IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STANLEY B. GELMAN,

Respondent.

CASE NO.: 68,198

CASE NO.: 68,512

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This is a case of original jurisdiction pursuant to article V, section 15 of the Florida Constitution.

Subsequent to the appropriate probable cause findings, The Florida Bar filed two complaints in the Supreme Court alleging one count of misconduct on the first complaint, and two counts on the second. The cases were assigned to the Honorable E. L. Eastmoore for consideration. Final hearing was held on July 17th and July 23rd, 1986. The Referee's Report was filed in the Supreme Court on August 19, 1986.

Respondent appeals those findings of fact and recommendations as to discipline contained in the Referee's Report.

STATEMENT OF FACTS

Case Number 68,198:

On or about June 25, 1982, Respondent's client, Walter Williams, entered into an option agreement with Harold Hart to purchase 25% of a new corporation named Hart Enterprises. The total cost of the shares of Hart Enterprises was $10. The option had to be exercised no later than June 25, 1983.

On June 7, 1983, Mr. Williams hand-delivered a check for $10 to Mr. Hart in an attempt to exercise his option to

purchase. Mr. Williams had written "25% of New Corp. (Hart Enterprises)" on the reference line on the $10 check (TR-87). Mr. Hart neither negotiated the check nor issued the stock in Mr. Williams' name.

On June 24, 1983, Respondent hand-delivered a letter to Mr. Hart's residence on behalf of Mr. Williams purporting to exercise an option to purchase one-third of the shares of Hart Enterprises, Inc. Along with that letter Respondent enclosed a check for $10 made payable to Harold Hart with a notation in the upper right hand corner "Walter Williams-Purchase Hart Enterprises Stock (one-third)."

Mr. Hart neither negotiated Respondent's check nor responded to his transmittal letter. He never transferred any shares of Hart Enterprises, Inc. to Mr. Williams.

In November, 1983, Respondent filed suit against Hart on behalf of Williams seeking enforcement of the option agreement. Mr. Hart was represented by Jacksonville lawyer David Lewis.

Subsequent to suit being filed, Mr. Lewis filed a motion to dismiss the complaint for failure to attach copies of the option agreement and the June 24, 1983, letter. During the hearing on the motion to dismiss, Respondent produced a copy of the June 24, 1983, letter and allowed Mr. Lewis to review it. Mr. Lewis testified that the letter he was shown at hearing

stated that Mr. Williams is exercising an option to purchase "one-third" of the shares (TR-79). Respondent testified that the copy he handed to Mr. Lewis contained the typewritten words "one-third", but those words had been crossed out and the words "one-fourth" were written above (TR-104).

The court ultimately denied the motion to dismiss, but instructed Respondent to file copies of the option agreement and the June 24, 1983, letter with the court.

After the aforementioned hearing, Respondent filed with the court a copy of the option agreement and the June 24, 1983, letter with the words "one-fourth" hand-written over the typewritten words "one-third."

Respondent testified that after his secretary typed up the June 24, 1983, letter, he penciled in the words "one-fourth" after crossing out the words "one-third" so that she could retype the letter and make the correction (TR-93). He further testified that he never knew that the letter delivered to Mr. Hart had the words "one-third" instead of "one-fourth" until discovery in the case was underway.

Respondent told the referee that the copy he filed with the trial court was his file copy and was the same one that he showed to Mr. Lewis on the day of the hearing on the motion to dismiss. He believed it to be the file copy of what had been delivered to Mr. Hart (TR-104-105). Respondent acknowledged

that he did not have a copy of the letter without the correction on it.

After Respondent filed suit against Mr. Hart on Mr. Williams' behalf, a bankruptcy court found the assets of Hart Enterprises had been obtained through a fraudulent transfer and it ordered the return of those assets (TR-100-102). Respondent then elected not to pursue the action against Hart because there were no assets in Hart Enterprises. The case was ultimately dismissed for lack of prosectuion (TR-82).

Case Number 68,512, Count I:

Prior to September 24, 1982, Statewide Collection Corporation (Statewide) attempted to collect a judgment held by Barnett Bank against Louis R. Perfetto. Ultimately, Mr. Perfetto's accounts were garnished and Statewide advised a local credit bureau that the judgment was satisfied.

Subsequent to the aforementioned letter, Statewide again initiated collection proceedings against Mr. Perfetto. Mr. Perfetto resisted collection because, he asserted, the judgment was paid in full in approximately May, 1980.

On September 24, 1982, Statewide wrote the credit bureau stating that Mr. Perfetto's account had not been paid in full. Respondent was sent a copy of that letter because he had

earlier intervened on behalf of Mr. Perfetto.

In an attempt to determine the facts involved, Mr. Myers set Mr. Perfetto down for a deposition. On December 9, 1982, Mr. Myers sent a letter to Respondent mentioning the fact that there was a possibility of a conflict of interest because Respondent had represented Barnett Banks of Florida in the past and therefore Mr. Myers felt he knew their operating procedures. Statewide is a wholly-owned subsidiary of Barnett Banks of Florida.

Respondent testified that he could not verify Statewide's relationship with Barnett Bank (TR-130). Nonetheless, Respondent contacted Mr. Billy Foote, Senior Vice-President of Barnett Banks, and advised him of the potential conflict of interest.

On February 3, 1983, Mr. Perfetto was deposed and Respondent attended the deposition.

The Referee found that Respondent appeared as counsel for Mr. Perfetto at the deposition. Respondent testified he was representing Mr. Perfetto out of friendship and that his only obligation to Mr. Perfetto was to attempt to amicably resolve the dispute and to ascertain that the judgment had, in fact, been paid off (TR-51-56).

Ultimately, Respondent withdrew from the representation and the suit was presented to another attorney who obtained a

$15,000 judgment against Statewide for improperly seizing Perfetto's car (TR-48,51).

In 1984, Statewide filed a three-count complaint against James Rohman on a judgment held by Barnett Bank. Subsequent to the suit being filed, Respondent called Mr. Myers and discussed a payment plan on Mr. Rohman's behalf. Mr. Myers testified that he advised Respondent that there was a conflict of interest involved in the matter.

Steve Koegler, a lawyer in Respondent's firm, originally had handled the case as a favor to Mr. Rohman and had eventually referred to the case to J. Thomas McKeel, another lawyer in the firm. Mr. McKeel filed a motion to dismiss Statewide's suit. No pleadings were signed by Respondent (TR-52).

On November 9, 1984, Respondent wrote a letter to Mr. Myers and enclosed an executed stipulation prepared by Myers (TR-42) on behalf of Mr. Rohman. Respondent never met Rohman, who was Respondent's partner's friend and client (TR-67).

Respondent testified that he only acted as a conduit on the matter since Mr. Koegler had moved into another office complex and because the Rohman file was still in Respondent's office.

Respondent testified that he did not think there was a conflict of interest in the case because the matter was

virtually settled when he sent the letter.

The Referee found that Respondent represented Barnett Banks of Florida, Inc. Respondent, however, testified that he only represented various individual Barnett Banks, such as Barnett Bank of Jacksonville, Barnett Bank of Central Florida and Barnett Bank of Orange Park. Furthermore, Respondent's work was limited to replevins, foreclosures and bankruptcies, not collections (TR-53-54).

Case Number 68,512; Count II:

On April 26, 1973, Respondent was the closing agent for the sale of property by Mrs. Helen Sebra to Gateway Chemicals of Jacksonville.

As part of the aforementioned closing, Respondent prepared a closing statement which reflected all of the expenses owed by Mrs. Sebra. Among those obligations was an outstanding judgment on the property in the amount of $345.81. Respondent collected funds in the appropriate amount to retire the debt and deposited them into his trust account.

On April 27, 1973, Respondent discovered that $248.50 in closing costs had not been paid by Mrs. Sebra. Her attorney, Gregory Darby, was informed of the deficiency.

Respondent had several telephone conversations with

Mrs. Sebra's attorney, Gregory Darby, between April 27, 1973, and July 23, 1973. During that time, Mr. Darby contended that Mrs. Sebra would not pay the additional costs.

On June 5, 1973, Respondent advised Mr. Darby that he would not satisfy the judgment until the additional closing costs were paid.

On or about June 24, 1973, Respondent received a check in the amount of $248.50 representing Mrs. Sebra's unpaid obligations. At that time, Respondent wrote Mr. Darby stating I that he would withhold "any action on the judgment as your last indication was that you would handle the same." (Ex. 4).

Respondent never received further instructions from Mr. Darby about satisfying the judgment. Nonetheless, Respondent was able to satisfy the title exception on the title insurance policy and transferred title to Gateway Chemicals.

No further action was taken on the unpaid judgment until 1985, when Patricia Martin, Mrs. Sebra's new lawyer, wrote Respondent. Subsequent to receiving her letters, Respondent discovered the judgment had not been paid..

In 1973, Respondent's partner, Larry Figur, handled the trust accounts for the firm since he was also a CPA. In handling the monthly reconciliations of the trust account during that period, Mr. Figur never advised Respondent that Mrs. Sebra still had $345.81 in escrow. Several years later, when the firm

was dissolved, Respondent took the trust funds belonging to his clients and Mr. Figur took the funds belonging to his clients. No surplusage was noted in Respondent's transfer of funds and no funds belonging to Mrs. Sebra (TR-19).

In 1973, Respondent had not yet installed a tickler system for periodically reviewing all open files and he never received any complaint from Mr. Darby on Mrs. Sebra's behalf.

On or about June 19, 1985, Respondent received a letter from Mrs. Sebra's new lawyer, Patty Martin, stating that the judgment was still outstanding. In that letter, Ms. Martin demanded Respondent's immediate satisfaction of the judgment along with interest because the judgment was interfering with Mrs. Sebra's sale of another piece of property.

At the time that he received Ms. Martin's letter, Respondent was no longer engaged full-time in the practice of law. At that time, he was going through a difficult and acrimonious divorce (TR-20).

Due to his divorce, Respondent delayed responding to Ms. Martin's request. On November 15, 1985, Respondent testified to a Grievance Committee that he would satisfy Ms. Sebra's judgment. However, six weeks later Respondent was hospitalized for 28 days and did not immediately accomplish his intents.

On April 28, 1986, Respondent paid the judgment against Mrs. Sebra, expending $575.63 of his own funds to do so (TR-24,

25).

SUMMARY OF THE ARGUMENT

Respondent argues that the Referee erroneously found that he engaged in misconduct in Case 68,198, that his actions were not in violation of DR 5-105 (A), (C) and (D) of the Code of Professional Responsibility in Count I of Case 68,512 and that the Referee erroneously found that Respondent learned in 1983 that there was a problem with Mrs. Sebra's closing in 1973.

There was no motive for Respondent's falsifying the figures on the June 24, 1983, letter at issue in this case. Respondent admits an innocent mistake in the proceedings--a clerical mishap, it happens in all offices. Because there had been an earlier exercise on June 7, 1983, of the option relevant to these proceedings, Respondent's position was not prejudiced by the mathematical error in his June 24th letter. Under no circumstances can it be shown that Respondent in any way benefited from the difference in the wording.

The Referee's finding that Respondent violated TR 5-105(A) of the Code of Professional Responsibility is without evidentiary basis. That rule prohibits a lawyer accepting a client if his independent professional judgment on behalf of a client would be adversely affected by the acceptance of the employment. However, in the case at bar, the Florida Bar presented absolutely no evidence showing that at the time he

accepted his client's employment, that he was currently representing another client to the detriment of those clients.

In Count II of Case No. 68,512, the Referee found that Respondent admitted being put on notice in 1983 of the problem stemming from the closing he conducted in 1973. In fact, Respondent did not learn of the problem until 1985, and the problem was wrapped up within a year of his discovery. The Referee's mistake is material in that it led him to believe Respondent took three years to clear up a problem when, in essence, Respondent cleared it up in less than one-third that time.

Respondent also appeals the discipline recommended by the Referee in these proceedings. Even assuming all of the Referee's findings are upheld by this court, Respondent's misconduct warrants at most ninety days suspension.

ARGUMENT

I. THE REFEREE IMPROPERLY FOUND THAT RESPONDENT'S CONDUCT IN CASE NO. 68,198 CONSTITUTED UNETHICAL BEHAVIOR.

The facts in this case are virtually undisputed. On June 25, 1982, Respondent's client, Walter Williams, entered into an option agreement with Harold Hart to purchase for $10 25% of a new corporation named Hart Enterprises. The option had to be exercised no later than June 25, 1983.

On June 7, 1983, Mr. Williams personally delivered to Mr. Hart a check for $10 with notations indicating that the delivery of the check was the exercise of the option to purchase.

Seventeen (17) days later in an abundance of caution, Respondent hand-delivered a letter to Mr. Hart's residence on behalf of Mr. Williams once again exercising Mr. Williams' option to purchase. The letter, dated June 24, 1983, contained Respondent's check for $10.

The original of the June 24, 1983, letter delivered to Mr. Hart mistakenly bore the indication "one-third" of the stock to be purchased, rather than "one-fourth" as contained in the option agreement. Similarly, Respondent's check had the indication that it was for one-third of the stock.

Despite the clear cut terms of the option agreement and Mr. Williams' June 7, 1983, tender of a check, and notwithstanding Respondent's letter, Mr. Hart refused to honor the terms of the option agreement. Subsequently, Respondent filed suit in an attempt to enforce the option agreement on Mr. Williams' behalf.

Mr. Hart retained a Jacksonville lawyer, David Lewis, to represent him in the suit brought by Respondent. In December, 1983, Mr. Lewis filed a motion to dismiss Respondent's complaint for failure to attach copies of the option agreement

and the letter exercising the option. In January, 1984, Mr. Lewis' motion to dismiss was heard before the court. At that hearing, when Mr. Lewis indicated he did not have a copy of the June 24, 1983, letter, Respondent tendered his file copy of that letter. Here is the only material deviation in the testimony before the court.

Mr. Lewis testified that he clearly remembers seeing only the words one-third on the letter tendered at the hearing and that there was no interlineation on it (TR-79). Respondent testified, however, that the only copy of the letter in his file contained the interlineation one-fourth on it. Respondent testified that he showed that copy of the letter to Mr. Lewis at the motion to dismiss hearing. Subsequently, Respondent filed copies of the June 1982 option agreement and the interlineated June 24, 1983, file copy with the court.

Respondent's story, which is very plausible, is that the interlineated file copy from the June 24, 1983, letter is a correction of the original letter typed by Respondent's secretary. The letter was to be retyped and, for reasons unexplained, the new corrected original was not delivered to Mr. Hart. Respondent testified that the first time that he knew that the original delivered to Mr. Hart contained the words one-third was at Respondent's deposition subsequent to the hearing on Mr. Lewis' motion to dismiss.

During the pendency of the suit, the bankruptcy court ordered Mr. Hart to transfer all of the assets in Hart Enterprises back to the company that was in bankruptcy. The bankruptcy judge ruled that Mr. Hart had fraudulently transferred the assets and therefore ordered them returned. Upon Respondent's learning that Hart Enterprises no longer had any assets, he elected to discontinue the proceedings against Mr. Hart and, ultimately, it was dismissed for lack of prosecution.

The Bar showed no reason for any misrepresentation by Respondent relative the issue of the interlineated copy of the June 24, 1983, letter. Respondent's suit against Mr. Hart was based on two attempts by Mr. Williams to exercise his option within a one year period expiring June 25, 1983. First, Mr. Williams personally delivered to Mr. Hart a $10 check clearly bearing the words "25% of new corp (Hart Enterprises)" on it. This was sufficient exercise under the option agreement. Respondent's June 24, 1983, letter was delivered in an abundance of caution.

It simply beggars the imagination to believe that Respondent, as found by the Referee, would deliberately file a letter bearing interlineation in an attempt to deceive the court, when he knew that the original indicated otherwise. Deception like that is simply too easy to discover and it would be fool-hardy for any individual to attempt such a falsehood.

This is particularly significant when one considers that Respondent had absolutely nothing to gain through such deception.

Another plausible theory is that Respondent erroneously and unknowingly delivered the uncorrected original June 24, 1983, letter to Mr. Hart and threw away the corrected original through oversight. Mr. Lewis' testimony that he clearly remembers seeing no interlineation must be tempered by the fact that he had probably seen the original letter in Mr. Hart's possession and he saw what he believed to be the case.

The Referee's gratuitous finding that "the timing was critical because a bankruptcy action was instituted" is simply not warranted. The bankruptcy action to which he refers had been filed prior to the June 24, 1983, letter. By the time the January 1984 hearing was held, timing was no longer crucial. This is particularly the case since the assets belonging to Hart Enterprises were being removed from the company and returned to their source.

The Florida Bar must prove by clear and convincing evidence that misconduct took place. In the case at hand, the absence of a motive for wrongdoing completely emasculates the Bar's position. Respondent's theory of the events that occurred are not only plausible, but are likely. The Referee's findings of misconduct on Respondent's part are inappropriate.

II. THE REFEREE IMPROPERLY FOUND THAT RESPONDENT VIOLATED DR 5-105 IN HIS REPRESENTATION OF LOUIS PERFETTO AND J. CHRISTOPHER ROHMAN.

The Referee found that Respondent was guilty of a classic conflict of interest in violation of DR 5-105 because he represented Louis Perfetto in one case and J. Christopher Rohman in another. Those individuals had interests adverse to Statewide Collection Agency, a subsidiary of Barnett Banks of Florida, Inc..

The Referee's finding of misconduct is absolutely erroneous, however, because there is no finding of simultaneous representation.

The provisions of the Code of Professional Responsibility that the Referee found Respondent violated read as follows:

> DR 5-105. Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.
>
> > (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be, or is likely to be, adversely affected by the acceptance of the proferred employment, except to the extent permitted under DR 5-105(C).

> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
>
> (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

The Florida Bar presented no evidence to show that at the time that Respondent or his law firm accepted the cases of Mr. Perfetto or Mr. Rohman that he was simultaneously representing any Barnett Banks. Accordingly, the Bar has not proved by clear and convincing evidence that there was a violation of that provision.

The Referee found that Respondent represented Barnett Banks of Florida, Inc. However, the Referee makes no finding of simultaneous representation. He never gives any time frames for the representation

The alleged conflict between Respondent and Statewide is tenuous at best. Respondent's alleged conflict with Statewide, the collection agency, as to Perfetto and Rohman, is that Statewide is a wholly-owned subsidiary of Barnett Banks of

Florida, Inc. The banks for which Respondent did replevin, bankruptcy and foreclosure work are individual Barnett Banks that are also owned by Barnett Banks of Florida, Inc. Respondent did no collection work for any of these banks.

The Referee would have this court rule that a lawyer that occasionally represents subsidiaries of a company in certain types of action, has a conflict of interest if clients of his are sued by a separate subsidiary company on different types of action and on matters in which the subject matter is entirely unrelated to Respondent's prior representation. Such a connection is tenuous at best.

There is no allegation that Respondent has breached any confidences or secrets imparted to him by his clients in violation of Disciplinary Rule 4-101. When asked why Respondent had a conflict of interest, Statewide's lawyer testified that Respondent should not represent Perfetto and Rohman because he knew about general operating procedures of the banks. Such knowledge is not privileged, and actually is irrelevant to the case at hand. Respondent represented Barnett on replevins, foreclosures and bankruptcies--not collections. Statewide did all of the collecting work.

Furthermore, there is nothing to show that Respondent's clients, the various individual Barnett Banks, had

interests adverse to Messrs. Rohman and Perfetto. Perhaps, Statewide had an interest adverse to those two individuals, but Statewide was never Respondent's client.

The Referee would have this court rule that Respondent vicariously represented Statewide because it is owned by the same company that owns several of Respondent's clients in the past. That is extending the rule of vicarious representation too far.

The Florida Bar has not shown that Respondent was representing any Barnett Banks or Barnett Banks of Florida, Inc., at the time that he accepted Perfetto and Rohman's representation. Such lack of evidence precludes a finding of misconduct on Respondent's part as it relates to Disciplinary Rule 5-105.

III. THE REFEREE'S FINDING THAT RESPONDENT LEARNED IN 1983 THAT HE FAILED TO SATISFY A JUDGMENT FOR WHICH HE RECEIVED TRUST FUNDS IN 1973 IS ERRONEOUS.

On page three of his Report, in his discussions on Count II of Case No. 68,512, the Referee made the following finding of fact:

> Respondent admitted that in 1983, he received a letter from Gregory J. Darby, Esquire, bringing to his attention the matter of the judgment (TR-P13). Respondent testified that he was going through a domestic breakup and that was the reason he did not pay the money off when it was brought to his attention in 1983, and that he took his personal funds and paid the judgment off in 1986 (TR-P20-25).

In fact, the letter from Mr. Darby to which the Referee refers in the aforementioned language was a letter dated June 5, 1973, and is entered into evidence as a Bar exhibit. The Referee's confusion stemmed from the following question on the page cited by the Referee. On line 18, page 13, Bar counsel asked the following question:

> I show you a letter thats dated June 5, 1983, from a Gregory J. Darby addressed to you, do you recall receiving that letter?

In fact, the letter is dated June 5, 1973. Either the court reporter mistakenly typed the numeral 8 instead of the numeral 7, or it was a slip of the tongue by Bar counsel that was not picked up by either Respondent or the Referee. Regardless, there is absolutely nothing in the record indicating that Respondent received any correspondence from Mr. Darby relative the Sebra matter in 1983. In fact, Respondent received no word from Darby after July 1973.

Respondent testified, and the evidence is consistent with his testimony, that he first learned of the outstanding

Sebra judgment in June, 1985, when Mrs. Sebra's new lawyer, Patricia Martin, wrote him in June 1985.

The Referee's error makes it appear that Respondent waited from 1983 until April 1986 to pay off the Sebra judgment. In fact, the period extended from June 1985 until April 1986.

Respondent admits that he lost $345.81 in trust funds received from Mrs. Sebra in 1973. He rectified his error by retiring in 1986 the entire judgment, plus interest, the sum now totaling $575.63.

The evidence is unrebutted that in July, 1973, Mrs. Sebra's lawyer, Gregory Darby, advised Respondent that Mr. Darby would try to satisfy the $345 judgment for a discounted amount. If Mr. Darby was successful, Respondent was to refund the entire sum to Mrs. Sebra. If not, Respondent was to retire the judgment. When Respondent heard nothing more from Mr. Darby, he allowed the matter to lie fallow and nothing more was heard on the matter until 1985. In the interim, Respondent's partnership with Larry Figur broke up and, in the division of trust assets, Mrs. Sebra's $345 was misplaced.

There is no basis for the Referee's finding that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(4). Respondent obviously neglected a legal matter in that he never

followed up on Mr. Darby's last correspondence to him in July 1973. However, his error was a simple oversight.

This isolated trust fund incident in no way indicates that Respondent stole any trust funds or that he acted in a dishonest manner. Perhaps he neglected a case. Perhaps he allowed his trust records on Mrs. Sebra's closing to be misplaced. But he stole nothing.

IV. THE DISCIPLINE RECOMMENDED BY THE REFEREE, SUSPENSION FOR SIX MONTHS, IS UNDULY HARSH AND SHOULD BE REDUCED, AT MOST, TO THIRTY DAYS' SUSPENSION WITH AUTOMATIC REINSTATEMENT.

The starting point for the determination of the appropriate discipline to be meted out in any disciplinary proceeding is The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970) at page 132. There, this court said:

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitiation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

In the case at hand, the discipline recommended by the Referee clearly focuses on the third element of Pahules and ignores the first two purposes. Such a discipline improperly focuses on retribution, The Florida Bar v. Pincus, 300 So. 2d 16 (Fla. 1974).

None of Respondent's offenses involved a corrupt motive. Even assuming the Referee's findings as to the alteration of the June 24, 1983, letter in Case No. 68,198 is true, what was Respondent to gain by his actions? Nothing.

Respondent's actions on the conflict of interest count bespeak no ill motive on his part. In fact, had Statewide heeded Respondent's attempts to resolve its dispute with Mr. Perfetto, Statewide and Barnett Bank of Florida, Inc., would not have incurred a $15,000 judgment after trial with Perfetto.

Finally, while Respondent may be guilty of neglect on the Sebra case, he clearly did nothing immoral or corrupt. He dropped the ball on a case for 12 years--admittedly improper--but he stole nothing. Perhaps Respondent should have satisifed Mrs. Sebra's judgment in less than 10 months, but his intervening divorce and 28 day stay in the hospital contributed to his delay.

The Referee would suspend Respondent for six months for his offenses, putting him in the same class as the Respondents in:

(1) The Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983). Six months suspension for failure to file tax returns for 22 years and four misdemeanor convictions related to the failure. Mr. Lord failed to pay taxes on $545,000 during the four year period covered by the convictions.

(2) The Florida Bar v. Blessing, 440 So. 2d 1275 (Fla. 1983). Six months suspension for (a) failing to remit premiums to a little insurer; (b) failure to disburse $52,000 in escrow funds for three months; (c) failure to appear at two hearings and failure to file an appeal; and (d) failure to remit title insurance premiums to an insurer and use of escrow funds for personal benefit.

(3) The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986). Six months suspension for intending to steal $25,000 from his law firm.

(4) The Florida Bar v. Dancu, 490 So. 2d 40 (Fla. 1986). Six months suspension for failing to disburse $934,000 in trust funds, for stealing the $8,800 interest generated by those funds and for lying when the client's CPA inquired about the lack of interest.

(5) The Florida Bar v. Welty, 382 So. 2d 1220 (Fla. 1980). Six months suspension for misappropriation of trust funds over a two year period with resulting shortages amounting to, at times, $24,000.

Each of the above cases has at least one thing in common: they all involved lawyers who engaged in unethical conduct for pecuniary gain. That element is not present in the instant case.

Even when the lawyer's misconduct involved fraud, this court has not always handed down material suspensions. For example, in The Florida Bar v. Jennings, 482 So. 2d 1365 (Fla. 1986), a lawyer was reprimanded in public for fraudulently giving two second mortgages on the same piece of property.

A case more serious than Respondent's is The Florida Bar v. Jameison, 426 So. 2d 16 (Fla. 1983). Yet, even here, after noting that Respondent's conduct involved no "criminal mens rea, or corrupt motive", this court reduced the Referee's recommended discipline from one year to three months. In Jameison, the court found the lawyer guilty of failing to avoid a conflict of interest, bad record keeping and failure to comply with his 88 year old client's wishes.

A case more closely akin to Respondents than any of the above is The Florida Bar v. Hagglund, 372 So. 2d 76 (Fla.

1979). In Hagglund, the Supreme Court publicly reprimanded a lawyer for conflict of interest and for filing a false affidavit with the court. In Hagglund, as in the case at bar, Respondent's initial misconduct had occurred ten years earlier. The dissenting justices would have suspended Hagglund for two months--a term only one-third that recommended in the instant case.

The two months recommended by the Referee in Hagglund is consistent with that given in The Florida Bar v. Oxner, 431 So. 2d 983 (Fla. 1983). The Respondent in that case was suspended for 60 days for lying to a trial judge to gain a continuance. The dissent, however, due to the absence of "evil or fraudulent intent" would have given a public reprimand.

The Respondent in these proceedings has, at worse, exercised a lack of good judgment. He has done nothing indicating a lack of good character. He certainly has done nothing that shows a corrupt motive. To suspend Respondent for six months, with the resulting nine to twelve months ensuing reinstatement proceedings, is to visit too harsh a punishment upon.

Respondent asks this court to reduce his suspension, if any is deemed appropriate, to less than three months, i.e., one with automatic reinstatement.

CONCLUSION

The Referee's findings are unsupported by the evidence, and to the extent they show misconduct in Case No. 68,198 and Count I of Case No. 68,512, his findings should be reversed.

Respondent's misconduct, if any, does not warrant the harsh punishment recommended by the Referee. A more appropriate suspension is one of less than three months and requiring no proof of rehabilitation before reinstatement.

Respectfully submitted,

JOHN A. WEISS
Post Office Box 1167
Tallahassee, Florida 32302

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. mail on this 5th day of November, 1986, to James N. Watson, Jr., Esquire, Bar Counsel, The Florida Bar, Tallahassee, FL 32301-8226.

JOHN A. WEISS