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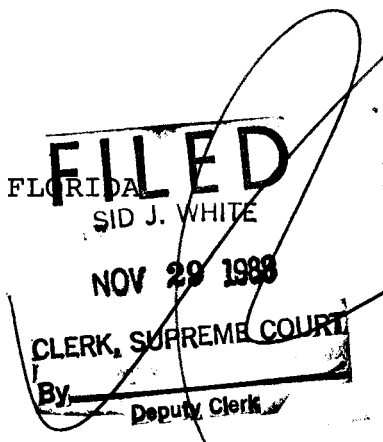

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petititoner,

v.

WILLIAM FENTON LANGSTON,

Respondent.

_____/

CASE NO. 67,261

(TFB File No. 83-03599-02)

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

In this Brief, Petitioner, THE FLORIDA BAR, will be referred to as "The Florida Bar" or the "BAR." Respondent, WILLIAM FENTON LANGSTON, will be referred to as "Respondent."

References to the transcript of hearing before the Referee will be (T page number) and references to exhibits introduced at the hearing before the Referee will be (Bar's Exhibit - number) or (Respondent's Exhibit - number). References to the Referee's Report will be (RR - page number).

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case with only one exception. Judge Agner's August 29, 1988, report found Respondent guilty of violating the Disciplinary Rules cited in Petitioner's Statement of the Case only as to the Respondent's perjury regarding an extra-marital affair.

STATEMENT OF THE FACTS

Respondent disagrees with Petitioner's Statement of the Facts, and restates them as follows:

Respondent became a member of The Florida Bar in 1969 and has been a member at all times pertinent to the matters now before this Court. Respondent ceased representing clients in 1974 and began developing real estate and constructing rental properties (T 17).

As a builder and developer, Respondent did not receive regular paychecks, but rather earned his living through buying and selling real property, through refinancing property, and through constructing residential and commercial property (T). Respondent usually did business in conjunction with various partners, particularly Kent Deeb, also a developer in Tallahassee (T 18-20, 21). Legal title to partnership property was often in the name of only one of the partners, depending on which of the partners had stronger credit when it became necessary to borrow money on the property to conduct business (T 23). Respondent and Deeb, however, both signed on the notes and mortgages and considered the property held for their joint benefit (T 20, 23).

In May 1981 Respondent and his wife, Ramsey C. Langston, became embroiled in a particularly acrimonious dissolution of marriage proceeding. Through the energetic advocacy of counsel for Mrs. Langston, the presiding circuit judge, Judge Kenneth Cooksey entered orders requiring Respondent

to perform various acts. Judge Cooksey ordered Respondent to pay temporary child support and alimony in the total amount of $3,500.00 per month, at the rate of $1,750 on the first and fifteenth of each month (Exhibit B to Bar's Complaint). Judge Cooksey also ordered Respondent not to transfer or encumber any of the property titled in his name, and to return to his possession property which had been transferred to his partnerships or to his partners during the previous year (Exhibit A to Bar's Complaint). In that same Order, Judge Cooksey found that Respondent had the ability to perform such transfers (Exhibit A to Bar's Complaint).

Respondent did not, however, believe he had the ability to legally return title of those properties to his sole name, as they had been transferred for consideration and were encumbered with new mortgages; however, he was never permitted to give this explanation to Judge Cooksey during the dissolution proceedings (T 27). Respondent did not cause the property to be reconveyed to his individual name, was found in contempt of court for failure to re-transfer the properties and for failure to pay child support (Exhibit B to Bar's Complaint). A subsequent Order of Commitment entered against him (Exhibit C to Bar's Complaint). In September 1982 another Order of Contempt and corresponding Order of Commitment were entered against Respondent for the same failures to act (Exhibits D & E to Bar's Complaint). Subsequent to the September 1982 Order of Commitment, Respondent left the jurisdiction to stay with his sister in Texas in order that he

have time to determine how to fulfill his obligations in Tallahassee (T 29).

Respondent returned to the jurisdiction of his own volition on December 1, 1982, surrendered himself to the Sheriff and remained in the Jefferson County Jail for forty-six (46) days. Through negotiations between the parties' counsel, the contempt order was purged, and Respondent was released.

In November 1979 Respondent gave a financial affidavit to Sun Federal Savings & Loan Association for the purpose of inducing Sun Federal Svings & Loan Association to make him a loan. The financial affidavit in question included as Respondent's property a one hundred ninety-two acre tract of land in Wakulla County (T 31; Bar's Exhibit 9). The property had been given to Respondent by his mother, but due to his parents' divorce, transfer of legal title to Respondent was delayed (T 31). Though the financial statement was admittedly incorrect, uncontroverted evidence before Judge Agner showed that Respondent had put his loan officers at Sun Federal on notice of the problem with the title (T 32).

In the deposition of February 16, 1982, taken during the dissolution proceedings, Respondent testified that his net worth on the November 1979 financial statement was perhaps overstated (Bar's Exhibit 7). When asked at the hearing before the Referee in this matter about this admission of puffing his financial statement to Sun Federal, Respondent testified that when he gave that statement the values of real property were

based on the fair market values established by Sun Federal's own appraisers. Thus Sun Federal had more knowledge of the value of the property than did Respondent. The BAR did not present any testimony to the contrary.

Respondent and his former wife, Ramsey Langston, had agreed that they would refrain from engaging in mudslinging during their divorce, and that the only matters at issue were financial rather than personal (T 52). Further, at the time of their dissolution, no fault dissolution was firmly in place. At Respondent's February 16, 1982, deposition the Wife's counsel departed from the parties agreement and asked Respondent whether he had engaged in any extra-marital affairs. Respondent at first refused to answer this question. The Court entered an order compelling him to respond at a subsequent deposition on March 5, 1982. At that deposition, Respondent falsely denied any such involvement because he felt it had no place in no fault divorce litigation (Bar's Exhibit 1, T-40, 41). The deposition was continued to the next morning, and at that deposition, Respondent recanted the testimony (T 41). Respondent also recanted that testimony by letter and at the final hearing (T 41). It was only on the basis of this false statement under oath that Judge Agner as Referee found that Respondent was guilty of breach of the disciplinary rules.

SUMMARY OF ARGUMENT

The Referee has broad discretion in recommending disciplining lawyers for unprofessional conduct. The nature of the discipline must be resolved on the basis of the factual situations presented by each particular case. The Referee in the instant case was correct in determining that, based on the evidence before him, Respondent had not breached the disciplinary rules with regard to his conduct relating to the financial statement and his failure to comply with orders of the court in his dissolution proceedings. Further, in light of the facts of the case, Respondent's perjury in deposition and immediate rehabilitation of his testimony were a breach of those rules. The appropriate discipline was a private reprimand and probation to terminate upon successful completion of the ethics portion of the Florida Bar Exam.

ARGUMENT

ISSUE I

THE REFEREE WAS CORRECT IN FINDING THE RESPONDENT NOT GUILTY OF VIOLATION OF DISCIPLINARY REGULATIONS AS TO HIS FINANCIAL STATEMENT.

Just as the court does not condemn a man to death because he killed someone without considering the mitigating circumstance of self-defense, it is insufficient to review the issues of Respondent's guilt or innocence on the bare facts as represented in THE FLORIDA BAR's brief without the benefit of knowledge of the surrounding circumstances and mitigating factors.

Disciplinary actions, while not fully criminal, are penal proceedings, and therefore the standard of proof is more than the mere preponderance of evidence sufficient for a civil action, although not as stringent a standard as that required in criminal cases. The BAR must prove its case by clear and convincing evidence. The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973).

THE FLORIDA BAR failed to prove Respondent had any knowledge of falsity at the time he made representations on the 1979 financial statement to Sun Federal Savings & Loan Association, and also failed to prove the representations were made for the purpose of inducing the Bank to rely on those facts. Common-law remedy for fraud requires that Petitioner show that Respondent made false representations of fact which Respondent

knew were false when made and that such representation was made for the purpose of inducing the party to whom made to act in reliance of it, and that party must have the right to rely on those facts. Pettinelli v. Danzig, 722 F.2d 706 (11th Cir. 1984). A fraud is never to be assumed, but must be proven by clear and convincing evidence. Buscher v. Mangan, 59 So.2d 745 (Fla. 1952). The BAR did not have such proof.

THE FLORIDA BAR is incorrect in its allegations in its Brief before this Court that Respondent stated in his Answers (Bar's Exhibit 6) to his ex-wife's Request for Admissions (Bar's Exhibit 5) that the financial affidavit to Sun Federal was true and correct. Respondent testified at trial that his attorney had read the admissions to him aloud and had advised him that they related to the genuineness of the copy of the affidavit, not to the truth contained therein (Bar's Exhibit 10, page 503).

The Referee correctly considered the surrounding facts regarding the financial statement which THE FLORIDA BAR alleged was fraudulent and correctly found there had been no breach of the disciplinary rules. Uncontroverted evidence before Judge Agner showed that Respondent told his loan officers at Sun Federal Savings & Loan that the 192 acres of land in Wakulla County was still in his mother's name and why that was so (T 32). The bank did not extend the requested financing on the basis of the financial affidavit, but rather on the strength of his past history of successfully developing and managing real estate (T 58-59). The BAR did not produce evidence to the contrary.

Though THE FLORIDA BAR has the burden of proving its allegations of fraud by clear and convincing evidence, it completely failed in its attempt to prove that Respondent intentionally misrepresented his assets and net worth on the November 1979 financial statement. The record before this court does not contain any admission by Respondent that he had not owned the Ocala Road property which he had claimed as his on the November 1979 financial affidavit. Indeed, Respondent testified before the Referee that he still believed that he had owned the Ocala Road property at all times pertinent to the financial affidavit (T 33-34).

Petitioner also failed to prove that Respondent lied on the financial affidavit with regard to the value of his notes receivable (T 35). At his February 16, 1982, deposition, when asked if the amounts on the financial statement were the exact values of the notes, Respondent admitted the value of the notes was overstated, but was not allowed to testify as to how much or why that might be so (Bar's Exhibit 8). At the hearing before the Referee, however, Respondent testified that the amounts might have been overstated because payments were due at different times and in differing amounts, which might not have been accounted for in the preparation of the affidavit (T 35).

THE FLORIDA BAR failed to produce any evidence to rebut Respondent's testimony. THE FLORIDA BAR failed to produce any evidence on the time Respondent became the owner of the Ocala Road property; evidence as to the balances actually due on the

notes in November 1979; evidence rebutting Respondent's allegation that the bank officers actually knew that Respondent did not currently own the 192 acres in Wakulla County; or evidence as to the exact amount in Respondent's bank accounts at the time the financial affidavit was filed. THE FLORIDA BAR failed to carry its burden of proof.

The Referee was correct in finding, based on the evidence before him, that the Respondent was not guilty of violation of disciplinary regulations as to his financial statements. It is for the referee in disciplinary proceedings to weigh credibility of the witnesses before him. Any conflicts in evidence are properly resolved by the referee sitting as the Court's finder of fact. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). The Referee in the instant case resolved any conflicts of evidence before him as appeared to him appropriate as finder of fact. His determinations were correct and should affirmed by this honorable Court.

ISSUE II

THE REFEREE WAS CORRECT IN FINDING THE RESPONDENT NOT GUILTY OF VIOLATION OF DISCIPLINARY REGULATIONS AS TO BEING HELD IN CONTEMPT OF COURT DURING HIS DISSOLUTION OF MARRIAGE PROCEEDINGS.

As the Referee stated in his report to this Court, the BAR charged that Repsondent violated Disciplinary Rules numbered 1-102(A)(3), 1-102(A) (4), 1-102(A)(5) and 1-102(A)(6) when Respondent failed to cause property which he had transferred out of his name to be transferred back into his name; for

transferring interests in property in violation of the Court's Order not to transfer interests in property; for failure to make Court ordered alimony and child support payments; and, for violating a Court Order not to leave the jurisdiction.

As shown by Respondent's Statement of the Facts (supra page 2) the trial court's orders, taken together with Respondent's means of making a living at that time, put the Respondent in the position of having to breach certain orders in order to comply with others. As shown by Respondent's testimony before the Referee, transfers of property and readjusted financing were central to Respondent's ability to earn a living and therefore to his ability to pay child support and alimony.

Regarding Respondent's failure to cause property transferred to other parties to be reconveyed to him, Respondent testified before the Referee that the property had been conveyed for consideration to entities who were not parties before the court. Mortgages had been given to financial institutions by the new owners. Respondent was legally incapable of causing the property to be reconveyed to him (T 27).

Respondent's assignment of notes receivable to the bank in Cairo, Georgia, was justifiable in that Judge Cooksey had ordered Respondent to pay $3,500.00 a month in alimony and support and also entered orders freezing the assets from which Respondent made his living. Respondent could not have complied with both orders.

The referee was correct in determining that the contempt orders entered against Respondent in his divorce action were products of particularly zealous representation of the Wife's interests by her attorney. Further, Respondent spent six (6) weeks in jail as a result of those orders. The fact that Respondent ultimately satisfied all such orders and has not been held in contempt since that time further weigh in Respondent's favor (T 48-50). In light of the unusual circumstances of the case, the inability of Respondent to perform some of the court's orders without violating others, and Respondent's eventual purge of the contempt, the Referee was correct in finding that Respondent was not in violation of Disciplinary Rules 1-102(A)(5) and 1-102(A)(6) and Respondent 's conduct was not prejudicial to the administration of justice, nor does it reflect adversely on his fitness to practice law.

Considering all the circumstances of the Respondent's divorce, the Referee was correct in determining that, although Respondent's actions may not have been correct, Respondent is not by his conduct guilty of violating any of the above Disciplinary Rules.

ISSUE III

A PRIVATE REPRIMAND IS AN APPROPRIATE DISCIPLINE WHEN A LAWYER PERJURES HIMSELF BUT RECANTS THE TESTIMONY OF HIS OWN ACCORD, AND WHERE A LAWYER VIOLATES INJUNCTIVE COURT ORDERS UNDER CIRCUMSTANCES AS WERE DEMONSTRATED IN THE HEARING BEFORE THE REFEREE.

The nature of the discipline must be resolved on the basis of the factual situations presented by each particular

case. State v. Dawson, 111 So.2d 427 (Fla. 1959). The Referee has wide discretion in disciplining an attorney for unprofessional conduct. Holland v. Flournoy, 195 So.2d 138 (Fla. 1940). Further, it is appropriate for the Referee and the Court to consider unusual circumstances in determining the discipline to be exercised in a case. Rule 3-5.1.(b), Rules Regulating the Florida Bar. The Referee correctly considered the unusual circumstances of Respondent's breaches of the Disciplinary Rules as alleged by THE FLORIDA BAR, and properly recommended private reprimand and probation for the offense.

The passage of time between the offense and the disciplinary hearing, taken together with a dramatic change in circumstances, is a mitigating factor to be considered in the exercise of discipline. The Florida Bar v. King, 174 So.2d 398 (Fla. 1965). In the instant case, the offenses charged by THE FLORIDA BAR occurred in 1982, during particularly acrimonious dissolution proceedings. Respondent was not acting as an officer of the Court, but rather was a party to the dissolution proceedings.

Since the entry of those orders, circumstances have changed radically. Respondent has (1) satisfied all orders of that trial court (RR 4; T 48, 56-57), (2) is no longer in contempt of court (RR 4; T 48), (3) has since supported his family over and above the requirements of the trial judge (T 49), and (4) voluntarily submitted himself to the jurisdiction of the court and purged himself of contempt thereby reinstating all his

rights and privileges. Palm Shores v. Nobles, 5 So.2d 52 (Fla. 1942). The hardships and lost time incurred during the dissolution proceeding resulted in Respondent's subsequent bankruptcy and loss of credit worthiness (T 50). Over the last three or four years, Respondent has succeeded in beginning to reestablish credit and rebuild his business (T 50-51; Respondent's Exhibit 1). These new circumstances support the Referees recommended discipline.

Regarding the Respondent's perjury at deposition in response to questions about his having had any extra-marital affairs, the Referee was correct in finding sufficient change in circumstance and mitigating factors to recommend private reprimand and probation to terminate upon successful completion of the ethics portion of the Florida Bar exam. The Referee might have considered Respondent's agreement with his wife not to bring such matters into the courtroom (T 40-41) as well as the fact that no fault divorce made such testimony irrelevant. Also contributing to mitigation of the act of perjury is the fact that Respondent retracted the testimony during the same deposition the next morning, as well as retracting the testimony by letter and in the final hearing of the dissolution (RR 4; T 41).

In light of the unusual circumstances at the time of the dissolution proceedings, the Referee was correct in recommending private reprimand and probation to be concluded upon successful completion of the ethics portion of the Bar exam.

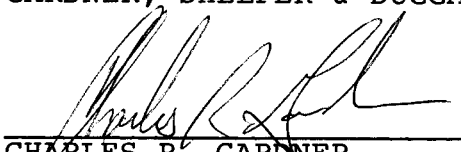
CONCLUSION

Respondent respectfully requests that this honorable Court approve the Referee's findings of fact and recommendation of discipline.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to JAMES N. WATSON, JR., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by U.S. Mail, this 28th day of November, 1988.

GARDNER, SHELFER & DUGGAR, P.A.



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