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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DAVID M. ANDERSON,

Respondent.

_________________________/

CONFIDENTIAL

Case No. 67,803

TFB No. 08-87N78

RESPONDENT'S BRIEF IN SUPPPORT OF CROSS-PETITION FOR REVIEW AND ANSWER BRIEF

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STATEMENT OF THE CASE

This is a case of original jurisdiction pursuant to Article V, Section 15, of the Constitution of the State of Florida.

On April 30, 1984, Nancy Yenser and Mitzi Austin wrote letters of complaint to The Florida Bar on behalf of their respective clients alleging improper conduct on Respondent´s part. On March 26, 1985, Respondent stipulated to probable cause before the Eighth Judicial Circuit Grievance Committee. Seven months later, on October 22, 1985, The Florida Bar filed its formal complaint in this court. Final hearing was held on July 2 and July 8, 1986, before the Honorable John Thurman. Judge Thurman issued his Report of Referee on July 25, 1986.

In his report, Judge Thurman found Respondent violated various disciplinary rules and recommended suspension from the practice of law for six months, passage of the Ethics portion of the Bar examination, and payment of a judgment entered against Respondent by the widow of his client, A. E. Copeland.

The Florida Bar appealed the discipline recommended by the referee and asked for disbarment.

Respondent appeals the referee´s report and argues that the referee erroneously found that various disciplinary

rules were violated, that the referee improperly denied Respondent's Motion to Dismiss for delay of prosecution and that, even should the referee's findings be upheld, that a suspension is not warranted in this cause.

STATEMENT OF THE FACTS

In late September 1980, Mitzi Austin, on behalf of her client, Betty LeMarchand, filed a Petition for Involuntary Guardianship seeking to have Ms. LeMarchand's father, A. E. Copeland, declared incompetent and appointing Ms. LeMarchand the guardian of his estate. That petition was served on Mr. Copeland on September 25, 1980. Shortly thereafter, Mr. Copeland contacted Respondent for the purpose of resisting Ms. LeMarchand's petition.

Respondent testified that, based on Mr. Copeland's instructions and with his approval, Respondent devised a method of buffering Mr. Copeland's assets from his daughter. To that end, Respondent set up a corporation, Orchard Investment Company (hereafter OIC) to which Mr. Copeland transferred his assets. Among those assets were the Starlite Motel and the Orchard Restaurant, and an assignment of mortgage from Kirk Reeb and Ronald Reeb to Mr. Copeland. OIC was filed with the Secretary of State on October 10, 1980, having been chartered one week earlier.

Simultaneously with the assignment of Mr. Copeland's assets to OIC, Respondent filed a Petition for Voluntary Guardianship requesting that Respondent be appointed guardian of Mr. Copeland's property. Respondent noticed his Petition for Voluntary Guardianship to Ms. Austin by Notice

of Hearing dated October 16, 1980.

On October 17, 1980, Mr. Copeland executed an irrevocable trust instrument in which he appointed Respondent trustee of all of his property, including the stock in OIC or any other indebtedness or indenture that Mr. Copeland might own. The trust agreement was originally executed on October 17, 1980, but, because it was not properly witnessed, it was re-executed on October 29, 1980.

On October 31, 1980, Respondent supervised Mr. Copeland's execution of his Last Will and Testament.

Respondent testified that during his initial discussions with Mr. Copeland, the subject of Mr. Copeland's investing approximately $92,000 in liquid assets was discussed. Respondent suggested that Mr. Copeland invest his funds into a real estate corporation in which Respondent was a principal. Although, Mr. Copeland did not accept this idea, he did, however, agree to lend $90,000 to Respondent at an interest rate of 12 percent (TR II 14, 82, 88). That rate was approximately four to five percent better than the interest rate he was receiving on the money that he had in his possession. On approximately October 24, 1980, Respondent withdrew from Mr. Copeland's banks the funds that had been lent to him on October 6, 1980.

On February 17, 1981, the two motions to appoint a guardian were heard by the Honorable John Crews, Circuit Judge, in Gainesville, Florida. By Order issued that date, Judge Crews rejected Ms. LeMarchand's motion to have her

father declared incompetent and granted Respondent's motion for the appointment of a voluntary guardian. Judge Crews found that Mr. Copeland was

> a physically incapacitated person with some mental disability but not incompetent. (TFB Ex. 3e)

Judge Crews appointed Melvin Copeland as Mr. Copeland's guardian pursuant to Mr. Copeland's request. Although Melvin Copeland was required to post bond, he never did so. Nor did he ever file any inventory or file any other documents in probate court.

Respondent never represented Melvin Copeland in any capacity.

The sole issue before the court at the February 17, 1980, hearing was Mr. Copeland's competency. The nature or quantity of his assets were never at issue and were never discussed by any of the parties to that action. (TR I-41; TR II-20).

Respondent testified that the purpose of the trust agreement was to allow Mr. Copeland to run his life in the same manner that he had done before September 1980 without any interference from any individuals. Toward this end Mr. Copeland was given unfettered discretion in running his motel and restaurant business and to obtain the payments from any mortgages that he held. Respondent received no compensation from any of the businesses or any of the mortgages that Mr. Copeland assigned to OIC. All revenue from those assets flowed directly to Mr. Copeland.

Respondent testified that the arrangement for the repayment of the loan was that Mr. Copeland could call it due at any time. If, prior to demand for full payment, Mr. Copeland needed funds he was to contact Respondent and they would be delivered to him promptly.

On March 23, 1981, Mr. Copeland remarried his former wife, Velma. Mrs. Copeland was not living with Mr. Copeland at the time of the previous events. In fact, she first learned of the guardianship after their remarriage (TR I 47). Mrs. Copeland testified that at the time she remarried her husband he was competent and "was in good shape" (TR I 63 - 64).

On four occasions after their marriage, Mr. and Mrs. Copeland went to Respondent and obtained sums of money from him. Those disbursals took place on the following dates:

May 27, 1982	$ 2,000
August 24, 1982	$ 10,000
December 22, 1982	$ 3,000
March 14, 1983	$ 4,000

Mrs. Copeland and Respondent are in basic accord on the dates and amounts of these payments (TR I 63 - 64; TR II 61). However, Mrs. Copeland, even as late as final hearing, denied that those payments were for the note. Mrs. Copeland also denied the existence of any note. In fact, despite the testimony of her own lawyer, Nancy Yenser, to the contrary, Mrs. Copeland testified that she never sued Respondent on a note nor made any demand for payment on any such note (TR I 65).

In September 1981, because Mr. Copeland was in danger of losing homestead exemption on the motel that he operated and in which he lived, Respondent prepared and Mr. Copeland executed a document granting to Mr. Copeland from OIC a life estate in the motel. At another point in time, Respondent supervised Mr. Copeland's execution of a Warranty Deed resolving a boundary dispute with one of his neighbors.

In August or September 1983, Mr. and Mrs. Copeland contacted Respondent requesting $10,000 on the note to enable them to buy a new car. Here, the testimony between Respondent and Mrs. Copeland digresses markedly.

Mrs. Copeland testified that no note had ever existed and that previous payments by Respondent to the Copeland's had been made on Anderson and Wright (Respondent's law firm) checks. She said Respondent refused to disburse the $10,000 and, at that point, she went to Nancy Yenser for representation.

Respondent testified that on all previous occasions when money had been disbursed to them, Mr. and Mrs. Copeland had brought the original Promissory Note to Respondent's office. At that time, the amount of the payment was recorded simultaneously on the original note, which remained in the Copelands' presence, and on a duplicate note which Respondent kept in an envelope in his desk drawer together with the bank books relating to the Copelands' accounts and other pertinent documents to the loan (TR II 30 - 31).

He further testified that all payments were made by

cashier's check, contrary to Mrs. Copeland's testimony. Respondent brought to final hearing the bank statements from all of the Anderson and Wright accounts germane to the four previous payments and testified to the referee that he had reviewed those statements and there were no payments made to the Copelands from those accounts.

Respondent testified that when he was contacted about the loan payment in August 1983, he advised Mrs. Copeland that he had lost his original note and that he would not remit the $10,000 until the original note was brought to him for copying. His reason for doing so was that he had no proof of having made the prior $19,000 in payments. Mrs. Copeland refused to bring the original note to Respondent.

On September 20, 1983, Nancy Yenser filed on behalf of Velma Copeland a Petition for Appointment of Successor Guardian (TFB Ex. 3f). Although it was signed by Ms. Yenser and, under penalty of perjury was sworn to by Mrs. Copeland, the petition wrongfully stated that Judge Crews had determined that Mr. Copeland was incompetent in February 1981. The petition further stated that Mr. Copeland was still incompetent and that his condition had worsened. Ms. Yenser asked Judge Crews to appoint Velma Copeland as Mr. Copeland's involuntary guardian. Respondent filed an objection to and a Motion to Quash or Dismiss Ms. Yenser's petition (Resp. Ex. B3).

On November 17, 1983, Judge Crews granted Respondent's motion and denied the relief sought by Ms. Yenser and Mrs.

Copeland (Resp. Ex. B4). On November 26, 1983, Ms. Yenser filed a Petition for Successor Voluntary Guardianship (Resp. Ex. B5) asking that Mrs. Copeland be appointed guardian of the voluntary guardianship. Respondent did not resist that motion and, by letter dated January 4, 1984, Respondent expressed his complete agreement with the new relief sought. On February 22, 1984, Judge Crews named Mrs. Copeland successor guardian and Letters of Guardianship of the property were issued to her on February 27, 1984.

No issues relative the nature or extent of Mr. Copeland's assets were before the court prior to this time.

Respondent disclosed to Ms. Yenser the existence of the trust towards the end of November 1983 (TR I 94). Ms. Yenser received a copy of the October 1980 trust agreement on January 19, 1984 (TR I 76).

In January 1984, four months subsequent to her petition alleging Mr. Copeland incompetent, Ms. Yenser supervised Mr. Copeland's execution of a will and trust. Ms. Yenser testified that in January 1984, Mr. Copeland had the requisite testimentary capacity to execute the will (TR I 91).

On March 6, 1984, Ms. Yenser filed a Motion for Production of Assets and Account of Trustee and served it on Respondent. Subsequent to that motion, Judge Crews ordered that the accounting was to be filed on April 19, 1984. After seeking an extension, Respondent filed on April 25, 1984, with the court his report of David M. Anderson as

Trustee for A. E. Copeland (TFB Ex. 3j).

After receiving objections from Ms. Yenser as to the sufficiency of his April 25, 1984, report, Respondent filed on May 18, 1984, a supplemental report (TFB Ex. 3k). In June or July 1984, Ms. Yenser and Respondent agreed to the sufficiency of his supplemental accounting and it was accepted by joint motion (TR II 54).

In his April 25, 1984, report, Respondent listed as one of the assets of the trust a demand Promissory Note (TFB Ex. 3i) from Respondent to Mr. Copeland dated October 6, 1980, in the principle sum of $90,000 plus interest at 12 percent. He tabulated the principle and interest due to date at $134,590.72. Respondent did not claim credit for the $19,000 in payments previously made to the Copeland's. He testified that he did not claim them because he had absolutely no proof at the time of the report that the payments had been made and Velma Copeland was denying receiving them (TR II 50).

Respondent testified to the referee that the copy of the note that was attached to his report had been typed two days before it was filed by an employee of Manpower, Inc., a temporary services company. Respondent testified that the duplicate note was an exact copy of the original note made to Mr. Copeland. Respondent testified that he was able to duplicate the note exactly because it was a duplicate of many other notes he had used on other occasions (TR II 41).

Respondent stated that it was his intention to let the

note be considered a copy of the original that had been lost by the Copelands and that it bore the date October 6, 1980, because that was the date of the transaction and interest had begun to acrue from that date (TR II 110).

By letter dated May 1, 1984, Ms. Yenser demanded payment in full of the note to Mr. Copeland. Pursuant to the terms of the note, on July 31, 1984, Respondent delivered to Ms. Yenser a cashier's check for $33,824.38 representing the first of four installments on the note. Prior to making that payment, on July 10, 1984, (Resp. Ex. B7) Respondent had written Yenser asking for an acknowledgment of the validity of the note. Subsequently, following conversations and correspondence between the parties, Respondent wrote Yenser acknowledging both the $90,000 indebtedness and Mrs. Copeland's representation that the original Promissory Note had been lost or destroyed (Resp. Ex. B8).

After the Complaint against Respondent was filed with the Bar, Bar Investigator Claude Meadow interviewed Mrs. Copeland and a copy of his report was delivered to Respondent. For the first time, after her previous denials, Respondent had proof that the Copelands received the $19,000 previously paid to them (TR II 56). Respondent then demanded credit for the $19,000 previously paid, retabulated the amount owed and, on October 30, 1984, tendered payment to Yenser for the second installment due on the note in the amount of $22,483.00. Ms. Yenser refused to accept the

amended accounting.

Respondent made no further payments on the note after his $22,483.00 payment was refused. After suit was filed and trial had, on August 12, 1985, Final Judgment was entered against him on the note for $114,155.43 in favor of Mr. Copeland. Respondent appealed that judgment solely on the issue of whether he should receive credit for the $19,000 that Mrs. Copeland initially denied receiving but later admitted to the Bar that she had received (subsequent to final hearing in this matter, Respondent's appeal was denied).

Mr. Copeland did not testify at final hearing in this cause. He died on April 22, 1986, between the time the Bar filed its formal Complaint in this matter and final hearing. Mr. Copeland never signed any letters of complaint against Respondent, wrote him any letters, signed any Affidavits, signed any pleadings, or testified in any manner as to the events giving rise to this cause of action.

SUMMARY OF ARGUMENT

The referee's findings of fact in this matter lack precision. In fact, his purported findings are in reality conclusions of law and not findings of fact resolving conflicts in the testimony. Such conclusions of law are more easily subject to attack than a referee's findings of fact.

The referee's conclusions are erroneous and are not supported by the evidence because there was no testimony given refuting Respondent's version of those events that took place in the period October 1980 through February 1981. Furthermore, there is no evidence whatsoever indicating Respondent failed to deliver anything to any court that he was required to deliver.

The referee erred in denying Respondent's Motion to Dismiss these proceedings for laches. The Complaint in this cause was filed on April 30, 1984. For reasons not attributable to Respondent, the grievance committee hearing on this cause was not held until March 26, 1985. At that time, Respondent stipulated to probable cause. Despite the requirement in the integration rule that the Bar's Complaint subsequent to a finding of Probable Cause be filed "promptly", the Bar's formal Complaint was not filed in this court until October 22, 1985,--18 months subsequent to the

letters of complaint being filed.

Notwithstanding this court's requirement that disciplinary proceedings be held within 180 days of the filing of the formal complaint, the Bar did not file its Motion for Final Hearing until May 20, 1986. Final hearing was held on July 2 and July 8, 1986.

The only delay attributable to Respondent in this entire matter was his counsel's request subsequent to the motion for hearing, that final hearing not be held during the period of June 14 to June 28, 1986, because his child was due to be born during that period. Respondent also requested a continuance due to illness after the Bar rested at final hearing on July 2, 1986. Accordingly, testimony was completed on July 8, 1986.

The Florida Bar is responsible for prosecuting its disciplinary proceedings with dispatch. If their failure to comply with their mandate results in prejudice to the Respondent, the case should be dismissed. In the case at hand, the only witness that could corroborate Respondent's story relative his loan from Mr. Copeland, Mr. Copeland himself, died several months prior to final hearing.

Should the court find that the referee's findings and conclusions of law are appropriate, Respondent's misconduct warrants no more than a public reprimand. The Bar's delay in bringing this action is a substantial mitigating factor that removes this misconduct from the realm of suspension requiring proof of rehabilitation. Respondent's alleged

misconduct is an isolated incident in an otherwise long and distinguished legal career.

POINT ON APPEAL

POINT I

THE REFEREE´S FINDINGS ARE PRIMARILY CONCLUSIONS OF LAW RELATIVE RESPONDENT´S VIOLATION OF VARIOUS DISCIPLINARY RULES, ARE ERRONEOUS, AND ARE NOT SUPPORTED BY THE EVIDENCE.

POINT II

THE REFERRE IMPROPERLY DENIED RESPONDENT´S MOTION TO DISMISS FOR LACHES.

POINT III

RESPONDENT´S MISCONDUCT, IF ANY, WARRANTS AT MOST A PUBLIC REPRIMAND. (ADDRESSING THE BAR´S POINT ON APPEAL).

ARGUMENT

THE REFEREE'S FINDINGS ARE PRIMARILY CONCLUSIONS OF LAW RELATIVE RESPONDENT'S VIOLATION OF VARIOUS DISCIPLINARY RULES, ARE ERRONEOUS, AND ARE NOT SUPPORTED BY THE EVIDENCE.

It is difficult for Respondent to address the errors in the referee's findings of fact and conclusions at law because the factual findings are sketchy. They consist primarily of conclusions supporting the referee's belief that Respondent violated various disciplinary rules.

In The Florida Bar: In Re: Inglis, 471 So.2d 38 (Fla. 1985), at page 40, this court made the following statement relative its review of a referee's report:

> Thus, we must accept the referee's findings of fact unless they are not supported by competent, substantial evidence in the record. With regard to legal conclusions and recommendations of a referee, this court's scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment.

The court then went on to reverse several of the referee's findings of fact and conclusions of law.

Each of the referee's conclusion that a disciplinary rule was violated is addressed below.

A. DR 1-102 (A)(1)

This disciplinary rule prohibits the violation of any disciplinary rule by a lawyer. Respondent concedes that if

this court finds that he has violated any disciplinary rule, he has violated DR 1-102 (A)(1).

B. DR 1-102 (A)(4)

The referee concluded that Respondent violated this disciplinary rule by making a misrepresentation to Judge Crews. The misrepresentation was one of omission, the referee found, because Respondent did not disclose to the court the existence of a fully executed trust agreement when he filed the Petition for Voluntary Guardianship in October 1980. The referee's conclusion is not supported by any evidence. Ms. Austin and Respondent both testified that the only issue before the court in the time frame October 1980 until February 1981 was Mr. Copeland's competency (TR I 41; TR II 20). There was no requirement that Respondent reveal the existence of the trust at that time. Respondent did reveal the trust to Melvin Copeland, the guardian appointed on Mr. Copeland's behalf.

The referee further concluded that Respondent violated this disciplinary rule by failing to return Mr. Copeland's money when requested. Once again, there is no dispute in the evidence in regards to this matter. When Respondent received notice of demand of the note on May 1, 1984, he timely paid the first of four installments on the note in the amount of $33,824.38 on July 30, 1984.

Because Velma Copeland, Mr. Copeland's wife, had refused to acknowledge Respondent's prior $19,000 in payments, Respondent did not initially claim an offset for

this amount. However, when she acknowledged to the Bar's Investigator that Respondent had paid $19,000 towards the note, Respondent then demanded credit for those payments and, after retabulating the payment schedule, timely tendered a check in excess of $22,000 for the second quarterly payment. However, it was refused by Ms. Yenser.

Litigation, as is proper under such circumstances, was engaged in to resolve the dispute only over the disputed $19,000 plus interest.

Finally, the referee's conclusion that this disciplinary rule was violated by Respondent's "deceitful and dishonest conduct" in the preparation and back dating of the Promissory Note is, once again, a conclusion and is not based on facts.

It is unrebutted that Respondent originally executed a Promissory Note with Mr. Copeland on October 6, 1980. Mr. Copeland, who could have corroborated Respondent's version, died after The Florida Bar filed its formal Complaint and before final hearing. Velma Copeland, Mr. Copeland's widow, was not married to or living with Mr. Copeland at the time of the October 1980 transaction.

Respondent never represented to anybody that the note that was included in his April 1984 report of trustee was the original. He referred to it as a copy and has maintained consistently throughout the probate proceedings and disciplinary proceedings that the original was in the Copelands' custody. Respondent acknowledged to the court

that the second note was prepared several days prior to filing the report. However, the referee's conclusion that it was deceitful and dishonest to prepare such a copy, does not comport with the facts.

Respondent testified that the note that he submitted to the court is virtually identical to the original. He was able to duplicate it exactly because the language used in the note was identical to that used in numerous other transactions in which Respondent had engaged. Respondent's actions were no attempt to prejudice Mr. Copeland or to deceive the court. Rather, his actions inured to Mr. Copeland's benefit because it was proof positive that Respondent owed him $90,000 with interest accruing from October 6, 1980.

Respondent's good faith is further evidenced by his correspondence with Ms. Yenser in which, on several occasions, he insisted that the validity of the note be acknowledged by all parties concerned.

If anybody was deceived in the matter of the loan, it was Respondent. After initially refusing to acknowledge Respondent's $19,000 in loan payments, Mrs. Copeland finally admitted to the Bar's investigator that those payments had been received. Yet, she refused to credit Respondent for the payments because she knew that, without the original note or other proof of payment, Respondent could not prove his payments.

Mrs. Copeland's testimony on the issue of the note is

entirely suspect because of her financial interest in the matter. At final hearing she was so dogmatic in her refusal to acknowledge any loan that she contradicted her own lawyer. She denied that Ms. Yenser demanded payment on the note and insists she did not sue on the note (TR 65). Ms. Yenser, testified otherwise.

Other flaws in Mrs. Copeland´s story was her testimony to the referee that the judgment against Mr. Anderson did give him credit for his $19,000 in payments when, in fact, it did not. In fact, she is getting $109,000 in principal on a loan of $90,000.

If there is any doubt about Mrs. Copeland´s credibility, one only has to examine the first Petition for Successor Guardian (TFB Ex. 3f) filed by Ms. Yenser. Although Mrs. Copeland signed the document under penalty of perjury, she stated to the referee that she did not mean to say in the petition that Mr. Copeland was incompetent in September 1983 (TR I 60 - 61).

C. DR 1-102 (A)(6)

This disciplinary rule prohibits a lawyer engaging in any conduct adversely reflecting on his fitness to practice law. The referee concluded that Respondent violated this disciplinary rule by "the foregoing" (presumedly the referee´s remarks relative DR 1-102 (A)(4)) and because Respondent supervised the transfer documents signed individually by Mr. Copeland without the signature of the trustee or guardian.

Respondent's failure to sign the transfer documents to which the referee refers in his capacity as trustee, or to have Melvin Copeland sign them, is a technical oversight at best. The transactions were extremely routine--they involved the granting of a life estate to Mr. Copeland from OIC and the resolution of a minor boundary dispute with one of his neighbors. The transactions were insignificant, minor, and were purely for Mr. Copeland's benefit.

D. <u>DR 5-101 (A)</u>

Disciplinary rule 5-101(A) reads as follows:

> 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.

The referee concluded that Respondent violated this disciplinary rule because the referee believed Mr. Copeland came to Respondent for the express purpose of defending his daughter's incompetency proceeding and that subsequently, Respondent "induced", Copeland to part with Copeland's savings.

There is no evidence in the record to rebut Respondent's testimony as to the events that occurred in October 1980. Respondent testified that he and Mr. Copeland discussed the disposal of Mr. Copeland's funds, examined the various alternatives, and then Mr. Copeland elected to lend the money to Respondent at an interest rate four to five percentage points higher than it was receiving in a

certificate of deposit. Respondent testified that his net worth at the time was approximately 1.7 million dollars and that it was a sound (although not technically secured) investment. Respondent further testified that he suggested that Mr. Copeland seek legal counsel before consummating the loan (TR II 82, 83, 87, 88).

There is nothing in the record to indicate that when Respondent first accepted representation of Mr. Copeland, there was any potential conflict between the two of them. The disciplinary rule only prohibits "accepting" employment if there is a conflict.

The nature of the relationship between Respondent and his client should be considered here also. Respondent had represented Mr. Copeland in numerous matters for over 14 years at the time of the October 1980 transaction. During that time Respondent had represented Mr. Copeland in real estate transactions and in two condemnation matters. (TR 2 and 5 - 8). Mr. Copeland was an astute businessman, had various sources of income including payments to him from mortgages and from his business and was clearly capable of running his own business.

Five months after the loan, Velma Copeland testified that Mr. Copeland was in good mental shape when she married him in March 1981 (TR I 63). Ms. Yenser acknowledged that Mr. Copeland possessed the requisite testamentary capacity when she drew up a will for him in 1984 (TR I 91 - 92).

There is no evidence whatsoever to indicate that

Respondent in any way took advantage of Mr. Copeland or induced him to do anything that was not in his best interest.

E. DR 5-104 (A)

If Respondent has violated a disciplinary rule relative to conflict of interest, it is not DR 5-101 (A) prohibiting acceptance of employment, it is this disciplinary rule. DR 5-104 (A) prohibits a lawyer entering 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 client's protection. However, even then, such a transaction is permissible if the client has consented after full disclosure.

The referee concluded that the Respondent violated this disciplinary rule by "his actions described above" (presumably) the conclusions listed in DR 5-101 (A) and because Mr. Copeland had to sue to obtain a return of his money.

Mr. Copeland did not have to sue to obtain a return of his money. In fact, he secured over $52,000 of his money without resorting to litigation. His guardian's lawyer, Ms. Yenser, rejected a further $22,300 payment from Respondent. Ms. Yensere, in fact, testified that Respondent never denied his indebtedness (TR I 92).

It was only after Velma Copeland continued her refusal to give Respondent credit for the $19,000 paid to the Copelands that Respondent allowed this issue to be

litigated. As he testified before the referee, failure to give him credit for the $19,000 that everybody acknowledged was paid resulted in a $30,000 increase in the final judgment.

One cannot help but wonder if Ms. Yenser would have better served her client by accepting Respondent's $22,300 payment in October 1984, and the two payments due thereafter. She could have then sued Respondent soley on the $19,000 issue.

F. DR 7-101 (A)(3)

This disciplinary rule prohibits a lawyer prejudicing or damaging his client during the course of the professional relationship.

The referee concluded that Respondent violated this rule by failing to have the guardian and trustee sign Mr. Copeland's Warranty Deed to OIC on October 7, 1980, and his Assignment of Mortgage bearing the same date to OIC, and by having the client resort to litigation to recover his property.

If there is any finding that shows the referee's misapplication of the facts to his conclusions, it is this paragraph.

At the time that Mr. Copeland executed Bar Exhibits 3A and 3B, which the referee stated constituted a violation of this disciplinary rule, there was neither a guardian nor a trustee. Respondent became trustee two weeks later. Melvin Copeland was not appointed guardian until four months later.

Respondent did not violate any ethical precept by failing to have those documents signed by individuals not yet acting in a fiduciary capacity.

The referee's conclusion that Mr. Copeland was prejudiced because he had to resort to litigation to recover his property, presumably refers to the Promissory Note litigation discussed in the preceding subparagraph.

G. DR 7-102 (A)(3)

The referee concluded that Respondent violated this disciplinary rule by failing to disclose the trust agreement and by failing to file a full accounting of the trust on April 19, 1984, as ordered by Judge Crews.

DR 7-102 (A)(3) prohibits a lawyer's concealing or knowingly failing to disclose that which he is required by law to reveal.

Respondent was never required by law to disclose the trust agreement prior to the time when it was disclosed. Prior to April 1984, the only issue before the court was Mr. Copeland's competency--not the nature or extent of his assets.

The issue before Judge Crews in February 1981 was Mr. Copeland's competency. Judge Crews found that Mr. Copeland was competent and appointed a guardian over his property, Melvin Copeland. Melvin Copeland then had the duty to file an inventory of his brother's assets. He did not do so. That is not Respondent's fault.

Respondent never represented Melvin Copeland.

Respondent did, however, advise Mr. Copeland of the existence of the trust.

When Mr. Copeland's guardianship again came before Judge Crews in November 1983, Respondent's actions were minimal. He correctly filed a Motion to Dismiss Ms. Yenser's and Velma Copeland's Petition for Successor Guardian in which they wrongfully alleged that Mr. Copeland had been adjudicated incompetent and that his condition was deteriorating. Judge Crews agreed with Respondent that Ms. Yenser's pleadings were incorrect and improper and dismissed her action. Thereafter, when Ms. Copeland filed a proper pleading, Respondent did not resist it and, of course, agreed to Velma Copeland being appointed voluntary guardian.

At no time in either of the aforeamentioned hearings, was there any requirement under the law for Respondent to disclose the trust agreement.

In fact, however, Respondent did disclose its existence to Ms. Yenser. She testified before the referee that she first learned of the trust in November 1983, six months before the accounting (TR I 94). She first saw the trust document on January 19, 1984 (TR I 76).

Even if Respondent did not reveal the existence of the trust to the court, he did reveal it to Velma Copeland's lawyer. Such an action shows no subterfuge or desire to violate the law. In fact, it shows outright candor with one's opposing counsel.

The referee further found that Respondent violated DR

7-102 (A)(3) because he did not file a full accounting on April 19, 1984, as ordered by Judge Crews. In fact, Respondent moved for a continuance and, although no hearing was held on the continuance, his report was filed on April 25, 1984, a mere six days late. The delinquency was due to Respondent's having two out-of-state trials, each lasting two weeks, during the six weeks prior to April 19, 1984 (TR II 44).

Judge Crews never imposed any sanctions on Respondent fo his six-day deliquency.

H. DR 7-102 (A)(8)

The referee here found that Respondent violated this rule "as evidenced by the foregoing" and by violating DR 9-102 (B)(3).

DR 7-102 (A)(8) prohibits a lawyer knowingly engaging in other illegal conduct or conduct contrary to a disciplinary rule. The referee does not specify what conduct violated this rule.

Respondent was never charged with any trust fund violations in this matter. Accordingly, it was improper for the referee to in any way predicate his findings on a violation of DR 9-102.

There is no evidence before the court that Respondent has been accused of any illegal conduct and accordingly, there is no basis for a finding that Respondent violated this disciplinary rule through engaging in illegal conduct.

The referee's conclusion that Respondent violated this

disciplinary rule is unsupported by the evidence and by the facts and should be thrown out.

As this court pointed out in Inglis, it has wide latitude in dismissing a referee's conclusions.

A finding that a disciplinary rule has been violated by certain conduct is a conclusion, not a finding of fact. It is an application of the facts before the court to the pertinent law or rule before it. Accordingly, this court has broad discretion in reviewing such conclusions.

The referee in the case at hand did not make findings that resolved conflicts in the evidence. He merely "found" that certain acts violated certain disciplinary rules. These findings are not supported by the evidence, in fact, are erroneous conclusions of law, and should be reversed by this court.

POINT II

THE REFEREE IMPROPERLY DENIED RESPONDENT'S MOTION TO DISMISS FOR LACHES.

Despite changes in bar disciplinary proceedings over the last 15 years including changing the Integration Rule of The Florida Bar, the change from the Code of Ethics to the Code of Professional Responsibility to the Rules of Professional Conduct, from the use of volunteer Bar counsel and referees to the use of paid staff and judges, there has been one consistency in disciplinary proceedings. The Florida Bar is notoriously slow in prosecuting its cases. The statements made in 1960 by retired Justice Drew, in his concurring opinion in State ex rel The Florida Bar v. Bieley, 120 So.2d 587 (Fla. 1960) at page 589, is as applicable today as it was then. Addressing the Bar's delay in bringing disciplinary proceedings, Justice Drew said:

> Nothing contributes more to bringing the Bench and Bar into disrepute than the long and interminable delays which sometimes, and too often, occur in the administration of justice. Such delays in disciplinary matters are particularly detrimental to the general welfare and tend to lower the respect of the public for the Bench and Bar. If an accused attorney should be adjudged to be innocent of such charges, long delays bring about incalculable harm to him. If he is ultimately adjudged to be guilty, the net result of long delays has been to allow an unworthy member of the Bar to continue in the practice of law along side the worthy and honorable members of the profession and in its courts of justice.

Nineteen years later, in 1979, this court appointed a special committee, chaired by then Justice Karl (hereinafter Karl Committee) to study and to propose changes which could improve our disciplinary system. After numerous hearings and extended study, the committee submitted its filings and recommendations to this court. Most of those changes were adopted in Petition of Supreme Court Special Committee, etc., 373 So.2d 1 (Fla. 1979).

Among the recommendations rejected by this court, however, was a "speedy-trial rule" for disciplinary proceedings. The court denied the speedy-trial rule and stated on page four that:

> We find that such a speedy trial rule is not necessary at this time since the revisions to article XI, which we approve, are expected to expedite disciplinary matters.

Despite its expectations, this court was still addressing three years later the Bar's failure to expeditiously bring disciplinary proceedings in The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). There, the court addressed the Bar's delay and stated that:

> While the delay in reaching a final resolution is regretable, it was not prejudicial and should not happen under the new rules.

It has now been seven years since the Karl Committee's report. Despite the court's expectations, the Bar is still dragging its feet reprehensibly in Bar disciplinary matters.

On April 30, 1984, the complaints against Respondent

were mailed to The Florida Bar. It took almost one year for the grievance committee to hold its hearing in this matter. Respondent stipulated to probable cause at that hearing, obviating the necessity of a long hearing and avoiding the necessity of awaiting a hearing transcript being compiled. Despite his acknowledgment of the existence of probable cause, the Bar's formal Complaint in this matter was not filed until October 22, 1985--one and one-half years after the grievance was filed.

After the Bar's Complaint was filed, this court on October 28, 1985, appointed Circuit Judge John P. Thurman, referee in these proceedings. In its Order appointing Judge Thurman, this court directed the Referee's Report to be filed within 180 days of the date of this Order. One hundred eighty days from that date was April 26, 1986. Almost four weeks after that date, The Florida Bar, for the first time, asked for final hearing. At that point over two years had elapsed since the initial grievance was filed.

The Florida Bar, as an arm of the Supreme Court of Florida, is charged with the duty of prosecuting cases responsibly. The Florida Bar v. McCain, 330 So.2d 712 (Fla. 1976) at 718. The responsibility for exercising diligence in bringing grievance cases rests with the Bar. The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970) at 639. If the Bar fails in its duty, the Randolph court observed that:

> the penalizing incidents which the accused lawyer suffers from the unjust delays, might well supplant more formal judgments as a form of discipline. This is

> so even though the record shows that the conduct of the laywer merits discipline. The Florida Bar v. Wagner, 197 So.2d 823 (Fla. 1967).

The mere fact that a grievance is pending against a lawyer is, to some extent, a disciplinary sanction. As this court stated in Murrell v. The Florida Bar, 122 So.2d 1699 (Fla. 1960), at 174:

> the minute such a proceeding is instituted the lawyer's professional reputation is shattered and in danger of being permanently impaired. Such charges should not be suspended in limbo. They should be dispatched and if found to be without merit the lawyer charged should be exonerated.

This court stated in Randolph, supra, at page 638 that:

> inordinate delays are indeed unfair and even unjust to the one accused.

Of course, the Bar consistently argues to this court that its persistent delay in bringing disciplinary proceedings should, at worst, be considered a mitigating circumstance. This court has been presented with this argument as recentlyas last year in The Florida Bar v. James, 478 So.2d 27 (Fla. 1985) and The Florida Bar v. Fussell, 474 So.2d 210 (Fla. 1985).

As long as this court keeps accepting the Bar's argument that its delay should not result in dismissal, and should only be considered at mitigation, delay will continue unabated. In 1979 this court expressed expectations that delay would be eliminated. In 1982 it reiterated its opinion. In 1986, David Anderson is making the same arguments to the court.

In the case at bar, not only did the Bar drag its feet before filing its formal Complaint in this cause, it violated the court's 180-day mandate. Yet, Respondent fully expects the Bar to argue that, at most, the Bar's delay should be considered in mitigation.

It is time for that argument to be rejected. Until such time as this court specifically and emphatically rules that it will not tolerate delay in disciplinary proceedings, particularly the 180-day mandate, the Bar will continue to flagrantly flaunt its responsibility.

In The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978), at page 16, this court said:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar...

In Rubin, despite two different referees finding that the accused lawyer had acted unethically, this court dismissed those two disciplinary proceedings because of the Bar's violation of the integration rule. Among those violations was the Bar's failure to comply with this court's time guidelines. It is time for the court to resort to the same drastic action again.

In most cases, the Bar points to The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978) as support for their argument that delay should not result in dismissal for disciplinary proceedings unless the Respondent can show prejudice. Generally, the Respondent cannot do so.

Respondent avers to this court that pending disciplinary proceedings, without resolution are, in and of itself, prejudice. He is left hanging in limbo with the fear that his livelihood will be removed at some indeterminate point.

In the case at hand, contrary to most cases, Respondent can call the Bar's bluff. Respondent can point to specific prejudice that resulted from the Bar's dilatory tactics.

Mr. Copeland, the individual who constituted the central figure in this entire Complaint, died on April 22, 1986, after the Bar filed its Complaint but before final hearing. Mr. Copeland is the only individual who can verify Respondent's version of events in October 1980. His widow, Velma Copeland, did not enter the scene until her marriage to Mr. Copeland in March 1981. Without Mr. Copeland's testimony, Respondent's story is uncorroborated. (It is also uncontradicted).

Mr. Copeland died two years after this grievance action began.

The Bar argued to the referee in its resistance to Respondent's Motion to Dismiss, that it, too, wanted Mr. Copeland's testimony. Then why didn't they bring final hearing sooner? The Bar's arguments in this regard are similar to the old saw about the defendant who pled for mercy after he was convicted of murdering his parents because he was an orphan.

Bar Counsel candidly admitted to the referee the delay

in this case was attributable to his having more work than he and his assistant can handle. Such being the case, the leadership of the Bar has the responsibility for getting Bar Counsel more help.

If Respondent was guilty of misconduct in his borrowing funds from Mr. Copeland and in his setting up of a trust for Mr. Copeland's benefit, such misconduct occurred in October 1980--over six years ago. And if Respondent is guilty of the misconduct that was alleged to have taken place in early 1984, that misconduct occurred over two and one-half years ago. The delays in bringing these actions are directly attributable to The Florida Bar.

This court has the opportunity now to clearly direct The Florida Bar to start fulfilling its mandate and bringing disciplinary proceedings with dispatch. As an incentive to the Bar to do so, this case should be dismissed at this time. Nothing short of dismissal will get the message across to The Florida Bar.

<u>POINT III</u>

RESPONDENT´S MISCONDUCT, IF ANY, WARRANTS AT MOST A PUBLIC REPRIMAND. (ADDRESSING THE BAR´S POINT ON APPEAL).

Despite the fact that Respondent was not charged with any violation of Canon 9 or the Integration Rule relating to trust accounts, The Florida Bar cites numerous defalcation of trust fund cases as support for its position that Respondent should be disbarred. Even then, most of the case cited by The Florida Bar did not result in disbarment.

Disbarment is the "death penalty" of disciplinary proceedings. <u>The Florida Bar v. Hirsch</u>, 342 So.2d 970 (Fla. 1977). It should be used only in extreme cases.

In recommending disbarment, the Bar is focusing upon punishment rather than the goal of disciplinary proceedings, i.e., protection of the public. In <u>The Florida Bar v. Pincus</u>, 300 So.2d 16 (Fla. 1974), this court rejected the Bar´s request for discipline because its recommendation

> focuses upon retribution rather than the goal of effective discipline which is primarily to protect the public from incompetent and unethical practitioners and only secondarily to punish the offender and to act as a deterrent to others.

Disbarment should be reserved for one who should never be at the Bar and should never be used if a less severe punishment will accomplish the purposes desired. <u>State ex rel The Florida Bar v. Murrell</u>, 74 So.2d 221 (Fla.

1954). A less severe punishment wiill serve the public.

Respondent submitted into evidence his resume which indicated a long history of public service. Admittedly, Respondent received a private reprimand once for notarizing the signature of an individual who did not sign the document in front of him. That was a minor lapse in a long (26 years) and distinguished legal career. In urging disbarment, The Florida Bar states that there is no mitigation present in this case. That simply is not true.

First, and foremost, mitigation exists to the extent that The Florida Bar has unduly delayed these proceedings. This court has time and again stated that delay in disciplinary proceedings will mitigate the discipline to be imposed. The Florida Bar v. James, supra, The Florida Bar v. Randolph, supra.

Even the referee felt that Respondent´s misconduct warranted a six-month suspension, not disbarment. Respondent asserts that his misconduct merits, at most, a public reprimand. Prior decisions from this court supports Respondent´s assertion.

Even assuming all of the referee´s conclusions are correct, Respondent´s worse offense is "back dating" the Promissory Note. Such misconduct was not to the detriment of his client. It enhanced his former client´s position rather than hindered it. Even Ms. Yenser acknowledged that Respondent never denied his debt to Mr. Copeland (TR I 92). Respondent acknowledged to the court

that the note was a copy of the original and resisted paying it only when Velma Copeland tried to visit a fraud upon him by refusing to acknowledge $19,000 in payments. Respondent's offense of back dating the note is certainly no worse than that committed by the accused in The Florida Bar v. Murrell, 411 So.2d 178 (Fla. 1982). There, Mr. Murrell received a public reprimand for back dating a Quit-Claim Deed. Of similar ilk is The Florida Bar v. Guard, 448 So.2d 981 (Fla. 1984). There, one of the two counts for which a lawyer received a public reprimand was found guilty involved lying about the status of a corrected deed.

In essence, this court has taken the position that isolated instances of lapse of judgment will be met with compassion the first time around. Such a view should be utilized here. Analagous cases are:

a. The Florida Bar v. Garcia, 485 So.2d 1274 (Fla. 1986). Public reprimand involving one count of misrepresentation to a client, three counts of neglect, and one count misuse of trust funds.

b. The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986). Public reprimand for giving two second mortgages on the same piece of property without disclosure of prior liens.

c. The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985). Public reprimand for obtaining a mortgage from a bank under false pretenses.

d. The Florida Bar v. LaPorte, 477 So.2d 560 (Fla. 1985). Public Reprimand for four counts of misconduct including trust fund violations, misrepresentations concealing that which he is required by law to reveal, and preservation or creation of false evidence.

e. The Florida Bar v. Wendel, 254 So.2d 199 (Fla.

1971). Public reprimand for misleading the court.

f. The Florida Bar v. Gifford, 478 So.2d 46 (Fla. 1986). Public reprimand for knowingly violating a court order.

g. The Florida Bar v. Hagglund, 372 So.2d 76 (Fla. 1979). Public Reprimand for filing false affidavit with court.

Even in those instances where attorneys have been suspended for isolated misrepresentation, the suspensions have not required proof of rehabilitation. For example:

a. The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979). Ninety day suspension for lying to a grievance committee.

b. The Florida Bar v. Lund, 410 So.2d 922 (Fla. 1982). Ten days suspension for lying to a grievance committee.

c. The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983). Sixty days suspension for misrepresentation to a judge to secure a continuance.

d. The Florida Bar v. Shapiro, 456 So.2d 452 (Fla. 1984). Ninety days suspension for filing false Motion to Dismiss with forged client's signature.

e. The Florida Bar v. Babbitt, 475 So.2d 242 (Fla. 1985). Sixty days suspension (pursuant to a consent judgment) for the preparation and use of a forged document in a real estate transaction.

Respondent's alleged improper loan with Mr. Copeland does not warrant even the six month recommended by th referee. At most, this offense warrants a public reprimand similar to that given to The Florida Bar v. Staley, 457 So.2d 489 (Fla. 1984) or The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981). In the latter, a public reprimand

was given for borrowing trust funds and failing to repay them together with inadequate trust-account records.

Loans of funds from clients does not even always result in a public discipline. In approximately February 1983, The Florida Bar published in The Florida Bar News an announcement of a private reprimand given a lawyer for borrowing from a client and then failing to repay her. A copy of that news article is attached as Appendix "A".

In the case at hand, Respondent is guilty of, at most, lapses in judgment. He has a long history of notable accomplishments in his legal career. He has never tried to defraud Mr. Copeland out of any money and only refused to repay the note at issue in this case after Mr. Copeland's wife refused to give Respondent credit for $19,000 in payments made.

He has never tried to mislead the court.

It is significant to note that nowhere in the record (or outside of the record for that matter) is there any complaint by Mr. Copeland about the way in which Respondent handled his business dealings.

Respondent's distinguished legal career should not be ruined because of some lapses of judgment. A public reprimand, including the opprobrium of his fellow practitioners, will have a very significant effect on the Respondent. Such a discipline is consistent with the second element of discipline as described The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), i.e., fair to the

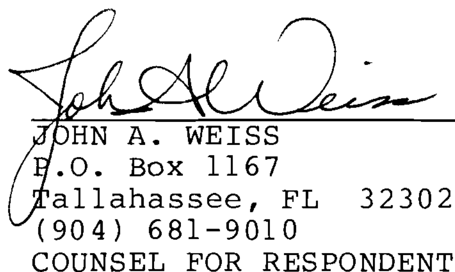
lawyer. Should this court feel that a suspension is necessary to deter other lawyers who might be tempted to engage in other misconduct, _Pahules_, _supra_, at 132, a suspension without proof of rehabilitation would suffice. Respondent has a sterling record. He should receive some credit for his past achievements and should not be ruined because of a single blemish in his exemplary career.

CONCLUSION

Respondent asks that the referee's conclusions that he violated various disciplinary rules be reversed and that this court find that the Respondent violated no disciplinary rules. In the alternative, Respondent asks this court to dismiss The Florida Bar's disciplinary proceedings for delay and laches.

Should this court find that Respondent has violated any disciplinary rules, he should be publicly reprimanded at most. His misconduct can be characterized as a lapse of judgment and an aberration in a distinguished career extending over 25 years.

RESPECTFULLY SUBMITTED this 24th day of November 1986.



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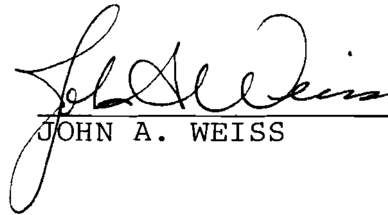
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief with attachment was mailed to James N. Watson, Jr., Bar Counsel, The Florida Bar, Tallahassee, FL 32301, on this 24th day of November 1986.



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