IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, DEVELOPMENT

Complainant,

v. CASE NO. 67,850-18B85C12

EUGENE COLLIER,

Respondent.
_____/

BRIEF OF RESPONDENT ON

PETITION FOR REVIEW

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PRELIMINARY STATEMENT

Respondent in the lower court will be referred to herein as Respondent.

The Complainant in the lower court will be referred to as the Complainant or the Bar.

Reference to the Appendix will be by citation (A-____).

Reference to proceedings before the Brevard County Grievance Committee "B" of the 18th Judicial Circuit, August 12, 1985 and September 3, 1985, will be by citation (GRT-____).

Reference to the first hearing before the Referee, the Honorable Ted P. Coleman, March 20, 1986, will be by citation (TR-____).

Reference to the second and continuing hearing before the Referee, the Honorable Ted P. Coleman, April 20, 1986, will be by citation (TTR-____).

STATEMENT OF THE CASE AND FACTS

The current action arises out of a Complaint by David W. Dyer, Attorney at Law, dated December 7, 1985, alleging the Respondent had committed certain improprieties in connection with his appearance as Co-Defendant and counsel for the defense in Cause No. 83-6859-CA-N, Circuit Court in and for Brevard County, Florida. That case was a cause of action brought against Respondent, Respondent's wife, Katharine Scranton Crisman Collier, individually and as trustee of the testamentary trust estate of Charlotte Scranton Crisman, who died in 1939. (A-8-14) (Bar Exhibit 16). Charlotte Scranton Crisman left a trust upon her death designating her husband, E. M. Crisman, Sr., as life beneficiary, the corpus to go to her only child, Katharine Scranton Crisman Collier, if she survived E. M. Crisman, Sr. If not, there was a provision for contingent remaindermen. (TTR-12, lines 20-25; TTR-12, lines 1-2) (Bar Exhibit 16). In 1952, E. M. Crisman, Sr. was alleged to have assigned his interest in said trust to Katharine Scranton Crisman Collier, and based on that assignment, a bill was filed in Brevard County to terminate the trust. E. M. Crisman, Sr. admitted the assignment (TTR-11, line 12) (Respondent's Exhibit 4) (A-15-18), but because of the remainderman's interest, the court denied the bill. (TTR-12, lines 17-25, TTR-13, lines 1,2). However, Katharine Scranton Crisman Collier was appointed trustee. The beneficiary received a small income every year thereafter until 1983. In 1983, E. M. Crisman, Sr. was declared incompetent, and his son, E.M. Crisman, Jr., was appointed by Marion County Curcuit Judge as guardian. Thereafter, Case No. 83-6859-CA-N was filed seeking an

accounting, removal of trustee and damages against Respondent, Eugene Collier, as well as his wife, Katharine Scranton Crisman Collier, for abuse of the trust. (Bar Exhibit 16) (A-8-14). This case was pending for about two years, when E. M. Crisman, Sr. died and the court dismissed it. Mr. David W. Dyer was one of the guardians' attorneys in the above referenced case, and as a result of his complaint the Florida Bar brought this disciplinary proceeding in three counts alleging: inter alia (A-19-26).

(a) That the Respondent on June 29, 1983 secured a waiver and relinquishment of interest in a testamentary trust fron an individual who was not competent to execute said waiver; and that the Respondent knew, or should have known, of such imcompentency at the time.

(b) That the Respondent had secured a continuance of a hearing on a Motion, in the aforesaid Cause No. 83-6859, through a misrepresentation to the Court.

(c) That Respondent had violated certain provisions of the Bar's Professional Code by involving himself in possible conflicts, through his representation of various parties, including himself.

(d) That the Respondent had participated in reporting to a Georgia Public Housing Authority the fact that one of its tenants had not, and was not, reporting the true state of her assets and income (in order that she could secure a reduced rental for such public housing), and,

That all of the foreging constitued violations of:

Article XI, Rule 11-Ø2-(3)(a), conduct contrary to honest justice and good morals.

DR-1-102(A)(4), conduct involving fraud, deceit, or misrepresentation.

DR-1-102(A)(5), conduct prejudicial to the administration of justice.

DR-1-102(A)(6), conduct adversely reflecting on fitness to practice law.

DR-5-101(A), accepting employment when the Respondent knew his own personal or financial interest would be involved.

DR-5-101(B), accepting employment when the Respondent knew he would be called as a witness.

DR-5-102(A), failing to withdraw after learning that the Respondent would be called as a witness.

DR-5-105(B), continuing multiple employment when exercise of judgment might be adversely affected by representation of another client.

The Respondent denied all of the charges and trial was had, as to all counts, on March 20 and April 10, 1986.

The Referee by his report of June 26, 1986, exonerated the Respondent as to Count III of the Complaint. The Referee, however, found adversely to the Respondent as to Counts I and II. (A-1). Respondent has petitioned for review of the Referee's Adverse Report.

SUMMARY OF ARGUMENT

Respondent contends that the Referee's findings of fact in his report to the Supreme Court are contrary to the manifest weight of the evidence and clearly erroneous. While it is true there is some evidence to support some of the Referee's findings of fact, in some instances there is only innuendo and suggestion to support the Referee's findings. On the other hand, there is an abundance of evidence to support the Respondent's position he is not guilty of any of the charges brought by the Bar.

The allegations in Count I, which accused Respondent of having secured a waiver (referreed to as the 1983 waiver) from a person who was incompetent, and that he knew the person was incompetent, was not supported even by many of the Bar's own witnesses. Many of the Bar's own witnesses, including the alleged incompetent's personal physician, testified that at or about the time the waiver was executed, that the person was, in fact, competent. True, there was some evidence to support the Bar, but the best and most credible evidence was the evidence that did not support the Bar, and since the Bar must have evidence, which is clear and convincing before the Referee should find in its favor, the Referee was clearly erroneous in making the adverse finding with respect to the Respondent as to Count I. The Bar in presenting its case has the burden of proof, and it failed to produce witnesses and other tangible evidence, which would have been very helpful to the Referee, but instead chose to prosecute its case on innuendo and with witnesses who obviously had some personal axe to grind. This was and is a family dispute, which has degenerated to the state of affairs we have today.

With respect to Count II, the Referee, after implying some wrongdoings through his findings, clearly found the Respondent to have been guilty of wrongdoing in his handling of the law suit, which had been brought against him, his wife, individually and as trustee of the testamentary trust of Charlotte Scranton Crisman, who had died in 1939. It is Respondent's contention that contrary to the Referee's findings, he was not dilatory and did not prolong the aforesaid court

action; he merely did the things, which are ordinary and common in the defense of any law suit, and no evidence in the record shows he made more than one motion for a continuance. Under this count the court also found that the Respondent's use of the 1983 waiver referred to hereinabove, as well as an alleged assignment of E. M. Crisman, Sr.'s interest in the trust in 1952, to be a fraud on the court. Respondent contends that the record, or at least the best evidence in the record and the most credible evidence in the record, shows that the 1952 assignment was, in fact, valid, since its validity was admitted to by E. M. Crisman, Sr. at the time a bill was filed in 1952 to terminate the trust, and this is true, even though the court denied the bill. With respect to the 1983 waiver being a fraud on the court, Respondent contends he would have been derelict in his duties, if it had not been raised, and the Bar in trying to show that it was improperly obtained failed to call even a single witness, who had attested to E. M. Crisman, Sr.'s execution of that waiver. Instead, the Bar again relied upon innuendo and the testimony of relatives, who had sued Respondent and who apparently had some personal axe to grind. Under this count the Referee also found Respondent to be guilty of representing various parties, who perhaps had conflicting interests in the same law suit and also representing these people as their attorney, when he, himself, was an interested witness and would, in fact, be testifying, and did, in fact, testify, through affidavits in the law suit, and that he further had a financial interest in said law suit, which would motivate him to obstruct and delay the litigation. The

Respondent's position on that particular finding is that the Bar has not proved its case by any standard, and certainly not by a "clear and convincing" standard. The record is devoid of any showing by the Bar, that his representation in any of those matters in any of those capacities was prejudicial to any of the clients, and unless it is prejudicial, there is no violation. The Referee, also under this count as his last finding of fact, determined that the Respondent had misrepresented certain matters before the Honorable J. William Woodson in securing a continuance of certain matters, which had been scheduled for March 5, 1984. Again, the Bar in proving its case relied upon the testimony of David Dyer, who was the attorney for the guardian in the law suit, which was brought against Respondent and his wife, individually and as trustee. The Bar did not produce solid objective evidence, which could have been produced. The Bar accused the Respondent of misrepresenting to Judge Woodson at a hearing on March 1, 1984, that he had a pending matter before Judge Goshorn on March 5, 1984, when according to the Bar, the court, namely, Judge Goshorn, had already released the Respondent from representing a criminal defendant before him, which had been scheduled for March 5, 1984. The Respondent's contention is that the Bar could have, but did not, produce any evidence other than the testimony of David Dyer (which could in no way be conclusive), and a signed order by the Judge dated February 28, 1984, releasing the Respondent from further representing the criminal client. However, the Respondent's testimony in the hearing before the Referee was that he had made the motion to withdraw prior to February 28, 1984, that he took the matter up

at docket sounding before Judge Goshorn, that Judge Goshorn did not immediately rule and told him he would let him know later, and that he, the Respondent, did not receive the order, which was dated February 28, 1984, until after the hearing, which was held before Judge Woodson on March 1, 1984. No witnesses or documentary evidence, such as a transcription of the proceedings before Judge Goshorn February 28, 1984, were produced by the Bar. Respondent's testimony on this last point stands unrefuted. The Bar has failed to carry its burden of proof, and the Referee's findings are against the manifest weight of the evidence. Therefore, the disciplinary measure recommended is not supported by substantial facts, and the report should be rejected in total.

ARGUMENT

COUNT I

THE FINDINGS OF THE REFEREE, REGARDING THE SECURING OF A WAIVER OF INTEREST FROM ONE NOT COMPETENT TO EXECUTE IT IS CONTRARY TO THE EVIDENCE, NOT SUPPORTED BY THE RECORD, AND ERRONEOUS.

AS TO PARAGRAPH 1, COUNT I:

There is no credible evidence Respondent had Mr. Crisman, Sr. execute the waiver dated June 29, 1983, thereby relinquishing his interest in a trust. Bar Exhibit 2 (Waiver dated June 24, 1983) was notarized and witnessed. Yet the Bar, which has the burden of proving its case by clear and convincing evidence, failed to call as witnesses any of those persons who were witnesses to the execution by Mr. Crisman, Sr. of Bar exhibit 2. (A-27-28). The Bar chose to prove its case by innuendo and circumstance. No copy of Charlotte Scranton

Crisman's will was introduced into evidence, but Bar Exhibit 16 contains some of the provisions relevant to the trust. (A-8-9).

The surviving husband (E. M. Crisman, Sr.) was to receive the income derived from the trust corpus during his life. Upon the husband's death the trust corpus was to then go to the surviving child, provided however, should there be no surviving child at the husband's death, the trust then passed to Charlotte Scranton Crisman's sisters, or their surviving issue. (TTR-12, lines 17-25; TTR-13, lines 1-2). The effect of all of this was to create first, a vested life beneficiary in the trust income (E. M. Crisman, Sr.), second, a vested remainderman as to the trust corpus (Katharine Scranton Crisman as the sole surviving child), and third, a number of contingent remaindermen (the sisters of Charlotte Scranton Crisman and their surviving issue), should Katharine Scranton Crisman, at any point, predecease the vested life beneficiary. (A-8-9) (Bar Exhibit 16).

The Referee is in error in its finding that the effect of the 1983 waiver would be to have the corpus of the trust pass to Mrs. Collier (wife of Respondent). The true effect was to pass to the vested remainderman the right to receive the income from the trust during the life of E. M. Crisman, Sr. for the interests of the contingent remaindermen could still come to the fore should Katharine Scranton Crisman Collier predecease her father, E. M. Crisman, Sr.

The Respondent's contention throughout was that in his opinion, the 1983 waiver was of no legal import, since Mr. Crisman, Sr. had assigned whatever interest he had in the trust (as life beneficiary) to Respondent's wife, Catherine Scranton

Crisman Collier in 1952. (Bar Exhibit 1, TTR-10-13. (A-15-18, 29-30).

On the 14th day of November, 1952, the trust vested remainderman (Katharine Scranton Crisman Collier) filed a bill to terminate the trust estate of Charlotte Scranton Crisman, deceased (Cause No. 12324). Said bill named as Co-Defendants the designated life beneficiary (E. M. Crisman, Sr.), the then de-facto trustee (an out-of-state corporation), and all of the existing contingent beneficiaries. The designated life beneficiary (E. M. Crisman, Sr.) appeared pro-se and filed an answer bearing his signature on the 11th day of December, 1952, admitting the allegations of the Complaint and specifically recited that he had assigned his life interet in the trust estate to Katharine Scranton Crisman Collier. (TTR-10, lines 22-25; TTR-11, lines 1-25; TTR-12, lines 1-25; TTR-13, lines 1-25) (Respondent's Exhibit 4) (A-15-18, 29-30), all of which is unrefuted. The sole issue for determination by the court was whether or not the assignment and transfer of the life beneficiary's interest in the trust income to the vested remainderman, Katharine Scranton Crisman Collier, resulted in such a merger of trust interests as to defeat the rights of the contingent remaindermen to the trust corpus should Katharine Scranton Crisman Collier predecease her father. The validity of the life beneficiary's assignment should not have been an issue in the case, but the trial court correctly determined the contingent beneficiaries' interests could not be defeated by the subject assignment and therefore refused to terminate the trust.

AS TO PARAGRAPH 2, COUNT I:

The Referee here makes specific findings relating to the activities and mental condition of Mr. E. M. Crisman, Sr. in June, 1983, not supported by the manifest weight of the evidence.

It is not disputed that Mr. E. M. Crisman, Sr. visited his son E. M. Crisman, Jr. in Georgia during the month of June, 1983, however, the assertions of his son and daughter-in-law that Mr. Crisman was disoriented, lacked familiarity with his surroundings and was so mentally confused that he had to be tagged and monitored, as a small child would be, for a commercial airline flight back to Florida are effectively refuted by the Bar's own witnesses, including E. M. Crisman, Sr.'s treating physician.

Dr. Margaret Palmer, as witness for the Florida Bar, testified she was the treating physician for E. M. Crisman, Sr. during the period 1972 into late 1984 (TR-39, lines 1-1Ø; TR-41, lines 5-7; that she saw him at fairly regular intervals (TR-39, lines 6-7); that while he manifested episodes of mental confusion during periods of hospitalization (TR-44, lines 1-5), once he was released from the hospital, Mr. Crisman, Sr. was mentally competent (TR-44, lines 1-11; TR-42, lines 6-17).

Mrs. Betty Dixon, as witness for the Florida Bar, testified she was acquainted with Mr. Crisman, Sr. for nine years; that they were good friends; and had seen each other most every day for the past five years (Bar Exhibit 4, page 3, lines 11-2Ø); that at the time of Mr. Crisman, Sr.'s trip to Georgia to visit his son, she and her husband and Mrs. Lollie (Mr. Crisman's companion of some fifteen years - Bar Exhibit 5, page 5, lines 1-

18), took him to the airport and on that day he was mentally competent. (TR-27, lines 6-25; TR-28, lines 1-15; TR-29, lines 1-13). Mrs. Dixon further testified that upon his return from Georgia the same parties went to the airport to pick up Mr. Crisman, Sr., and on that day he was mentally competent. Mrs. Dixon also testified that on June 29, 1983, (the date on which the 1983 Waiver of interest was executed), E. M. Crisman, Sr. and his companion visited in the Dixon home and E. M. Crisman, Sr. was mentally competent. (TR-3Ø, lines 1-25; TR-31, lines 1-13). See Also Bar Exhibit 5, (deposition of Mrs. Geraldine Lollie dated November 29, 1984, page 1Ø, lines 4-1Ø, indicating that during the period approximately July 11, 1983, E. M. Crisman, Sr. was not forgetful, and exhibit 2 to said deposition indicating that on June 29, 1983, E. M. Crisman, Sr. was mentally competent).

Bar witness E. M. Crisman, Jr. testified that immediately after E. M. Crisman, Sr. returned from Georgia (on or about June 29, 1983), he had a discussion over his father's condition with Respondent, Eugene Collier, who said he believed E. M. Crisman, Sr. to be (mentally) competent and in good condition. (TTR-72, lines 8-14) (TR-5Ø, lines 8-16).

Referee further finds that after the 1983 waiver of interest was executed (June 29, 1983), that Mr. E. M. Crisman, Sr. did not later know what document he had signed nor the effect of the document. This finding is likewise not supported by the manifest weight of the evidence. The record reflects E. M. Crisman, Sr. was not a man given to discussing his personal

business with anyone very much, whether friend, family, or stranger.

The Bar witness, Monica Lynn Sweet, testified she had lived with E. M. Crisman, Sr., since she was five years old (TR-10, lines 3-15; TR-13, line 13), but that E. M. Crisman, Sr. did not usually discuss his business affairs with her. (TR-19, lines 3-11). In the same vein Mrs. Geraldine Mae Lollie (Mr. Crisman, Sr.'s companion of some fifteen years) testified that he never talked his business over with her and with reference to the 1983 waiver, never indicated he forgot what he had signed (Bar Exhibit 5, page 11, lines 3-20). She further testified that during this period, Mr. Crisman, Sr. was not forgetful (Bar Exhibit 5, page 10, lines 7-10 and exhibit 2 thereto). This testimony is unrefuted.

Respondent, Eugene collier, testified that E. M. Crisman, Sr. was very closed-mouthed about his personal business and did not discuss it with anybody very much. (TTR-20, lines 8-13). This testimony is likewise unrefuted.

The Referee's finding that E. M. Crisman, Sr. was not competent on June 29, 1983, when he executed a waiver of interest is not supported by the manifest weight of the evidence, and is clearly erroneous.

AS TO PARAGRAPH 3, COUNT I:

The implication of the comments contained in Paragraph (3) is that following June 29, 1983, E. M. Crisman, Sr. did not have sufficient assets to provide for his continuing care. This is only an implication, but is, nevertheless, not supported by the manifest weight of the evidence.

It is conceded that E. M. Crisman, Sr. had a small pension from Boeing Aircraft Co. (not Ford Motor Company as asserted by the Referee) and social security income. (Bar Exhibit 11, page 2). However, the Bar's own witness (E. M. Crisman, Jr.) testified his father's income was sufficient to cover the twenty-four hour care he was receiving in a congruent care home. (GTR-69, lines 10-17). This testimony is the only evidence before the Referee on this subject.

Since E. M. Crisman, Sr., had assigned and transferred his interest in the trust income in 1952 (Bar Exhibit 1) (A-29-30), he was not relinquishing some present asset or possession as asserted by the Referee. Further, E. M. Crisman, Sr. confirmed his lack of interest in the subject trust in 1975 following his arrest and incarceration on felony charges in Marion County, Florida (TTR-49, lines 11-15; TTR-50, lines 1-11). The record before the Referee revealed (Respondent's Exhibit 6) that E. M. Crisman, Sr. on September 7, 1975, executed and delivered to the Marion County Circuit Court (Criminal Case No. 75-670) an Affidavit of Indigency. The Court upon evidence, including testimony by E. M. Crisman, Sr., in open court, found him to be indigent and appointed a public defender for his defense. On the 22nd day of September, 1975, E. M. Crisman, Sr. once again executed and delivered to the Circuit Court in the subject criminal matter, another affidavit indicating he was without money or means and requesting appointment of a public defender (Respondent's Exhibit 6). The Respondent testified that E. M. Crisman, Sr., as a result of his aforesaid arrest, spent four to

five weeks in the Marion County jail, and had he the means to extricate himself from jail, he certainly would have done so. (TTR-5Ø, lines 5-21).

It appears to be well settled in Florida that in disciplinary proceedings, on complaint of the Florida Bar, that it is incumbent upon the Complainant to establish its allegations by sworn testimony of witnesses and other competent evidence, State ex rel. The Florida Bar v. Grant, 85 So.2d 232 (1965), and that such evidence, for a conviction, must be clear and convincing. The Florida Bar v. Stillman, 4Ø1 So.2d 13Ø6 (1981); The Florida Bar v. Rayman, 238 So.2d 594 (197Ø); State ex rel. The Florida Bar v. Bass, 1Ø6 So.2d 77 (1958). See also Louisiana State Bar Association v. Edwins, 329 So.2d 437, 443. By clear and convincing it is meant that facts must be established by more than a preponderance of the evidence, but something less than beyond a reasonable doubt. Edwards v. Sentell, 2Ø8 So.2d 914, 916 (Ala. 1948); In re: Henderson, 199 NW 2d. 111, 121 (Iowa); 3Ø Am. Jur. 2d Evidence, Section 1167.

In summary, it appears that as to Count I, the Referee failed to consider the testimony of most of the Bar's own witnesses, including E. M. Crisman, Sr.'s treating physician, all of which indicated that during the period June/July, 1983, Mr. Crisman, Sr. was mentally competent. Uncontroverted evidence, when properly admitted, cannot be disregarded or arbitrarily rejected by the finder of fact, even though such evidence be given by a witness who is an interested party. Berg v. Berg, 16Ø So.2d 145 (Fla. 1DCA 1964); Moring v. Levy, 452 So.2d 1Ø69 (Fla. 3DCA 1984); City of St. Petersburg v. Vinoy Park Hotel, 352 So.2d

149 (Fla. 1DCA 1971); In re: Estate of Hammon, 447 So.2d 1Ø27 (Fla. App. 4DCA 1984); and Parker v. Wideman, 38Ø F.2d 433 (C.A. Fla. 1967); Brannen v. State, 114 So. 429 (Fla. 1927); Harris v. State, 1Ø4 So.2d 739 (Fla. App. 2DCA 1958; Levy v. Cox 22 Fla. 546 (1886).

As to the Referee's finding regarding a violation, by the Respondent, of Article XI, Rule 11-Ø2(3)(a), i.e., conduct contrary to honest, justice and good morals, the manifest weight of the evidence before the Referee, as set forth above, clearly establishes that the Respondent has not engaged in any conduct which was dishonest or contrary to justice or good morals.

As to the Referee's finding regardig a violation by the Respondent of Disciplinary Rule 1-1Ø2(A)(4), i.e., conduct involving fraud, deceit, or misrepresentation, the manifest weight of the evidence before the Referee, as set forth above, shows conclusively that the Responent did not engage in such conduct.

As to the Referee's finding regarding a violation by the Respondent of Disciplinary Rule 1-1Ø2(A)(6), i.e., engaging in conduct reflecting adversely on his fitness to practice law, the manifest weight of the evidence before the Referee, as set forth above, shows clearly that the Respondent did not, at any time, engage in any improper conduct.

The Referee's findings as to Count I of the Complaint, are contrary to the manifest weight of the evidence and clearly erroneous and should be rejected by this Court.

COUNT II

THE FINDINGS OF THE REFEREE, THAT THE RESPONDENT SECURED A CONTINUANCE OF HEARINGS ON CERTAIN MOTIONS IN CAUSE NO. 83-6859 THROUGH MISREPRESENTATIONS TO THE COURT AND DID OTHERWISE ACT IMPROPERLY AS AN ATTORNEY IS NOT SUPPORTED BY THE RECORD.

AS TO PARAGRAPH 1, COUNT I:

The Referee, without the benefit of the record in the matter of the guardianship of E. M. Crisman, Sr., (Cause No. 83-2Ø59-B), Marion County, Florida, found that the Respondent sought to have either himself or his wife substituted (for E. M. Crisman, Jr.) as guardian in that cause. The evidence in the record does not support that finding of fact.

The evidence before the Referee does reveal that at the time when E. M. Crisman, Jr. was named as guardian for his father (E. M. Crisman, Sr.), the Respondent opposed such appointment and asked to be appointed guardian of E. M. Crisman, Sr., because he felt he and Katharine Scranton Crisman Collier would look after her father better than E. M. Crisman, Jr. would do, (LGTR-75, lines 11-14) (TTR-45, lines 5-9 and lines 21-25; TTR-47, lines 1-7) (GTR-72, lines 1-16), especially since E. M. Crisman, Jr. lived out of state in Georgia (TR-6Ø, lines 17-15), and had never had much to do with him over the years. (GRT-72, lines 4-9; GRT-75, lines 11-14; and TTR-45, lines 14-25; TTR-46, lines 1-5). All of this testimony is unrefuted and shows there was no attempt to make a substitution of guardians as to E. M. Crisman, Sr.

AS TO PARAGRAPH 3, COUNT II:

The Referee implies the Trustee and the Respondent jointly engaged in some impropriety or mismanagement of the trust

estate.

The unrefuted evidence before the Referee reveals there was no impropriety in the handling of the trust estate.

The Honorable Edward M. Jackson, Judge of The Circuit Court, Eighteenth Judicial Circuit in and for Brevard County (as witness for the Bar) testified he represented the trustee from 1968 to the spring of 1980 (Bar Exhiit 20, page 4, lines 4-5), and the Respondent did not have contact with the trust during that period (page 12, lines 6-9).

Mrs. Barbara J. Carroll (as witness for the Respondent) testified she was familiar with the trust and its records from 1973-1980 (TTR-53, lines 5-15; TTR-54, line 1), and the trust records were accurate and complete. (TTR-53, lines 13-25; TTR-54, lines 1-2).

Mrs. Mildred Wages (as witness for Respondent) testified she was an accountant of thirty-four years experience (TTR-63, lines 21-25; TTR-64, line 1); that she was familiar with the testamentary trust (of Charlotte Scranton Crisman, deceased); that she prepared tax returns for the trust for the years 1980-1981-1982 (TTR-64, lines 9-18); that she examined the trust records for the years 1977 to the present time, and the records were complete and accurate, and there were no instances of impropriety or misappropriation of funds. (TTR-65, lines 1-15; TTR-66, lines 1-12).

AS TO PARAGRAPH 4, COUNT II:

Once Again the Referee implies the Respondent has received monies from the trust for legal fees, which are excessive and self-dealing or are evidence of self-interest, or

that the same indicate some impropriety in handling trust matters. That finding is not supported by the evidence.

The Referee's finding that $7,595.ØØ was paid to Respondent as legal fees is clearly erroneous. Although E. M. Crisman, Jr. did testify to that figure (TTR-55, line 13). He also testified to $6,5ØØ.ØØ (TR-55, line 17). The Petitioner had all the records with respect to the trust (TR-114, lines 18-2Ø), and the record below is devoid of any such concrete evidence. On the other hand, Respondent concedes he was made secured loans in the approximate amount of $6,5ØØ.ØØ (GRT-22,23), and David Dyer testified those notes were in the trust files. (TR-115, lines 1Ø-12). Even if the Referee was correct in the amount of remuneration paid Respondent for his handling of the lawsuit brought by E. M. Crisman, Jr. as Guardian, the finding that such a fee was unethical and morally reprehensible is truly astonishing, since E. M. Crisman, Jr. testified his legal expenses were $17,ØØØ.ØØ on behalf of the guardian. (Tr-59, lines 21-22). In the same litigation Respondent's fees were only $6,5ØØ.ØØ. (TRR-87, line 17). Furthermore, the Referee's finding ignores the testimony of Judge Jackson, which indicated that during his representation of the trust, he dealt with the matters of the trust and the trustee only once each year (Bar Exhibit 2Ø, page 13, lines 9-11); that his secretary, Mrs. Barbara J. Carroll, was the primary person responsible for contact with the trustee, and for gathering information and preparing the documents for his approval (Bar Exhibit 2Ø, page 6, lines 13-25; page 7, lines 1-7). Mrs. Barbara J. Carroll corroborates this

testimony in its entirety. (TTR-52, lines 21-25; TTR-53, lines 11-19) (GTR-133, lines 1-25, GTR-134, lines 1-6, GTR-135, lines 5-7). The Referee's remarks further ignore the fact that while Judge Jackson's representation of the trust involved no litigation, the Respondent's representation of the trust, which began in December, 1983, continued through approximately two years of heavy litigation to April, 1985.

AS TO PARAGRAPH 5, COUNT II:

In Paragraph (5) the Referee finds some impropriety or wrong-doing by finding "prolonged dilatory actions" in Cause No. 83-6859, a litigation which lasted from December, 1983 to April, 1985. Again, there was no evidence Respondent did any thing other than defend the law suit in a professional manner. (Entire Record). Even David Dyer did not contend that Respondent was guilty of "prolonged dilatory actions" (TR-94-137), and he never moved to disqualify Respondent. (R-124, lines 11-15).

It is well settled in Florida, that one who seeks an accounting must establish his right to it; that such right must be established upon the record either through pleadings, admissions, or a bi-furcated proceeding, wherein the court received competent evidence establishing the right to the requested accounting. Giammaresi v. Parker, 326 So.2d 243 (Fla. 4DCA 1976); Ponte Verda Recorder, Inc. v. Carpenter, 401 So.2d 834 (Fla. 5DCA 1981); East Colonial Refuse Service, Inc. v. Velocci, 416 So.2d 1276 (Fla. 5DCA 1982); and Charles Sales Corp. v. Rovenger, 88 So.2d 551 (Fla. 1956).

Continuing, the Referee in Paragraph (5) finds that the reliance of the Respondent on the 1952 waiver by E. M. Crisman,

Sr. was a fraud upon the court. Such a contention is without foundation in the evidence. While it is true the document attached to the Complaint in the 1952 litigation was unsigned, E. M. Crisman, Sr. admitted the truth of it. (TTR-11, line 12) (Bar Exhibit GRC 1, page 10, line 19) (Bar Exhibit 15) (A-15-18) (Respondent's Exhibit 4).

The Referee likewise finds, without benefit of the record, that the court in the 1952 action seeking to terminate the subject trust (Brevard County Chancery Case No. 12324) "apparently found that the waiver of interest executed by E. M. Crisman, Sr. was not effectively made." The court is referred to the explanation set out heretofore, regarding the trust provisions and the Chancery Case No. 12324. The validity or efficacy of E. M. Crisman, Sr.'s 1952 assignment of his life interest in the trust income, to his daughter Katharine Scranton Crisman Collier was obviously not an issue in light of Mr. Crisman's answer to the complaint. The sole issue for determination by the court was whether or not the assignment and transfer of the life beneficiary's interest in the trust income to the vested remainderman (Katharine Scranton Crisman Collier) resulted in such a merger of trust interests as to defeat the rights of the contingent remaindermen to the trust corpus, should Katharine Scranton crisman Collier predecease her father. (TTR-12, lines 17-25; TTR-13, lines 1-2; Bar Exhibit No. 15).

AS TO PARAGRAPH 6, COUNT II:

In Paragraph (6) the Referee indicates the Respondent was a "witness to many substantive matters disputed in the

litigation", and that the Respondent had come into possession of property which should have remained in the (guardianship) estate of E. M. Crisman, Sr. Such contentions are erroneous and contrary to the manifest weight of the evidence.

FIRST, the deposition of the Honorable Edward M. Jackson, Judge of the Circuit Court, Brevard County, Florida, makes it clear the Respondent had no contact with the trust during the period 1968-198Ø. (Bar Exhibit 11, page 4, lines 16-18, page 5, lines 1-4, page 12, lines 3-15). This testimony is corroborated by Mrs. Barbara J. Carrol, (GTR-133, lines 8-25; GTR-134, lines 1-25) (TTR-55, lines 7-18), and the Respondent testified he had no contact with the trust until after December, 1983, (GTR-77, lines 24-25; GTR-78, lines 1-5; GTR-81, lines 11-18) (TTR-29, lines 11-16; TTR-4Ø, lines 18-21; TTR-43, lines 1-5), and all of said testimony is unrefuted.

As to the Referee's SECOND contention, i.e. that the Respondent had come into possession of property, which should have remained in the (guardianship) estate of E. M. Crisman, Sr., presumably this refers to certain power and hand tools claimed by E. M. Crisman, Jr. in his Second Amended Complaint (Cause No. 83-6859) (Bar Exhibit 16), the evidence does not support such a finding and shows conclusively that such items were the property of the Respondent since 1979 (Bar Exhibit 5, exhibit 1 thereto, page 17, lines 19-25, page 18/lines 1-13; see also Bar Exhibit 4, page 14, lines 8-1Ø). The evidence further shows that this fact was certainly within the knowledge of the guardian, E. M. Crisman, Jr., prior to his filing said Complaint, for he admits helping the Respondent load some of these items for transport.

(TR-79, lines 3-1Ø). This evidence is uncontroverted.

As to the Referee's comments regarding obstruction or delay of litigation, the Respondent submits that there is no evidence to suggest the Respondent did anything other than defend a law suit in a professional manner. (Entire Record).

AS TO PARAGRAPH 7, COUNT II:

In Paragraph 7, Count II, the Referee finds that the Respondent sought and got a continuance in Cause No. 83-6859 through a misrepresentation to the presiding trial Judge, the Honorable J. William Woodson, knowing that such representation was false. The evidence does not support such a finding. (Entire Record).

The best and most credible evidence in the record below was submitted by the Respondent through his own testimony. The sequence of events with respect to Criminal Cause No. T-84-32Ø-CF-A (Edward Lowerre) were:

(1) Case was docketed for trial at 9:15 a.m. on March 5, 1984, (Respondent's Exhibit 1), with docket call set in said matter on February 28, 1984 at 9:15 a.m.

(2) That the Respondent filed his Motion to Withdraw from representation of the Defendant in Cause No. T-84-32Ø-CF-A on February 23, 1984.

(3) That on February 28, 1984, the Respondent appeared for docket call, and the court agreed to hear the matter of the Motion to Withdraw in the early afternoon of that day. Upon a hearing of the Responent's Motion to Withdraw, the court declined to allow the withdrawal until further investigation to

determine if Mr. Lowerre was eligible for the appointment of a Public Defender, and the Respondent was granted leave to retire from the hearing. The court, later in the afternoon of February 28, 1984, signed an Order granting the Respondent leave to withdraw from the criminal case, and a copy of the Court's Order was mailed to the Respondent. The Responent did not receive his copy of said Order until sometime after March 1, 1984. (TTR-1Ø1, lines 2-14).

The Respondent's testimony stands unrefuted. The Bar chose not to produce evidence, which might have been more clarifying. For example, there is a record kept of all proceedings before the Circuit Court on criminal docket sounding days. Neither that record, nor indeed the possible testimony of Edward Lowerre was used by the Bar in an effort to prove its allegations. Surely, the evidence produced by the Bar is not clear and convincing in light of Respondent's own testimony and in light of what the Bar might have produced as evidence.

As to the Referee's finding regarding a violation by the Respondent of Article XI, Rule 11-Ø2(3)(a), i.e., conduct contrary to honesty, justice and good morals, the manifest weight of the evidence before the Referee, as set forth above, clearly establishes that the Respondent has not engaged in any conduct, which was dishonest or contrary to justice or good morals.

As to the Referee's finding regarding a violation by the Respondent of Disciplinary Rule 1-1Ø2(A)(4), i.e., conduct involving fraud, deceit, or misrepresentation, the manifest weight of the evidence before the Referee, as set forth above, shows conclusively that the Respondent did not engage in such

conduct.

As to the Referee's finding regarding violation by the Respondent of Disciplinary Rule 1-102(A)(6), i.e., engaging in conduct reflecting adversely on his fitness to practice law, the manifest weight of the evidence before the Referee, as set forth above, shows conclusively that the Respondent did not engage, at any time, in any improper conduct.

As to the Referee's finding regarding a violation by the Respondent of Disciplinary Rule 5-101(A), i.e., accepting employment under such circumstances where he knew, or it was obvious, that his own personal or financial interests would be involved, the unrefuted testimony of the Respondent indicates he had no interest or claim as to the subject trust, would not receive anything from the trust, and was not connected with it in any way. (TTR-30, lines 11-14). As to personal interests, the record clearly indicates the personal property claimed by the guardian in his Second Amended Complaint (Cause No. 83-6859) was the property of the Respondent, since 1979, (Bar Exhibit 5, page 17, lines 19-15, page 18, lines 1-13, and exhibit 1 thereto), (see also Bar Exhibit 4, page 14, lines 8-10), and that such fact was known by him long before his initiation of Cause No. 83-6859. (TTR-79, lines 3-10). In any event, The Florida Bar presented no evidence on the matter, and there is no basis for a finding by the Referee on this issue. It is well settled in Florida that it is incumbent upon the Complainant to establish its allegations by sworn testimony and other competent evidence. State ex rel. Florida Bar v. Grant, 85 So.2d 232 (1956).

As to the Referee's findings regarding a violation of the Respondent of Disciplinary Rules 5-101(B) and 5-102(A), i.e., accepting employment or failing to withdraw from employment when he knew, or it was obvious, that he would be called as a witness. The provisions of said Rules clearly provide an exception and allow an attorney to accept or continue employment when he is or may be a witness. Further, the case law interpreting said Rules allows an attorney to continue his representation, where, as in the instant case, the attorney does not have crucial information which would have to be divulged to further his client's interest, Williams v. Wood, 475 So.2d 289 (Fla. App. 5DCA 1985). It also allows the attorney to continue such representation until it becomes apparent that the attorney's testimony will be prejudicial to his client. Cazares v. The Church of Scientology of California, Inc., 429 So.2d 348 (Fla. App. 5DCA 1983), Allen v. Estate of Dutton, 394 So.2d 132 (Fla. App. 5DCA 1981).

In the instant case the record shows the Respondent had no knowledge of the trust prior to the initiation of Cause No. 83-6859 in December, 1983. (TTR-29, lines 15-16; TTR-30, lines 1-4; TTR-40, lines 18-21; TTR-43, lines 1-5) (Bar Exhibit 20 deposition of Judge Jackson, page 4, lines 16-18; page 5, lines 1-4; page 12, lines 3-15) (TTR-55, lines 7-18). Further, the Florida Bar presented no evidence on the matter of whether or not the Respondent's appearance in Case No. 83-6859 was prejudicial to the other Co-Defendants' position, and there is no basis of record for a finding by the referee on this issue. It is incumbent upon the Complainant to establish its allegations by sworn testimony and other competent evidence. State ex rel. The

Florida Bar v. Grant, supra.

As to the Referee's finding regarding a violation by the Respondent of Disciplinary Rule 5-1Ø5(B), i.e., continuing multiple employment where the exercise of his independent judgment, on behalf of his client, was likely to be adversely affected by his representation of another, to-wit: himself. The provisions of the referenced Rule clearly provide for an exception, which allows an attorney to accept or continue employment of multiple clients. In the instant case the Florida bar presented no evidence that the other Co-Defendants in Cause No. 83-6859 were not fully informed and consented to the Respondent's representation of all the Co-Defendants' interests, and there is no basis for a finding by the Referee on this issue. Again, the Complainant must prove its allegations by sworn testimony and other competent evidence. State ex rel. The Florida Bar v. Grant, supra. It is unrefuted by the Florida bar that the other Co-Defendants in Cause No. 83-6859 never asserted a client/attorney privilege during that litigation, even though they knew of their right to do so. (TR-133, lines 9-14).

This record cannot be reviewed without readily noticing the Referee would arbitrarily elect to base his fact finding upon the facts most adverse to the Respondent, where there was a conflict in the evidence. One of the best examples, but by no means the only one, of this is his finding as a fact Respondent received $7,595.ØØ as attorney's fee in representing the trustee, etc. in the law suit brough by the guardian E. M. Crisman, Jr. The record shows E. M. Crisman, Jr. testified immediately

thereafter that the amount of fees was the total of three notes, $6,500.00. (TR-55, lines 10-18). This is all the more true, since even the Bar's counsel referred to the fee of $6,200.00, maybe $6,500.00. (TTR-87, line 17).

Another example is the Referee's finding that Respondent perpetrated a fraud on the court by pleading the validity of the 1952 assigment by E. M. Crisman, Sr. to Katharine Scranton Crisman Collier in the law suit brought by the guardian against Respondent and his wife. Yet all the evidence is contrary to the Referee's findings. There was a complaint, which alleged the validity of the 1952 assignment, and an answer signed by E. M. Crisman, Sr. that admitted its validity. (GRC Bar Exhibit 1 and 2, page 10, lines 14-21, page 11, lines 1-15) (Bar Exhibit 15) (TTR-11, line 12) (Respondent's Exhibit 4) (A-15-18, 29-30).

Although the Referees finding of fact enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding, the findings in the instant case are clearly erroneous and against the manifest weight of the evidence, and this court should grant Petitioner relief. As was said in Johnson v. Jaquith, 180 So.2d 827, 829 (Fla. 1966):

> ...Ordinarily, an appellate court will refuse to consider a finding of fact made by a trial judge acting in a non-jury case as factfinder unless the finding is clearly erroneous or against the manifiest weight of the evidence....

Even if the Bar's burden was only to the greater weight of the evidence, the Referee's report should be rejected; but the Bar's burden of proof must be clear and convincing.

It is clear from the record the Bar has failed to carry

its burden of proof.

The evidence in the record is abundant, if not overwhelming, that during the period June/July, 1983, E. M. Crisman, Sr. was mentally competent; that he had previously parted with his interest in the subject testamentary trust in 1952; and the Respondent did not secure a waiver of interest from one who was mentally incompetent at the time.

As to Count II, the record reflects the Bar presented no evidence regarding certain of the Referee's findings. On all other findings of fact, the record reflects an abundance of evidence to support the Respondent's position, and this is particularly true with respect to those findings where the best and most credible evidence is the unrefuted testmony of the Respondent.

CONCLUSION

Since the Referee's findings are erroneous and unjustified, his report should be disregarded, and the Respondent discharged.

If this court determines that total exoneration would not be justified, the Respondent respectfully requests the discipline imposed be something less severe than suspension as recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY to David McGunegle, Esquire, Bar Counsel, 604 E. Robinson St., Orlando, Florida 32801 and John Berry, Esquire, Staff Counsel, 600 Apalachee Parkway, Tallahassee, Florida 32301, by mail this 25th day of July, 1986.

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