IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN A. BARLEY,

Respondent.

_____/

Case No. 66,701

TFB File No. 84-05551-02

ANSWER BRIEF

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OTHER AUTHORITIES CITED:

Code of Professional Responsibility

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PRELIMINARY STATEMENT

The Florida Bar, Complainant below, files this answer brief in the case against John A. Barley, hereinafter referred to as Respondent. References to the hearing transcript will be designated (TR - page number), and references to exhibits introduced as evidence at the hearing will be designated (Bar Exhibit - number) or (Respondent's Exhibit - number). References to the Report of the Referee will be designated (RR - page number), and references to the Initial Brief of Respondent will be designated (Respondent's Brief - page number).

STATEMENT OF THE CASE AND FACTS

On March 13, 1985, The Florida Bar filed a complaint against John A. Barley. On March 19, 1985, the Chief Justice of the Supreme Court of Florida appointed the Honorable L. Arthur Lawrence, Jr., Chief Judge of the Third Judicial Circuit of Florida, as referee in the matter. The final hearing was held on March 12, 1987, and the Report of the Referee was filed on June 17, 1988.

In his report, the referee recommended that Respondent be found guilty of the following violations of the Code of Professional Responsibility:

1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law);

2-106(A) (a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee);

2-106(C) (a lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case, nor shall he enter into an arrangement for, charge, or collect any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof);

5-101(A) (except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests);

5-104(A) (a lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional

judgment therein for the protection of the client, unless the client has consented after full disclosure); and

9-102(B)(4) (a lawyer shall promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive).

The referee also recommended that Respondent be found not guilty of violating the following Rules under the Code of Professional Responsibility:

1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation);

6-101(A)(1) (a lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it; however, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client);

6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him); and

9-102(B)(3) (a lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them).

Finally, the referee recommended that Respondent be suspended from the practice of law for sixty days and pay costs in the proceedings.

Respondent's misconduct arose from his representation of Ms. [redacted] in divorce proceedings, in post-judgment proceedings, and in matters related thereto.

Ms. [redacted] initially retained Respondent in 1980 to represent her in divorce proceedings initiated by [redacted] Ms. [redacted] agreed to give Respondent $5,000 immediately and to pay additional attorney fees when the divorce was final (TR 9). As part of the divorce proceedings, the [redacted] entered into a property settlement agreement on September 24, 1981. The agreement provided that [redacted] would pay Ms. [redacted] a lump sum of $250,000. Two hundred thousand dollars ($200,000) of this sum was to be used to set up a trust fund having three trustees to ensure Ms. [redacted] s financial security for the balance of her life. The remaining $50,000 was used by Ms. [redacted] to pay outstanding debts and attorney fees. The settlement agreement also required Dean [redacted] to make the mortgage payments on their marital residence and to pay Ms. [redacted] $2,000 per month for 45 consecutive months (Bar Exhibit 1).

Several months later, Respondent created a $200,000 trust for Ms. [redacted] as required by the property settlement agreement. Contrary to the express terms of the agreement, however, Respondent named himself sole trustee (TR 12). The trust document prepared by Respondent represents that Ms. [redacted] signed it on September 25, 1981 (Bar Exhibit 2). Although this signature and date are witnessed by the Respondent and notarized, Ms. [redacted] was, in reality, out of town on September 25, 1981 (TR 16-17). By Respondent's own

admission, the document was actually signed in January 1982 (TR 260).

In January 1982, before the document naming Respondent as trustee was drafted, Respondent asked Ms. [redacted] to loan him money from her $200,000 trust principal. Ms. [redacted] agreed to this proposal and on January 15, 1982, she loaned $12,500 to Respondent, individually, and $30,000 to John A. Barley and Associates, P.A. In February 1982, Ms. [redacted] loaned Respondent, individually, $5,000 more. Respondent and Ms. [redacted] orally agreed that the loans would be short-term and carry an interest rate as high as she was receiving on her investments (TR 19-20, 68). The referee found that at the time Ms. [redacted] agreed to the loans, no notes were drawn up evidencing the debt and no security was provided (TR 19, 155-156) (RR 2). In fact, Respondent admits that he had virtually no assets available to offer as security (TR 179).

In July 1982, [redacted] (hereinafter Mr. [redacted] died in a boating accident. When his estate refused to fulfill the obligations undertaken by Mr. [redacted] in the settlement agreement, Ms. [redacted] asked Respondent to bring an enforcement action against the estate and to obtain modification of the agreement based on Mr. [redacted]'s alleged failure to disclose fully his financial worth. For his services, Respondent requested $100 per hour plus one-third of all sums

recovered in excess of the amount due under the previous property settlement agreement (TR 28). Ms. [redacted] refused to pay both an hourly rate and a contingency fee. On September 27, 1982, Respondent sent Ms. [redacted] a letter agreeing to reduce any contingency fee earned by an amount equal to hourly fees earned in bringing the enforcement and modification action (Bar Exhibit 4). Ms. [redacted] acquiesced to this arrangement and assumed Respondent would be paid at the conclusion of the case, as he had been in the divorce action (TR 31, 54). It was, therefore, without Ms. [redacted]'s knowledge or approval that Respondent began withdrawing his attorney fees from her trust (RR 2). Ms. [redacted] was unaware of this arrangement until sometime in late December 1983 or early January 1984 (TR 32-33). Partly as a result of Respondent's withdrawal of funds, Ms. [redacted]'s trust developed liquidity problems (TR 33, 42, 128). Ms. [redacted] was thus forced to obtain an $18,000 loan from Barnett Bank to replenish her liquid assets (TR 42-43). Pursuant to the loan process, Respondent prepared a personal financial statement for Ms. [redacted]. The statement failed to reflect the $47,500 Respondent owed Ms. [redacted] (Bar Exhibit 8; TR 145).

On September 16, 1983, Ms. [redacted] entered into a stipulated settlement with the estate for $185,000. Despite Ms. [redacted]'s earlier disapproval, Respondent deducted from this final settlement a 35% contingency fee unreduced by hourly

fees earned (TR 37-38, 163-164). At a meeting with Respondent on January 23, 1981, Ms. [redacted] disputed both Respondent's entitlement to a contingency fee and the way in which the fee was calculated. Dissatisfied with his answers to her questions, Ms. [redacted] demanded written proof of the $47,500 in loans made to Respondent in 1982. In response to this demand, Respondent drafted three separate notes evidencing debt of $12,500, $30,000, and $5,000. Respondent admits backdating those notes to January and February of 1982 (TR 276). All three loans were at twelve percent per annum interest with the principal not due until 1991. Each had a 90-day grace period. None had a provision for attorney fees upon default (TR 162). Ms. [redacted] never agreed to these terms (TR 21-22).

On February 16, 1984, after discovering that Respondent had missed several interest payments, Ms. [redacted] demanded acceleration of the notes (TR 184-185). When Respondent failed to pay, Ms. [redacted] retained another attorney to collect on the loans. Eventually, a settlement was reached in which Respondent agreed to repay the notes on more favorable terms and to return the contingency fee. Respondent has now satisfied all of his financial obligations to Ms. [redacted]. At no time did Respondent ever suggest to Ms. [redacted] that she seek the advice of independent counsel regarding the loans, and she did not do so until the occurrence of the above-referenced circumstances (TR 20, 176).

SUMMARY OF ARGUMENT

The evidence presented at the final hearing clearly and convincingly supports the following findings made by the referee: Respondent charged a contingency fee in a domestic relations matter; charged a clearly excessive fee by claiming a contingency fee in addition to hourly fees; accepted the position of trustee while indebted to the trust; borrowed money from his client without fully advising her of the implications; and failed to repay promptly both the contingency fee and the loans. The Florida Bar therefore submits that the referee's findings should be sustained, especially when they are viewed with the presumption of correctness generally accorded such findings.

Furthermore, The Florida Bar argues that case precedent and the Florida Standards for Imposing Lawyer Sanctions dictate Respondent be suspended from the practice of law for the sixty-day period recommended by the referee.

ARGUMENT

ISSUE I

THE REFEREE'S FINDINGS OF GUILT SHOULD NOT BE OVERTURNED ABSENT A SHOWING THAT SUCH FINDINGS ARE CLEARLY ERRONEOUS OR LACKING IN EVIDENTIARY SUPPORT.

When the referee's findings of fact in a disciplinary proceeding have been challenged, this court has repeatedly stated that such findings are to be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). While the "ultimate judgment remains with this court," the "initial fact-finding responsibility is imposed upon the referee. His findings of fact should be accorded substantial weight." The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968). Since the referee's findings of fact in disciplinary proceedings are entitled to the same presumption of correctness as the judgment of a trier of fact in a civil proceeding, The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981), the burden here is on Respondent to demonstrate that the findings should be overturned. Respondent has failed to meet his burden of proof, and the findings of fact made by the referee should be upheld.

A. Based on his prior course of dealing with Ms. [redacted], Respondent was required to obtain her consent before withdrawing his substantial attorney fees from her trust.

When Respondent was first retained to represent Ms. [redacted] in divorce proceedings, they signed a retainer agreement containing the following provision: "In the event such legal services exceed the $5,000 sum initially paid, you will pay the additional fees due within ten days from your receipt of each monthly billing" (Respondent's Exhibit 1). Despite that language, there is no evidence to suggest Respondent objected when Ms. [redacted] waited until the conclusion of the divorce action to pay his fees. In fact, billing statements mailed to Ms. [redacted] by Respondent's office during the pendency of the action carried a balance forward each month without comment (Respondent's Exhibit 2) (TR 54).

Prior to the subsequent proceedings brought against Mr. [redacted]s estate, Respondent and Ms. [redacted] entered into another retainer agreement. This second agreement contained language similar to the first: "You will be provided a monthly statement of legal services rendered and costs incurred which shall be paid in full within (10) days" (Bar Exhibit 4). Ms. [redacted] read and signed this agreement. Based on her prior course of dealing with Respondent, however, she assumed he would be paid at the conclusion of the litigation (TR 31, 54).

Monthly billing statements sent to Ms. [redacted] by Respondent from June 1983 through September 1983 did nothing to contradict this assumption (Respondent's Exhibits 11-14). While the billing statements did not carry a balance forward, they also did not reflect the fact that the previous balance had been paid to Respondent, as attorney, out of funds entrusted to Respondent, as trustee. Ms. [redacted] was unaware of this arrangement until sometime in late December 1983 or early January 1984 (TR 32-33). Partly as a result of Respondent's unauthorized withdrawals, the trust created to ensure Ms. [redacted]s financial security developed liquidity problems (TR 33, 42, 128). She was then forced to obtain an $18,000 loan from Barnett Bank to replenish her liquid assets (TR 42-43).

In The Florida Bar v. Bratton, 413 So.2d 754 (Fla. 1982), the attorney was charged with violating Disciplinary Rule 9-102(B)(4) for failing to return to his client $10,000 that had been posted in a bond foreclosure proceeding. The court rejected the attorney's argument that he held a lien on the $10,000 and was entitled to retain it. In adopting the referee's findings that the client's funds were entrusted to respondent for the specific purpose of posting a bond and not in partial payment of any fees, and when released should have been returned to the client, the court stated that "an attorney must not allow his claim of a fee for past services rendered to conflict with his duties as a trustee when entrusted with money

for a specific purpose of his client." Id. at 755. For this and other misconduct, the court publicly reprimanded the attorney and suspended him for 18 months. By the Bratton court's reasoning, Respondent herein clearly engaged in unethical conduct when he withdrew his attorney fees from Ms. [redacted]'s trust fund, a fund established solely for the purpose of providing for his client's future financial security.

B. Other than Respondent's own testimony, the record is void of any proof that Respondent drew up notes evidencing his debt to Ms. [redacted] at the times the loans were made.

On two separate occasions in 1982, Ms. [redacted] agreed to loan Respondent money from her $200,000 trust principal. On January 15, 1982, she loaned $12,500 to Respondent, individually, and $30,000 to John A. Barley and Associates, P.A. In February 1982, Ms. [redacted] loaned Respondent, individually, $5,000 more. Respondent claims that notes evidencing his indebtedness to Ms. [redacted] were typed up by his secretary on the day the loans were made, or the day thereafter, and promptly placed in Ms. [redacted]'s file (TR 275-276). Respondent further testified that he could not locate either the January 1982 notes or the February 1982 note when Ms. [redacted] asked to see them in January 1984, even though the notes were purportedly drawn up separately. Respondent then admits to backdating to 1982 the promissory

notes he drafted in 1984 pursuant to Ms. [redacted]'s inquiries (TR 276).

In his report, the referee found that no notes were drawn up evidencing the debt at the time the loans were made. From this finding of fact, a finding that is to be accorded substantial weight upon review, Wagner at 772, it is obvious that the referee found Respondent's version of the facts difficult to accept.

Respondent's initial brief makes much of the fact that the Bar elected not to call Respondent's secretary to rebut Respondent's testimony regarding the drafting of the notes. It should be observed, however, that Respondent also did not call his secretary as a witness, even though she purportedly typed up the original notes in 1982 and is the only person who could possibly have corroborated his version of the facts.

C. Contrary to the express terms of the property settlement agreement, Respondent drafted a trust document naming himself sole trustee.

Respondent disputes the referee's finding of fact in this regard and claims that his appointment as sole trustee was "entirely Ms. [redacted]s decision" (Respondent's Brief 19). Moreover, Respondent maintains that his testimony on this point is consistent with that of Ms. [redacted] (Respondent's Brief

19). That simply is not the case. Ms. [redacted] testified unequivocally that the single trustee provision in the trust document was Respondent's idea (TR 12).

The fact that Ms. [redacted] may have acquiesced to the naming of Respondent as sole trustee, or that she currently employs only one trustee, is irrelevant since the property settlement agreement gives her no discretion in this regard. In fact, Respondent himself testified that the three-trustee requirement was insisted upon by Mr. [redacted] and his attorney out of the former's fear that Ms. [redacted] would mismanage her money (TR 191-193). Accordingly, the property settlement agreement contained the following provision:

> Husband agrees to pay wife $250,000. Wife agrees to place said principal sum in the trust account of Wife's attorney for appropriate disbursement, it being understood that $200,000 of said sum shall be deposited in a trust to be created by Wife's attorney for her benefit naming a financial counselor, a certified public accountant and an attorney of the Wife's choosing as co-trustees.
>
> (Bar Exhibit 1)

Despite that provision, Respondent subsequently drafted a document in which he was named sole trustee of Ms. [redacted]s trust (Bar Exhibit 2). Respondent's argument that the referee's finding of fact is erroneous and should be overturned is, therefore, totally without merit.

D. Respondent challenges the referee's finding that only an additional $185,000 was obtained from Mr. [redacted]s estate. Yet Respondent's own billing statement reflects a total settlement amount of $185,000.

After Mr. [redacted]s death in 1982, his estate refused to fulfill his obligations under the settlement agreement entered into pursuant to the divorce. As a result, Respondent brought an enforcement action against the estate on behalf of Ms. [redacted]. The referee found that Ms. [redacted] eventually settled out of court for $185,000, the amount of money Mr. [redacted]s estate agreed to pay Ms. [redacted] on or before March 23, 1984 (RR 3).

Respondent, however, asserts that the settlement was worth "considerably more" than $185,000 to Ms. [redacted] based on the immediate satisfaction of the mortgage (Respondent's Brief 20). This assertion is contradicted by Respondent's own billing statement (Bar Exhibit 6). That statement reflects a "total amount of settlement" of $185,000. From that amount, Respondent deducted costs advanced to Ms. [redacted] and hourly attorney fees, as well as a 35% contingency fee. Nowhere on that statement is the $185,000 figure increased by an amount representing the purported enhanced value of the stipulated settlement (a value almost impossible to calculate), as Respondent now claims it should be.

Furthermore, the settlement reached between the parties was initiated by Ms. [redacted] after the enforcement action filed by Respondent had been pending for a year (TR 34-35). In fact, it took only a few days for the settlement agreement to be effected once the discussions proposed by Ms. [redacted] had begun. The agreement signed on September 16, 1983, was therefore more directly attributable to Ms. [redacted]s efforts than the efforts of Respondent. This fact makes Respondent's claim to additional fees even more questionable.

ISSUE II

THE FACTS OF THIS CASE MANDATE THAT RESPONDENT BE FOUND GUILTY OF VIOLATING THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR, AND THE REFEREE DID NOT ERR IN SO FINDING.

The testimony and exhibits presented at the final hearing in this matter clearly establish multiple instances of misconduct by Respondent. After a careful review of the evidence, the referee recommended that Respondent be found guilty of six separate violations of the Code of Professional Responsibility of The Florida Bar. Each recommendation is supported by competent, substantial evidence and should be upheld.

A. It was impossible under the facts of this case for Respondent to be both debtor and trustee without violating Rules 5-101(A) and 5-104(A) of the Code of Professional Responsibility of The Florida Bar.

In January 1982, Respondent borrowed $42,500 from Ms. [redacted]s trust (TR 197). That same month Respondent drafted a document naming himself trustee of the trust (TR 260). Under Rule 5-101(A) (except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests), Respondent should

never have assumed that position since he was already indebted to the trust. Respondent's failure to make timely interest payments on the money he borrowed from the trust is clear evidence that his professional judgment on behalf of his client was affected by his own interests. It was impossible under the facts of this case for Respondent to wear the hats of both trustee and debtor without harming the interests of his client.

A conflict also resulted from Respondent's position as trustee and his representation of Ms. [redacted] in the enforcement and modification action. Respondent, as trustee, paid to himself, as lawyer, attorney fees from Ms. [redacted]'s trust without her knowledge or consent.

In his brief, Respondent asserts there was no testimony presented to the referee upon which he could find that Ms. [redacted] expected Respondent to exercise his professional judgment on her behalf in the loan transaction between them. Therefore, argues Respondent, the referee erred in recommending Respondent be found guilty of violating Rule 5-104(A) (a lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure) of the Code of Professional Responsibility of The Florida Bar. Contrary to Respondent's

assertions, Ms. [redacted] trusted Respondent completely to act in her best interest throughout the course of their attorney-client relationship. Following is an excerpt of Bar Counsel's examination of Ms. [redacted] at final hearing:

> Q. Did you place your full trust in Mr. Barley?
>
> A. Yes.
>
> Q. Would you say this trust was almost a blind trust?
>
> A. Yes.
>
> Q. And you -- you looked to Mr. Barley to give you the best legal advice you could get?
>
> A. Yes. (TR 134)

Ms. [redacted] responded similarly when subsequently questioned by Respondent's counsel:

> Q. You said a few moments ago that you looked to John for the best legal advice you could get. But you didn't just -- just automatically say to yourself, well, if John says it's gospel. I mean, y'all would discuss things wouldn't you? You wouldn't sit there lamely and listen.
>
> A. I'd fight with him. But if John said it was gospel, it did usually wind up gospel. Yeah. (TR 137)

From the foregoing, it is apparent that Respondent's challenge to the referee's recommendation of guilt with regard to the loan transaction is completely unfounded. Ms. [redacted]

trusted Respondent to act in her best interest at all times. This trust was violated when Respondent entered into a borrowing transaction with Ms. [redacted], a transaction in which the former's interest directly conflicted with that of the latter. It is clear that this differing interest impaired the exercise of Respondent's professional judgment on behalf of Ms. [redacted] in the transaction: promissory notes were not drawn up until two years after the loan was made; the notes were unsecured and had no provision for attorney fees upon default; the notes were long-term and bore a 12% rate of interest; and the notes had a ninety-day grace period (Bar Exhibit 3). These terms, all dictated by Respondent, were plainly beneficial to him and detrimental to Ms. [redacted]

Respondent argues that he had no responsibility to refer Ms. [redacted] to independent counsel concerning the loans. While the Code of Professional Responsibility of The Florida Bar does not explicitly require attorneys to do so, it does prohibit business transactions with clients absent full disclosure. Full disclosure in this case required Respondent to at least suggest to Ms. [redacted] that she seek the advice of another attorney. By Respondent's own admission, he did not do so (TR 176).

Furthermore, business transactions between an attorney and his client are to be closely scrutinized. Waldeck v. Marks,

328 So.2d 490, 493 (Fla. 3rd DCA 1976). There is a "heavy burden" upon the attorney to show the fairness of his dealings with his client. Id. The terms of the promissory notes drafted by Respondent, as well as his missed interest payments, clearly negate any assertion that Respondent has met this burden.

B. Respondent charged Ms. [redacted] twice for the same services, resulting in a fee that was clearly excessive.

Citing The Florida Bar v. Miller, Supreme Court of Florida, Case No. 54,443 (March 15, 1979), Respondent argues that the referee's recommendation as to guilt should be dismissed because he did not make specific findings to support his conclusion that DR 2-106(A) (a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee) was violated. In Miller, the court objected to the referee's "discourse", in place of specific findings of fact, "on the need for honesty and integrity in dealing with clients." Id., footnote 2. There is no such absence of specific findings here. In his report, the referee made the following findings of fact with respect to Respondent's fee arrangement with Ms. [redacted]:

> For his services in [the enforcement action against the estate], the Respondent requested a fee of $100.00 per hour plus one-third of all sums recovered in excess of the amount

> due under the original property settlement agreement. Ms. [redacted] objected to both an hourly rate and a contingency fee and the Respondent subsequently agreed in writing to reduce the contingency fee by any amount to which he was entitled under the hourly fee arrangements.
>
> . . .
>
> In September 1983, Ms. [redacted] settled with her former husband's estate for the additional sum of $185,000. The Respondent deducted from this settlement, attorney's fees for himself in the total amount of $62,307.00. Of this amount, he presented Ms. [redacted] an accounting of hourly fees in the amount of $40,630.00 and a contingency fee of $21,677.00. Ms. [redacted] again objected to the Respondent charging both a contingency fee and an hourly fee. (RR 2-3)

Respondent also argues that it is impossible to determine whether the referee based his recommendation of guilt on the above findings of fact. That those findings of fact were indeed the basis upon which the referee found Respondent guilty of charging a clearly excessive fee becomes evident once the transcripts of the final hearing are examined. At the hearing, Respondent's counsel moved for acquittal on each of the alleged disciplinary violations. Bar Counsel, in response, reviewed the evidence supporting each allegation in the Bar's complaint. As to the alleged violation of DR 2-106(A), Bar Counsel argued: "[N]ot only did [Respondent] take his hourly fees, he took his contingency fee on top of this" (TR 209). Thus, it is unmistakable that the above-described actions of

Respondent resulted in the referee's recommendation of guilt on DR 2-106(A).

C. In violation of DR 2-106(C), Respondent charged a contingency fee in a domestic relations matter.

In the enforcement and modification action, Respondent charged Ms. [redacted] a contingency fee of one-third of all sums recovered in excess of the original property settlement agreement. Respondent argues that he did not violate DR 2-106(C) since the litigation was not a divorce proceeding. However, the rule prohibits a contingency fee in any "domestic relations" matter, not just a divorce proceeding. The action against Mr. [redacted]s estate was to modify and enforce the property settlement agreement entered into pursuant to the divorce. This is the very sort of domestic relations matter encompassed by the rule, and the referee properly recommended Respondent be found guilty of violating it.

D. Respondent failed timely to pay Ms. [redacted] the $21,000 contingency fee he improperly charged, as well as the proceeds she was due from the loans.

Respondent, without Ms. [redacted]s knowledge or consent, subtracted a $21,000 contingency fee from her settlement with [redacted]s estate. Respondent refused to return the money even though Ms. [redacted] made repeated requests. It was

not until Ms. [redacted] hired other counsel to pursue her claim to the money did Respondent return the funds.

Ms. [redacted] was similarly entitled to receive the proceeds from the loans she made to Respondent. Yet, Respondent defaulted when Ms. [redacted] accelerated the notes. Respondent thus failed, in violation of DR 9-102(B)(4), to pay promptly the monies to which his client was entitled.

In his brief, Respondent incorrectly states that DR 9-102(B)(4) requires a lawyer to comply with a client's request to deliver "trust funds." Since, argues Respondent, neither the contingency fee nor the loan proceeds can be characterized as trust funds, he did not violate the rule. The rule, however, does not specify trust funds. Instead, it reads much more broadly: "A lawyer shall promptly pay or deliver to the client, as requested by a client, the funds, securities, or other properties in possession of the lawyer which the client is entitled to receive." Thus, Respondent's argument is without merit.

E. Several acts of omission committed by Respondent while in Ms. [redacted] s employ clearly reflect adversely on his fitness to practice law.

Most of Respondent's misconduct stems from his dual and often conflicting roles of debtor and trustee. As soon as

Respondent borrowed money from Ms. [redacted], he developed a personal interest in her financial affairs. This interest resulted in Respondent's failure to render the best possible legal advice to his client.

Disciplinary Rule 5-104(A) of the Code of Professional Responsibility of The Florida Bar prohibits business transactions with a client unless the client consents after full disclosure. Full disclosure in this case required Respondent to suggest to Ms. [redacted] that she seek independent advice concerning her loans to him. No such suggestion was ever made.

The way in which Respondent subsequently handled his personal loan transactions with Ms. [redacted] also reflects adversely on his fitness to practice law. When the notes evidencing his $40,000 debt to her were finally drafted in 1984, they were unsecured and contained no provision for attorney fees. Such omissions, contrary to established practice, left Ms. [redacted] unprotected in event of default. In fact, Respondent did fail to repay the loans on time, forcing Ms. [redacted] to initiate a civil suit in order to obtain satisfaction.

Respondent's actions in connection with the establishment of Ms. [redacted]'s trust also adversely reflect on his fitness

to practice law. In naming himself sole trustee of Ms. [redacted]'s trust, Respondent totally disregarded the provisions of the property settlement agreement requiring the appointment of three trustees. Respondent also failed in his duty as trustee by allowing Ms. [redacted]'s trust to be depleted. Respondent even contributed to this depletion by withdrawing his attorney fees from the fund. Ms. [redacted] was not informed of this depletion until Respondent told her that she would have to obtain a loan in order to ensure the trust's continued liquidity.

These omissions, all contained in the referee's findings of fact, provide sufficient evidence that Respondent violated DR 1-102(A)(6).

ISSUE III

THE REFEREE PROPERLY FOUND THAT THE SEVERITY OF RESPONDENT'S MISCONDUCT WARRANTS THE IMPOSITION OF A PERIOD OF SUSPENSION.

In the past, the Supreme Court of Florida has not hesitated to discipline attorneys publicly for misconduct in circumstances similar to those in the case at bar. This discipline has ranged from public reprimand to disbarment, depending upon the seriousness of the misconduct itself and the presence or absence of mitigating or aggravating factors.

In The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981), a case with facts similar to those at bar, this court publicly reprimanded an attorney who, with his client's permission, borrowed money his client had deposited with him. Though the loan was to be short-term, the respondent was unable to repay it for nearly two years despite repeated attempts by the client to recover his money. For this action, the referee recommended that the respondent be found guilty of violating Disciplinary Rules 5-101(A), 5-104(A), and 9-102(B)(4). The court agreed with this recommendation and finding no past disciplinary record, determined that the respondent should be publicly reprimanded. Thus, contrary to the assertion made by Respondent in his brief, the Golden court did cite a

mitigating factor in ordering a public reprimand rather than a private admonishment.

The attorney in The Florida Bar v. Staley, 457 So.2d 489 (Fla. 1984), was also publicly reprimanded by the Supreme Court of Florida for accepting employment in a loan transaction when his own financial and business interests were involved, in violation of Disciplinary Rule 5-101(A), and for entering into a business transaction with his client in which they had differing interests and the client expected the respondent to exercise his professional judgment to protect his client, in violation of Disciplinary Rule 5-104(A). The court further ordered that the respondent by placed on probation for one year.

The Florida Bar v. Simonds, 376 So.2d 853 (Fla. 1979), involved an attorney who obtained investment loans from two of his clients. No written security was provided to either client at the time of the loan or for several months thereafter. The attorney did subsequently provide each a note for $20,000 bearing a 10% interest rate payable in five years and a second note for $5,000 bearing no interest. The investment venture failed and the clients lost almost half of their money. In accepting the attorney's petition for leave to resign in lieu of discipline for this misconduct, and for other violations of the Code of Professional Responsibility, the court noted that the respondent, like Respondent herein, failed to properly

advise his clients of their legal rights, of the fact that their interests in the transaction differed from his, and of the "almost strict fiduciary" standard imposed upon attorneys who enter into business transactions with their clients. Id. at 854.

In The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978), the court held that an attorney who, among other things, accepted employment as administrator of an estate when the exercise of his professional judgment on behalf of his client was or could reasonably have been affected by his own interests, should be suspended for one year from the practice of law. The misconduct in Papy stemmed from the respondent's actions while administrator of an estate which included a roofing business. During his tenure as administrator, the respondent sold the assets of the aforementioned company to a company of which he was an officer and subsequent owner. Even the dissenting justices in Papy found the attorney's conduct clearly objectionable. In language relevant to the case at bar, the dissent noted that "it was obviously improper for [respondent] to become financially involved personally with an estate for which he was serving as attorney and legal representative." Id. at 7. Although both the majority opinion and the dissent found fault with respondent's actions, a consideration of the totality of the circumstances in the

case resulted in imposition of a one-year suspension and rejection of the referee's recommendation of disbarment.

Disbarment was also the recommended discipline in The Florida Bar v. Drizin, 435 So.2d 796 (Fla. 1983), a case involving misrepresentation, conduct adversely reflecting on fitness to practice law, conflicting business transactions with client, and wrongful use of client's funds. The court held that such misconduct warranted acceptance of the referee's recommendation of disbarment from the practice of law in Florida for five years.

The existence of cumulative misconduct or the lack of a disciplinary record is generally afforded considerable weight in a determination of appropriate discipline. Cumulative misconduct can mean that an attorney has a discipline record; that previous discipline involved unethical conduct similar to that in the case at bar; that the case at bar involves repeated violations of a similar nature; or that the case at bar involves more than one type of misconduct. While Respondent has no prior disciplinary record, the instant case does contain more than one type of misconduct. Respondent has been found guilty of violating six disciplinary rules, the aggregate effect of which warrants sterner sanctions than would be appropriate for a single act of misconduct. This was the holding in The Florida Bar v. Mavrides, 442 So.2d 220 (Fla.

1983), a case in which a member of The Florida Bar was found guilty of eight violations of the Code of Professional Responsibility. The Mavrides court found that none of the derelictions, standing alone, would require disbarment. The cumulative nature of the violations, however, compelled the court to accept the referee's recommendation of disbarment.

Similarly, in The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981), the Supreme Court of Florida held that a one-year suspension from the practice of law was not excessive punishment in light of the fact that Abrams' misconduct involved solicitation of employment, a subsequent attempt to withdraw therefrom without good cause, conflict of interest, and misrepresentation to a court. The court reasoned that a series of acts of misconduct which in aggregate constitute a serious breach of ethics warrants sterner sanctions.

Additionally, the Florida Standards for Imposing Lawyer Sanctions state that the vulnerability of the victim and substantial experience in the practice of law also may be considered in aggravation. Respondent has been a member of the Bar for 19 years. [redacted] hired him in 1980 to represent her in divorce proceedings initiated by her husband after 22 years of marriage. During these proceedings, Ms. [redacted] was treated for alcoholism at the suggestion of Respondent and relied on him for personal advice (TR 58-59).

Throughout the course of their attorney-client relationship, Ms. [redacted] completely trusted Respondent to act in her best interests. Respondent, however, repeatedly violated this trust. Among other things, he persuaded Ms. [redacted] to enter into a business transaction with him that was detrimental to her financial interests but beneficial to his own; he charged her both a contingency fee of $21,677.03 and hourly fees totaling $50,105.00; and he failed to pay promptly to his client the funds to which she was entitled. Thus, evidence relating to each of the aforementioned aggravating factors is part of the record of this case.

The Florida Standards also specify factors that should not be considered as either aggravating or mitigating. Among these are 9.4(c) (withdrawal of complaint against the lawyer) and 9.4(f) (failure of injured client to complain). Contrary to Respondent's assertions, then, the fact that Ms. [redacted] did not file a complaint with The Florida Bar or that she continued to use Respondent as her attorney has no bearing on this case.

Respondent also argues that his conduct warrants a private reprimand, rather than a public sanction, because the referee found that it did not involve dishonesty, fraud, or misrepresentation. In support of this proposition, Respondent cites The Florida Bar v. Weed, 513 So.2d 126, 128 (Fla. 1987), where the court ruled that the presence of such factors

removed Mr. Weed's offenses from that realm of conduct requiring merely a private reprimand. It does not necessarily follow, however, that the absence here of dishonesty, fraud, or misrepresentation makes Respondent's misconduct "minor", thereby warranting only a private reprimand. That this is true is evidenced by the fact that this court has repeatedly ordered public sanctions against attorneys for misconduct not involving DR 1-102(A)(4).

Based upon the nature of Respondent's misconduct, the presence of numerous aggravating factors, the level of discipline imposed in similar cases cited herein, and the recommended discipline set forth in the Florida Standards for Imposing Lawyer Sanctions [Section 4.12 (suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client); Section 4.32 (suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client), and Section 7.2 (suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system)], The Florida Bar asks this court to approve the referee's recommendation of a sixty-day suspension.

CONCLUSION

For the reasons cited herein, this court should sustain the referee's findings of fact and approve his recommendations of guilt.

Additionally, The Florida Bar respectfully requests that Respondent be suspended from the practice of law in Florida for sixty days and ordered to pay costs in these proceedings, as recommended by the referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief was mailed by certified mail # P 978 505 602, return receipt requested, to JOHN A. WEISS, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32302, this 5th day of December, 1988.

JAMES N. WATSON, JR.
Bar Counsel