon this loan transaction was necessary to proceed. (R.H., p. 172-177 and 198-200). He was not on the documents personally.

Respondent and Mr. Simon entered into a verbal agreement whereby respondent would operate Crystal Bowl and make monthly mortgage payments from the proceeds until the mortgage was reduced to the level of releasing Sportsman's Bowl. Mr. Simon understood the new bowling alley was his until Sportsman's was released. Respondent claims Crystal Bowl was always to be in his ownership. The verbal agreement was never reduced to writing.

The Referee noted respondent did not adequately advise Mr. Simon to seek independent counsel before agreement to the

loan in which respondent had a substantial financial interest. The Referee noted that even respondent admits he does now know why Mr. Simon would be interested in encumbering his properties to see the second bowling alley built as he would hold no interest whatsoever in the property. (R.R. II CII, para. 8).

He did not fully disclose to Mr. Simon what he was doing by signing finance documents which led to mortgages against Mr. Simon and his bowling alley in excess of $500,000 to finance construction of a bowling alley in which respondent was the total owner and was of no benefit to Mr. Simon. (R.R. III CII).

Mr. Simon made the mortgage payments until Crystal Bowl opened for business in 1977 and for several months thereafter. He also invested substantial personal funds, was holder of the liquor license and paid property taxes that were in arrears. (R.H., p. 172-173, and 177)

Throughout this period of time, respondent acted as attorney for Mr. Simon, Sportsman's Bowl and Crystal Properties, Inc. (R.H., p. 179-180). In 1981, Mr. Simon brought suit against

respondent alleging mismanagement of Crystal Bowl to his detriment, legal malpractice and petitioned to set aside certain conveyances. Respondent has settled with Mr. Simon upon execution of a promissory note in his favor for $69,000.00 to be paid monthly. Mr. Simon waived all claims contained in his civil complaint and respondent waived all claims in Crystal Bowl. Mr. Simon remains personally liable on the construction loan mortgage. (R.H., p. 216-220).

SUMMARY OF ARGUMENT

The Referee's recommended 18 month suspension with proof of rehabilitation required prior to reinstatement is erroneous and unjustified notwithstanding several conditions included in the recommendation. Despite requiring restitution in the amount of $104,000.00 to his clients and payment of costs and conditioning, any subsequent reinstatement on three years probation with quarterly trust account reports and passage of an ethics course within 180 days, the discipline is unduly generous given the egregious nature of the misconduct here present. Respondent's total mishandling of the trust and record keeping, combined with the improper business transactions, simply warrant disbarment. This discipline should also include the conditions recommended by the Referee in his discipline to better effectuate the purposes of discipline.

Adverse publicity in a small town is not a matter for mitigation. In general, most Referee proceedings are supposed to be public. In this case, there were several delays caused by respondent and not The Florida Bar which certainly contributed to the impact of that publicity. Finally, it is uncertain whether the publicity caused respondent to close his practice and precluded him from hiring counsel.

ARGUMENT

THE REFEREE'S RECOMMENDED 18 MONTH SUSPENSION WITH PROOF OF REHABILITATION AND FULL RESTITUTION PRIOR TO TO REINSTATEMENT FOLLOWING BY THREE YEARS PROBATION AND PASSAGE OF AN ETHICS COURSE AS WELL AS PAYMENT OF COSTS IS ERRONEOUS AND UNJUSTIFIED IN THESE TWO CASES, WHERE MISHANDLING OF TRUST ASSETS, MISREPRESENTATION, IMPROPER MULTIPLE REPRESENTATIONS AND BUSINESS TRANSACTIONS HAVE OCCURRED WITH SUBSTANTIAL LOSSES AND THE BOARD OF GOVERNORS RECOMMENDED DISBARMENT WITH FULL RESTITUTION PRIOR TO SUBSEQUENT READMISSION FOLLOWED BY THREE YEARS PROBATION WITH CONDITIONS AS RECOMMENDED BY THE REFEREE AND PAYMENT OF COSTS IS THE APPROPRIATE DISCIPLINE.

The Referee has recommended the respondent be suspended for 18 months and thereafter until full restitution is made to both Nancy Naylor and Robert Simon. He further recommends respondent be placed on probation for three years during which time he is to file with the Clerk of the Supreme Court, with a copy to The Florida Bar, a complete accounting

of his trust account every ninety (90) days and complete an ethics course within the first 180 days of practice. He recommends respondent be found guilty of mishandling a substantial trust and failing to maintain appropriate client records concerning it as well as prejudicing and damaging his client in the Naylor matter (Count I). The verbal trust arrangement began on unstable footing in that the Referee noted that $10,000 of the $124,783.44 transferred funds were never deposited in the trust account. Respondent has no idea where these funds went.

Not only did respondent fail to maintain accurate records concerning the trust assets so as to allow an adequate accounting when requested by his client, he engaged in "loan" transactions with another client and friend he knew to be a severe financial risk. These loans were extended without authorization from or notification to the trust beneficiary. As noted by the Referee, respondent "invested" these trust funds in a manner totally contrary to the best interest of his client, causing substantial monetary losses which may never be recouped.

Over the course of his representation, respondent loaned at least $83,000 to Mr. Allen and $1,500 to Mr. Osborne who is now deceased. Respondent was to invest these trust funds to earn a higher rate of interest than previously realized by a former trust arrangement. Instead he loaned funds to three corporations, owned or held as principal by Horace "Bud" Allen. Note, one was not even functioning at the time. Respondent was fully aware of Mr. Allen's poor financial standing as he was Mr. Allen's attorney and kept his records. Such poor judgment is even more disgraceful when considered in light of the fact that respondent found it necessary to "launder" these loaned funds through his own company, Crystal Properties, Inc., too accomplish creditor avoidance on behalf of Mr. Allen. This practice by an attorney acting as a trustee is beyond justification.

Respondent's trust account records, at least for the trust, totally lack coherence. Work paper disbursements and receipts show no relation to account records in the Allen loans. Furthermore, respondent claims a $45,000 loan was made for an alleged condominium sale to Mr. Osborne which was returned one week later, less $1,500.00. Supposedly, the returned funds were subsequently loaned to Mr. Allen.

None of respondent's records, real estate or otherwise, verify these transactions.

The Referee found that trust monies did not necessarily flow on the dates alleged on the accounting finally provided by respondent, but were "parcelled out" as needed by Mr. Allen. Even Mr. Allen is not certain how much he actually received although he signed promissory notes for the sums "loaned". Furthermore, the Referee found respondent so irresponsible in dealing with the trust monies that he was not capable of rendering an accounting when requested to do so and it required a lawsuit and a pending Order to Show Cause to secure a half-accurate and unsatisfactory rendition to the beneficiary. Respondent still owes Nancy Naylor $35,000.00 from a much larger judgment she obtained against him.

In Count II, the Referee found respondent had improperly engaged in business transactions with a client and had accepted and continued multiple employment although an obvious conflict was present. Respondent prepared documents on behalf and continued to represent Robert Simon in financial transactions with Crystal Properties, Inc. in

which respondent held a personal, financial and business interest.

Respondent failed to fully disclose to Mr. Simon the ramifications of his signing finance documents which led to mortgage against him, his wife and his property in excess of $500,000.00 to finance the construction of a bowling alley which was to be of no benefit to him whatsoever. Respondent prepared the construction loan documents for Mr. Simon, Sportsman's Lanes and Crystal Properties listing Mr. Simon as president of both and he and his wife as guarantors. Respondent was conspiciously absent from the documents although Crystal Properties, Inc. showed all shares in his name. He also did not adequately advise Mr. Simon to seek independent legal advice before entering into this business transaction.

There is no apparent reason why Mr. Simon would expose himself to such liability. Even respondent himself stated he does not know why Mr. Simon would encumber his property in order to build the bowling alley in which he had no interest. Mr. Simon was under the impression the new bowling alley was his until respondent could obtain loans to

release Simon's debt. He made mortgage payments until Crystal Bowl opened for business in 1977 and for several months after. He invested substantial personal funds, was holder of the liquor license and paid property taxes in arrears.

Although Mr. Simon has settled his civil suit against respondent for $69,000.00 which remains unpaid, he still remains personally liable on the construction loan mortgage.

The issue is the applicable measure of discipline. The most egregious conduct is respondent's mishandling of the trust assets, its record keeping and his client's trust funds. It is a matter of utmost seriousness when an attorney "invests" funds on behalf of a client without authorization or notification to the client. His handling of the trust displayed not just the poorest judgment as characterized by the Referee, but showed absolute irresponsibility for his client's interests. There is no justification for an attorney to loan trust funds to a party he knows to be a poor financial risk at best. Moreover, to make these loans without securing any adequate collateral is more reprehensible. The manner by which he made the loans including

"laundering" the money through his own business so Allen's creditors would be avoided is absolutely incredible if not incredulous. Allen does not even know how much money he received from the loans and respondent cannot satisfactorily explain what happened to at least $10,000.00. While there is a strong inference respondent may have personally benefited, such was not explicitly found by the Referee. Obviously, respondent's irresponsible conduct caused a loss of substantial funds to his client to whom he still owes $35,000.

This count alone warrants disbarment. See e.g. The Florida Bar v. Lewin 342 So.2d 513 (Fla. 1977) where a respondent as personal representative invested over $50,000.00 estate funds in a silver company investment without court order or consent of the beneficiary and without any evidence whether the investment was a prudent one. Needless to say, the money was lost. That respondent, as personal representative, also misappropriated funds belonging to a beneficiary in a separate estate and prepared and filed a false receipt with the court. The similarity in this case has to do with the deliberate investment of the trust funds in loans to an individual or his corporations when the respondent knew that

those loans were very risky at best. Further, the manner in which he transferred the funds by laundering them through his own bowling alley displays a pattern of deception not unlike that in the Lewin matter.

In Count II regarding respondent's improper dealings with Mr. Simon, the Referee noted he had too many irons in the fire. From an overall view of the record, it appears the respondent was greedy and utilized Mr. Simon's credit to facilitate the building of his own enterprise with Mr. Simon left holding the bag with respect to the construction loan for a business in which he had no interest. Respondent simply failed in this matter to act in accordance with the provisions of the code of Professional Responsibility. His conduct is not dissimilar to that encountered in The Florida Bar v. Simonds 376 So.2nd 853 (Fla. 1979) where an attorney was allowed to resign in lieu of discipline for improper business transactions with clients combined with some neglect matters. Mr. Simonds failed to advise two investors that he was a substantial owner of the business for which he was soliciting loans. He gave them no adequate security. The business went bankrupt and the investors lost approximately one half of their total $40,000.00 investment.

Combine these two cases and the Bar submits that the Referee's recommended discipline is simply erroneous and unjustified. It is too lenient not withstanding the conditions precedent to any subsequent reinstatement of full restitution to both Mrs. Naylor and Mr. Simon of a total $104,000.00.

Is this a case that warrants disbarment? The Bars submits it is recognizing the criteria justifying disbarment as articulated in The Florida Bar v. Hirsch 342 So.2nd 970 (Fla. 1977). In that case the court stated:

> "Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession," at page 971.

The court further noted quoting from Henry S. Drinker's book on Legal Ethics that:

> "Ordinarily the occasion for disbarment should be the demonstration, by a continuous course of conduct, of an attitude totally inconsistent with the recognition of proper professional standards. Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. For isolated acts, censor, private or public, is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate

> embezzlement, bribery of a juror or court official or the like, should suspension or disbarment be imposed." at page 971.

Drinker went on to write that the lawyer should be given the benefit of every doubt and extreme measure should be invoked only in cases of fairly recent offenses except where respondent has actively attempted to conceal the evidence.

In this instance, the misconduct is not isolated, involves the terrible mishandling of client funds from a trust and grossly inappropriate dealing with another client in a business transaction resulting in severe and continuing liability to that client. The area of improper use of trust accounts, trust funds and improper trust account record keeping is the most troublesome one in discipline and has caused this court to issue it's sternest disciplines. Over the years, the rules on trust account record keeping and reporting have gotten more rigorous in an ongoing effort to insure all attorneys follow those rules and are able to account promptly the funds entrusted to them.

In The Florida Bar v. Breed 376 So.2d 783 (Fla. 1980), the Supreme Court put the Bar on notice that it would not be reluctant to issue the sternest discipline in cases

involving misuse of client funds even where no client was injured. That case also involved a check cutting scheme failure, to keep adequate records or reconcile the account and commingling. In this instance, there has been injury although no finding respondent personally benefited from the mishandling of the Naylor funds. As noted in The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982), the Breed holding had been tempered by another case where cooperation and restitution were present. In this instance, civil actions became necessary by both Mrs. Naylor and Mr. Simon resulting in judgment or settlement against respondent. The Bar submits activities of this respondent are simply beyond the pale and fully justify disbarment. Respondent actions in these cases display an attitude which is totally at odds with the high professional standards expected of members of The Florida Bar. Simply put, he meets the test set forth in Hirsch Supra.

In the Florida Bar v. Powers 458 So.2d 264 (Fla. 1984) an attorney was disbarred for misdealings with an elderly client. He entered into a relationship with an elderly widow which lent itself to the appearance of impropriety without advising her to consult a separate attorney. He

assisted her in revoking her former will in favor of a new one with him as the sole beneficiary to receive her home and personal property. He also assisted her in executing a power of attorney appointing himself to handle various of her personal and property matters. He then deeded the home over to his wholly owned corporation in exchange for caring for her.

Later he quit claimed the property back to her when she became upset. After she revoked a power of attorney and with notice of it, he used the power to transfer the property back to his corporation and sold the house for a profit. Although he agreed to take care of her for her lifetime, he discontinued payment of her convalescent home bills. He never established a trust account containing funds to provide for her care and his records were in such a poor state that money from the mortgage and sale of the property could not be traced. Although the Referee found that he had not defrauded his client, he had acted deceitfully in mishandling her affairs. He recommended that the respondent be suspended for one year and thereafter until he provided proof of rehabilitation. The court disagreed and

disbarred Mr. Powers after appeal by the Bar. In part, the court stated:

> "The Bar argues that the Referee's recommended discipline is too lenient for an attorney who in the above described manner violated the trust of his fiduciary relationship with, and participated in conduct involving deceit and misrepresentation concerning, an elderly disabled woman.
>
> We agree. This type of action is totally inconsistent with membership in The Florida Bar. Respondent's record reflects his having preyed upon an aged infirmed widow, and the abysmal state of his financial records makes it impossible to find that he has not done so. We find this conduct fully warrants disbarment." at page 266.

It is evident that in the two cases before us there are glaring similarities especially as to the totally inadequate record keeping and improper multiple representation and/or business dealings with the client. Certainly loaning trust funds to an individual the attorney knows to be a poor financial risk, without securing adequate collateral and proper record keeping is as inconsistent with the proper fiduciary relationship as the matters engaged in by Mr. Powers.

Disbarment has been deemed appropriate in cases involving fraud and misrepresentation coupled with improper business transactions with a client. In The Florida Bar v. Drizin,

435 So.2d 796 (Fla. 1983), this court ordered disbarment for conduct involving fraud and misrepresentation, conduct adversely reflecting on fitness to practice law, entering into business transactions with a client and wrongful use of client funds. In The Florida Bar v. Zinzell, 387 So.2d. 346 (Fla. 1980) disbarment was ordered for preparing and allowing a client to execute a document she believed to be a will but was a trust agreement, using that trust power without the client's knowledge or consent to convert and convey her properties and failing to pass on any of the proceeds to the client or beneficiaries of the trust as well as allowing the mortgages to go into foreclosure costing the client at least $70,000. Additionally, in The Florida Bar v. Linn, 461 So.2d 101 (Fla. 1984), disbarment was ordered for solicitation to traffic in cocaine, failing to record and deliver a promissory note and purchase money mortgage and executing a second thereby causing the sellers mortgage to become a second mortgage despite representations to the contrary by the attorney. Respondent in the present case misrepresented to Mr. Simon the true nature of his liability and position in the business venture.

In The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982), the court ordered the maximum suspension for misuse of $2500.00 in trust funds and totally inadequate record keeping which caused shortages of over $20,000.00. These shortages were corrected without economic loss. Justice Alderman dissented and would have disbarred. In the present case, respondent's records preclude any accurate picture of what actually happened to the trust monies and his activities has caused severe financial losses which may never be recouped.

In The Florida Bar v. Harden, 448 So.2d 1017 (Fla. 1984) the attorney was disbarred for engaging in multiple misuse of client trust funds, maintaining improper trust account record keeping, commingling, neglecting a legal matter, failing to carry out a contract of employment, intentionally prejudicing or damaging clients, failing to deliver trust funds promptly upon demand and failing to render an appropriate accounting. Respondent in the present case misused the trust assets, caused damage to his clients, failed to deliver trust funds upon demand and suffered from such ill-maintained trust account records that an appropriate accounting could not even be accomplished. Add

to this list, the fact that respondent engaged in misrepresentation and improper business transactions with clients and disbarment is most appropriate.

The Referee noted adverse publicity in a small town and personal knowledge caused respondent to close his practice leaving him without funds for defense counsel as an apparent matter in mitigation. The Florida Bar submits it should not be a reason for mitigation. A large degree of this adverse publicity was brought on by respondent through his successful attempts to delay this case. Final hearing was originally scheduled for March 8, 1985. It was continued and hearings were held on April 23, 1985, June 26, 1985 and finally on August 29, 1985 when a full evidentiary hearing was held. The Bar sought none of these delays. Certainly, they caused more publicity on the case. It is also questionable whether the publicity forced respondent to close his practice as he may have done so regardless. Further, to accept adverse publicity as a reason for possible mitigation, runs totally counter to the philosophy that Referee proceedings should be public in most cases.

Respondent's conduct in these matters is extraordinarily gross. The concern is the appropriate discipline. The purpose of discipline was most recently addressed by this court in The Florida Bar v. Lord, 433 So.2d 983 and 986 (Fla. 1983). It should serve three purposes. It must be fair to society, protecting it from unethical conduct while not denying the public services of a qualified lawyer due to an unduly harsh penalty. Obviously, the public needs protection from an attorney who mishandles trust assets and keeps abysmal records let alone one who misapplies those funds to his own personal use. It also needs protection from those who will not follow the rules for whatever reason. Disbarment is not unduly harsh given respondent's irresponsible actions in both cases.

The discipline must also be fair to respondent to punish the breach and encourage rehabilitation and reform. The breach here demands disbarment with full restitution prior to any readmission. Reform and rehabilitation should be directed to the Board of Bar Examiners. Finally, the discipline must be severe enough to deter others who might be prone or tempted to become involved in similar violations. The Board of Governors urges this purpose be given significant weight.

The totality of respondent's misdeeds clearly demand disbarment and the Referee's recommended conditions prior to any readmission and probation. The Referee's recommended 18 month suspension even with the conditions recommended would be a totally insufficient deterrent for others.

The Board of Governors submits the appropriate discipline is disbarment and full restitution prior to any subsequent readmission followed by three years probation, with quarterly trust accounting reports, and passage of an ethics course within 180 days of readmission. Respondent should also be taxed with the costs in this proceeding currently totalling $4,597.56.

CONCLUSION

Wherefore, The Board of Governors of The Florida Bar respectfully prays this Honorable Court will review the Referee's Report and recommendations, approved the findings of fact and recommendation of guilt; but reject his recommended discipline of an 18 month suspension followed by three years probation and order instead in an appropriate opinion that he be disbarred and condition any future readmission upon full restitution in the amounts of $35,000 to Nancy Naylor and $69,000 to Robert L. Simon followed by three years probation under the terms recommended by the Referee and pay costs in these proceedings currently totalling $4,597.56.

Respectfully submitted,

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Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Brief in Support of Petition for Review has been furnished, by regular U.S. Mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Complainant's Brief in Support of Petition for Review has been furnished, by regular U.S. Mail, to Gary E. Wagner, P. O. Box 2439, Crystal River, Florida, 32629; and a copy of the foregoing Complainant's Brief in Support of Petition for Review has been furnished, by regular U.S. Mail, to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 26th day of November, 1985.

David G. McGunegle
Bar Counsel