IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

EUGENE COLLIER,

Respondent.
_____/

Public
Case No. 67,850
TFB Case No. 18B85C12

COMPLAINANT'S RESPONSE BRIEF

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PRELIMINARY STATEMENT

Reference to the first hearing before the referee on March 20, 1986 will be by citation (T). Reference to the second and continuing hearing before the referee on April 20, 1986 will be by citation (TT). References to Bar Exhibits will be by citation (BEX) and to respondent's exhibits by (REX). Reference to the referee's report will be by citation (RR:).

Although the transcript of the March 20, 1986 hearing does not list Bar composite Exhibit 11, which were the records relating to the trust, they were offered, admitted and are part of the record. (See T. pp. 67-69)

STATEMENT OF THE CASE

Following a complaint to The Florida Bar in 1984, probable cause was found after hearings on September 3, 1985. The Bar's complaint was filed November 5, 1985. Two hearings were held before the referee on March 20, 1986 and April 10, 1986. His report was submitted to this Court on June 26, 1986.

In his report, the referee recommends that the respondent be found guilty of the charges in Count I. Specifically, he recommends he be found guilty of violating the following Integration Rules of The Florida Bar and Disciplinary Rules of the Code of Professional Responsibility: A) Rule 11.02(3)(a) for engaging in conduct contrary to honesty, justice or good morals; B) Disciplinary Rule 1-102(A)(4) for engaging in a conduct involving fraud, deceit or misrepresentation; and C) Disciplinary Rule 1-102(A)(6) for engaging in conduct reflecting adversely on his fitness to practice law.

The referee further recommends that the respondent be found guilty of violating the Integration Rule and Disciplinary Rules charged in Count II. Specifically, he recommends he be found guilty of violating: A) Rule 11.02(3)(a) for engaging in conduct contrary to honesty, justice or good morals; B) Disciplinary Rule 1-102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; C) 1-102(A)(5) for engaging in conduct prejudicial to the administration of justice;

D) 1-102(A)(6) for engaging in conduct reflecting adversely on his fitness to practice law; E) 5-101(A) for accepting employment under circumstances where he knew or it was obvious that his own personal or financial interests would be involved; F) 5-101(B) for accepting employment when he knew or it was obvious he ought to be called as a witness in the proceeding; G) 5-102(A) for failing to withdraw after accepting employment contemplated or pending litigation after learning or after it became obvious he ought to be called as a witness in behalf of his client; and, H) 5-105(B) for continuing multiple employment where his exercise of independent judgment on behalf of the client was likely to be adversely affected by his representation of another client to wit himself.

The referee recommends he be found not guilty of the charges in Count III.

As discipline, the referee recommends the respondent be suspended for a period of six months and thereafter until he shall prove his rehabilitation as provided in Rule 11.10(4). He further recommends that respondent pay the costs of these proceedings currently totalling $2,056.77.

At their July, 1986 meeting, the Board of Governors reviewed this case. They approved the referee's findings and recommendations of guilty and discipline. The respondent duly filed his Petition for Review and Motion for Oral Argument at the end of July. The Florida Bar requested and received an extension of time to serve this response brief not later than September 5, 1986.

STATEMENT OF THE FACTS

A testamentary trust was created by Charlotte Scranton Crisman in the 1930's. It designated Elton Morris Crisman, Sr. as beneficiary of a life estate in the trust. Upon the extinction of Mr. Crisman, Sr.'s interest, his daughter, Katherine Collier, the wife of the respondent, would become the successor beneficiary. If she predeceased her father, the resultant interest would go to contingent remaindermen who were other relatives. At some time in the early 1950's, Katherine Collier became a successor trustee of the trust.

In 1952, civil action was undertaken in Brevard County to extinguish Mr. Crisman, Sr.'s life interest in the trust. Although he signed an answer admitting the allegations and although there is a copy of an assignment of his interest to his daughter, no original was ever found. In that action, the Court refused to terminate his interest in the trust apparently because it would defeat the contingent remaindermen's interest.

Respondent and his wife resided in Brevard County whereas Mr. Crisman, Sr. resided near Ocala in Marion County. On June 29, 1983, the respondent and his wife visited her father. During that visit they took him to Ocala where they had him execute a waiver and relinquishment of his interest in the trust. The respondent was the only attorney involved. By relinquishing his interest, it would pass to Mrs. Collier. (BEX 2) Mr. Crisman, Sr. was approximately 77 years old at this time. (BEX 3)

In the immediate weeks preceeding the waiver, Mr. Crisman, Sr. had visited his son who lived in Blairsville, Georgia at the time. During the visit, Mr. Crisman, Sr. exhibited a lack of familiarity with the surroundings and appeared to be disoriented much of the time. When he returned to Florida on a commercial airline, he was tagged and monitored as a small child during the flight. (T. pp. 48-50, 71-73, 81-82, 85-89, 90) The waiver was secured a few days after he returned. Respondent and Mrs. Collier took Mr. Crisman, Sr. out to get ice cream and asked him to sign some documents. He later did not know what documents he had signed nor what the effect of the documents might be. (T.

pp. 12, 18-20, 23; TT. pp. 20-21, BEX 5, p. 11, BEX 21, pp. 70-71)

The referee noted that the only income Mr. Crisman, Sr. received other than this trust income was a small pension from a company and his Social Security income. At the time of his death, his monthly income was about $600 (REX 9, p. 69) It appears he was receiving $1,200-$1,500 a year from the trust which had assets totalling considerably less than $100,000. (T. p. 51, 54). The referee further found Mr. Crisman, Sr. had no significant assets and noted it strained the creditability of the Court to believe he would knowingly relinquish the income. Finally, the referee found the respondent secured the waiver knowing that Mr. Crisman, Sr. was not competent to execute it. (RR: Count I, paras. 3 and 4)

On or about July 13, 1983 Mr. Crisman, Sr. was found incompetent and his son, Elton Crisman, Jr., was appointed guardian of his estate. The appointment was made over the objections of the respondent who sought to have either have himself or his wife

substituted as guardian. (T. p. 60) Once the guardianship was established, Mr. Crisman, Sr. received no further monies from the Trust other than a $700 payment at the end of the month in order to release him from the hospital. (T. p. 60, BEX 11). Until the waiver of his interest in the trust, Mr. Crisman, Sr. had been receiving payments on a regular basis for the life of the trust. In fact, he was shown as the beneficiary on several documents including annual trust and tax returns in the 1970s. (T. pp. 53-54, BEX 11, 19)

In December 1983, the guardian instituted a lawsuit against the respondent and his wife over their handling of the trust in the years since 1979 and demanded an accounting. The trust had been represented between 1968 and 1979 by Edward Jackson. He received a total of $811.20 as attorney's fees in his work for the estate. A total of $1,200 was paid to the respondent's wife for her services as trustee during those years. The beneficiary received $13,050.77 (BEX 11, 12) The referee found that the respondent served as attorney for the trustee between 1980 and 1983 and was paid $7,595.00 in legal fees. His wife received $6,200 for her

services as trustee during this period. Mr. Crisman, Sr. received $9,005.00. (BEX 11, 12) There are promissory notes of loans to the respondent during this period of approximately $6,500 which notes were secured by respondent office furniture but not recorded. (T. pp. 55-56) Respondent repaid the trust by having the notes cancelled and exchanged for his services in defending the trust in the lawsuit. (T. p. 56)

The referee found the respondent defended the lawsuit against himself, the trust, and his wife by engaging in a prolonged dilatory action to try and delay it rather than furnish an accounting of his activities to the guardian. According to the guardian, he incurred some $17,000.00 in legal fees. (T. p. 59) The referee further noted that respondent maintained that Mr. Crisman, Jr. was not entitled to an accounting because his father relinquished his interest in the trust first on December 11, 1982 and later in the June 29, 1983 document. Respondent also took the position at the final hearing that the June 29, 1983 document was worth nothing at all. (TT. pp. 10, 17-18, 21-22) Reliance on the earlier document was set forth despite the fact that the

court had apparently found the waiver had not been effectively made. (RR: p. 3; Count II, para. 5) Whether it was an ineffective waiver or whether the Court found it would cut off the rights of the contingent remaindermen in 1952, Mr. Crisman, Sr. continued to receive money on a regular basis from the trust until just after the June 29, 1983 waiver and Mr. Crisman, Jr.'s appointment as guardian in July 1983. (T. p. 60, RR: p. 3 Count II, para. 5) The referee further found it would appear to be inconsistent for Mrs. Collier, as trustee, to maintain that Mr. Crisman, Sr.'s interest had terminated in 1952 when she continued to make payments to him for over 25 years. Finally, the referee noted the reliance by the respondent on the 1952 waiver was a fraud on the Court as was an effort to rely on the 1983 waiver. (RR: p. 3, Count II, para. 5)

During this litigation between the guardian and the respondent and his wife, the respondent was a witness to many of the substantive matters being disputed in the litigation. The referee found he was also a real party in interest because some of the allegations were to the effect he had personally come into

the possession of certain property which should have remained in the estate of Mr. Crisman, Sr. (RR: p. 4, Count II, para. 6) Respondent was also indebted to the trust at the onset of the litigation and which debt was extinguished in return for his legal efforts (T. pp. 55-57) The referee noted the obvious interest of the respondent in the litigation provided a strong motive for his continued efforts to obstruct and delay the litigation. The referee found the interest clearly should have prevented him from acting as Counsel for his wife, the trustee. (RR: p. 4, Count II, para. 6)

On March 1, 1984, the respondent appeared before the Honorable J. William Woodson, a circuit judge in the Eighteenth Judicial Circuit and requested a hearing which had been scheduled by the opposing side to be continued. In his request for continuance, he alleged he had an appearance scheduled before another judge of that judicial circuit for the same time. The referee found that the representation was false. The respondent only had one matter pending before Judge Goshorn. He appeared before the Judge on February 28, 1984 and had been permitted to withdraw from

representation in a criminal matter that was pending before that judge. (T. pp. 101-102, 112) The referee specifically found the representation was made by the respondent on March 1, and was made with the knowledge that was blatantly untrue. (RR: p. 4, Count II, para. 7)

The referee recommended the respondent be found not guilty as to Count III. The Board of Governors takes no issue with that recommendation. Accordingly, the facts underlying Count III will not be set forth.

SUMMARY OF ARGUMENT

The referee's findings of fact relative to both counts are amply supported by clear and convincing evidence both direct and circumstantial. The recommendations of guilt flow from those findings and his recommendation of a six month suspension with proof of rehabilitation prior to reinstatement and payment of costs is the appropriate measure of discipline under the criteria set forth in The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). A referee's findings of fact enjoy the same presumption of correctness as a civil trier of fact pursuant to Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a)(1). The referee serves as the Court's finder of fact and properly resolves the conflicts in the evidence. It is well settled a referee's findings of fact will be upheld unless they are without support in the record or clearly erroneous. The Florida Bar v. Stalnaker, 485 So.2d 815, 816 (Fla. 1986).

Respondent simply disagrees with the referee's findings and is attempting to rewrite them. This is simply inappropriate under the rule and settled case law. The referee heard the witnesses, judged their demeanor and credibility, and reviewed all of the

evidence available to him. That evidence clearly and convincingly supports his findings of fact which should be upheld. His recommendations as to guilt and discipline should also be adopted and respondent should be suspended for a period of six months with proof of rehabilitation required prior to reinstatement and pay the costs of these proceedings currently totalling $2,056.77.

ARGUMENT

THE REFEREE'S FINDINGS OF FACT ARE CLEARLY AND CONVINCINGLY SUPPORTED BY THE EVIDENCE IN BOTH COUNTS I AND II AND THEY SHOULD BE SUSTAINED ALONG WITH HIS RECOMMENDED DISCIPLINE OF SIX MONTHS SUSPENSION WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IN THESE PROCEEDINGS.

A. COUNT I

Respondent contends that the referee's findings of fact are not supported by the record and erroneous. This simply is not the case. There is ample clear and convincing evidence both direct and circumstantial in the record to support all of the referee's findings.

Respondent appears now to take the position that he did not procure the waiver dated June 29, 1983. This is contrary to his own testimony at the final hearing where he admitted preparing it and having Mr. Crisman, Sr. execute it. (TT. pp. 17-18, 28) There is no question that he and his wife proceeded from Brevard County to Marion County to visit Mr. Crisman, Sr. and while there took him to Ocala to have papers signed. Later, Mr. Crisman, Sr. did not know what he had signed according to Ms. Sweet who talked with him that night. (T. p.12, 18-20) Further, this waiver did not surface until the resulting civil litigation ensued and then only at respondent's wife's deposition several months into the

litigation in early August 1984. (T. p. 136, TT. pp. 10, 20, 21) Respondent's position at final hearing was not that he had not procured the document, but rather that it wasn't worth anything. (TT. pp. 10, 17-18, 21-22) Unfortunately, the Bar was unable to locate the notaries who were witnesses to the execution. Respondent notes that the referee erroneously indicated that the effect of the waiver would be to have the corpus of the trust passed to Mrs. Collier. True, the effect of the waiver would be to pass to her respondent's interest until his death, which occurred in March, 1985 at which time she got the corpus and the contingent remaindermen's interests were extinguished.

Respondent argues that the 1952 assignment was the effective waiver of Mr. Crisman, Sr.'s interest in the trust to his daughter notwithstanding the fact that the court in that action denied the request to terminate his interest despite his answer apparently due to the interests of the contingent remaindermen. Moreover, in the civil action against he and his wife individually and as trustee for an accounting, respondent first utilized the 1952 action in a motion to dismiss unsuccessfully in April 1984, and then after the discovery of the June 29, 1983 waiver in August used both in his answer and affirmative defenses

filed in September 1984. (TT. p. 8-9, 21-22) If the 1983 waiver was of no import, certainly it should never have been injected into the 1983 action as an affirmative defense. Furthermore, if respondent at all times believed it was worthless, it makes absolutely no sense for him to have procured on July 31, 1984 written statements from Mrs. Dixon and Ms. Lollie which statements purported to testify as to Mr. Crisman, Sr.'s mental competence on the day the June 29, 1983 waiver was procured. (BEX 4 and BEX 5) Interestingly enough, when respondent procured the statements from Ms. Lollie and Ms. Dixon, he advised them it was necessary to help get Mr. Crisman, Sr. home from the hospital where he was at that particular point having been declared incompetent. (T. p. 25, 33)

Respondent's stated reason for utilizing the waiver simply does not comport with the evidence. Further, if the 1952 assignment were valid notwithstanding the court's refusal to terminate respondent's interest in the trust, why was not the income assigned over to his daughter for the 25 plus years until July 1983? Furthermore, if the waiver was worthless and respondent was placing no reliance on it, why were the regular interest payments of approximately $1,200-$1,500 a year in the last few

years suddenly cut off after the execution of the June 29, 1983 waiver and Mr. Crisman, Jr.'s appointment as guardian over respondent's objection in July 1983? Plainly this was more than a worthless instrument in the view of the respondent. The referee's finding is amply supported by the evidence.

Next, respondent contests the referee's findings regarding procurement of the June 29, 1983 waiver at a time when respondent knew that Mr. Crisman, Sr. was incompetent and asserts that the Bar's own witnesses do not support the finding. This simply is not true. When Mr. Crisman, Sr. visited his son in Georgia, there is ample evidence to support the finding that he was confused, disoriented and had to be tagged and treated as a child on his return flight. It was testified to by Mr. Crisman, Jr. and his wife. (T. p. 48-50, 71-73, 81-82, 85-89, 90) These were the individuals on the spot in dealing with him. Moreover, Mrs. Crisman testified that she called Mrs. Collier and was advised that respondent had visited them in 1981 in a similar condition and roamed the house with a flashlight during the night. When she attempted to call Mrs. Collier later on during the course of this 1983 visit, she could not make any contact. (T. p. 92)

Dr. Margaret Palmer did testify that she concluded that Mr. Collier, Sr. was incompetent in June 1982 during a period of hospitalization due to acute alcoholism and other problems of advancing age. While she did indicate that he was competent when she saw him in the office later, she qualified that by stating it was limited to those office visits and that she did not test him for mental competency. (T. p. 39, 44, 46) True, Mrs. Dixon did testify as to the respondent's mental competence during the time at issue in 1983. However, the Bar submits she was actually an adverse witness and particularly exhibited considerable confusion as to why the respondent was securing a sworn statement on July 31, 1984 as to Mr. Crisman, Sr.'s competence on June 29, 1983 purportedly to assist in getting him out of the hospital. Further, although Ms. Lollie testified they did not talk business, this is refuted by Ms. Sweet's testimony that Mr. Crisman, Sr. talked business with Ms. Lollie. (T. p. 18-19, BEX 5 p. 11) Moreover, Mr. Crisman, Jr. testified as to a conversation he had with a social worker around this time in 1983 who related a concern call from Ms. Lollie as to Mr. Crisman, Sr.'s deteriorating mental condition and need of help. (TT. pp. 70-72)

While the witnesses gave conflicting testimony, obviously the referee was in the position to best resolve their demeanor and creditability. Circumstantially, the sudden procurance of the waiver a few days after Mr. Crisman, Sr. returned from Georgia and after respondent and his wife had been alerted by Mr. and Mrs. Crisman, Jr. as to his confused state lent further credence to the finding that it was procured by respondent when he knew Mr. Crisman, Sr. was mentally incompetent.

Respondent takes issue with the referee's finding that Mr. Crisman, Sr. was a man of limited means and would have not willingly signed away the trust income. Clearly, he was not a man of means even if his other than trust monthly income of approximately $600 was adequate to cover the 24 hour care he was receiving in a congruent care home. Further, the guardian testified he incurred $7,327 in unreimbursed expenses including $1,870 he paid the nursing home and $2,402.36 for funeral expenses. (T. pp. 59-60, BEX 12) Moreover, at one point in the past, he had filed an affidavit of indigency in 1975 which resulted in him being appointed a public defender. The Bar does not understand respondent's argument that by signing the June 22, 1983 waiver Mr. Crisman, Sr. was giving up nothing since he

already assigned his interest in the trust income in 1952 despite the Court's ruling at that time. This is nonsensical considering the fact that he was considered the trust beneficiary and received the income of the trust right up until the time of the 1983 assignment. Clearly, he was deprived of the interest earned by the trust until his death in March 1985.

A referee's findings of fact enjoy the same presumption of correctness as does the trier of fact in a civil proceeding. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a)(1). In this Count, as in Count II, the evidence is conflicting. However, it is well settled that the referee in these proceedings acts as the Court's fact finder and resolves conflicts in the evidence. The Florida Bar v. Stalnaker, 485 So.2d 815, 816 (Fla. 1986) was a very recent controverted case where the Court again addressed this issue. The Court wrote at 815:

> "A referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985); The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985). The evidence presented before the referee boils down to a credibility contest between Stalnaker and Jones. The referee listened to and observed both of them, and, as our fact finder, resolved the conflicts in the evidence. See The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). Our review of the record discloses

> support for the referee's findings, and, therefore, we will not disturb them."

In Hoffer, supra, the Court wrote at 642:

> "Our responsibility in a disciplinary proceeding is to review the referee's report and, if his recommendation of guilt is supported by the record, to impose an appropriate penalty. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). The referee, as our fact finder, properly resolves conflicts in the evidence. See The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966)."

In the Hirsch case, the Court wrote at 857,

> "Fact finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968)."

In The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985) the Court again noted at 1242,

> "It is well established that a referee's finding of fact is presumed correct and will be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978)."

Respondent's arguments that the referee's findings of fact in Count I are erroneous and are not supported by clear and convincing evidence which is the standard in Bar disciplinary proceedings are without merit. Those arguments should be rejected and the referee's findings in this Count should stand as

they are amply and fully supported by clear and convincing direct and circumstantial evidence in the record. They should be upheld by this Court.

B. COUNT II

The referee's findings of fact with respect to Count II are amply supported by clear and convincing evidence and should be upheld. The respondent objects to the referee's finding that he opposed Mr. Crisman, Jr.'s appointment as guardian of Mr. Crisman, Sr. in July 1983 in Marion County and sought to have either himself or his wife substituted as guardian. However, it appears from page 16 of his brief that he admits it. Moreover, it is supported by testimony at final hearing. (T. p. 60) Had his opposition been successful, it is plainly obvious that either his wife or himself would have been preferred as the substitute guardian or alternate guardian.

Respondent next seeks to prove that there was no impropriety in his handling of the trust subsequent to 1980 when Edward M.

Jackson no longer was attorney for the trustee. Mr. Crisman, Sr. stopped receiving payments from the trust from the time the guardianship was established. As indicated above, this is flatly supported by the records and testimony. (T. p. 60; TT. pp. 44, 105) The main point is that after the June 29, 1983 waiver which respondent characterizes as worthless and the guardianship appointment of Mr. Crisman, Jr. all monies from the trust stopped being paid to Mr. Crisman, Sr. The last $700 payment was made to get him out of the hospital in late July 1983. The guardian found it necessary to file a lawsuit because the monies had stopped and he could not receive an accounting from the trustee. The referee's findings are amply supported by the evidence.

Respondent appears to draw negative conclusions from those findings which are not warranted from a plain reading of the findings. Whether the respondent received $7,595 or $6,500 during the time frame is of less import than the referee drawing the conclusion fully supported by the evidence pointing to the disparities of amounts received by Mr. Jackson for an 11 year period of slightly over $800 and the trustee of $1,200 and then a

four year period wherein respondent was paid the much larger sum and the trustee wife, $6,200. (T. pp. 55-56, BEX 11, 12) Granted during Mr. Jackson's stewardship there was no litigation, whereas heavy litigation ensued in December 1983, spawned by respondent's actions in securing the June 29, 1983 agreement and having the trustee terminate payments to her incompetent and elderly father. Stubborn refusal to provide an accounting is what incurred the heavier attorney's fees which allowed respondent to conveniently cancel the monies he had borrowed from the trust during the years 1980-1983. Although he claims he knew nothing about the trust during those years, he did in fact borrow those monies from his trustee wife. Although he gave notes back to the trust secured by office furniture and furnishings, it appears there were no recorded notes and mortgages.

Respondent's argument regarding the referee's findings in paragraph five misses one significant overwhelming point. If 1952 assignment was effective, notwithstanding the Court's action, then it makes absolutely no sense for Mrs. Collier as trustee to continue paying her father monies from the trust for the next 25

plus years. It makes no sense to continue listing him as the beneficiary. It makes little sense in the light of the 1952 Court decision to terminate benefits and refuse to provide an accounting after the execution of the June 29, 1983 waiver, which according to the respondent was worthless. If that is the case, then the 1952 Court decision prevailed and Mr. Crisman, Sr. was still the beneficiary of the trust and fully entitled to the trust income and to an accounting from his trustee daughter.

The referee's finding that respondent was self-interested and had a conflict of interest during the litigation brought by the guardian against himself, his wife individually and as trustee is amply supported by the evidence. He drew the June 29, 1983 waiver and secured its execution. He borrowed at least $6,500 from the trust. He was the defendant in the lawsuit. He gave at least one affidavit and at least two depositions during the litigation which only terminated with the death of Mr. Crisman, Sr. (T. pp. 99, 125; TT. pp. 18-19) He also secured items from Mr. Crisman, Sr. which the referee found should have remained in Mr. Crisman, Sr.'s estate. The referee found these factors

provided an obvious strong interest of the respondent to prolong the litigation and which should have prevented him from acting as counsel for his wife, the trustee. True, Mr. Dryer did not move to have the respondent disqualified. However, he testified that he believed respondent had a clear conflict of interest in the case and should have moved himself. He also indicated he thought that he had discussed this problem with respondent. (T. pp. 124-125) Although respondent asserts he had no contact with the trust until after December 1983, his borrowing of the monies during the intervening years plainly belies that assertion. The referee has made his finding. It is fully supported by the evidence.

Respondent's argument with respect to the referee's finding in paragraph seven that he made a misrepresentation to obtain a continuance before Judge Woodson on March 1, 1984 is also not supported by testimony. (T. pp. 101, 102, 112) At the time he moved for the continuance, he had already been permitted to withdraw from the conflicting criminal case for Judge Goshorn. The referee's finding should be upheld. Respondent asserts he

did not receive the withdrawal order until after March 1, 1984. Once again, the referee as the fact finder has weighed the creditability of the witnesses in question. Furthermore, there is nothing on the order to indicate it was received in respondent's office after March 1, 1984. (REX one)

In this Count, as well as Count I, respondent's attempts to rewrite the referee's findings of fact are meritless, unsupported by the clear and convincing weight of the evidence and should be rejected. The referee's findings are amply supported by clear and convincing evidence in the record and should be adopted. Stalnaker, supra, Hecker, supra, Hoffer, supra, Hirsch, supra.

C. RECOMMENDED FINDINGS OF GUILT

The referee's findings of fact in both Counts support his recommendations as to the findings of guilt as to the rules charged. There is no question securing the waiver in 1983 when he knew Mr. Crisman, Sr. was incompetent violated Article XI, rule 11.02(3)(a) for conduct contrary to honesty, justice and good

morals and Disciplinary Rules 1-102(A)(4) for conduct involving dishonesty and deceit. It also reflected adversely on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6). The respondent's actions with respect to the trust and the lawsuit brought by the guardian also violate Fla. Bar Integr. Rule, art. XI, Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals and Disciplinary Rules 1-102(A)(4) conduct involving fraud, deceit or misrepresentation and 1-102(A)(6) for engaging in conduct reflecting adversely on his fitness to practice law.

His refusal to withdraw from the representation of the trust, his wife and himself also violates Disciplinary Rules 5-101(A) when he accepted the employment and defending the suit under such circumstances where he knew or it was obvious that his own personal or financial interests would be involved. At the time he undertook the representation, he was indebted to the trust for at least $6,500. Furthermore, his other client was his wife, the trustee. He violated Disciplinary Rule 5-101(B) when he accepted defense of the suit where he knew or it was obvious that he ought

to be called as a witness. As stated throughout these proceedings, the respondent was inextricably involved in the material events giving rise to the suit. He drew the June 29, 1983 waiver and secured its execution. He submitted at least one affidavit and gave at least two depositions. Further, it can be reasonably concluded that he was making the decisions with respect to the events following the 1983 waiver and appointment of Mr. Crisman, Jr. as guardian. His activities further violated Disciplinary Rule 5-102(A) when he failed to withdraw after accepting employment in contemplated or pending litigation after learning or it became obvious that he ought to be called as a witness on behalf of his client.

Respondent has cited three cases arguing they absolve him of violating 5-101(B) and 5-102(A). Williams v. Wood, 475 So.2d 289 (Fla. 5th DCA 1985); Cazares v. The Church of Scientology of Cal., Inc., 429 So.2d 348 (Fla. 5th DCA 1983) and Allen v. Estate of Dutton, 394 So.2d 132 (Fla. App. 5th DCA 1981). These cases do not stand for the proposition that one who is self-interested and a necessary witness to the presentation of the case can

remain in as counsel. Respondent was not going to be called by the opposing party. Rather, it was necessary for him to give testimony as to his activities regarding the purported termination of the trust interest of Mr. Crisman, Sr. and the later activities of the trust as well as his financial interests in the trust. Clearly, he was a central and material witness which he simply failed to recognize. The test in these cases is not whether his testimony would be prejudicial to his client, but rather whether it was material and central to defense of their suit. Obviously, it was, particularly with respect to the June 29, 1983 waiver. Moreover, he gave at least one affidavit attesting as to his personal knowledge as well as at least two depositions. The referee's findings are obvious. Finally, the referee's recommended finding that he violated Disciplinary Rule 5-105(B) for continuing multiple employment of the defense of this suit when exercise of his independent judgment on behalf of his client was likely to be adversely affected by his representation of himself is clearly supported by the evidence and the plain policy behind the rule discouraging multiple representa-

tion. As stated before, the referee is the court's finder of fact in disciplinary cases and especially so when the evidence is controverted. Stalnaker, supra, Hecker, supra, Hoffer, supra, Hirsch, supra The referee determines the creditability of each witness and the relevance and materiality of their testimony. The evidence presented to him was competent and substantial and certainly established a substantial basis of facts in which the facts at issue could reasonably be inferred and made. Duval Utility Company v. Florida Public Service Com'n, 380 So.2d 1028 (Fla. 1980) Hirsch, supra. There is no question that the competent and substantial evidence presented exceeds the clear and convincing evidentiary standard which is the requirement in these cases. Both the direct and circumstantial evidence presented fully support the referee's findings of fact as well as the recommendations of guilt which flow from those findings.

D. RECOMMENDED DISCIPLINE

The referee recommends the respondent be suspended for a period of six months and thereafter until he shall prove his

rehabilitation in a separate proceeding and to pay costs in these proceedings currently totalling $2,056.77. This is a family fight which got out of hand primarily due to respondent's activities. However, the respondent is a member of The Florida Bar. While there are no cases exactly on point for this situation, there are several which touch on various aspects. In The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978) an attorney was suspended for a year for mishandling an estate where he had a conflict of interest and for conduct involving misrepresentation of assets. The Court's discipline reduced the referee's recommendation due to the delay in processing of the case. In The Florida Bar v. Zinzell, 387 So.2d 346 (Fla. 1980) an attorney was disbarred for preparing a document conveying a client's property to himself and allowing her to believe it was something else and converting the property to his own uses. Obviously, there are differences in this situation. In The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983) an attorney was suspended for 60 days for making misrepresentations to a Judge in order to obtain a continuance.

There are a number of cases flowing from family disputes. In The Florida Bar v. Terry, 333 So.2d 24 (Fla. 1976) an attorney was publicly reprimanded for taking advantage of his appointment as guardian of his physically incapacitated and aged aunt. He discovered almost $20,000 cash in a safety deposit box which he did not disclose or report in the guardianship until a potential heir intervened through counsel. In The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982) an attorney was publicly reprimanded for making derogatory statements to a judge and refusing to turn over the funds due to the opposing party despite several demands for several months. The court noted that it was a complicated inter-family dispute over the management of family property in upholding the referee's recommendation. Most recently in The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986) an attorney was publicly reprimanded for improper business transactions with members of his family regarding some loans. Justice Erlich dissented noting that the fact that it was not in a lawyer and client setting was no defense and that more particularly his status as a family member made his conduct more reprehensible. He

would have suspended him for a period of 91 days requiring proof of rehabilitation.

The purposes of discipline were recently set forth in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) at page 986. The judgment must be fair to society both in terms of protecting the public from unethical conduct and not denying it a qualified attorney. Clearly, the respondent's conduct in this case is morally reprehensible and outrageous. He took advantage of an incompetent old man and then warred with the other members of the family for no good reason over the trust which value was substantially less than $100,000. (T. p. 51). It goes without saying that the public needs protection from attorneys who would engage in such conduct. Further, the suspension will not deny them of a qualified attorney at this point given the Bar population. Second, the discipline must be fair to the respondent, both to punish the breach of ethics and at the same time encourage reform and rehabilitation. Throughout these proceedings, respondent has never conceded that he has committed any impropriety. It is plainly evident he does not understand that he has broken any of

the rules charged in this particular case. A suspension requiring proof of rehabilitation is plainly necessary. Finally, the judgment must be severe enough to deter others from engaging in like conduct. This referee's recommended suspension will accomplish that goal. It addresses the major areas at issue being the 1983 waiver, warring litigation, the conflict of interest and misrepresentation to the court. It also takes into consideration, as specifically noted by the referee, that the respondent has no prior record. His recommendation meets the purposes set forth in Lord, supra, and should be adopted as discipline in this particular case.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's report and record in this matter and approve his findings of fact, recommendations of guilt, and discipline and suspend the respondent for a period of six months and thereafter until he shall prove his rehabilitation in a separate proceeding as provided in Rule 11.11 and order him to pay costs of these proceedings currently totalling $2,056.77.

Respectfully submitted,

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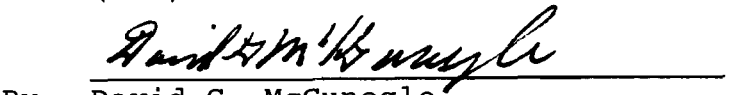

By: David G. McGunegle
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Response Brief and Appendix has been furnished by ordinary U.S. mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing was mailed by ordinary U.S. mail to Kenneth A. Studstill, Counsel for respondent, 503 Palm Avenue, Titusville, Florida 32796; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301 on this 4th day of September, 1986.

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