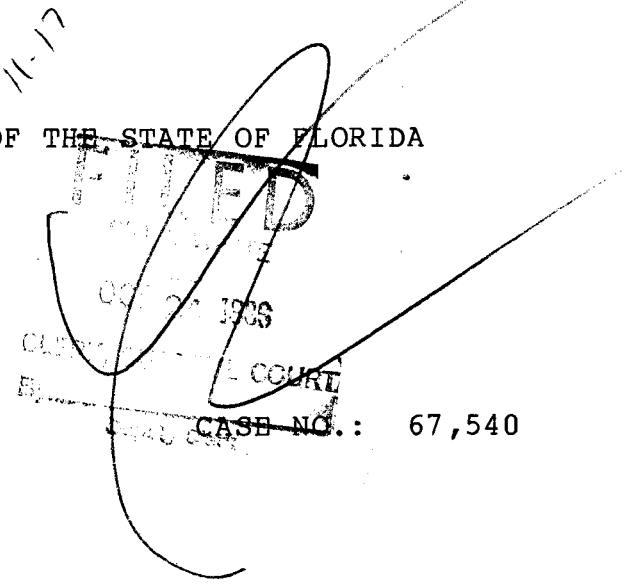
IN THE SUPREME COURT OF THE STATE OF FLORIDA



THE FLORIDA BAR,

Complainant,

v.

DONALD McLAWHORN,

Respondent.

CASE NO.: 67,540

RESPONDENT'S INITIAL BRIEF

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SUMMARY OF ARGUMENT

The Referee made findings of fact in his Referee Report which he does not specifically match up with the four disciplinary rules that he finds were violated. Moreover, some of the findings of fact do not constitute violations of the Code of Professional Responsibility. One finding, that the Respondent made misrepresentations as to the handling of trust funds, is simply totally unsupported by the record.

In some instances, the Referee's findings are not merely rebutted by other evidence, but are totally unsupported by any evidence. The Respondent respectfully urges this Court to view the record in its entirety to confirm that the Referee's findings are without evidentiary support.

Additionally, should the Court find that any of the findings of fact reach the level of a violation of a disciplinary rule, the Respondent urges that the public reprimand recommended by the Referee is far too harsh based on the fact that many of the findings of fact upon which he relies to arrive at his recommendation are incorrect.

STATEMENT OF THE CASE

The case sub judice originated by a letter of complaint from Diana Vann Cummings dated August 6, 1984, to The Florida Bar. The referenced complaint was heard before Thirteenth Judicial Circuit Grievance Committee "B" on February 1, 1985, and thereafter, The Florida Bar filed its complaint on August 26, 1985. On September 5, 1984, the Respondent filed his Motion to Maintain Confidential Status, followed by the filing of his Answer dated September 13, 1985.

On April 1, 1986, the Referee, Judge Frank H. White, conducted the final hearing in this cause, followed by his Findings of Fact dated May 22, 1986. On May 30, 1986, the Respondent filed his Motion for Rehearing, amending the same on July 8, 1986. The Respondent's Amended Motion for Rehearing was heard by Judge White on July 18, 1986, along with Respondent's Motion to Maintain Confidential Status. On July 31, 1986, Judge White issued an order denying both of the aforestated motions; and further issued his Report of Referee finding the Respondent guilty of misconduct and recommending the imposition of a Public Reprimand.

On October 2, 1986, Respondent timely filed his Petition for Review and Motion for Extension of Time. This Court granted the Motion for Extension of Time allowing the Respondent until October 24, 1986 to file this brief.

STATEMENT OF THE FACTS

Symbols and abbreviations used in this brief are as follows:

R. = Page of transcript, April 1, 1986, hearing

Resp. Ex. = Respondent's Exhibit

Bar's Ex. = Florida Bar's Exhibit

The Respondent was retained in August, 1982 to represent Diana Vann Cummings in her claim for personal injuries suffered as a result of an automobile accident in Sebring, Florida. [Resp. Ex. 4]. At the outset, the Respondent was informed that the driver of the vehicle which struck Ms. Cummings car, may have been drinking at the time of the accident. [R. 46]. The potential involvement of alcohol led the Respondent to consider and discuss with Miss Cummings a punitive damage claim, [R. 121], which never materialized.

During the pendency of the case, Miss Cummings received settlement offers of $50,000.00, $75,000.00 and $100,000.00 which she refused. [R. 81, 82]. After trial, a jury awarded her $67,500.00 minus $2,500.00 towards the defendant's costs for a net award of $65,000.00. [R. 62,63].

After the Respondent received the judgment check Miss Cummings became angry about a disbursement sheet prepared by the Respondent, although advised by the Respondent that it was not a final one. [R. 66, 139]. Miss Cummings then hired Mr. Jim Kadyk, a Tampa attorney to discuss the disbursement of the referenced funds with the Respondent. [R. 93].

In an effort to enhance his client's recovery the Respondent offered to place the funds in an interest bearing account, write the medical providers of Miss Cummings requesting a discount on outstanding bills, and reduce his fee. [R. 141, 142].

On June 26, 1984, Miss Cummings endorsed the $65,000.00 check for placement into the Respondent's trust account. [R. 69, 93]. On August 6, 1984, barely one month later Miss Cummings sent her letter of complaint to The Florida Bar accusing the Respondent of stealing the $65,000.00. [Resp. Ex. 4].

On March 1, 1985, over one year prior to the trial in this disciplinary cause, Miss Cummings received some $18,000.00 from the proceeds of the referenced funds; $3,000.00 of which constituted the interest earned on the entire judgment amount by reason of the Respondent's placing the funds into an interest bearing account. [R. 80].

THE REFEREE ERRED IN HIS SELECTIVE ENFORCEMENT OF THE RULES OF EVIDENCE AND PROCEDURE AND IN SO DOING PREJUDICED THE RESPONDENT REQUIRING REVERSAL OF THE REFEREE'S FINDINGS OF FACTS AND RECOMMENDATION OF DISCIPLINE.

At the Referee Trial, the Respondent attempted to introduce depositions of two witnesses, Monte Floyd and Marion Vann, brother-in-law and father of Miss Cummings, respectively. These two witnesses had been listed as Florida Bar witnesses and deposed by Respondent's counsel with Bar Counsel present prior to trial, and their testimony proved favorable to the Respondent. [R.2]. Thereafter, The Florida Bar released these two witnesses unbeknownst to the Respondent's counsel.

Rule 1.330(a)(3)E of The Florida Rules of Civil Procedure specifically allows the use of deposition testimony at trial in "exceptional circumstances". Counsel for Respondent stated that due to his experience with disciplinary cases, the relaxed rules of evidence, and the lack of prejudice to The Florida Bar, sufficient circumstances existed to admit the depositions or allow the witnesses to be called live at a later date. [R. 5, 7].

Although present at the referenced depositions with the ability and opportunity to cross examine, Bar Counsel for unknown reasons, saw fit to "object strenuously" stating "[I]'m not saying that we are entering in any kind of position in bad faith, I'm just saying I feel in fairness to our proceedings

we've had sufficient time to get our witnesses organized ...". [R. 4]. The Court thereafter denied the Respondent's request to admit the depositions in evidence, or in the alternative to bifurcate the hearing to take the testimony of the two witnesses. [R. 6].

Thereafter, Bar Counsel attempted to admit into evidence a letter written by Jim Kadyk, although Mr. Kadyk was not present to testify and be cross-examined. The letter questioned the Respondent's trial tactics and otherwise addressed the merits of the subject matter of the case before the Referee. [Bar Ex. 8].

Chapter 90.801, Florida Statutes specifically excludes a letter of the nature Bar Counsel sought to admit. Notwithstanding Chapter 90.081 and although, Bar Counsel objected to the use of the depositions, although by her own admission "we've had sufficient time to get our witnesses organized", and although Mr. Kadyk could not be cross-examined by Respondent's counsel, Bar Counsel took the untenable position that the letter was admissable.

Counsel for the Respondent objected on heresay grounds and on the grounds the letter could not be properly authenitiated. [R. 78, 79]. The Referee overruled the objection and allowed the introduction of the letter. [R. 79].

The Referee's selective enforcement of the Rules of procedure and evidence were unjustifiable and clearly prejudicial to the Respondent and require reversal of his findings of fact and recommendation of discipline.

THE REFEREE'S FINDING OF FACT THAT MISS CUMMINGS TURNED DOWN OFFERS OF JUDGMENT DUE TO RESPONDENT'S REPRESENTATIONS IS NOT SUPPORTED BY THE EVIDENCE AND IS CLEARLY ERRONEOUS.

The Referee recommended that the Respondent be found guilty of various subheadings of Disciplinary Rule 1-102 of the Code of Professional Responsibility based in part upon the finding that "(R)espondent's statements to Plaintiff's fiancee (now husband) apparently affected her unwillingness to accept offers of judgment of sums substantially less." In order to sustain this finding, this court must find that clear and convincing evidence existed in support thereof. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). However, the Referee's findings should be overturned if clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, supra.

In this instance, the Referee's finding is palpably erroneous. Certainly, there was testimony from Miss Cummings fiancee, David Robinson, that the Respondent, in the presence of Monte Floyd, placed a million dollar value on Miss Cummings claim. [R. 38]. However, Respondent denied placing a dollar value on the claim in discussions with either Mr. Robinson or Miss Cummings, but said that he did explain that a punitive damage claim would enhance the value of the case. [R. 120]. Moreover, Mr. Floyd's testimony which was proferred at trial, is supportive of the Respondent's recollection that a dollar amount was not mentioned. [R. 166].

However, assumming Arguendo, that Respondent did make the statement to David Robinson that the case had a million dollar value, it is overwhelmingly clear from the record that Miss Cummings was totally unaffected by the alleged statement when she turned down offers of judgment. In support of this contention the following cross examination testimony of Miss Cummings is offered.

Q. And when you turned down the various offers that you received that was your decision was it not? When you ...

A. Yes.

****

Q. When you were offered $50,000.00 you turned it down because you wanted more money, isn't that correct?

A. Yes.
[R. 80]

****

Q. And why did you turn it down?

A. Because the fact that they had offered $75,000.00 and I had .... they hadn't even gone to court yet. So I kind of thought that it was worth more than $75,000.00. (emphasis added) [R. 60].

****

Q. Isn't it also true when he told you about the offer of judgment, $75,000.00 that you turned that down on your own?

A. Yes.
[R. 81]

****

Q. And isn't it true that the reason why you thought the case was worth more than a hundred thousand was just based on your instincts, and not on anything Mr. McLawhorn had told you? (emphasis added)

A. Based on my instincts and how severe I had been hurt. [R. 84, 85].

It is indisputable that Miss Cummings turned down all offers of judgment for reasons other than any supposed statement that the Respondent made concerning the dollar value of her case. In fact, when communicating the $100,000.00 offer to Miss Cummings, Miss Cummings admits that the Respondent told her "that's a lot of money". [R. 82]. Notwithstanding, the Respondent's tacit encouragement to Miss Cummings to accept the offer, she testified that she made a phone call then told the Respondent that she did not want the money. [R. 83].

Accordingly, the Referee's finding that Respondent's statement apparently affected her unwillingness to accept offers of judgment is clearly erroneous and should be overturned.

THE REFEREE'S FINDING THAT THE RESPONDENT MADE MISREPRESENTATIONS IN A LETTER TO DOCTORS SEEKING REDUCTIONS IN MEDICAL BILLS IS WITHOUT FACTUAL SUPPORT IN THE RECORD BELOW.

The Referee further found that a letter sent by the Respondent to the various medical providers seeking a reduction in their bills contained misrepresentations in stating "the verdict was not sufficient to satisfy all outstanding financial obligations resulting from her accident and injuries". The Referee found that "the damages awarded were more than ample to satisfy all obligations". [Report of Referee at 1]. The referenced letter was sent by the Respondent to Doctors Taxdal and Brackett and was introduced as Bar's Exhibit 9.

The Referee would be correct if he stated that the jury verdict was ample to satisfy the outstanding out-of-pocket obligations. However, the Respondent's letter speaks of all obligations, not just out-of-pocket expenses. Additionally, the Court below has failed to consider the expert testimony adduced at trial with respect to what constitutes a proper obligation in a personal injury setting as existed in Miss Cummings case.

Michael L. Kinney, Esquire testified that he had engaged in the practice of law in Florida for a period of 34 years with emphasis on personal injury trial work. [R. 25]. Mr. Kinney further stated that he too had previously requested doctors to discount their services to enhance a client's recovery and

found that practice to be common in the personal injury field. [R. 26]. More importantly, Mr. Kinney testified that it was not uncommon to send a letter similar to that sent by the Respondent to the doctors in Miss Cummings case, even when the verdict amount exceeded the out-of-pocket expenses. [R. 30, 31]. Mr. Kinney explained that one of the obligations involved in a personal injury case "would be to compensate the client for the pain and suffering and all that they've gone through because of the accident. [W]hat does the client want? That's the bottom line." [R. 31]. The Florida Bar offered no expert testimony in opposition to the proposition that compensation for client pain and suffering is a proper obligation to consider.

In the instant cause, the Respondent was dealing with a client who had turned down a $100,000.00 offer of judgment only to be awarded $65,000.00 by a jury. Miss Cummings balked at signing the check for deposit in his trust account [R. 142, 143], and when she did sign the check on June 26, 1984, she gave the Respondent a letter instructing him not to disburse any money without her prior approval and signature. [R. 93].

It was obvious to all concerned that Miss Cummings was unhappy about the amount she would receive inasmuch as she had been offered a settlement that was greater by 50 percent, and she, on her own initiative rejected it. The Respondent, in an attempt to enhance her recovery, asked the doctors to reduce

the costs of their services. There was no misrepresentation as to the jury verdict amount in the Respondent's letter. There was no evidence of any complaint from the doctors contacted, that they had been mislead. In fact, the letter first came to the attention of The Florida Bar when the Respondent sent a copy of the referenced letter to The Bar in response to Miss Cummings complaint letter. The letter was forwarded by the Respondent to make clear his efforts to satisfy his disgruntled client by enhancing her recovery. [R. 168, 169].

Simply stated, the Respondent's conduct involved absolutely no misrepresentation, but was consistent with a common trade practice which is and was employed to further the obligation to compensate the client for his or her pain and suffering, mental anguish, etc. The Referee's vague reference to misrepresentations in the subject letter is categorically without support in the record below and must be reversed.

THE REFEREE'S FINDING THAT THE RESPONDENT MADE MISREPRESENTATIONS REGARDING THE JUDGMENT PROCEEDS OF $65,000.00 SHOULD BE OVERTURNED AS LACKING IN EVIDENTIARY SUPPORT.

The Referee further found:

> That Respondent also made misrepresentations regarding the judgment proceeds of $65,000.00, which were to be kept in escrow, but which were later placed in a different account in Respondent's name only without prior permission of the Plaintiff. Such conduct creates distrust of the legal profession and gives the appearance of an effort to defraud Plaintiff of monies belonging to her, even though the money was placed in a money market account. Such actions should not have been taken without her prior permission. [Report of Referee at 1].

Once again, a review of the record indicates no evidence of "misrepresentations" made regarding the judgment proceeds.

With respect to the handling of the judgment proceeds Miss Cummings testified in a contradictory and confusing manner. Under direct examination she stated she was under the assumption that the proceeds would be placed into an account with both hers and Respondent's names. However, she further stated that the Respondent made no such representations. [R. 68, 69].

Contrarily, during her redirect testimony she stated that she believed the proceeds would be placed into an escrow account, [R. 105], which is supported by her June 20, 1984 letter to the Respondent. [Bar Ex. 3]. Moreover, that letter instructs the Respondent that any disbursement must be signed by Miss Cummings. However, during recross examination Miss Cummings acknowledged that based on the fact that she knew she

could not sign on the Respondent's trust account, the money would have to be moved to a second account. [R. 107, 108]. Finally, Miss Cummings testified during further redirect that she believed the money would be placed initially in a joint account. [R. 109].

It is clear from the obfuscated testimony of Miss Cummings that she was not sure at the time of the Referee trial, what she understood or remembered concerning the handling of the judgment proceeds. Perhaps her bad memory was a function of her auto accident as she and her fiancee suggested. [R. 43, 87]. Whatever the reason for her inconclusive testimony, it is abundantly obvious that there is no clear and convincing evidence that a misrepresentation was made to her by the Respondent concerning the handling of the judgment proceeds.

Conversely, Respondent's testimony regarding the handling of the proceeds is simple and consistent with a proper handling of the funds.

The Respondent testified that he attempted to get Miss Cummings to come sign the judgment check on several occasions without success. [R. 139, 140]. Prior to her signing, the Respondent testified that he was contacted by Jim Kadyk, who indicated he was representing Miss Cummings. The Respondent met with Mr. Kadyk and indicated that he would place the funds in an interest bearing account, giving Miss Cummings the interest earned on the entire sum, reduce his fee, and attempt to get medical bills discounted pending disbursement of the funds [R. 141, 142, 147]. Mr. Kadyk indicated that he liked the idea of the money drawing interest. [R. 142].

Thereafter, Miss Cummings came to sign the check and was told by the Respondent that the money would first have to be placed in his trust account, [R. 143] but would later be placed into an interest bearing account. Respondent further testified that he intended to place the proceeds in a joint money market account, however, upon the Respondent attempting to do so the bank would not allow such a procedure due to possible liability problems. [R. 144]. Miss Cummings confirmed in her testimony, that the Respondent explained that the bank would not open a joint account for them and she admitted that the Respondent even immediately took her to the bank. Miss Cummings admitted she was given the same explanation by the bank employees concerning the bank's concerns over liability. [R. 87, 88].

Clearly, the proceeds were moved by the Respondent upon the permission of Miss Cummings and her attorney, Jim Kadyk. At the very least, Miss Cummings admitted she knew the proceeds would require moving to a new account, [R. 107, 108] and further admitted that she did not know if her attorney had approved such a maneuver. [R. 99]. Accordingly, Respondent's testimony is unrebutted and even considering the confused testimony of Miss Cummings, the entire evidence with respect to the handling of the judgment proceeds indicates a total absence of misrepresentation. The Referee's finding in this regard is clearly erroneous and must be reversed.

THE REFEREE'S FINDING THAT RESPONDENT'S FAILURE TO PAY THE MEDICAL BILLS OF MISS CUMMINGS WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE ON HER BEHALF OVERLOOKS THE GREATER WEIGHT OF THE EVIDENCE AND MUST BE OVERTURNED.

The Referee additionally found the Respondent guilty of misconduct based upon the following:

> The failure of Respondent to pay outstanding medical bills, resulting in a law suit and damages to Plaintiff's credit, was prejudicial to the administration of justice in her behalf. The evidence failed to show a genuine effort by Respondent to protect his client from creditors he knew existed, or to persuade her to permit him to make immediate payment of undisputed bills. Respondent was told to pay certain of the bills but failed to do so for several months. The delay was unjustified.

The Referee's finding in this respect again overlooks the confused and contradictory testimony of Miss Cummings. Moreover, this finding flies in the face of Miss Cummings written directions to the Respondent with regard to disbursement of the proceeds. [Bar Ex. 3].

The critical evidence with regard to the payment, or lack thereof, of medical bills is as follows. Miss Cummings testified that when she saw the disbursement sheet that she retained Jim Kadyk, prior to signing the judgment proceeds check on June 26, 1984. [R. 77, 93]. Furthermore, she testified that she told Mr. Kadyk that the judgment proceeds were in the bank, but that she was being sued and could not pay. [R. 77, 78]. Miss Cummings further claimed that she filed her grievance on August 6, 1984 because "I was being sued by all these people with my money in the bank, but I couldn't touch the money at all." [R. 74]. Miss Cummings testified about a law suit by Gisler Clinic and one by Winter Haven Hospital. [R. 72].

However, on cross examination Miss Cummings reluctantly admitted that the Gisler law suit predated receipt of the judgment proceeds check by some 5 months and that Respondent defended that suit on her behalf. [R. 90, 91]. It is obvious the Gisler law suit bore no relation to any alleged failure of the Respondent to pay her bill as the proceeds simply were not available.

Moreover, with regard to the Winter Haven suit filed in January, 1985, Respondent's failure to pay the outstanding bill or to "protect his client from creditors" is certainly justified. The judgment proceeds check was signed on June 26, 1984, before which the Respondent was aware that Miss Cummings had hired Mr. Kadyk and additionally had been given written instructions from Miss Cummings not to disburse any money "to any institution, any person, or persons anywhere or anytime without the full consent and signatures of both parties concerned (Donald McLawhorn and Diana Cummings) appearing on each and every check on draft. [Bar Ex. 3].

Miss Cummings never gave the Respondent written instructions or authorization to pay the outstanding medical bills. In light of the edict of Miss Cummings June 20, 1984 letter, [Bar Ex. 3] without such authorization, payment would have subjected the Respondent to further grievance complaint or

law suit from Miss Cummings. Furthermore the only evidence of any attempt by Mr. Kadyk to have these bills paid is the vague reference made in his January 25, 1985 letter to Respondent, which notice came after the Motion in Garnishment filed by Winter Haven Hospital earlier that same month. [Bar Ex. 6].

Accordingly, there is no evidence that Miss Cummings or her lawyer were concerned with the Winter Haven Hospital law suit until after the proceeding began. Thereafter this was vaguely communicated to the Respondent by Mr. Kadyk, and the Respondent still was under compulsion to follow the written instructions of Miss Cummings. Had Miss Cummings or Mr. Kadyk revoked the prior limitations on the Respondent, or provided him with subsequent written authorization to pay medical bills, payment would be prudent, indeed, mandatory. However, the Respondent acted properly in not paying the bills in light of his lack of authorization, the pending grievance, and the fact that new counsel was retained by Miss Cummings who could have seen that such matters were timely addressed.

In light of all these facts, the finding of the Referee that the Respondent caused prejudice to his client cannot be sustained.

THE REFEREE'S FINDING THAT THE RESPONDENT'S OVER-ALL CONDUCT IN THE HANDLING OF MISS CUMMINGS CASE REFLECTS ON HIS FITNESS TO PRACTICE LAW IMPOSES UPON THE RESPONDENT A DUTY NOT MANDATED BY THE CODE OF PROFESSIONAL RESPONSIBILITY.

On page 2 of the Report of Referee, the Court states:

> The Referee recognizes the inherent difficulties in attorney/client relationships, especially in matters dealing with the settlement of claims or obtaining a jury verdict satisfactory to the client. However, competent attorneys should possess the necessary skills and experience to effectively deal with such problems in a manner which does not adversely reflect upon the respect and confidence the public places in the legal profession. The over-all conduct of Respondent in the handling of this case does reflect upon his fitness to practice law.

In the above-statement the Referee apparently finds the Respondent guilty of a violation of Disciplinary Rule 1-102(A)(6), (conduct that reflects adversely on the Respondent's fitness to practice law) based on the dissatisfaction of Miss Cummings. The Referee apparently feels that "competent attorneys" would have been able to keep Miss Cummings satisfied. That proposition seems remote at best as Miss Cummings' testimony was so confused and contradictory that it is evident that she is a difficult person to deal with rationally.

In any event, to the knowledge of this writer, never in the history of The Florida Bar has an attorney been disciplined for having difficulty in dealing with a client who was unhappy with the result of his or her litigation. Moreover, nowhere in the Code of Professional Responsibility is it mandated that

"difficulty in attorney/client relationships" must always be "effectively dealt with" or discipline will result. Should this Court uphold the Referee's report in this respect, it will create a standard of conduct up to which no attorney can live. The finding of the Referee is without precedent or support in the Code of Professional Responsibility and must be reversed.

CONCLUSION

The case below is a prime example of how The Florida Bar in its sincere effort to police its ranks and maintain the public trust can be misused by an avaricious client. Forty-one days after signing the judgment proceeds check, the Complainant filed her complaint; the substance of which changed rapidly and often. A complete review of the Complainant's testimony reveals a credibility problem of obvious proportions.

Notwithstanding, The Florida Bar has the burden to prove the allegations of its complaint by clear and convincing evidence. The evidence, primarily the testimony of the Complainant, falls well short of that level.

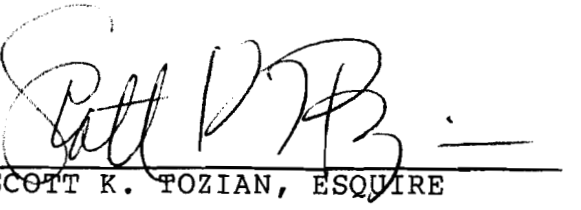
Moreover, some of the findings of the Referee, even if proven do not constitute conduct which is violative of the Code of Professional Responsibility.

The thought that the record below reveals misconduct of a magnitude to justify the Respondent being publicly reprimanded is incomprehensible. The greed of one client should not justify such a result.

The case against the Respondent should be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Initial Brief has been furnished by U. S. Mail delivery this 23 day of October, 1986, to: Diane V. Kuenzel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.



SCOTT K. TOZIAN, ESQUIRE