IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN A. BARLEY,

Respondent.

_____/

CONFIDENTIAL
CASE NO. 66,701

INITIAL BRIEF OF RESPONDENT

JOHN A. WEISS
P.O. Box 1167
Tallahassee, FL 32302
(904) 681-9010
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF THE FACTS AND THE CASE

Respondent appeals the Referee's recommendation that Respondent be found guilty of violating the disciplinary rules listed in paragraph III of the Referee's report, various factual findings made by the Referee in paragraph II of his report, and the Referee's recommendation that Respondent receive a 60-day suspension.

These proceedings commenced in March 1984 when a complaint against Respondent was filed by the former attorney for Dean [redacted] in dissolution of marriage proceedings against Respondent's client, [redacted] That complaint was filed without the knowledge or authorization of Ms. [redacted] (TR 46). The complainant had originally represented Mr. [redacted] in dissolution of marriage proceedings, but was forced to withdraw from the representation when a motion to disqualify for conflict of interest, filed by Respondent, was granted (TR 252).

The Florida Bar found probable cause in May 1984 and the Bar's formal complaint was filed on March 13, 1985. On March 12, 1987, three years after the grievance was filed, the case went to final hearing.

The Referee's report was filed in this court on June 17, 1988, and Respondent timely filed his petition for review.

Respondent was retained by Ms. [redacted] on October 1, 1980 (R. Ex. 1). Although Ms. [redacted] did not remember the details of her initial retainer agreement with Respondent (TR 8, 9, 49-

51), her employment agreement specifically indicated that she paid a $5,000 fee deposit and a $991 cost deposit to Respondent to be deposited into trust and drawn down periodically.

Ms. [redacted]s divorce proceedings had been initiated by her husband of 22 years. The marital estate was substantial.

At the time that he accepted Ms. [redacted]s case, Respondent had been in private practice for approximately two years (TR 240), although he had been admitted to the Bar since July 1969 (TR 239).

Respondent's original fee arrangement with Ms. [redacted] called for him to receive $100 per hour for fees. Originally, he had asked for a $5,000 non-refundable retainer. However, at Ms. [redacted]'s request, that portion of the initial fee contract was deleted (TR 242).

In December 1980, Respondent filed an answer and a motion to dismiss the husband's initial petition for dissolution of marriage. Subsequently, an amended petition was filed to which Respondent filed an answer and a counter-petition (TR 245).

In December 1980, Respondent received a telephone call from Mr. [redacted]s lawyer asking that activity on the divorce be delayed. Respondent and Ms. [redacted] complied, and the matter laid fallow until June 1981 (TR 245).

In June 1981, the proceedings were resuscitated by Mr. [redacted]'s lawyer filing a motion for final hearing on extremely short notice. When Respondent's motion for continuance was denied, he was forced to appeal the decision to the District

Court of Appeal. Meanwhile, a motion to disqualify husband's lawyer was granted by the court (TR 252).

Ultimately, the dissolution of marriage proceedings were settled when the parties executed a property settlement agreement on September 24, 1981 (B. Ex. 1).

During the course of his attorney-client relationship with Ms. [redacted], Respondent developed the closest relationship that he has ever had to any client (TR 249). During their discussions, it became apparent to Respondent that Ms. [redacted] was an alcoholic. Respondent, who was sensitive to the problem of alcoholism because his mother was one (TR 250), made arrangements for Ms. [redacted] to receive treatment at The Friary in Pensacola (TR 251, 58, 59).

The final settlement that Respondent obtained for Ms. [redacted] was substantial. She immediately received $250,000 cash, $200,000 of which Respondent almost immediately placed in a 90-day Certificate of Deposit while investment possibilities were researched. The husband also agreed to pay the wife $90,000 in the form of 45 consecutive monthly payments and to retire the balance of the mortgage on the marital homestead, which was deeded over to Ms. [redacted] by continuing the $1,535 monthly payments on the household. The mortgage at the time of the marital settlement agreement amounted to approximately $150,000. Mr. [redacted] also paid off all of Ms. [redacted]'s outstanding bills, which totaled approximately $11,000. They included outstanding medical bills, among which were the costs of The

Friary, various loans and charge card accounts, and the note on her car (TR 253, 254).

Mr. [redacted] also signed over to Ms. [redacted] a motor home which she sold in approximately January 1981 for $33,000. All of the proceeds from that sale went directly to Ms. [redacted] (TR 254, 255).

Respondent estimated that Ms. [redacted]s settlement was worth approximately $850,000, for which he charged her approximately $26,000 in fees and costs (TR 255). Some of the costs were extraordinary because Respondent was forced to travel to Dayton, Ohio, and to Lakeland, Florida, to take depositions (TR 255, 256).

One of the terms of the marital settlement agreement was that $200,000 of the $250,000 paid to Ms. [redacted] would be placed into a trust for her benefit. That trust was to be administered by three trustees, a lawyer, a financial counselor, and a certified public accountant (B. Ex. 1, p. 4).

After discussion with Respondent, Ms. [redacted] elected to have only Respondent administer her trust (TR 64, 258). (Even after Ms. [redacted] discharged Respondent as her lawyer and trustee, and after receiving the advice of her new lawyer, Bob Hinkle, she continued to use but one trustee to administer her trust, CPA Larry Lehman [TR 129, 149]).

In January 1982, the CDs that had been purchased with the $200,000 cash settlement matured, drawing approximately $8,000 in interest (TR 258, 62). At that time, a formal trust document was

drawn up by Respondent ratifying the trust relationship that he had had with Ms. [redacted] since he first received the $250,000 from Mr. [redacted]

On approximately January 14 or 15, 1982, Ms. [redacted] executed the new trust agreement. The effective date of the agreement was September 25, 1981, the day after Ms. [redacted] executed the marital settlement agreement (TR 260, 62). Ms. [redacted] testified that she felt the trust had been in effect since that date (TR 62).

The trust agreement bore witness dates stating they were executed on September 25, 1981. Those dates were on the typed trust agreement through error. Ms. [redacted] did not object to signing the documents bearing the September 25, 1981 date, even though she signed them in January of 1982, because she felt the trust had been in effect since that date (TR 63). Respondent did not know why the notarial certificates bore the date September 25, 1981, but it was not by design (TR 261).

Prior to signing the trust agreement, Respondent researched investment opportunities for the corpus of Ms. [redacted]'s trust fund. He sought the advice from former Chief Justice of the Supreme Court Stephen C. O'Connell and he inquired of Merrill Lynch and Waddell and Reed (TR 182, 262). Ultimately, he selected Vicki Kirkbride, a registered representative with Waddell and Reed (TR 262).

Ms. Kirkbride provided Mr. Barley with periodic accounting of the Waddell and Reed investments. Approximately three or four

months after the investment was set up, at Respondent's urging, Ms. Kirkbride met with Ms. [redacted] in Respondent's office (TR 218). They met for approximately 2½ hours. Respondent called the meeting because he was concerned that Ms. [redacted] did not fully understand the nature of her investments. Even after Respondent was discharged, Ms. [redacted] continued her investments with the Waddell and Reed investment firm (TR 150).

At about the time Respondent entered into the relationship with Waddell and Reed, he approached Ms. [redacted] about loans to himself and to his firm. He apologized to her for asking for the loan and fully explained the reasons for his need to borrow money. He specifically told her that he had approached banks for loans and had been turned down (TR 18, 174, 267).

Ms. [redacted] completely buttressed Respondent's testimony that he advised her that he needed to borrow money because he had been turned down by various banks (TR 18, 67). She testified that she did not show any reluctance to Respondent to lend him the money because she knew what it was like to try and borrow money from a bank and have it turn its back on you (TR 67).

During January and February 1982, Ms. [redacted] lent $47,500 to Respondent and to his firm.

The arrangement between the parties was very informal--it was a loan between friends. Ms. [redacted] testified that a specific interest was not agreed upon. She understood that it would be the same as the highest interest that her investments would get, i.e., at least "as high as" she was making in her cash

management account (TR 19, 68). Respondent's understanding was that he would pay her 12%, compounded semi-monthly, to be paid to her in the form of two payments per month in the amount of $237.50 each (TR 273, 274).

Both parties understood that Respondent would pay off the loans when a big case that he was handling was settled (TR 20, 70, 274). (That occurrence took place in September 1985, and Respondent promptly paid off all indebtedness to Ms. [redacted] at that time [TR 274].)

At the time that Respondent borrowed the $47,500 from Ms. [redacted] she was in a very secure financial posture. She had no outstanding indebtedness. Her assets with Waddell and Reed were approximately $160,000. Mr. [redacted] was making her mortgage payments, including insurance and interest, and was paying her $2,000 per month living expenses. Furthermore, the proceeds from the sale of the motor home, totaling $33,000, had just gone directly to her (TR 267, 268, 70, 71).

Respondent immediately typed up notes evidencing his indebtedness to Ms. [redacted]. However, those notes were subsequently lost and he had to retype them in January 1984, when he was discharged. There was no evidence in the record whatsoever to rebut Respondent's testimony in this regard (TR 275, 276).

On July 31, 1982, Mr. [redacted] died in a racing accident. Shortly thereafter, his estate stopped making the mortgage payments on Ms. [redacted]s house and discontinued her $2,000 per month living expenses. She asked Respondent to represent her in

her dispute with the estate. On September 27, 1982, Ms. [redacted] formally retained Respondent with a written fee agreement (B. Ex. 4). This agreement was a redraft of the original agreement proposed by Respondent. In that agreement, Ms. [redacted] agreed to pay Respondent $100 per hour plus one-third of all sums recovered above that provided for in the original September 1981 property settlement agreement. The clause following that agreement was to the effect that the continued fee would be reduced to the extent of the hourly fees earned by the firm. The parties further agreed that Respondent would submit monthly statements to Ms. [redacted] which would be paid within 10 days.

Shortly after being retained, Respondent filed a motion to enforce and to modify the original marital settlement agreement with Mr. [redacted] and he filed a complaint for damages against the estate in which he alleged breach of contract and fraud (R. Ex. 8, 9; TR 282).

Respondent was under a time restraint in filing his actions against the estate because of the one-year prohibition under Rule 1.540.

Because Respondent recognized that he might be a witness in the action, he associated Tallahassee lawyer Barry Richard in the case. Ms. [redacted] specifically consented, in advance, to Mr. Richard's retention (TR 284, 83, 84).

Ultimately, the dispute between Ms. [redacted] and the estate was settled. Ms. [redacted] received $100,000 from the estate on

September 23, 1983, and an additional $85,000 on or before March 23, 1984. In addition, the estate immediately paid off the mortgage on Ms. [redacted]s house. At that time, the mortgage was in excess of $135,000 (TR 291). Under the terms of the original marital settlement agreement in September 1981, Mr. [redacted] did not have to retire the mortgage during the remainder of its 15-year term.

Shortly after the settlement of the case against the estate, Respondent submitted a closing statement to Ms. [redacted] (B. Ex. 6). In that statement, Respondent indicated that he was disbursing as fees $40,630 to his firm and $9,475 to Mr. Richard's firm. He then deducted from the $185,000 figure the various sums that Ms. [redacted] had lost in interest as a result of the estate failing to live up to its bargain, and computed the figure of $61,905.81 as recovery over and above the original settlement. Respondent then took a 35% contingency fee from that sum, i.e., $21,677.03.

Respondent testified that he delivered this closing statement to Ms. [redacted] shortly after the settlement (TR 297). On January 23, 1984, Ms. [redacted] met with Respondent and, for the first time, indicated that she had objections to the fee disbursals contained on his closing statement (TR 297, 303). Shortly prior to that meeting, on January 20, Respondent had delivered to Ms. [redacted] notes evidencing his indebtedness to her.

Soon after the January 24, 1984 meeting, Ms. [redacted] discharged Respondent and hired Mr. Hinkle to represent her. Respondent and Mr. Richard met with Mr. Hinkle on February 29, 1984. Prior to that meeting, Respondent had received a letter from Ms. [redacted] dated February 16, demanding acceleration of the notes and another letter from Mr. Hinkle dated February 22, requesting information about the representation.

At his meeting with Mr. Hinkle, Respondent made it clear that he did not wish to be embroiled with any fee dispute with Ms. [redacted] He stated his position regarding the contingency fee, asked Mr. Hinkle to consider it, and then said that he would abide with Mr. Hinkle's and Ms. [redacted]'s decision (TR 305-307, 104).

The basis for Ms. [redacted]'s accelerating the note was Respondent's failure to make two interest payments early on in the relationship.

At final hearing, Respondent provided the Referee with figures showing that the interest that he paid Ms. [redacted] on her notes exceeded by $916 the amount she would have earned in Certificates of Deposit and exceeded by $1,967 the amount she would have earned had the $47,500 remained in the cash management account at Waddell and Reed (R. Ex. 16).

Larry Lehman, the successor trustee to Respondent and a CPA, testified that he found no irregularities in Respondent's handling of the trust account (TR 150). He also pointed out that Respondent was very cooperative in switching over the trust (TR 149).

Curiously, despite her retaining the new lawyer, and despite the Bar's allegations of impropriety, Ms. [redacted] continued with a single trustee over her trust, i.e., Mr. Lehman, after Respondent was discharged (TR 129, 149). Waddell and Reed continued to handle her account (TR 150).

Respondent resolved his dispute with Ms. [redacted] which primarily surrounding payment of attorney's fees and accountant's fees, in December 1984. At that time, he paid a lump sum to her in the amount of $37,000 and agreed to $2,500 per month payments for the next 19 months. In September 1984, he retired the entire balance due when a large case he was handling settled out (TR 274).

Ms. [redacted] testified that her only displeasure with Respondent was his charging a contingency fee on the settlement of her suit against the [redacted] estate (TR 40). She further testified that the complaint was filed against Respondent without her authorization and that Respondent has represented her in the drafting of her will after these disciplinary proceedings began (TR 46).

SUMMARY OF ARGUMENT

The Referee's findings as to various factual matters are not supported by any evidence before him. These factual findings, in some instances, are material to the Referee's recommendations as to guilty findings.

The Referee erroneously recommended that Respondent be found guilty of each of the disciplinary rules listed in his report. In fact, the Referee's findings of fact and the plain interpretation of the rules shows that none of Respondent's conduct violated any ethical precepts.

Even if Respondent was guilty of some misconduct, there was no dishonesty, fraud, deceit, or misrepresentation involved. All of his misconduct was good faith lapses of judgment. When these factors are combined with the various mitigation involved, i.e., no disciplinary record during 19 years of practice, interim rehabilitation (in the five years since the last possible wrongful act Respondent had been guilty of no misconduct whatsoever) and Respondent's immediate agreement with his client's position, when he had defenses available to him, removed this discipline from the realm of that requiring a public sanction.

ARGUMENT

I

VARIOUS FINDINGS OF FACT BY THE REFEREE ARE CLEARLY ERRONEOUS OR UNSUPPORTED BY THE EVIDENCE BEFORE THE COURT.

The Referee made several significant findings of fact that are clearly erroneous or are unsupported by the evidence before the Court. All of the Referee's findings of fact are included in section II of his Report of Referee.

A. Respondent Did Not Make Withdrawals of His Attorney's Fees Without Ms. [redacted]s Knowledge or Consent.

On the second page of his report, while discussing Ms. [redacted]s retaining Respondent for her action against the estate of her deceased ex-husband, the Referee said:

> Mrs. [redacted] agreed to this arrangement and assumed that the Respondent would be paid at the conclusion of the case, as he had been in the divorce action. However, during the course of the representation, the Respondent began to make withdrawals for his attorney's fees from Mrs. [redacted]s trust, of which he was the sole trustee. This was done without Mrs. [redacted]s knowledge or consent and she was unaware of it until sometime during the latter part of 1983 or the early part of 1984.

The predicate for the above finding by the Referee, i.e., that Mrs. [redacted] "assumed" that Respondent would be paid after his representation was over in like manner as the original divorce action, is completely erroneous and is unsupported by the evidence. The Referee then uses this improper finding to leap-frog to the conclusion, once again erroneous, that Respondent paid his fees without Ms. [redacted]s knowledge and consent.

In Ms. [redacted]'s original divorce action, as evidenced by Respondent's Exhibit 1, Ms. [redacted] paid Respondent a $5,991 retainer, which he placed into trust. The specific agreement between the parties, as laid out in the October 1, 1980 fee arrangement (R. Ex. 1) and signed by both parties, was that:

> It is further understood and agreed that all legal services performed will be billed to you on a monthly basis and that payment thereof will be satisfied by charging the same against the $5,000 sum initially paid, but that in the event such legal services exceed the $5,000 sum initially paid, you will pay the additional fees due within 10 days on your receipt of each monthly billing thereafter generated. It is further understood and agreed that all costs incurred will be billed to you on a monthly basis, and that payment of such charges will be satisfied by charging the same against the $991 sum initially paid, but that in the event such costs exceed the $991 sum initially paid, you will reimburse me for the additional costs incurred within 10 days from your receipt of each monthly billing thereafter generated.

The next sentence in the fee agreement was struck through by the parties because Ms. [redacted] objected to the $5,000 being non-refundable. Obviously, she read and completely understood the October 1, 1980 fee arrangement.

Ms. [redacted] was not a malleable client who blindly signed every document placed before her. Obviously, she read and understood the October 1, 1980 fee contract placed before her. Just as obviously, that agreement called for Respondent to be paid from the cost and fee deposit initially entrusted to him and thereafter she would be billed on a monthly basis.

Respondent's Exhibit 2 indicates that Respondent had been billing Ms. [redacted] for his divorce representation prior to the end of the case.

Ms. [redacted] was very confused about her fee arrangement with Respondent. When asked during direct examination by Bar counsel if Respondent had made any demands for payment of fees during the pendency of the initial divorce action, Ms. [redacted]'s reply was not a firm negative. It was, "Not that I recall" (TR 9). When asked if she had to execute any sort of written fee agreement before the divorce proceedings, she also testified, "I don't recall" (TR 9). Clearly, her testimony indicates a total lack of recollection of the basis of her original fee arrangement with Respondent and the payment of fees during the pendency of the action.

When shown Respondent's Exhibit 1, the October 1, 1980 fee agreement executed by her, Ms. [redacted] could only "vaguely" recognize the document. Even after reading it, she did not remember paying Respondent $5,991 as a retainer, but only remembered a $5,000 fee. She did not remember striking through the non-refundable provision of the October 1, 1980 agreement (TR 49, 50, 9).

Just as was true with the original divorce litigation, in Ms. [redacted]'s action against the [redacted] estate, her retainer agreement with Respondent was reduced to writing (B. Ex. 4). That agreement, dated September 27, 1982, and signed by both parties, contained the following provision:

> You will be provided a monthly statement of legal services rendered and costs incurred which shall be paid in full within ten (10) days from the date issued.

This written agreement completely rebuts any finding that Ms. [redacted] thought she would have to pay no fees until the case was over.

Consistent with the fee agreement, Respondent billed Ms. [redacted] periodically. Respondent's Exhibits 10 through 14 are copies of statements that were sent to Ms. [redacted]. The first two of those statements clearly reflect payment to Respondent of fees and completely rebut the Referee's finding that Ms. [redacted] did not know that Respondent's fees were being paid out of her trust. Where else could Respondent have received the $15,965.66 received on account reflected on the last page of Respondent's Exhibit 10?

Respondent testified that Exhibit 10 was prepared for the purpose of discussing with Ms. [redacted] "the need to make other arrangements for funds to support the litigation and to support her from May 1983 forward" (TR 287). It was at that time that Respondent discussed with Ms. [redacted] and her daughter the possibility of their taking out a loan from Barnett Bank to fund her living expenses and to continue the litigation as opposed to her drawing down on some of her long-term investments.

Respondent's Exhibits 11, 12, 13 and 14 are all statements for services rendered submitted to Ms. [redacted] None of those statements show the balance carried forward from the prior statement. (In the divorce case, the statements had shown a

balance carried forward.) In other words, it is clear that all prior statements for services had been paid. Ms. [redacted] knew full well that Respondent's fees and costs were being paid. There is only one place from which funds could have come to make those payments--her trust.

Even Ms. [redacted] did not evince displeasure with the manner in which Respondent paid his fees throughout the estate litigation. Her only problem with him was his taking a contingency fee after the litigation was settled (TR 40).

In addition to receiving statements from Respondent, which clearly put her on notice that the trust was paying her extensive fees and costs, Ms. [redacted] acknowledged that she received "sporadic accountings" and was told that she had free access to her trust books (TR 25).

The Referee's finding that Ms. [redacted] had no knowledge of Respondent's attorney's fees and costs being paid from her trust are supported by no evidence and should be reversed.

B. Respondent Immediately Drafted Notes Evidencing His Indebtedness to Ms. [redacted]

On page 2 of his report, the Referee made the following finding of fact:

> At the time of the loans, no written evidence of the debt was made and no security was provided.

Respondent acknowledges that no security for the note was provided. However, there was no evidence before the Referee upon which he could find that "no written evidence of the debt was

made." The only evidence before the Court on this issue was Respondent's testimony (Ms. [redacted]'s only testimony on this issue was that she did not know when the notes were typed up [TR 71]).

Respondent testified that notes evidencing his indebtedness to Ms. [redacted] were typed up on the day the loans were made or the next day thereafter. They were promptly placed in Ms. [redacted]'s file (TR 275, 276). When Ms. [redacted] asked for the notes in January 1984, almost two years later, Respondent could not find the original notes. He then had them retyped and they were delivered to Ms. [redacted] (TR 276).

The only evidence on this issue before the Court was Respondent's testimony. The only person that could have contradicted Respondent's testimony was his secretary in 1982, Ms. Hennessy. The Bar elected not to call Ms. Hennessy to rebut Respondent's testimony (Respondent submits that had Ms. Hennessy been called, she would have testified consistently with Respondent).

The Referee's finding that "no written evidence of the debt was made" is without any evidentiary support in the record and should be overturned.

C. Respondent Did Not Name Himself Sole Trustee of Ms. [redacted]'s Trust.

On page 2 of his report, the Referee found:

> Contrary to the property settlement agreement, the Respondent named himself as sole trustee of the trust.

Respondent acknowledges that he was the sole trustee of Ms. [redacted]'s trust. However, he disputes the Referee's finding that Respondent "named himself" as the sole trustee. It was entirely Ms. [redacted]s decision. If there is any doubt about that fact, one needs only to look to the present status of the trust. After Respondent was discharged, and after Ms. [redacted] retained new counsel, she continued to have but one trustee administering her trust, Larry Lehman, CPA (TR 129, 149).

Ms. [redacted] acknowledged that she knew that the September 1981 marital settlement agreement required that her trust be administered by three trustees: a lawyer, a financial consultant, and a CPA. She acknowledged that she and Respondent discussed naming trustees and she did not specifically state that she wanted three of them (TR 63, 64).

Respondent's testimony is consistent with that of Ms. [redacted]. He testified that at the time Ms. [redacted] and he discussed the establishment of the trust, she was aware that the provisions of the settlement agreement requiring three trustees. Ms. [redacted] was concerned about the expense of having three individuals administering the trust. She selected Respondent's firm as the sole trustee for two reasons: first, Respondent would do it for no charge, and second, she trusted the firm (TR 258, 259).

Respondent ably administered the trust. Waddell and Reed was selected as an investment counselor and, as of final hearing, was still handling the bulk of Ms. [redacted]s trust (TR 150).

The tax returns for the trust were done by an accountant and Ms. [redacted]'s new trustee, Larry Lehman (himself a CPA), testified that there were no irregularities in Respondent's handling of the trust (TR 150).

D. The Settlement With the Estate Was for More Than $185,000.

In the first sentence of the first full paragraph on page 3 of his report, the Referee erroneously found that

> In September, 1983, Mrs. [redacted] settled with her former husband's estate for the additional sum of $185,000.

The Referee's finding is erroneous. In fact, the value of the settlement that Respondent obtained from Ms. [redacted] was considerably more than $185,000.

In determining that the recovery from the estate for Ms. [redacted] was only $185,000, the Referee ignored one of the most significant terms of that settlement. The estate immediately paid off the mortgage on Ms. [redacted]'s house. The fact that she immediately owned her home free and clear, rather than having to wait another 14 years for the $135,000 mortgage to be retired, constituted an immediate benefit to her. Her ability to sell the house was immediately enhanced. Or, had she so chose, she could have then mortgaged the house for a considerable amount of money.

II

THE REFEREE IMPROPERLY FOUND RESPONDENT VIOLATED VARIOUS PROVISIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY.

In his report, the Referee recommended Respondent be found guilty of violating various provisions of the Code of Professional Responsibility. Respondent takes issue with those recommendations.

A. Respondent Did Not Violate Disciplinary Rules 5-101(A) and 5-104(A).

Disciplinary rule 5-101(A) states that:

> 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.

Disciplinary rule 5-104(A) reads:

> 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.

Respondent violated neither of the above disciplinary rules. In both cases, the consent of the client after full disclosure permits the representation or the business transaction. It is undisputed that Respondent made full disclosure of his financial difficulties prior to entering into the loan with Ms. [redacted] (TR 18, 67, 267). What more disclosure could Respondent give?

The Bar would argue that Respondent had to refer Ms. [redacted] to independent counsel. No such requirement

existed under the old Code of Professional Responsibility. Even now, under the stricter Rules of Professional Conduct, rules 4-1.7 and 4-1.8, there is no requirement that a lawyer require a client to seek advice of independent counsel before entering into a transaction with a lawyer. The current rules merely require the client being given a reasonable opportunity to seek the advice of independent counsel. Rule 4-1.8(a)(2).

Respondent submits that even had Ms. [redacted] consulted with counsel, she would have lent Respondent the money that he requested. As it was, Ms. [redacted] showed no reluctance towards lending Respondent the money that he needed (TR 67).

The second requirement of the rules is consent of the client. Obviously, Ms. [redacted] consented to lending Respondent the money he requested.

Although Respondent takes the position that full disclosure and knowing consent dispenses with any further argument relating to these rules, he must point out to the Court that DR 5-101 only prohibits <u>accepting</u> employment when the lawyer's personal interest may affect the representation. In January and February 1982, Respondent was accepting no employment from Ms. [redacted] All of her litigation had been wound down. If there was any employment ongoing, it was his continuing role as a trustee, a role which had been ongoing since September 1981. In other words, Respondent did not accept any new employment at the time of the loan.

Furthermore, Respondent did not violate rule 5-104. There was no testimony presented to the Referee, and therefore the Bar failed to meet its burden of proving by clear and convincing evidence a violation of the rule, that Ms. [redacted] expected Respondent to exercise his professional judgment on her behalf in the loan transaction.

Ms. [redacted]s loan to Respondent was a transaction between friends. It was entered into in an informal manner and was not a conflict of interest.

B. Respondent Did Not Charge a Clearly Excessive Fee in Violation of Rule 2-106(A).

No place in his report did the Referee make the finding that Respondent entered into an agreement for, charged or collected an illegal or clearly excessive fee. Such a finding is absolutely necessary before a referee can make the recommendation that DR 2-106(A) was violated. In The Florida Bar v. Miller, Supreme Court of Florida, Case No. 54,443 (March 15, 1979) (Appendix), an unpublished but public case, this Court said:

> We now come to the separate question of whether the conduct found by the referee to have been committed supports the conclusion that the respondent should be found guilty of misconduct justifying disciplinary measures. Florida Bar Integration Rule, art. XI, Rule 11.02(4) provides, in pertinent part: "Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or the demand is fraudulent." The referee found that the fee was a retainer and was excessive, but made no finding that it was clearly excessive. Disciplinary Rule 2-106(A), which the referee concluded was violated, provides: "A lawyer

> shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." The distinction between clearly excessive and merely excessive is more than a matter of semantics in the context of disciplinary proceedings. The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975).
>
> We therefore reject the recommended adjudication of the referee and the recommended discipline of the referee and the Florida Bar, and order these proceedings dismissed, each party to bear its own costs.

The Referee made no factual finding any place in his report indicating the nature or amount of the alleged illegal or clearly excessive fee. Was it the $26,000 that Respondent charged in the initial divorce wherein he obtained a recovery for Ms. [redacted] of over $600,000? Surely not. That fee constituted approximately 4 percent of her recovery. Was it Respondent's hourly rate of $100, for a total of $40,630, charged in the litigation against the estate? There was no evidence presented whatsoever to indicate that the fee of $100 per hour was improper. There was no evidence presented whatsoever indicating that Respondent did not actually spend the time stated and expend the costs claimed in tabulating that $40,630 fee. Was it the $21,677 contingency fee? That fee was 35 percent of the amount Respondent claimed was over and above the original recovery. A 35 percent contingency fee is not illegal or clearly excessive.

Respondent's total fee in the estate litigation, even counting the $21,677, was only one-third of Ms. [redacted]s total recovery.

The Florida Bar has failed to meet its burden of proving by clear and convincing evidence that Disciplinary Rule 2-106(A) was violated. The Referee's failure to designate what fee was clearly excessive or illegal, and why, is fatal in cases involving this disciplinary rule.

Miller is precisely on point. In that case, this Court noted in footnote 2 that

> The Referee's report does not follow with the desired precision the directives of integration rule, Article XI, rule 11.06(9)(a) with regard to the manner in which the Referee's findings and recommendations are to be reported. The section of the report designated as "Findings of Fact," rather than containing a "finding of fact as to each item of misconduct of which the Respondent is charged" is a discourse on the need for honesty and integrity in dealing with clients, followed by a conclusion that the Respondent's conduct was a violation of two disciplinary rules.

Just as was true in Miller, the Referee has failed to make specific findings to support his conclusion that DR 2-106(A) was violated. Just as in Miller, his findings should be dismissed.

C. Respondent Did Not Violate Disciplinary Rule 2-106(C).

Rule 2-106(C) prohibits a lawyer from charging for collecting a contingency fee for representing a defendant in a criminal case or for charging or collecting

> 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.

Respondent's representation of Ms. [redacted] in the litigation against her estate was not a divorce proceeding. The contingent fee was not based upon securing alimony or support or a property settlement in lieu thereof. Respondent's representation of Ms. [redacted] did not involve alimony or child support. His contingency was based only on those amounts he recovered over and above the original property settlement.

Respondent's conduct does not fall within the four corners of DR 2-106(C). The Referee made no factual findings in which he so indicated. Accordingly, his recommendation that Respondent violated 2-106(C) is improper.

D. Respondent Did Not Violate Disciplinary Rule 9-102(B)(4).

DR 9-102(B)(4) requires a lawyer to promptly comply with a client's request to deliver trust funds for property in the lawyer's possession. The Referee made no factual findings indicating what trust funds Respondent held that were not paid to the client upon demand. Did the Referee consider the loan proceeds Ms. [redacted] delivered to Respondent to be trust funds? We don't know. Did the Referee consider Respondent's contingency fee to be trust funds? We don't know.

The Referee did not designate which funds Respondent failed to pay to Ms. [redacted] upon her request. Respondent avers that absence of his specific finding, the Referee's recommendation that he be found guilty of violating DR 9-102(B)(4) cannot be upheld.

Respondent argues that the loan proceeds delivered to him with Ms. [redacted]'s consent, upon the instant the loan was consummated, lost their characteristic of being trust funds. His failure to promptly retire those loans upon Ms. [redacted]s demand cannot be considered a violation of DR 9-102(B)(4).

Perhaps, the Referee felt that Respondent's failure in January 1984, some three months after he deducted his contingency fee, to immediately refund Ms. [redacted]'s funds to be a violation of 9-102(B)(4). Once again, we do not know because there is no specific factual finding to support this recommendation. However, Respondent once again avers that Ms. [redacted]s failure to timely object to his withdrawal of the fees removed that $21,000 from trust fund category. Thereafter, his failure to immediately pay the funds to Ms. [redacted] could not be determined to be a failure to return trust funds.

It should also be noted that Respondent immediately went to Ms. [redacted]'s new lawyer, presented to him Respondent's position that he was entitled to the contingency fee, and immediately made known that if Ms. [redacted] rejected his position he would promptly refund the funds to her. Although he maintained his entitlement to the fees, rather than getting into an argument with his client, he agreed to refund them.

E. <u>The Referee's Finding That Respondent Violated DR 1-102(A)(6) Is Upsupported By the Evidence</u>.

DR 1-102(A)(6) is a "catch-all" rule. The Referee made no finding as to what "other conduct" adversely reflected on

Respondent's fitness to practice law. Absent such a specific finding, the Referee's recommendation in regard to this rule cannot stand.

III

IF THIS COURT FINDS THAT RESPONDENT'S CONDUCT WARRANTS DISCIPLINE, IT SHOULD BE, AT MOST, A PRIVATE REPRIMAND.

Even if Respondent's actions were improper, his offense warrants at most a private reprimand. Respondent acted in good faith throughout his representation of Ms. [redacted], his misconduct was an isolated occurrence that took place over five years ago, and is the only stain on his career lasting over 19 years. The Referee's finding that his conduct did not involve dishonesty, fraud, deceit or misrepresentation removes his case from the realm of offenses requiring a public discipline.

Understandably, the Bar emphasized the negative aspects of Respondent's representation of Ms. [redacted]. However, if the positive aspects are considered instead, a picture emerges of a lawyer whose actions inured to Ms. [redacted]'s great benefit.

At the outset, it must be stressed that Ms. [redacted] did not file a complaint about Respondent's conduct to The Florida Bar. Mr. [redacted]'s original lawyer in the divorce proceedings, who was disqualified from the representation upon motion of Respondent, filed the complaint with the Bar without Ms. [redacted]'s authorization (TR 46). Ms. [redacted]'s only problem with Respondent's representation was his deduction of a

contingency fee from the proceeds of her estate settlement (TR 39, 40).

Respondent, according to Barry Richard, is a "very conscientious, extremely precise lawyer" (TR 96). His representation of Ms. [redacted] was superlative. In the initial dissolution of marriage proceedings, Respondent's efforts resulted in Ms. [redacted] receiving a settlement of over $600,000. His representation of Ms. [redacted] in her claim against the [redacted] estate was effective and novel and resulted in a settlement of $185,000 plus the immediate retirement of a mortgage on her house amounting to over $130,000. Respondent's total fees for representing her in both actions, even including the disputed $21,677 contingency fee, totaled but $88,300 out of a recovery of over $800,000. After deducting the contingency fee, Respondent received but $66,600. Clearly, his fees were reasonable.

Ms. [redacted] came to Respondent in late September 1980 in a situation that was, financially speaking, virtually helpless. Respondent helped her get a $6,000 loan to start his representation of her in the dissolution of marriage brought by Mr. [redacted] and then continued to represent her without further payment until the litigation was concluded. His fees and costs of $26,000 were very reasonable considering the amount of work he had to do, including flying to Ohio and Lakeland for depositions and the filing of an appeal, and after considering the results obtained: $250,000 in cash, payment of over $11,000

in debts, recovery of the marital homestead and payment of the $150,000 mortgage thereon, recovery of a motor home sold almost immediately for $33,000 cash, and the securing of $90,000 in living expense payments, payable at the rate of $2,000 per month for 45 months. Respondent's effort easily netted Ms. [redacted] over $600,000 in benefits. His fee was only about 4 percent of her recovery.

While representing Ms. [redacted] Respondent became more than just her lawyer. He was accessible for long conferences and became as much a counselor as a lawyer. When the litigation was completed, he encouraged her to stay active, resulting in such activities as Ms. [redacted]'s joining the Governor's Club (with an initial fee of $1,000) and contributing to the Seminole Boosters (TR 131).

Respondent represented Ms. [redacted] on various other legal matters, including a suit against her by physicians and in collecting a personal debt owed to her (TR 121, 122). His sound business advice kept her from making a bad investment (unfortunately, after discharging him, she invested with that same individual to her economic disadvantage) (TR 120, 121).

Perhaps most importantly, Respondent, due to his long-term experience with his mother's alcoholism, recognized that Ms. [redacted] suffered from that disease and successfully encouraged her to seek treatment (TR 58, 249, 250).

Clearly, Respondent's services greatly benefited Ms. [redacted] They became friends.

Even after these grievance proceedings began, Ms. [redacted] continued to use Respondent as a lawyer (TR 46).

When settlement of the divorce litigation was achieved, Respondent immediately placed the $200,000 of those proceeds designated as trust funds into a 90-day certificate of deposit (resulting in a short-term gain of $8,000) while he researched investments. He asked a friend and fellow lawyer, the Honorable Stephen C. O'Connell, past Chief Justice of this Court, for advice on placing the trust proceeds (TR 182). He then discussed setting up a trust with both Merrill Lynch and Waddell and Reed, selecting the latter. Waddell and Reed is still the investment broker for the trust (TR 150). Sensitive to Ms. [redacted]s needs, Respondent chose Waddell and Reed in part because the agent handling the account was Vicki Kirkbride. The trust set up by Respondent was drafted by a lawyer in his office who consulted Florida Jurisprudence and who worked with attorney Jerry Hart, an expert on tax law (TR 181). Among the things that Mr. Hart recommended was an irrevocable trust for 10 years to properly avoid taxable consequences on the settlement (TR 181, 182).

When, after about three or four months of the existence of the trust, it became apparent that Ms. [redacted] was confused about the nature of her investments, Respondent set up a meeting in his office between Ms. [redacted] and Ms. Kirkbride (TR 218). The two met for approximately 2½ hours and the relationship between the two became more than an arm's length business arrangement. For example, Ms. Kirkbride took Ms. [redacted] out for a birthday luncheon (TR 221).

Respondent's administration of the trust was sound. The new trustee, Larry Lehman, found no irregularities in Respondent's handling of it (TR 150).

Is it any wonder that Ms. [redacted] did not file a complaint against Respondent?

It was in this atmosphere of friendship (Respondent testified that he was closer to Ms. [redacted] than any other client he has ever represented [TR 249]) that Respondent with great embarrassment asked Ms. [redacted] for a loan. He fully disclosed his dilemma--he could not get a loan from a bank (TR 18, 67, 174, 175, 267). Ms. [redacted] who had been rejected by a bank previously in times of need, "had no problem" with lending Respondent the money (TR 18, 51). The arrangement between the two individuals was informal. The parties did not get into any detail on the loans and it was of no importance to Ms. [redacted] whether there were three separate loans or a single lump-sum figure (TR 22, 176, 177). The transaction was similar to many loans between friends.

During the discussions about the loans, no set interest rate was discussed. The agreement was that Respondent would pay the highest rate of interest that Ms. [redacted] s investments could get. Perhaps, "as high as" her cash management account was paying (TR 19, 68). In fact, Respondent's 12 percent semi-monthly payments amounting to $237.50 each resulted in Ms. [redacted] getting $916 more than her $47,500 would have received in certificates of deposit and $1,966 more than she

would have received had the money stayed in her cash management account (TR 278, 279, R. Ex. 16).

No specific time period for paying the loan was determined. It was agreed by both parties that Ms. [redacted] would be paid off when a big case Respondent was handling was settled (TR 20, 70). In fact, when the case was settled in September 1985, Respondent did pay off all indebtedness to Ms. [redacted] (TR 274).

At the time of $47,500 loan to Respondent, Ms. [redacted] was in an enviable financial position. She was receiving $2,000 a month living expenses from Mr. [redacted] and expected receiving them for an additional 3½ years, and she had no outstanding obligations. Mr. [redacted] was making her mortgage payments, which included homeowner's insurance and taxes. She was completely debt-free. She had just received $33,000 in proceeds from the sale of the motor home she received in the marital settlement (TR 267, 268). Clearly, the loan to Respondent put Ms. [redacted] in no financial jeopardy.

In August 1982, after Mr. [redacted]s death, his estate reneged on the marital settlement agreement. They discontinued the $2,000 per month living expenses and the $1,550 per month mortgage payments. Ms. [redacted] immediately consulted Respondent and the two determined that the cessation of the $3,550 per month payment would put her in a financial bind. On September 27, 1982, Ms. [redacted] and Respondent ratified their retainer agreement for his representation of her against the

estate (R. Ex. 4). Respondent filed an action to enforce the settlement against the estate and he sued them for fraud and misrepresentation, alleging that Mr. [redacted] had deliberately and fraudulently concealed assets at the time the marital settlement agreement was entered into (R. Ex. 8 and 9). Ultimately, Respondent's representation was successful, resulting in a settlement of $185,000 in cash from the estate, which covered all losses to Ms. [redacted] including lost interest and attorney's fees, together with the immediate retirement of the $135,000 mortgage on her house.

Upon reaching the settlement, Respondent was paid the balance of his fees owed and, pursuant to his interpretation of the September 27, 1982 fee agreement, he took a contingency of 35 percent of the proceeds obtained from Ms. [redacted] above that which he had received in the original settlement. He disclosed this fee arrangement to her by virtue of a closing statement (B. Ex. 6) that was transmitted to her shortly after the settlement (TR 297). In January 1984, Ms. [redacted] asked Respondent about his contingency fee. That was her only problem with his representation (TR 40). Prior to that meeting, Ms. [redacted] had asked for and immediately received written evidence of Respondent's indebtedness to her.

Shortly after their January meeting, Ms. [redacted] called in Respondent's loan, predicated upon his missing two interest payments in the early stages of the arrangement. Ms. [redacted] retained counsel, Bob Hinkle, who made demand for the loan and

for the return of the contingency fee. On February 29, 1984, Respondent met with Mr. Hinkle, presented to him Respondent's reasons for taking the contingency fee, and left it up to Ms. [redacted] what should be done. Ultimately, after Ms. [redacted] persisted in her position that he was entitled to no contingent fee, Respondent paid her $37,000 in cash and agreed to $2,500 payments for 19 months (TR 168). When Respondent's major case was settled in September 1985, he paid off all indebtedness to her.

The Referee properly found Respondent innocent of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(4). He also found him innocent of engaging in conduct which he was not competent to handle and neglecting a legal matter. DR 6-101(A)(1) and (3). Finally, the Referee found that Respondent did not fail to maintain complete records of Ms. [redacted]'s funds and that he did not fail to render appropriate accounting to her. DR 9-102(B)(3).

Respondent submits that the finding of no dishonesty, fraud, deceit or misrepresentation obviates the necessity of publicly disciplining him. Even if this Court feels that his conduct might have warranted a public sanction, the fact that his last act of misconduct occurred over five years ago, that he has no prior disciplinary history in 19 years of practice, and that Ms. [redacted] did not complain against him, should reduce the sanction to the level of a private reprimand.

The purpose of disciplinary proceedings are enunciated in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) at 132. Those purposes are:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the lawyer the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, and sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

It is not necessary to determine sanctions that will protect the public from Respondent's misconduct. His actions did not involve any dishonesty, incompetence, or neglect. At worse, he was guilty of entering into a business transaction with a friend, who was also a client, and in charging what Respondent felt was a fair fee for services rendered.

As discussed earlier, Respondent submits that his entering into his transaction with Ms. [redacted] was not a violation of the conflict of interest rules. There was full disclosure to Ms. [redacted] of his financial position. There was no requirement in the rule at the time that he advise her to seek independent counsel. The loan was a transaction between friends. Ms. [redacted] was not reluctant to lend Respondent the money (TR 67).

The Referee made no specific finding that Respondent charged a clearly excessive fee. Without such a finding, his conclusion

that Respondent violated DR 2-106(A) must be reversed. The Florida Bar v. Miller, Supreme Court of Florida, Case No. 54-443 (March 15, 1979). Respondent's total fee, even including the contingent fee, was only approximately $62,000 in securing a $185,000 recovery for Ms. [redacted]--and that figure does not include the value of having a mortgage immediately retired. Respondent's fees were well within the parameters normally charged by lawyers. If Respondent is guilty of misconduct, he is guilty of good faith errors in judgment. A private reprimand will sufficiently discipline him for those lapses in judgment, and there is no reason to believe that any such misconduct will occur again. If protection of the public is the primary purpose of discipline, a private reprimand will suffice.

The second purpose enunciated in Pahules is rehabilitation. The purpose of a private reprimand is to rehabilitate. In re: The Florida Bar, 434 So.2d 883 (Fla. 1984). Respondent did an excellent job in his representation of Ms. [redacted]. She benefited greatly from his extremely conscientious representation. He became her good friend. Publicly castigating him for lapses of judgment which pale in comparison to his superlative representation does nothing more than humiliate him. Respondent's misconduct was at worst minor misconduct deserving of a private reprimand. Just as this Court considers the presence of dishonesty, fraud, and misrepresentation a factor that removes impropriety from the realm of a private reprimand, it should consider the absence of such misconduct as being

appropriate for imposing the private reprimand. See The Florida Bar v. Weed, 513 So.2d 126 (Fla. 1987) at 128.

This Court should also consider the effect a public discipline will have on Ms. [redacted]. She did not initiate this action. If this case becomes public, it will subject her to unwanted publicity. Her divorce cas was sealed (B. Ex. 1, p. 6). Publicly disciplining Respondent will effectively unseal her divorce case against the wishes of both her and her deceased ex-husband.

Obviously, Respondent cannot cite to the Supreme Court any disciplinary orders where similar misconduct received a private reprimand. However, included in the appendix is a photocopy of a sanitized summary which appeared in approximately February 1983 in The Florida Bar News. There, a lawyer received a private reprimand for borrowing money from a client. Mitigating factors cited in the summary include unintentional misconduct and an absence of clarity in the disciplinary rules.

Respondent is aware, however, of instances where lawyers have received public reprimands for similar misconduct where there were no substantial mitigating factors involved. In The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981), the accused lawyer received a public reprimand for borrowing money from a client, but then failing to repay the loan for two years and failing to keep adequate records of his trust account. Those offenses are worse than Respondent's. In the instant case there is no finding of a failure to keep adequate trust account

records, and there was no mitigation cited. Mr. Golden received but a public reprimand. Respondent should receive a lesser sanction.

In The Florida Bar v. Staley, 457 So.2d 489 (Fla. 1984), the accused attorney once again received but a public reprimand for entering into a business transaction with a client and, most notably, for violating trust accounting rules. Once again, there were no mitigating factors cited. Once again, Respondent should receive a lesser discipline.

Rule 9.32 of the Florida Standards for Imposing Lawyer Sanctions lists various mitigating factors which a Referee should consider in imposing discipline. Most significant among those rules, for the purposes of this case, are the absence of a prior disciplinary record, timely good faith effort to make restitution or to rectify consequences of misconduct, and interim rehabilitation.

Respondent has no prior disciplinary record.

Upon being alerted by Ms. [redacted] some three months after he originally billed her, that she objected to his contingency fee, Respondent appeared before her lawyer, set forth his position, and made it clear that if Ms. [redacted] rejected Respondent's position he would forfeit the fee and make payment to her. When his position was in fact rejected, he immediately entered into a repayment plan with her. The only dispute between the parties involved negotiating attorney's and accountant's fees.

The fact that Respondent's last act of alleged misconduct took place in September or October 1983, over five years ago, proves interim rehabilitation. He has had no other misconduct, and this Court may rest assured that no such misconduct will ever occur. He recognizes his mistakes, an important aspect in rehabilitation (TR 174, 178).

The Bar's Standards for Imposing Discipline support Respondent's position that a private reprimand is appropriate. Rule 4.14 of those standards, under the category of preserving the client's property, states

> Private reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client or where there is a technical violation of trust accounts rules or where there is an unintentional mishandling of client property.

Similarly, rule 4.44 of the Standards, relating to conflict of interest, states:

> Private reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

Respondent is not an unethical lawyer. His misconduct, if any, is more in the nature of ignorance of the rules than dishonest. The Referee's finding that Respondent did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation inherently included such a finding. The absence of improper motive is a mitigating factor. The Florida Bar v. Jamieson, 426 So.2d 16 (Fla. 1983). As was true in The Florida

Bar v. Randolph, 238 So.2d 635 (Fla. 1970) at 637, Respondent's wrongdoing "was more the handiwork of a fool than a knave."

Respondent has learned his lesson. There is no need to discipline him with more than a private reprimand.

CONCLUSION

Various findings by the Referee were flawed. When those findings are considered in tandem with the technical language of the disciplinary rules which the Referee concluded Respondent violated, it becomes apparent that Respondent engaged in no unethical conduct and should not be disciplined.

Should this Court find that Respondent did violate the Code of Professional Responsibility, the various mitigating factors involved should reduce his penalty to, at most, a private reprimand.

Respectfully submitted,

JOHN A. WEISS
P.O. Box 1167
Tallahassee, FL 32302
(904) 681-9010
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been mailed to James N. Watson, Jr., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, on this 14th day of October, 1988.

JOHN A. WEISS