

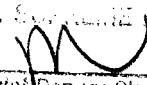
IN THE SUPREME COURT OF FLORIDA

CONFIDENTIAL

The Supreme Court
Case No. 66,547

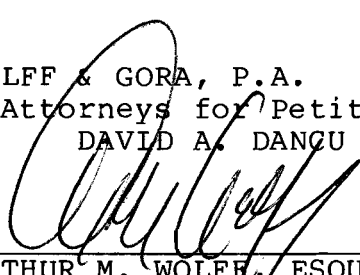
The Florida Bar
Case No. 17D85F12

DAVID A. DANCU,
Petitioner/Respondent,
vs.
THE FLORIDA BAR,
Respondent/Complainant.)

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PETITIONER'S BRIEF IN SUPPORT OF
PETITION FOR REVIEW

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STATEMENT OF THE CASE

This is a Petition for Review filed by the Respondent below and Petitioner in this proceeding, DAVID A. DANCU, pursuant to Article XI, Rule 11.09, of the Integration Rule of The Florida Bar to review disciplinary recommendation portions of the Report of the Refer dated 2 December, 1985. The Petitioner, DAVID A. DANCU, seeks review by this Court of a portion of the Report of the Referee pursuant to Article XI, Rules of Discipline, Rule 11.09(1), Right of Review, of the Integration Rule. Petitioner respectfully submits that the disciplinary recommendation of the Referee is unjustified under Article XI, Rule 11.09(1) and 11.09(3)(e), of the Integration Rule on the facts and taken in conjunction with the recommendation of The Florida Bar.

On 25 January, 1985 the Petitioner, DAVID A. DANCU, entered into a Consent Judgment for an Unconditional Guilty Plea to certain violations of the Code of Professional Responsibility with waiver of probable cause finding. The Petition for Approval of the Unconditional Guilty Plea was filed by The Florida Bar in this Court under certificate of service date 4 February, 1985. On 20 March, 1985, this Court made appointment of the Honorable Rosemary Usher Jones, Judge of the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, as Referee, to preside in the disciplinary action in which the Consent

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Judgment for the Unconditional Guilty Plea and Waiver of Probable Cause Finding had been filed.

On 29 March, 1985, the Petitioner filed his Motion to Maintain Confidentiality, and on 18 April, 1985, The Florida Bar responded by acquiescence.

On 24 June, 1985, the Honorable Rosemary Usher Jones entered and filed with this Court her first Report of Referee wherein she recommended the acceptance of the Consent Judgment and further recommended disciplinary sanctions to be imposed as recommended by The Florida Bar. More particularly, the Report of Referee of 24 June, 1985 recommended Petitioner's suspension from the practice of law for a period of thirty (30) days with automatic reinstatement and taxation of requisite costs. The Referee in her 24 June, 1985 Report applied the criteria established by The Supreme Court of Florida in formulating disciplinary sanctions as set forth in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). In addition the Referee with respect to her Report of 24 June, 1985, took into consideration the fact that complete cooperation was given from the outset by the Petitioner to The Florida Bar and that complete restitution was made. The Referee recited in her Report of 24 June, 1985 that "these factors have greatly tempered what otherwise would have been a more stringent disciplinary recommendation".

Finally the Referee in her Report of 24 June, 1985, stated that she was "convinced" that the matter under con-

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sideration was "an isolated occurrence that will not be repeated again" and that the "Respondent now understands his professional obligations and will abide by them".

On 28 June, 1985 Petitioner filed in this Court his Motion for Expedited Review. On Wednesday, 10 July, 1985 this Court rejected the Recommendations of the Referee and remanded the cause to the Referee "for further proceedings". On Motion for Clarification of The Florida Bar this Court stated that the penalty "appears to be unduly lenient" and remanded to the Referee with directions that "Further findings as to the appropriate sentence are necessary".

On 31 October, 1985 a full evidentiary hearing was held by the Referee. The Record is before this Court.

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STATEMENT OF THE FACTS

The facts upon which this proceeding is based are set forth in the Consent Judgment for Unconditional Guilty Plea of 25 January, 1985, augmented by the evidence and testimony presented at the hearing before the Referee on 31 October, 1985.

The monies held by Petitioner as an ill-advised offset against attorney's fees were returned in full with interest and attorney's fees to the client. Additionally Petitioner paid a reasonable accounting fee to the client in connection with this matter although the client and her accountant had demanded that he pay grossly inflated amounts as tribute for their not filing the Grievance with The Florida Bar. This was verified by the client's new lawyer, Attorney Alan Lerner, who came before The Florida Bar at the consent judgment stage and also verified these facts by letter to the Referee.

The Petitioner did not disburse the remainder of the funds to the client on the belief that she owed him additional monies as attorney's fees for which he had billed her and which fees had not been paid. (T-25) However, on the client's demand the Petitioner made full payment to her and waived his fees, but the client made further demand that "I want more than my interest money. I want you to pay my accountant's fee and I want you to pay Mr. Lerner". The client demanded return of the original Two Thousand (\$2,000.00) Dollars attorney's fee retainer in

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addition to the Ten Thousand (\$10,000.00) Dollars as "accounting fees", threatening Petitioner that unless this tribute was paid he "would pay the consequences". (T-26) The Petitioner and the client's new lawyer agreed that Petitioner had earned the attorney's fee and that the Ten Thousand (\$10,000.00) Dollars as "accounting fees" demanded by the client was conspicuously similar to the Ten Thousand (\$10,000.00) Dollars in accounting fees billed by the accountant to the client for work he performed in the client's late husband's Estate.(T-27) Nevertheless the client and her accountant demanded payment of the Ten Thousand (\$10,000.00) Dollars positioning that if the monies were not paid they would file a Grievance with The Florida Bar. The Petitioner, DANCU's, response to the demand was:

"I told them that I thought they should contact The Florida Bar." (T-28)

Prior to the filing of the Grievance the Petitioner attempted to make full restitution to the client and thereafter when the client filed the Grievance he voluntarily and with dispatch came before The Florida Bar and made a full and free disclosure of all relevant facts relating to the Grievance. This culminated in the Unconditional Guilty Consent Judgment. (T-33)

The Respondent below and Petitioner in this proceeding, DAVID A. DANCU, has been a member of The Florida Bar since 1974. He is a graduate of the Law School of the University of Miami having received his degree in December 1973. He attended under-

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graduate school at the University of Miami as well. He began practicing the profession of law in May of 1974 in Broward County, Florida. (T-17)

Currently DAVID A. DANCU is a Hearing Officer for the Broward County Day Care Center Ordinance Program. He has held that position for approximately five (5) years. (T-18)

DAVID A. DANCU served in the military forces of the United States. He entered the Marine Corps in 1966. He served in Vietnam during the Vietnam War where he was wounded. He is the recipient of four Purple Hearts. He was recommended for the Bronze Star on two separate occasions. Petitioner achieved the rank in the Marine Corps of Sergeant and when wounded entered the Veterans Administration Hospital with rank of E-5. (T-18)

During the Vietnam War DAVID A. DANCU was a machine gunner for a patrol squad. (T-19) He performed this duty for approximately eleven (11) months before he was wounded. He was required to carry a machine gun in his patrol and to fire it upon the enemy whenever they were engaged. In that capacity and the service of his country Petitioner killed many of the enemy.(T-19) He testified that initially he did not believe that he suffered psychological problems from his Vietnam service and the severe injury he received while there. The bone in his right leg was severely shattered in September of 1967. Petitioner was hospitalized in a Veterans Administration Hospital for a period of one (1) year. (T-20) It was during the course of the

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factual scenario which gave rise to this proceeding that Petitioner came to believe that his judgment was impaired by post-traumatic Vietnam war stress syndrome. He commenced treatment and he has continually been under treatment by the Veterans Administration as evidenced by his Veterans Administration counselor's verification. (T-20)

Previous to the facts which gave rise to this grievance Petitioner had suffered nightmares and experienced various psychological problems, including anxiety, and it generally became difficult for him to "deal with certain realities". (T-21) Petitioner testified that he tried to cope with this situation on his own without formal treatment until 1984 at which time he was diagnosed by the Veterans Administration as having post-traumatic war stress syndrome. (T-21)

Petitioner believes and positions in this proceeding that his Vietnam War service and the psychological problems resultant therefrom had a significant adverse causal effect on his life in general and the situation which gave rise to this Grievance in particular. (T-22)

Documentary and testimonial evidence in support of affirmation of the discipline recommended by The Florida Bar was submitted to the Referee in the form of Petitioner's testimony, letters from the Veterans Administration, Broward County Circuit and County Court Judges, a General Master of the Broward County Circuit Court, and a Police Officer of the City of Fort

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Lauderdale. Two witnesses, Attorney John W. Case, and businessman Robert P. Wheat, testified as to the high esteem in which DAVID A. DANCU is held by his peers for his honesty, integrity and professional competence.

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POINT INVOLVED

THE DISCIPLINARY RECOMMENDATION OF THE REFEREE
IS UNJUSTIFIED IN VIEW OF THE RECOMMENDATION
OF THE FLORIDA BAR, NO PRIOR DISCIPLINARY PROBLEMS,
THE ISOLATED EPISODE IN QUESTION, PETITIONER'S
VOLUNTARY AND TIMELY RESTITUTION, AND HIS FULL
COOPERATION WITH THE FLORIDA BAR, COUPLED WITH
HIS ADMIRABLE WAR RECORD

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SUMMARY OF ARGUMENT

The Petitioner timely and fully cooperated with The Florida Bar and seasonably made voluntary restitution to his client. These factors coupled with the isolated episode which is the subject of this Grievance, and combined with his otherwise unblemished record, and the admirable service to his Country during the Vietnam War justifies this Court's acceptance of the Recommendation of The Florida Bar that he be suspended from the practice of law for a period of thirty (30) days with automatic reinstatement and pay the costs of this proceeding.

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ARGUMENT

Petitioner concedes in retrospect that it probably would have been better for him to have established a Record before the Referee in support of her initial Report and Recommendation. When the cause was remanded to the Referee for further findings with the admonition by this Court that the penalty "appears to be unduly lenient", the Referee was placed in the difficult position of evaluating the recommendation of The Florida Bar in view of the remand. It is respectfully submitted that the result was the more severe recommendation. Whether the Referee's original recommendation would have been accepted by this Court had the Record which now has been established been presented is insofar as concerns Petitioner speculative. Clearly, however, the remand had an effect on the Referee.

The Referee noted in her 2 December, 1985 Report that Attorney DANCU gave full and complete cooperation to The Florida Bar and that he made appropriate restitution. The Referee also noted as was asserted at the 31 October, 1985 hearing that the monies retained by Attorney DANCU could legally have been claimed by him by his exercise of a retaining lien or by his interpleading the monies into the Registry of the Court, and perhaps if he had exercised proper legal procedures to perfect his lien the Grievance which gave rise to this matter would not

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have resulted, or at least its seriousness would have been mitigated. Nevertheless, it is respectfully submitted that although Attorney DANCU as the Referee found could have accomplished his objective in an ethical and legal manner, his post-Vietnam War syndrome and resultant psychological problems impaired his actions. The Referee found that compounding the case are physical and mental problems that plagued Attorney DANCU from his Vietnam military service. Attorney DANCU has sought treatment and is receiving treatment from the Veterans Administration on a continuing and regular basis. He is diligently engaged in the pursuit of appropriate medical treatment for his post-Vietnam War difficulties. These difficulties were clearly aggravated by the zealous over-reaching client who sought to take advantage of the attorney's misguided attempt to collect his fee.

DAVID A. DANCU's guilty plea, his cooperation with The Florida Bar, and his total restitution to his client are all factors which may and should be taken into account by this Court in determining the appropriate punishment. The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981) Furthermore, had Petitioner exercised proper procedures with respect to collecting his fee by the assertion of a retaining lien or by interpleading the money into the Registry of the Court, this case would involve a much less blameworthy handling of client's funds. Unquestionably the

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mishandling of client's funds is one of the most serious offenses a lawyer can commit. However, this Court has deemed it appropriate in assigning discipline to take into consideration circumstances surrounding an incident including cooperation and restitution. It is respectfully submitted that the mishandling by Attorney DANCU was as procedural as it was substantive. The case at bar is not a multi-count multi-client series of Grievances but rather, one aberration and one episode which procedurally could have been mitigated by proper retaining lien procedures but which was in a sense "bungled" by Petitioner because of his war stress syndrome - a condition which he now recognizes and for which he is now undergoing regular Veterans Administration treatment.

There are many factors reflecting on Attorney DANCU's good character in the Record before the Court including favorable evaluations of the Bench and Bar. These were considered by The Florida Bar in its recommendation and hopefully will be persuasive to this Court.

This Court is the final arbiter of attorney discipline. However, the administration of the Integration Rule insofar as concerns Grievances is enhanced by the Consent Judgments and Unconditional Guilty Pleas and the resultant Waivers of Probable Cause. Thus, lawyer cooperation with The Florida Bar is to be encouraged. Likewise recommendations of The Florida Bar to this

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Court in matter of Grievance should be afforded deference as an integral ingredient of the disciplinary process.

Initially the Referee agreed with The Florida Bar in its disciplinary recommendation. It was on remand for further proceedings that Petitioner believes the Referee felt compelled to report discipline more severe than that recommended by The Florida Bar. The Referee indicated at T-45 that it was the Court's remand that required that the penalty "be stepped up".

The Florida Bar in the instant case did as it does in every case of this nature. It undertook an indepth investigation of the facts and a study of Attorney DANCU. The Florida Bar determined that Attorney DANCU had rehabilitated himself, that the incident which gave rise to the Grievance was a one episode aberration which from a procedural standpoint could have handled by a retaining lien or other available legal procedures so as to mitigate its severity. Based on its evaluation of Attorney DANCU (concurrent in by members of the Judiciary), The Florida Bar does not believe that Attorney DANCU again will deviate from the proper ethical path. (T-48)

A fact that should not be ignored is that of the over-reaching by the client who in this case sought to profit by the attorney's error. The client's over-reaching does not exonerate the lawyer, but surely it is a mitigating factor coupled with others nonetheleast of which is Attorney DANCU'S war record and

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war disability which may be considered in mitigation and in support of the recommendation of The Florida Bar now that a Record has been established.

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CONCLUSION

It would have been better for Petitioner to have established a Record at the time of the original recommendation of the Referee to this Court so that this Court would have had more before it than simply the Unconditional Plea Agreement without a factual base. The procedural route which this case has taken may have caused the Referee to believe that she was bound to recommend a more severe discipline than that recommended by The Florida Bar.

Cooperation by lawyers with The Florida Bar in disciplinary matters is to be encouraged. In most cases this Court has acquiesced in recommendations of The Florida Bar as rightly it should. It is respectfully requested that the Court examine the Record which now has been established in this case and take into consideration in arriving at its decision the continued recommendation of The Florida Bar and Petitioner's total cooperation with The Florida Bar and his timely and full restitution, his resistance to the client's over-reaching even though it subjected him to this Grievance procedure, and the fact that the matter is a one episode aberration rather than a multi-count/multi-client Grievance. Finally it is respectfully submitted that the Court should consider favorably Attorney DANCUS war record and the injuries both physical and mental he suffered in the service of his Country in Vietnam. Surely these are legiti-

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mate mitigating factors. It therefore is respectfully requested that this Court in light of the now established Record adopt the recommendation of The Florida Bar as originally recommended by the Referee in her first Report.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief in Support of Petition for Review was furnished by U. S. Mail this 20th day of December, 1985 to:

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