IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	:	The Supreme Court Case No. 66,826
Petitioner,	:	
-vs-	:	The Florida Bar Case No. 11G84M50
JAMES L. WALL, JR.,	:	CONFIDENTIAL
Respondent.	:	

RESPONDENT'S BRIEF

JAMES L. WALL, JR.
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INTRODUCTION

THE FLORIDA BAR, Complainant in the lower proveedings, will be referred to as "The Florida Bar" herein.

JAMES L. WALL, JR., Respondent in the lower proceedings, will be referred to as "Respondent" herein.

THE BOARD OF GOVERNORS OF THE FLORIDA BAR will be referred to as the "Board of Governor" herein.

The following symbols will be used in this brief:

"T" - Transcript of Final Hearing held June 21, 1985.

"RR" - Report of Referee.

POINTS ON APPEAL

I.

WHETHER REFEREE'S RECOMMENDATION OF A SIXTY DAY SUSPENSION IS SUFFICIENT DISCIPLINE UNDER THE CIRCUMSTANCES OF THE CASE?

II.

WHETHER RESPONDENT SHOULD BE REQUIRED TO MAKE RESTITUTION TO PARTY HARMED BY ALLEGED MISCONDUCT?

STATEMENT OF THE CASE

Respondent adopts The Florida Bar's "Statement of the Case" as contained in its Initial Brief heretofore submitted in this cause.

STATEMENT OF THE FACTS

Respondent does not wholly agree with The Florida Bar's Statement of the Facts and set forth the following statement as his perception of the facts in this matter:

Prior to the commencement of any hearing before the Honorable LOUIS WEISSING, Circuit Judge, appointed by this Court as Referee in this matter, it was agreed and stipulated by and between Respondent and counsel for The Florida Bar that the facts stated in The Florida Bar's Complaint, as amended or clarified by Respondent's Response to the Complaint, were essentially true and correct. Additionally, Respondent and counsel for The Florida Bar discussed the position of each party in this matter; practice and procedure in matters of this nature; and, further the disciplinary measures The Florida Bar sought in this matter assuming a finding of violation of Disciplinary Rule 1-102(A)(4) and 1-102(A)(6), Code of Professional Responsibility. Those disciplinary measures are enumerated in Paragraph No. 3, page 1, Statement of Case, Complaintant's Initial Brief.

Based upon The Florida Bar's representations and discussions with Respondent, it was agreed that this matter should proceed to a very prompt hearing with essentially no witnesses, especially in light of the fact that the parties had narrowed the issue of the matter so severely.

Counsel for The Florida Bar never discussed the possibility of a stipulated settlement with Respondent nor did Respondent's former counsel.

As to the factual matters giving rise to the subject complaint, Respondent undertook the representation of KRAMER HOMES, INC., a Florida corporation, for the purpose of assisting it in reorganization of its financially troubled circumstances. KRAMER HOMES was in the business of developing, building and

condominium units in the Dade County, Florida area. One, LARRY C. GRIGGS, was the sole officer and director of this corporation. Respondent's representation of this client commenced sometime prior to April 1, 1983. At this time, Respondent was an associate with the Law Firm of MEYER, WEISS, ROSE, ARKIN, SHAMPANIER, ZIEGLER & BARASH, P.A., 407 Lincoln Road, Miami Beach, Florida. Respondent was admonished by the managing partner of this firm, H. HARVEY ZIEGLER, not to represent this client unless it was able to advance a retainer of at least $10,000. Obviously, the client was unable to advance any such sum of money, but needed a great deal of assistance in attempting to extricate itself from its financial difficulties and continued in its business. Respondent thereupon undertook this representation personally and outside the scope of his responsibilities with the said law firm - with no retainer and only a remote possibility of compensation in the future. Respondent viewed this client as a possible means of spinning-out from the law firm into his own private practice. As it turned out, Respondent received no income from this client, save and excepting the nominal premiums on the two (2) title insurance policies in question, after expending nothing less than 1000 hours of time and hundreds of dollars in advanced costs.

On or about April 1, 1983, to avoid and forestall pending foreclosures on the property of KRAMER HOMES, Respondent filed a Voluntary Petition in Bankruptcy, Chapter 11 - Reorganization - in behalf of KRAMER HOMES. Under the provisions of Chapter 11 of the United States Bankruptcy Code, the client, KRAMER HOMES, became a "debtor in possession", fully entitled to sell and convey free and clear of any liens items of property usually and normally sold in business. The usual and normal business of KRAMER HOMES was the development, construction and sale of condominium units in a project known as WOODS LANDING CONDOMINIUM.

On May 19, 1983, Respondent represented his client, KRAMER HOMES, in the sale of two (2) units within the project known as WOODS LANDING CONDOMINIUM.

Respondent prepared closing statements, mechanic's lien affidavits and warranty deeds pursuant to the directions of his client. These two (2) units had been sold to one, JORGE ZEDAN, by Respondent's client some two (2) years prior to May 19, 1983. No conveyances of the subject units was ever made by KRAMER HOMES to said JORGE ZEDAN. Shortly after said JORGE ZEDAN'S purchase of these units, he and his wife, inturn, sold the units to ALFONSO EDUCARDO CADER [Unit No. 38] and to JORGE EMILIO SA ZACARIAS and MARIA HASBUN de SA, his wife, [Unit No. 37]. Both of the ultimate purchasers, CADER and ZACARIAS, had been in possession of their respective units from approximately May 19, 1981. All of the above mentioned documents were prepared based upon the representations of Mr. Zedan and Mr. Griggs as to past occurances. No one produced an agreement for purchase and sale notwithstanding Respondent's request for the same. Mr. Zedan appeared as the agent for both of the above named ultimate purchasers, signed their respective closing statements and accepted their original documents. None of the above mentioned ultimate purchasers appeared at "the closing" and none were known or met by the Respondent. None of the above mentioned documents referred to any mortgage or the bankruptcy proceeding.

At the time of these conveyances, KRAMER HOMES, as a debtor in possession, was entitled under the United States Bankrupcy Code to convey these units free of any lien or encumbrance. At the time of the conveyances, the units were subject to a construction loan mortgage in favor of CAPITAL BANK, which loan then had an approximate balance of $240,000.00 and encumbered a total of six (6) units, including the subject units, within the project. The remaining constructed forty eight (48) units and undeveloped lands were encumbered by construction loans made by others. The CAPITAL BANK mortgage was in foreclosure at the time of filing the bankruptcy proceedings, therefore, those proceedings were fully stayed.

The proceedings in the CAPITAL BANK foreclosure proceedings revealed

that JORGE ZEDAN and LAURA ZEDAN, his wife, and "JOHN" CADER were parties defendant in said proceedings. The purchasers JORGE EMILIO SA ZACARIAS and MARIA HASBUN de SA, his wife, were not named parties defendant in the said foreclosure proceedings - although in possession of their unit - but were fully aware of the foreclosure proceedings by virtue of their several conversations with the foreclosure court's appointed Receiver, which conversations were enumberated in the Receiver's Reports introduced and accepted into evidence by this Court's Referee. Therefore, all parties in interest had actual and complete knowledge of the existence of the CAPITAL BANK mortgage and the foreclosure proceedings.

After considerable pressure from Mr. Griggs and Mr. Zedan, the Respondent ultimately issued the title insurance policies in question without referance to the said CAPITAL BANK mortgage to the ultimate purchasers. These policies were delivered to Mr. Zedan for ultimate delivery to the insureds with due admonishment from Respondent that he and Mr. Griggs had not secured the releases from CAPITAL BANK for these units. Respondent in the delivery of these policies was relying upon the fact that these ultimate purchasers had full and complete knowledge of the CAPITAL BANK mortgage and its foreclosure proceedings. Respondent even had telephone conversations with a person identifying himself as Doctor Mendez, Attorney for the ultimate purchasers, prior to issuance of the policies in question as to the status of obtaining release from the CAPITAL BANK mortgage.

Almost immediately after the issuance and delivery of these policies, the insureds, through a new attorney, filed claims for recovery thereunder with the Law Firm of MEYER, WEISS, ROSE, ARKIN, SHAMPANIER, ZIEGLER & BARASH, P.A. and ATTORNEYS' TITLE INSURANCE FUND. Upon coming to the attention of the law firm, Respondent was questioned relative to the transactions by the partners, H. HARVEY ZIEGLER and PHYLISS SHAMPANIER and summarily dismissed from employment by Ms. SHAMPAIER - then and now a member of the Board of Governors of The Florida Bar -

who further represented to the Respondent that nothing further would come of this matter from their law firm. The law firm ultimately filed the instant complaint against the Respondent. Thereafter, Respondent communicated with The Fund and its local counsel regarding this matter and advised them of all facts relative to the issuance of these policies and requested that they not settle with or pay any claim thereunder without first litigating the question of knowledge of the existing mortgage. Finally and without any notice to the Respondent, The Fund paid in full the policy limits to secure releases of the subject units from the CAPITAL BANK mortgage.

I

WHETHER REFEREE'S RECOMMENDATION OF A SIXTY DAY SUSPENSION IS SUFFICIENT DISCIPLINE UNDER THE CIRCUMSTANCES OF THE CASE?

Respondent answers YES to this question presented by The Florida Bar. Unquestionably, the ultimate disposition and discipline in cases of this nature rests with this Court. THE FLORIDA BAR v. HOFFER, 383 So. 2d 639 (Fla. 1980). In the wisdom of this Court, this matter was referred to an immanently qualified Referee for the purpose of taking testimony and receiving evidence in this matter. This Court's Referee did so and having heard the testimony and reviewed the evidence, made his determination of the case and recommendations to this Court under the facts and circumstances presented to him. Additionally, The Florida Bar advised Respondent of its official position relative to discipline prior to the hearing before this Court's Referee and advised the Referee thereof during that hearing. (R 72) Based upon those representations by counsel for The Florida Bar, Respondent proceeded to hearing before this Court's Referee and now, becuase of The Florida Bar's shift in position - for which even its counsel is embarrassed - Respondent is now severely prejudiced.

In the instant case, the questioned conveyances from KRAMER HOMES, INC. to the individual purchasers were valid conveyances from a "debotr in possession" free and clear of any and all liens and encumberances. See Bankruptcy Code, 11 U.S.C., Sections 102, 361 and 363. See also Florida Title Standards, Section 2.2. In addition thereto, each of the individual purchasers were on actual notice of the existence of the Capital Bank mortgage. (R 33-37) Therefore, the purchasers were not bona fide purchasers without notice and could not complain to the grantor of the existence of said mortgage. HARDAWAY TIMBER CO. v. HANSFORD, 245 So.2d 911 (Fla. App. 1971).

Based upon the foregoing principles of law, the title insurance policies in question were issued to the purchasers without reference to the Capital Bank mortgage. The Respondent's decision to issue said policies was based, in part, upon legal analysis of those principles of law and not upon any intent to misrepresent the status of title to these condominium units to anyone.

Unfortunately, The Fund did not sufficiently investigate the facts surrounding these policies and voluntarily chose to pay the claims of the insureds to divest themselves of the problem - as many insurance companies do these days - notwithstanding a ligitimate defense to the claims. It should be noted that The Fund paid full policy limits and there was no evidence to the effect that it attempted to even compromise with Capital Bank. The Fund paid approximately one-half of the outstanding balance on the loan for the release of two (2) units when the mortgage encumbered a total of six (6) units.

Notwithstanding the above, Respondent was found guilty of a knowing misrepresentation to The Fund by failing to except for the Capital Bank mortgage in the policies in question. (R.R. 9) This is a violation of Disciplinary Rule 1-102 (A)(4) and 1-102(A)(6). This finding of guilt is based largely upon a basic misunderstanding on the part of The Florida Bar and the Referee of the legal principles involved, the facts of the case and distinguishing between misconduct and making a legal judgment which may ultimately cause damage to some party. The Referee heard only a portion of the testimony and evidence which could have been placed before him. He did perceive the line of defense presented, but did not hear from experts which could have been called by Respondent. The Respondent did not call expert witnesses and present further testimony because of the representations of The Florida Bar as to the discipline sought if guilt was found and the representation that referees generally

frowned upon a great many witnesses in hearings of this nature. Respondent was willing to accept the discipline sought by The Florida Bar in the event that the Referee did not agree with the defenses presented by Respondent - merely to have the matter behind him. Now, having been soarly prejudiced, The Florida Bar seeks greater sanctions against the Respondent.

In addition to a one year suspension, The Florida Bar seeks proof of rehabilitation before Respondent may resume the practice of law. How might one demonstrate rehabilitation in making legal judgments? Must one always concur with The Florida Bar's, The Fund's or other members of the profession? If all members of The Bar were to concur in every legal judgment they make, we would soon have no need for the judicial system or the legal profession. The Respondent here made a legal judgment, which some perceive as misconduct merely for the purpose of obtaining conformity and restitution without the necessity of due process of law. Respondent has not even had the opportunity to test his principles before a court of law - only administrative panels and hearing officers not trying the principle, but trying whether or not assertion of the principles amounts to misconduct.

In each of the cases cited by The Florida Bar in its Initial Brief, the attorneys disciplined had <u>intentionally</u> and <u>deliberately</u> misrepresented certain matters. In the case at hand, Respondent made - what he belived to be - an independent legal judgment as to the status of title as to the proposed insureds and issued policies based thereon. There was no <u>intention</u> to misrepresent the status of title to any party nor was there any evidence of such intention prsented to this Court's Referee. Even a criminal must have the requisite intent to commit a crime before he may be convicted of the first degree thereof.

II

WHETHER RESPONDENT SHOULD BE REQUIRED TO MAKE RESTITUTION TO THE PARTY HARMED BY MISREPRESENTATION?

There is no doubt that Attorney's Title Insurance Fund paid the sum of $161,200.00 on the two (2) policies in question. The real question is whether they should have done so without challenging the ligitamacy of the insureds' claims under those policies?

It is without doubt that the insureds had full and complete knowledge of the existence of the omitted mortgage and were aware of the foreclosure proceedings upon that mortgage. (R 33-37) When the representative of Attorneys' Title Insurance Fund, Mr. R. James Knox, was questioned as to whether this knowledge on the part of the insureds would have made any difference in the payment of their claims, his response was "No." (R 31) When again questioned whether any title insurer ever defended claims based upon the insured's complete knowledge, he responded that he could not recall a specific case, but was sure that they did at some time. (R 31) Mr. Knox testified that a full and complete investigation of the matter was had by The Fund and their retained local counsel. (R 19) However, he appeared totally unaware of the fact that the insureds were parties defendant in the mortgage foreclosure proceedings. (R 63-66)

It appears from the Referee's report that he fully understood this discrepancy and realized that the Respondent should have an opportunity to present this valid defense in any civil litigation brought by The Fund against the Respondent. To require restitution under these circumstances would be tantamount to a denial of the Respondent's constitutionally protected right to due process of law.

The Florida Bar presents in its Initial Brief several cases which purport to stand for the proposition that restitution is clearly called for where there is financial loss. In each of these cases it is apparant that the accused attorney personally profited from misconduct involved. In the instant case, the Respondent receive no funds or diverted funds to his own personal profit. Respondent received only a nominal title insurance premium of $400.00 for each policy, 40% of which was remitted to The Fund as net premium. [See Lines 1 - 5, page 8, Complainant's Initial Brief] Restitution,therefore appears to be a discipline reserved for those instances where an accused attorney has personally profited from his misconduct, clearly not the situation at hand.

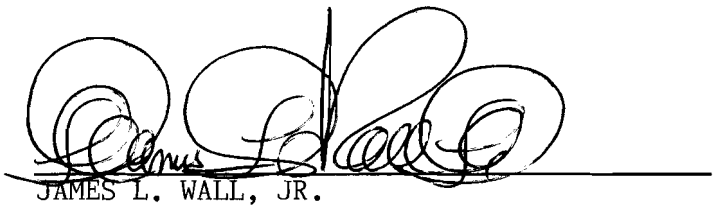
Additionally, the requirement of resitution would effectively disbar or suspend the Respondent from the practice of law, deprive him and his family of a livelihood and deprive the public of a competent real property pratitioner, all as a result of differing legal points of view - the gist of all litigation.

CONCLUSION

Because this Court's Referee was present to receive and hear the testimony and argument in this matter and is immanently qualified to determine the facts and fix judgment and, further, because The Florida Bar's counsel mislead the Respondent as to exactly what punishment The Florida Bar sought in this particular matter, therefore, severely prejudicing Respondent's case before the Referee, the Referee's determination should stand.

Because the injured party, Attorney's Title Insurance Fund, had the opportunity to litigate the validity of the insured's claims, but refused to do so and because the Respondent should have the opportunity to litigate the approprietness of their payment to the insured's, the question should be left to a civil matter between Attorney's Title Insurance Fund and the Respondent, and, therefore, restitution should not be made a condition of Respondent's ability to continue in the practice of law.

Respectfully submitted,



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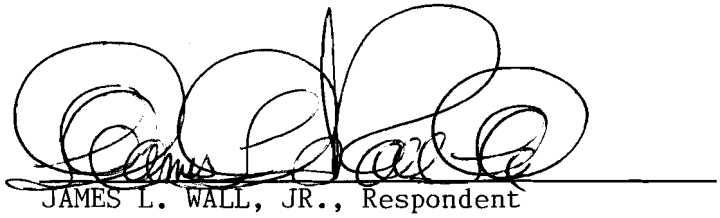
CERTIFICATE OF SERVICE

IT IS CERTIFIED that the original and seven copies of the foregoing Respondent's Brief were mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 and a true and correct copy was mailed to LOUIS THALER, Bar Counsel, The Florida Bar, Suite 211, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 on this 21st day of November, 1985.



JAMES L. WALL, JR., Respondent