IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

JOHN H. LOWE, JR.

Respondent.

_____/

Case No. 68,450

THE FLORIDA BAR'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This disciplinary proceeding is before the Court upon petitioner's Petition for Review of the Report of the Referee finding petitioner, John H. Lowe, Jr., in violation of The Florida Bar Code of Professional Responsibility Disciplinary Rule 1-102(A)(4)(misrepresentation) and DR 2-106(A)(excessive fees). Additionally, petitioner seeks review of the referee's recommendation of disciplinary penalty, to wit: suspension for thirty-six (36) months and thereafter until he shall prove his rehabilitation and for an indefinite period until he shall pay the costs of these proceedings in the amount of $2,272.09 and make restitution to his client in the amount of $7,500.00.

The Petitioner in this Petition for Review is John H. Lowe, Jr. and the respondent is The Florida Bar. In this Answer Brief, each party will be referred to as they appeared before the referee. Record references in this Answer Brief are to portions of the trial transcripts, pleadings and exhibits as they exist in the record. Transcripts will be cited in the following manner:

Final Hearing of June 26, 1986 - TR I

Continuation of Final Hearing of July 28, 1986 - TR II

Continuation of Final Hearing of Aug. 21, 1986 - TR III

Sentencing Hearing of Sept. 26, 1986 - TR IV

Evidentiary Hearing on Motion for Rehearing Jan. 13, 1987 - TR V

Hearing on Referee's Proposed Report Feb. 10, 1987 - TR VI

STATEMENT OF THE FACTS

Sgt. Robert Ingram, an U. S. Army R.O.T.C. supervisor with the Hillsborough County School System, first knew respondent when respondent was an R.O.T.C. cadet at Hillsborough High School in 1969. Sgt. Ingram retired from the U. S. army in 1980. [TR I 20, 21; TR II 4].

In July, 1980 Sgt. Ingram encountered respondent, who was then a practicing attorney, at the Hillsborough County Courthouse and explained to respondent that he was trying to find an attorney to represent him in a tort claim against the United States Army and the Hillsborough County School System involving a purported military-related or occupational disability. [Bar Exhibit 4]. Respondent, who was recently admitted to the Bar in May, 1980, agreed to represent Sgt. Ingram in his suit against the U. S. Army and the Hillsborough County School System. [TR I 21; TR II 3].

On September 17, 1980, respondent drafted and had respondent sign an employment contract wherein respondent would receive a $5,000.00 upfront retainer, and forty (40) percent of all future trial proceeds involving the federal case. In addition to the $5,000.00 fee, Sgt. Ingram was to pay all costs of the proceeding. [Bar Exhibit 6].

Sgt. Ingram paid respondent the $5,000.00 upfront retainer, which he obtained by placing a second mortgage on his home. He

later paid several hundred dollars in costs, as well. [TR I 23-25]. At the time, Sgt. Ingram's sole source of income was his retirement pension. [TR I 21].

On June 10, 1981, respondent filed a Complaint against the United States and the Hillsborough County School Board alleging outrageous infliction of emotional distress and negligence that caused Sgt. Ingram permanent mental, nervous, emotional and physical injuries. [Bar Exhibit 4]. In the Complaint, styled Ingram v. United States, Case No. 81-538, (M.D. Fla.), respondent alleged damages in the amount of ten million ($10,000,000.00) dollars. [Bar Exhibit 4, Complaint].

On March 10, 1982, the case was set for jury trial during the weeks of February 7, 14 and 21, 1983, by Order of U. S. District Judge William Terrell Hodges. [Bar Exhibit 4]. On March 24, 1982, pursuant to respondent's Motion for Recusal, Judge Hodges removed himself from the case. On November 18, 1982, by Order of U. S. District Judge Ben Krentzman, the case was dismissed against the Hillsborough County School Board, with leave for plaintiff to Amend the Complaint within twenty days. Respondent failed to file an Amended Complaint and, on January 5, 1983, Sgt. Ingram's case against the Hillsborough County School Board was dismissed without prejudice. [Bar Exhibit 4]. As for the remaining defendant, on December 22, 1982, the United States

filed a Motion to Dismiss or in the Alternative, for Summary Judgment and, on January 14, 1983, respondent filed a response. On February 2, 1983, Judge Krentzman denied the United States' Motion for Summary Judgment and, again, allowed respondent to Amend the Complaint. [Bar Exhibit 4].

Despite respondent's knowledge of the status of the above case, in January, 1983, respondent contacted Sgt. Ingram and requested $7,500.00, misrepresenting to his client that he needed the funds to defray costs for what Sgt. Ingram believed to be the upcoming federal trial during the weeks of February 7, 14 and 21, 1983. [TR I 33]. At that time, the case was not set for trial. [Bar Exhibit 4].

As a result, Sgt. Ingram, wrote respondent a check in the amount of $300.00 and again mortgaged his home to pay respondent the balance of the $7,500.00 respondent demanded for costs for the purported trial. [TR I 35-40]. When the trial did not take place and respondent failed to return any of the $7,500.00, Sgt. Ingram made several attempts to have respondent provide him with an accounting of the funds. [TR I 46]. After several demands for an itemized statement, Sgt. Ingram appeared at respondent's office and, again, demanded an accounting of the $7,500.00 he had paid. [TR I 47]. Respondent issued Sgt. Ingram a receipt in the amount of $7,500.00 dated January 19, 1983. [Bar Exhibit 15].

In October, 1983, after no progress was made on the federal case and no accounting was made of the $7,500.00 paid, Sgt. Ingram fired respondent and later, in February, 1984, hired attorney, J. Styles Wilson. [TR III 6]. On June 22, 1984, Sgt.

Ingram's federal case was voluntarily dismissed by stipulation of counsels. [TR III 9]. Mr. Wilson stated that the dismissal was in Sgt. Ingram's best interest. [TR III 9].

Respondent, in his defense to Sgt. Ingram's charges regarding the $7,500.00, stated that the $7,500.00 paid by Sgt. Ingram on January 19, 1983 represented fees for past services, although respondent, at no time, had provided Sgt. Ingram with either a written fee statement or a written accounting of the fees in question. [TR I 39; TR II 35].

At the grievance committee hearing, in defense of his position, respondent produced statements for costs and services totalling $7,888.11. [Bar Exhibit 16]. He contended that he had an oral agreement from Sgt. Ingram to pay respondent $5,000.00 for research into the issue of whether Ingram's illness was military related, the issue in the tort claim case. [TR I 18, 19]. Bar Exhibit 16 indicates that the $5,000.00 charged was to cover the research and appearance at a Veteran's Administration hearing on that issue. Also included in Bar Exhibit 16 was a bill for $500.00 for "Robert Ingram v. City of Tampa" (roofing inspection), although respondent did not begin to represent Sgt. Ingram in the matter until months after the $7,500.00 had been paid. [TR I 52-54].

At the final hearing before the Referee, respondent denied that the $5,000.00 charged Sgt. Ingram as part of the funds paid on January 19, 1983 was for his appearance at the Veteran's Administration hearing and contended that it was for "research

only". At that hearing, he testified to a different accounting for the $7,500.00. [TR II 22-24]. Later, his former secretary testified to yet a different accounting. [TR I 143].

In an additional matter, respondent represented Sgt. Ingram in a tort action against Sears for an alleged faulty air conditioner. [Bar Exhibit 1]. Although respondent had no fee agreement or contingent fee contract, he took $1,400.00 as fees from the $2,500.00 settlement due his client. [TR I 51, 52]. Although respondent contends that $400.00 of the amount was for costs, there is no evidence that any of the $1,400.00 fee represented costs, other than an unsubstantiated check for $400.00 written to respondent as "costs" from the proceeds. [TR I 18].

SUMMARY OF ARGUMENT

In this disciplinary proceeding, the referee found respondent in violation of Disciplinary Rule 1-102(A)(4) for misrepresenting to a client that he needed $7,500.00 to defray costs for an upcoming federal trial, which respondent knew was not scheduled to take place. Respondent contended that he asked his client for the $7,500.00 because the client owed fees for past services. The referee found that, even if respondent believed that the client owed him fees, the fees were clearly excessive and a violation of DR 2-106(A).

The referee, noting the egregious nature of respondent's overreaching of his elderly, trusting client and respondent's prior discipline with the Bar, recommended that he receive a suspension of thirty-six (36) months, and, thereafter, until he proves rehabilitation, makes restitution to his client in the amount of $7,500.00 and pays the costs of these proceedings.

The Bar supports the referee's findings and recommendation of discipline as they are abundantly supported in the record and should be upheld unless clearly erroneous. [The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986); The Florida Bar v. Weaver, 356 So. 2d 797 (Fla. 1978)]. Therefore, the Bar asks the Court to approve the Report of Referee in this disciplinary proceeding.

ARGUMENT I

> The referee's finding that Sgt. Ingram paid respondent $7,500.00, relying on respondent's misrepresentation regarding a pending federal case, is evident from the record.

The record clearly reflects, as the referee notes, that respondent misrepresented to Sgt. Ingram that the federal trial was scheduled for the month of February, 1986. [TR I 34-37; TR I 106; Amended Answer to Complaint, Paragraph 10]. It is also clear that respondent represented to Sgt. Ingram that he was in need of $7,500.00 to defray court costs in "the upcoming jury trial". [TR I 33-40]. The court file demonstrates that, at the time respondent requested the $7,500.00, the federal court case was not scheduled for trial, contrary to respondent's representations to his client. [Bar Exhibit 4].

However, respondent argues that, on January 19, 1983, Sgt. Ingram paid him the $7,500.00 for fees for past services. [TR II 24, 25]. Respondent contends that he asked Sgt. Ingram for the money on several previous occasions, although he never kept time records or provided his client with an itemized statement or other written accounting. [TR II 25, 35]. However, respondent's personal observations of Sgt. Ingram are inconsistent with his allegation of Ingram's failure to pay funds demanded.

> Respondent: Mr. Ingram was no stranger to me. I've known the man since I was a kid and I trust him to pay his own costs. [TR II 6].
>
> * * * *
>
> Respondent: I have known Mr. Ingram, by the way, since

> 1969. I'm no stranger to him. He was my commanding officer during the time I was ROTC at Hillsborough High School. I feel very comfortable with him and I felt he would pay. I wasn't concerned about getting costs from him up front. Whenever I advised him that he owed anything, he paid it. [TR II 51].

Respondent's former secretary, Carol McKee, who stated that she contacted Ingram regarding $7,500.00 in fees testified that, although Ingram had asked her for an accounting five or six times, she failed to provide him with the accounting. [TR I 138]. Further, although McKee was usually responsible for tallying fees owed, she said that she got the amount to demand from Sgt. Ingram directly from respondent. [TR I 140]. She then gave yet a different version of why the $7,500.00 was owed as attorneys fees. [TR I 143]. She said that respondent generally supplied her with an estimate of the length of time spent on each case. [TR I 141]. She stated that she started calling Sgt. Ingram in 1983 and stopped calling him for the $7,500.00 in "June, 1983, when he brought the money in", (although this was six months after Sgt. Ingram paid the funds to respondent on January 19, 1983). [TR 1 40 147].

As the referee aptly observes, it is not plausible that Sgt. Ingram would incur yet another mortgage on his home to obtain funds to pay respondent a total of $7,500.00 for what respondent contends were "accumulated legal fees", without a fee statement or other accounting of the exact nature and amount of those fees. What is plausible is that Sgt. Ingram believed that the federal

trial was forthcoming, as demonstrated by the following testimony:

> Sgt. Ingram:...it was imminent we were right the corner for our trial scheduled for the 7th, 14th and 21st of February....He was convincing to us, we had a landmark case. He mentioned that many many times, and we were going to prevail and win that case. [TR I 39].
>
> Sgt. Ingram: Mr. Lowe showed my wife and I both, a blank calendar. He picked it up off his desk and he said, I have nothing scheduled for the month of February, and I have got that time fully open for full devotion for my procedures and my legal counsel for the representation of our trial for the month of February 1983. [TR I 42].
>
> * * *
>
> Q: Did he make any other statements about the upcoming trial at all, that you recall?
>
> A: Nothing in that sense other than when we went over to the restaurant there was a lot of talk. He made some conversation, and as we left the restaurant he told my wife and I, both, when we go to trial they're going to fill our wheelbarrows and I'll meet you in the Bahamas. Hopefully, I think he meant my wife and myself and Mr. Lowe.
>
> Q: When was the next time you talked to Mr. Lowe about your case?
>
> A: I believe that came on the 5th of February 1983, at approximately 10:00 at night. He called me at my home and told me they were wrapping up the medicare trial and that our case was on standby to go to trial.

On February 22, 1986, when Sgt. Ingram discovered the trial had not been set for hearing, he confronted respondent and demanded an accounting of the $7,500.00 he paid to respondent in

January. [TR I 43-44]. Sgt. Ingram then asked respondent on five occasions for an accounting of the funds; however, respondent failed to comply. [TR I 46]. On April 28, 1983 at Sgt. Ingram's request respondent provided him with a receipt for the $7,500.00. [TR I 47; Bar Exhibit 15]. To date, Sgt. Ingram has not received an accounting from respondent or the return of the $7,500.00 paid. [TR I 49].

In further support of the referee's findings, it is also unmistakable from the record that, to date, respondent is unable to clearly account for what he purports were fees that totalled $7,500.00.

At the grievance committee hearing in the instant case, respondent presented several fee and cost statements in support of his defense that he obtained the $7,500.00 on January 19, 1983, because Sgt. Ingram made oral agreements to pay him money for past services. These fee and cost statements, introduced as Bar's Exhibit 16, were compiled and dated June 27, 1985, one day prior to the grievance committee hearing. The fee and cost statements, totaling $7,888.11, represent an obvious attempt by respondent to "put the cat back in the bag" following St. Ingram's disclosure to the Bar of respondent's misrepresentation and confiscation of Sgt. Ingram's $7,500.00.

At the final hearing before the referee, respondent recounted another version of how he reached the $7,500.00 in fees. [TR II 22]. And his former secretary testified to yet another. [TR I 143].

Respondent kept no time records or other written records to document his fees, and had no bills or fee statements. Instead he inferred that his records on all Sgt. Ingram's files were lost by Sgt. Ingram's new attorney, J. Style Wilson:

> Respondent's Counsel: Did Mr. Ingram ask you to tender an accounting for the amounts of money he paid you and the work you did for him?
>
> Respondent: Okay, your Honor, during the time of my representation of Mr. Ingram and during the time I was in possession of Mr. Ingram's file, Mr. Ingram did not ask for an accounting. Mr. Ingram forwarded to me at my request something in writing which I have here dated Oct. 3rd, 1983, and sometime later it was verified by his attorney, Mr. J. Styles Wilson, which I responded to and he asked me to forward his files to Mr. Wilson -- not forward the files, I'm sorry, that he no longer wanted me to represent him, but Mr. Wilson acknowledged he needed the files to represent Mr. Ingram. Your Honor, I have here before me the correspondence of my response to it. When those files were out of my office and for several months I didn't hear anything from Mr. Ingram. And sometime later Mr. Ingram asked for an accounting and when he did I advised Mr. Ingram I really couldn't give him anything until I received the files so I could put things together because there was things in this file. Mr. Ingram never asked for an accounting as for costs because he recognized the fact that he paid his own costs, okay? What Mr. Ingram basically asked for, your Honor, is where did his money go for, as for the fees, and what did I do for him. And I took time to explain to him that I charged him a flat rate which he agreed to. We have a conversation whereby Mr. Ingram acknowledged I was correct and I did not hear from him anymore until a little later when he advised me that some attorney told him that if he gave me any money at all it should have been deposited in my trust account and that it should have went for the payment of depositions and witnesses and other things, and that I had no

right to charge him an attorney's fee whatsoever.

Yet J. Styles Wilson, appearing as a rebuttal witness for the Bar, stated that, in February 1984, he requested and received only the file on the federal case and returned it to respondent, intact, within approximately forty-five (45) days. [TR III 6-9].

In further support of the referee's findings, the record shows that, prior to his request for the $7,500.00 from Sgt. Ingram, respondent opened a new law office and had just given a gala Christmas party. [TR I 119]. Additionally, Sgt. Ingram recounted, in great detail, the events, in early January, 1983 involving the urgency of respondent's requests for the $7,500.00 from Ingram, as follows:

> Bar Counsel: What transpired on the 4th?
>
> Sgt. Ingram: He didn't call me that night, he called me the next night on the 5th.
>
> Q: What happened then?
>
> A: He called me and said, Sergeant, I want you to come down to my office tomorrow morning at 10:00. I want to show you something, and then I'll tell you the exact amount of money I'll need to go to trial.
>
> Q: At that time were you involved in obtaining the funds that he requested?
>
> A: It goes back to the 3rd. There was a lot said, and he asked me on the 3rd, he said, have you paid off the first loan that you got to pay me the $5,000 in September, 1980? I said no, John, I told you I financed that for ten years. He said, can you get another loan? I said, I'll check it out. He said, if you can get another loan, how long is it going to take for you to get the loan? I said, I don't know, I'll check it out.

Q: On the 5th what happened?

A: He told me to come down to his office at 10:00 the next morning. He wanted to show me something, and he would give me the exact figure of the amount he needed. I went to his office. We went to the county courthouse into the law library on the second floor. As we went into the library, Mr. Lowe asked me, he said, can you give me a check or give me five hundred dollars? I said, no I can't give you any money this week; next week I can. Then he said, I have five attorneys who are in concurrence with me that we have a sound case against the United States government and Hillsborough County school system.

Q: What representations prior to that time had Mr. Lowe made to you about the value of your loss?

A: The initial suit filed in September or October 1980, was for ten million dollars. To be realistic, I didn't expect to get anything like ten million dollars.

Q: Did he make any representations as to what you might expect?

A: It came down to the wire, realistically, we were looking at a million-dollar settlement.

Q: In the law library did you discuss any money at that time at that meeting?

A: Well, in the law library after he told me about the other attorneys that concurred with him he said, I'm going to need $7,500.00 to get our case to trial.

When respondent requested the funds from his client, he knew that the case was not set for trial and that Ingram's case against the Hillsborough County School system had been dismissed. [Bar Exhibit 4].

In further defense of his position,, respondent points out

that Sgt. Ingram was confused as he does not easily distinguish between costs, fees and retainers. The Bar agrees with respondent's observation [TR I 91] and states that it is because of Sgt. Ingram's lack of understanding that, as the referee aptly noted, "respondent took unfair advantage of Robert Ingram". [Amended Report of Referee, p.5]. As Sgt. Ingram stated, "We paid him well over the $13,000.00 to take us to trial and he didn't do it". [TR I 58].

Finally, the issue of who wrote the word "trial" on the receipt presented to Ingram on April 23, 1983, which was the subject of the rehearing on January 13, 1987, is not dispositive to the issue of misrepresentation. Had nothing been written on the receipt, it would not alter the ruse by which respondent originally obtained the $7,500.00 from his trusting friend and client on January 19, 1983.

ARGUMENT II

The referee's finding that, if respondent's assertions that the $7,500.00 represented fees, then said fees were excessive, is clearly supported by the record and should be approved.

The referee found, that if one believes respondent's defense, respondent charged a clearly excessive fee on two occasions. First, his bill for $5,000.00 for research and/or appearance at a Veteran's Administration hearing was clearly excessive. Second, respondent retained $1,400.00 from a $2,500.00 settlement from Sears. Although he contended that costs were paid from the $1,400.00, he produced no fee contract or accounting of the distribution of costs.

Respondent argues that he charged and collected $5,000.00 from Ingram, for research involving federal regulations and court decisions for an administrative hearing before the Veterans Administration. This fee is clearly excessive for several reasons:

First, respondent's statement attached to Bar Exhibit 16 demonstrates that respondent charged Ingram $5,000.00 for preparation and appearance at the Veterans Administration hearing. [TR II 37; Bar Exhibit 16]. At the time respondent collected the funds from his client, 38 U.S.C.A. 3404 and 38 U.S.C.A. 3405 prohibited an attorney fee of more than ten dollars ($10.00) for representation in a Veteran's Administration hearing

and provided criminal penalties for the violation of the statute.

Second, at the final hearing, respondent changed his testimony and stated that the $5,000.00 was for "research" alone and that he had expended approximately thirty (30) hours researching federal regulations on the issue of whether or not Sgt. Ingram's disability was military related. [TR II 18, 22]. Respondent stated at the final hearing that, at the time of the research, he knew nothing of the Veterans Administration hearing. [TR II 20]. As the referee noted, even at an hourly rate, respondent's alleged fee for research was excessive, calculated at an average rate of $100.00 per hour.

Third, the issue respondent researched was directly related to the federal tort claim involving a suit against the military for which respondent had previously received another $5,000.00 from Sgt. Ingram and on which respondent had a forty (40) percent contingent fee. Thus, not only was the alleged fee excessive for research, it appears that, in charging his client yet another $5,000.00 to research an issue identical to the tort claim for which he was to receive yet another fee, respondent collected two $5,000.00 fees for the same services.

In another matter, the referee found that respondent took $1,400.00 from a $2,500.00 settlement as attorney fees in Sgt. Ingram's suit against Sears Roebuck for faulty air conditioning. Sgt. Ingram stated that there was no fee contract or other written agreement regarding this fee. Respondent countered that the fee contract in the Sears case existed, but was not returned

by Styles Wilson when Sgt. Ingram's files were returned to his office. [TR II 12]. Styles Wilson, on the other hand testified that the only file he received from respondent involved Sgt Ingram's federal case. [TR III 6-9]. Respondent provided no closing statement or other records to indicate that costs were paid to anyone other than himself.

Finally, respondent argues that the Bar failed to submit documentation or other physical evidence to support its charges. [Answer Brief, pp 10-11]. To this the Bar responds that, at one point, an audit was performed on respondent's books by The Florida Bar Auditor. The auditor testified at the final hearing that no monies were placed in respondent's trust account as costs for Sgt. Ingram other than a check written to respondent for $500.00 labeled "costs", withdrawn from the $2,500.00 settlement in the Sears Case. [TR I 18].

Respondent, on the other hand offered no record of his contention that the $7,500.00 was owed as fees for past services and relies on his failure to keep time records and issue fee statements as a defense to the Bar's contentions. He argues that he had no such records and, therefore, because the Bar could not obtain them, the Bar failed to prove that his fees were excessive.

In The Florida Bar v. White, 368 So. 2d 1294 (Fla. 1979) this Court found that White had charged clearly excessive fees, noting that respondent's records were inadequate to determine how

much time or work he expended. Further, White's estimate of hours expended was found to be unrealistic when the court considered that the evidence did not reveal any legal work of any significance, involving, among other things, some legal research. Id. at 1297. [See: The Florida Bar v. Berger, 394 So. 2d 415 [Fla. 1981]. Thus, the referee's findings of excessive fees is supported by the record and should be upheld.

ARGUMENT III

The penalty recommended by the referee is adequate when one considers that respondent, who has two prior disciplines, took $7,500.00 from his client under false pretenses and failed to return any of the funds.

The penalty recommended by the referee is more than appropriate in view of the unique facts of the instant case. As the referee noted, and, as anyone who reviews the testimony in this proceeding will determine, respondent clearly fueled Sgt. Ingram's enthusiasm for his case with his statements about a "million dollar" settlement or award.

What is also apparent is Sgt. Ingram's trust in respondent as a long time acquaintance and his naivete regarding legal matters. The obvious manipulation of his elderly, trusting client by which respondent encouraged Sgt. Ingram to take yet another mortgage on his home to pay respondent $7,500.00 funds for a trial that did not exist, represents such a gross abuse of the attorney-client relationship, that a suspension of any kind is a lenient penalty. Sgt. Ingram, a retired and disabled veteran, was compelled to obtain two mortgages on his home, with payments totaling $467.00 per month, to pay respondent for services he did not receive.

Respondent's misconduct is further aggravated by his two prior reprimands. In Case No. 61,255 (Oct. 28, 1982), respondent received a Private Reprimand with appearance before the Board of

Governors, for physically threatening a parole prior to a hearing. Justice Aldeman especially noted that respondent's conduct indicated a disrespect for the law and raised a serious question as to his fitness to practice law.

In Case No. 62,737 (March 1, 1984), respondent received a Private Reprimand with an appearance before the Board of Governors and six months probation for trust account irregularities covering a period of May, 1980 through March, 1982. On June 29, 1983, the referee issued his Report of Referee finding that respondent's two checking accounts labeled as "escrow accounts" indicated twenty-six (26) negative balances and seventy-five (75) checks returned for insufficient funds. During this same period of time, approximately (20) checks were returned by the bank due to insufficient funds. Another general office account also reflected twenty three (23) negative balances and three returned checks. [Case No. 62,737, Report of Referee]. Despite this pending disciplinary matter involving bookkeeping procedures, respondent failed to attend to his problems with billing and bookkeeping, which continued throughout his representation of Sgt. Ingram until October, 1983. [TR I 143].

In a similar case, Samuel B. Berger was suspended by this Court for a period of three years for charging a clearly excessive fee, failing to maintain adequate records and failure to refund unearned fees. The Court noted that, previously, Berger had been suspended for a period of one year on a separate

offense. Supra at 394. Unlike Berger, respondent failed to remedy bookkeeping problems which were the subject of a prior disciplinary proceeding and then used the continuation of those same problems as a defense against the subsequent charges in the instant case.

In addition to respondent's past and present disciplinary problems, he stated to the referee, "It's my intention not to practice law in the state of Florida, anytime soon...". [TR II 36].

When one considers respondent's failure to remedy his bookkeeping problems, the second Private Reprimand involving threats of physical violence and, the egregious abuse of this retired and disabled client, and his intention not to practice law in this State in the near future, the three year suspension, recommended by the referee is more than appropriate.

CONCLUSION

In his report, the referee observed that not only had respondent abused his attorney-client relationship with Sgt. Ingram, he had also betrayed the client's admiration and longtime personal friendship.

The referee further observed and the record reflects that, respondent, relying on Sgt. Ingram's trust, obtained $7,500.00 by misrepresenting to his client the status of his pending federal case. Furthermore, he found that respondent defended the Bar's charges of misrepresentation with inconsistent and uncorroborated testimony that the funds were for fees, which, if proven true, the referee found to be excessive.

The aggravating factors involved in this case, coupled with the nature of respondent's two prior reprimands, adequately support the referee's recommendation of discipline.

Wherefore, the Florida Bar respectfully requests that the Court uphold the referee's recommended disciplinary findings and recommendations.

Respectfully submitted,

By: 
DIANE V. KUENZEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished to ROBERT F. MCKEE, Attorney for Respondent at his record Bar address of 1724 E. 7th Avenue, Tampa, FL 33673-0638; and a copy to JOHN T. BERRY, Staff Counsel, The Florida Bar, 600 Apalachee Parkway, Tallahassee, Florida 32301-8226, this 2nd day of April, 1987.

DIANE V. KUENZEL