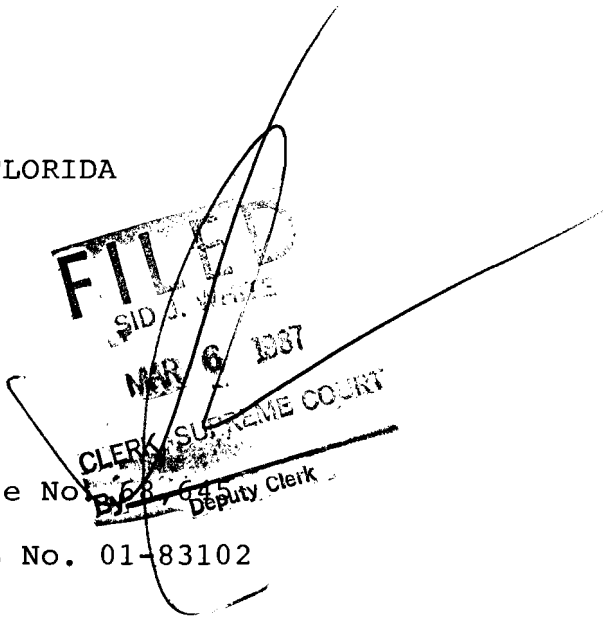
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Complainant,

vs.

JOE G. HOSNER,

Respondent.
_____/

Case No. 68,645

TFB No. 01-83102

ANSWER BRIEF OF COMPLAINANT

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STATEMENT OF THE CASE

Final hearing in this matter was held on October 6, 1986. The referee submitted her report to this Court on November 11, 1986, wherein she found Respondent guilty of violating Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility of The Florida Bar and Article XI, Rule 11.02(3)(a) of the Integration Rule of The Florida Bar. The referee recommended that Respondent be publicly reprimanded for violation of these rules.

Petition for Review was filed by Respondent on February 2, 1987, pursuant to Rule 3-7.6(c)(1) of the Rules of Discipline.

STATEMENT OF THE FACTS

A. Respondent's Conduct

In 1980, Mrs. Wanda Lewis entered into a lease-purchase agreement with Blue Bird Leasing, Inc. The automobile that was the subject of the agreement was a 1979 Datsun, Model B-210. The terms of the lease required Ms. Lewis to make monthly payments of $171.60 for 24 months and a balloon payment in the amount of $3,186.55. At the time that the lease-purchase agreement was entered into, Respondent was the president of Hosner Enterprises, Inc., which owned Blue Bird Leasing, Inc.

On at least one occasion during the time period covered by the lease-purchase agreement, Respondent wrote to Ms. Lewis regarding the status of her lease and demanded full payment of arrearages. (Appendix 1)

At the end of the lease period, Respondent's employee, Mr. Claude R. (Chig) Findley, sent a letter dated June 30, 1982 to Ms. Lewis. (Appendix 2) This letter was sent with Respondent's knowledge, and recited a pay-off figure on the lease-purchase agreement. (TR 33) According to this letter, Ms. Lewis had paid all 24 of the payments, as required by the agreement, plus four additional monthly payments of $171.60 each. Mr. Findley again wrote to Mr. Lewis on July 20, 1982, demanding the final balloon payment.

(Appendix 3) On July 30, 1982, Ms. Lewis delivered to Blue Bird Leasing, Inc., a check in the amount of $2,340.35 which represented the full pay-off figure under the terms of the agreement, including interest. The check was made payable to Blue Bird Leasing, was endorsed by Respondent and deposited into an account entitled "Joe G. Hosner Rental Account" at the First State Bank. (Appendix 4) After delivery of the pay-off check to Respondent, Ms. Lewis telephoned Mr. Findley approximately every two or three weeks demanding delivery of the title to her automobile. (TR 35) These demands were relayed to Respondent's secretary by Mr. Findley. (TR 35) On at least one occasion, Mr. Findley asked Respondent directly about the delay in providing the title to Ms. Lewis. Mr. Hosner's response was simply that he was busy. No mention was made of any missing payments or indebtedness on the part of Ms. Lewis. (TR 36)

Although the lien on Ms. Lewis' car was held by West Florida Bank, the funds representing the pay-off on Ms. Lewis' car were deposited into Respondent's bank account at another bank, and were never transferred to the West Florida Account. (TR 75, 76, 77) Despite repeated demands, Ms. Lewis did not receive her title until late June of 1983, approximately eleven months after the lease-purchase agreement had been paid in full. (TR 82)

B. Grievance Procedures

The Florida Bar received Ms. Lewis' complaint against Respondent on June 22, 1983. A copy of the complaint form was forwarded to Respondent shortly after July 14, 1983. (TR 128) In approximately October 1983, Respondent was notified that Ms. Lewis' complaint had been assigned to a member of the First Judicial Circuit Grievance Committee for investigation. A copy of the list of grievance committee members was attached to this notice. (TR 15) The constituency of the grievance committee did not change from October 1983 through the time of the grievance committee hearing on April 17, 1984. (TR 15) At the time the grievance committee hearing was held, the First Circuit Grievance Committee was not compromised of two-thirds nonlawyer members. However, of those members participating in the finding of probable cause against Respondent, three were lawyer members and two were nonlawyer members. (TR 14) No objection was received from Respondent at the grievance committee hearing as to the constituency of the committee.

Probable cause was found against Respondent on April 17, 1984, and the final complaint was filed on April 22, 1986. The final hearing was held on October 6, 1986, and the Referee's Report was filed with this Court 42 days later, on November 11, 1986.

SUMMARY OF ARGUMENT

A. The Referee did not abuse her discretion in denying the Respondent's Motion to Dismiss

Respondent's Second Motion to Dismiss alleged as ground for dismissal that the grievance committee for the First Judicial Circuit was comprised of less than one-third nonlawyers. Article XI, Rule 11.03(2)(c) states that, "[a]t least one-third of the [grievance] committee members shall be nonlawyers." This rule does not state that the grievance committee is without jurisdiction or authority to find probable cause in the event that the number of nonlawyers drops below one-third.

Respondent's Second Motion to Dismiss also alleges as cause for dismissal that the Bar failed to attach a list of grievance committee members to the notice of hearing before the grievance committee as required in Article XI, Rule 11.03(2)(c) of the Integration Rule. However, Respondent was provided with a copy of the list of grievance committee members in October of 1983, approximately six months prior to the grievance committee hearing. Assuming, for the sake of argument that the purpose of Rule 11.03(2)(c) is to provide an accused attorney the opportunity to challenge the constituency of the committee or to ask for recusal of prejudiced members, that purpose was met.

In his first Motion to Dismiss Respondent alleged that The Florida Bar failed to prosecute Respondent's case with "utmost diligence." However, the Referee specifically found that Respondent had not been prejudiced by any delay in processing the case against him (Referee's Report at page 3). This Court has held on more than one occasion that delay in finalizing a grievance proceeding does not constitute grounds for dismissal absent some prejudice or harm to the accused attorney. No harm or prejudice has been alleged here and none found, thus dismissal is simply not warranted.

B. The findings of fact of a Referee are presumed correct and should not be overturned unless wholly lacking in evidentiary support.

Respondent argues that The Florida Bar did not prove its case by clear and convincing evidence; however, a petition for review does not entitle the petitioning party to a de novo trial. The party seeking review must demonstrate that the referee's report is clearly erroneous.

The Referee's Report in this case contains findings of fact which are supported by the record and, as such, are not subject to review. A presumption of correctness is attached to a referee's findings of fact in part because the referee has had an opportunity to personally observe the demeanor of witnesses and to assess their credibility. The Referee's Report in this matter specifically found that parts of Respondent's testimony were not believable and, that

evidence of Respondent's guilty was clear and convincing (Referee's Report at page 3). These findings, presumed correct, are adequately supported by the record and should not be overturned.

C. The facts in this case constitute violation of disciplinary rules prohibiting deceit, misrepresentation and violation of Florida Statutes.

Neither the disciplinary rules charged, nor previously decided discipline cases require an attorney-client relationship before an attorney can be found guilty of ethical violations. The Referee in this case found Respondent's conduct to be in violation of several disciplinary rules. First, Respondent was found to have demanded, through an employee under his supervision and control, pay-off of a lease-purchase agreement for a vehicle at a time when he knew he could not produce the title to the vehicle. Such conduct was found to be in violation of Disciplinary Rule 1-102(A)(4) for conduct involving dishonesty, fraud, deceit or misrepresentation.

Respondent's failure to produce the title to Ms. Lewis was also in violation of §320.27, Florida Statutes, which requires motor vehicle dealers to produce title to the purchaser of a vehicle within 20 days. Ms. Lewis did not receive the title to her vehicle from Respondent until nearly eleven months after she had paid in full all monies owing under the terms of the lease-purchase agreement. Violation of this statute is punishable by fine no greater than $500 and/or a maximum sentence of six months imprisonment. Such conduct

is violative of Article XI, Rule 11.02(3)(a), and a finding of guilt was made by the Referee in this matter.

D. The facts in this case support imposition of a public reprimand.

The discipline of public reprimand recommended by the Referee is appropriate based on the misconduct involved and in light of past disciplinary cases for similar misconduct. Respondent argues in mitigation that the complainant, Ms. Lewis, suffered no harm due to Respondent's misconduct. Although Ms. Lewis was not present to testify at the final hearing regarding prejudice, it is undisputed that Ms. Lewis was deprived of the possession of the title to her vehicle for nearly eleven months. During this eleven month period, Ms. Lewis was unable to sell her vehicle. She was further deprived of any other of the benefits attendant to full ownership of a motor vehicle.

ARGUMENT

ISSUE I

MERELY TECHNICAL VIOLATIONS OF DISCIPLINARY PROCEDURE RULES CONTAINED IN THE INTEGRATION RULE DO NOT CONSTITUTE GROUNDS FOR DISMISSAL OF DISCIPLINARY CHARGES AGAINST AN ATTORNEY.

During the course of these proceedings, Respondent filed two motions to dismiss. The first motion to dismiss was filed on May 13, 1986, and alleged four grounds for dismissal. In his petition for review, Respondent argues that the Referee erred in not granting dismissal based on one of the grounds in this particular motion; laches and/or failure on the Bar's part to prosecute in a timely manner. Additionally, Respondent asserts that the Referee erred in not granting the second motion to dismiss wherein it was alleged that the Bar had failed in two instances to comply with procedural rules found in the Integration Rule of The Florida Bar.

Respondent's first motion to dismiss asserts that the Bar's complaint should be dismissed due to laches and/or the Bar's failure to timely prosecute the disciplinary matter against Respondent. This Court has consistently held in the past that delay in processing a disciplinary case is not sufficient grounds to dismiss the proceeding in the absence of actual prejudice. The Florida Bar v. King, 174 So.2d 398 (Fla. 1965); The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970); The Florida Bar v. Nealy, 372 So.2d 89 (Fla. 1972).

This Court has further held that the Florida Bar has a reasonable time in which to proceed against an attorney in a disciplinary matter. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978); and The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986).

The preeminent case regarding the laches defense is the McCain case. In McCain, this Court recited the four requisite elements for a laches defense. Two of these elements are particularly applicable to disciplinary proceedings. First, the lack of knowledge by an accused attorney that the Bar intends to proceed against him or her. In the case at bar, Respondent was notified that probable cause against him had been found on April 17, 1984. Respondent was, at that time, put on notice that the Bar intended to proceed against him in this disciplinary matter. The second element of laches which is pertinent to disciplinary proceedings is a showing of prejudice by the party seeking the laches defense. There has been absolutely no allegation or proof of any harm, injury, or prejudice to Respondent in these proceedings as a result of the alleged delay in processing this matter. It is clear from the McCain case that all four elements must be demonstrated by a party seeking to use the laches defense before the matter will be dismissed based on laches. Here, Respondent has not asserted in his Initial Brief that any of the four required elements are present.

Respondent seeks to have this Court dismiss the charges against him based on his perception that the Bar "drags its feet" in

prosecuting disciplinary charges against attorneys. It appears that Respondent is asserting that the Bar should be taught a lesson and forced to process disciplinary cases more quickly. Respondent asserts that the way to do this is to dismiss his case. A number of cases are cited by Respondent and language from these cases is quoted. However, none of these cases is dispositive in this matter or even persuasive, since the facts in those cases indicate that the delay in those cases was of a different and/or more serious nature than in the instant case.

In essence, Respondent's position regarding delay is that a delay in the filing of a formal complaint in and of itself, even where no demands to expedite have been made by the respondent, and no prejudice alleged or shown by respondent, should be grounds for dismissal of the complaint. This position is totally without support both in prior cases and in logic. There is no evidence in the Bar's file or in the record presented to the Referee that any demands were made by Respondent to expedite filing of the formal charges against him. Respondent made no such demands and if anything, clearly stood to benefit from any delay in filing of charges. Because the burden of proof is on the Florida Bar in a disciplinary matter, any damage to the case due to delay would accrue to Respondent's favor. At the final hearing in this matter, Respondent presented no witnesses other than himself and no documentary evidence. It is therefore somewhat unlikely that Respondent was damaged by the passage of time.

Finally, the Referee specifically found that any delay in presenting the case had not resulted in prejudice to Respondent.

An administrative rule recently enacted by this Court requires that disciplinary matters be completed within 180 days from the filing of a formal complaint. The case against Respondent was fully litigated within the 180-day requirement set down by this Court. The Referee tendered her report only 42 days after the date of the final hearing. Clearly, no delay has taken place during the actual litigation of this matter. Respondent's tirade against the Florida Bar regarding delay in this matter is more in the vein of an objection to the system in general, and not justification for dismissal of the charges against him.

Respondent's second motion to dismiss filed in the proceeding before the Referee states two grounds which are again argued by Respondent in his petition for review. The first argument is that the Florida Bar failed to comply with an Integration Rule provision requiring that grievance committees be composed of not less than one-third nonlawyer members. The Florida Bar has conceded that the grievance committee that found probable cause against Respondent did not have among its members at least one-third nonlawyers. The Florida Bar further acknowledges that the Integration Rule requires that grievance committees be composed of at least one-third nonlawyer members. However, the Integration Rule does not state that a failure to have at least one-third nonlawyers listed as members of the

grievance committee renders the committee without authority or jurisdiction to find probable cause against an attorney. Respondent takes the somewhat draconian view that when a rule is not complied with, the entire matter should be dismissed as void ab initio. To do so would be to "throw the baby out with the bath water."

In determining whether or not failure to comply with this rule should be a fatal flaw, it is important to consider the reason behind the rule. This particular provision was in all likelihood enacted in order to raise the perception of the public in the matter of lawyer disciplinary proceedings. By having at least one-third nonlawyer members impanelled on a grievance committee, the public has some assurance that individuals outside of the legal profession are participating in the decision to bring charges against an attorney. It is improbable that this particular rule was enacted in order to protect the rights of an accused attorney.

The constituency of the grievance committee in this matter was never questioned or objected to by Respondent at the grievance committee hearing. Further, even though the grievance committee contained less than one-third nonlawyer members among its constituency, of those committee members who were present and participated in the finding of probable cause against Respondent, three were lawyers and two were nonlawyers. Based on actual participation in the probable cause vote, 40% of the committee's membership were nonlawyers. Respondent's late objection to the Bar's

failure to comply with this rule is merely an attempt to circumvent the finding of guilt against him. In refusing to dismiss this cause, the Referee apparently agreed that a failure to comply with a technical rule of procedure does not justify dismissal of a disciplinary complaint against an attorney. While the strict letter of this rule was not met, there is no indication that the Respondent either objected to or was harmed by the absence of additional nonlawyer members on the committee.

Respondent's final ground for dismissal of the charges is that the notice of the grievance committee hearing against Respondent was not accompanied by a list of the grievance committee members. Bar counsel advised the Referee at final hearing that while the Bar could not determine for certain that Rule 11.03(2)(c) had been complied with, that it had been determined that a list of the members of the grievance committee had been provided to Respondent at the same time that Respondent was advised that the complaint of Ms. Lewis was being assigned to a member of the grievance committee for investigation. This particular notice had been sent to Respondent on October 18, 1983, six months before the date of the grievance committee hearing on April 17, 1984. From the time that the list of committee members was forwarded to Respondent, until the date of the hearing, the constituency of the committee remained the same. Therefore, Respondent's argument that he could not have objected to the constituency of the committee by virtue of the fact that he was not in possession of a current roster, is without merit.

The purpose behind this portion of Rule 11.02(2)(c) must be considered when determining whether a failure to comply with the rule would be fatal. No guidance exists in the form of case law regarding the purpose behind this particular integration rule provision. However, it would logically follow that notice to an accused attorney of the constituency of a grievance committee would enable the attorney to object to particular committee members and request their recusal in considering the matter against the attorney. Respondent's attorney noted at the final hearing that the obvious purpose behind the rule requiring the attachment of the grievance committee roster to the notice of hearing was to alert a respondent as to who was on the committee. (TR 7) Because Respondent received a roster of the grievance committee members six months prior to the date of the hearing, the spirit of this rule clearly has not been violated.

Respondent urges dismissal of the matter against him because of a failure to comply with rules which he himself has admitted are technical in nature (TR 7) As support for his argument, Respondent has cited this Court, and the Referee at the hearing below, to The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978). However, Respondent's counsel conceded at the final hearing that "Rubin obviously is a lot more heinous misconduct than what we have at the case at Bar." (TR 12)

In the Rubin case, this Court pointed out four specific and separate instances of noncompliance with the rules on the part of the

Bar. First, the Bar in the Rubin case had deliberately held the referee's report in order to consolidate it with a referee's report in another matter against the accused attorney. Secondly, the Bar had filed the referee's report before filing a petition for review, in violation of the Integration Rule provisions in effect at that time. The third instance of noncompliance in the Rubin matter was the filing of the petition for review fifty-one days late. Finally, the Bar in the Rubin matter had improperly waived confidentiality, said waiver resulting in the accused attorney being subjected to widespread negative publicity. There is simply no comparison between the four instances of noncompliance pointed out by this Court in the Rubin case and the two technical instances of noncompliance pointed to by Respondent in this matter. Both the number and the seriousness of the charges in the Rubin case distinguish it from the case against Respondent.

This Court specifically stated in Rubin,

> Whether the Bar's violation of the Integration Rule warranted dismissal of all charges, as Rubin urges, depends, we believe, upon the purpose for our procedural requirements, the severity of their breach, and the gravity of the consequences of the accused attorney whose rights are thereby abridged.

The apparent purposes for the rules which Respondent argues have been violated in this matter have not been thwarted. The severity of the breach of these rules is at best technical, and

Respondent has not demonstrated any negative consequence to him by virtue of these particular procedural rules having not been followed.

Respondent argues that the Bar should be made to comply with its owns rules and should be penalized for technical breaches of procedural provisions of the Integration Rule. In support of this argument, Respondent asserts that attorneys may be prosecuted and disciplined for technical violations of ethical rules. However, violation of the substantive disciplinary rules cannot be compared to violation of procedural rules. The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986), cited in Respondent's brief, does not support Respondent's argument that attorneys are prosecuted and disciplined for violating "technical" provisions of ethical rules. Mitchell was disciplined for commingling personal funds with clients' funds; and for failing to maintain quarterly trust account reconciliations, deposit slips, ledger cards, or any records indicating reasons for disbursement from his trust account. Mitchell at 1019. Additionally, the respondent in Mitchell had previously received a private reprimand. Mitchell's conduct clearly constitutes more than violation of a technical provision of an ethical rule. Trust accounting rules and provisions exist to provide protection to the public when funds are placed into an attorney's hands for safekeeping. Mitchell seriously undermined this protection for the public when he failed in numerous respects to comply with trust accounting rules and procedures.

This Court has held in the past that the findings of a referee are presumed correct and will not be disturbed absent a showing that such findings are clearly erroneous. The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986); and The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985). The Referee's refusal to grant Respondent's motions to dismiss was within the discretion of the Referee and has not been shown to be clearly erroneous as a matter of law.

ISSUE II

THE FINDINGS BY THE REFEREE ARE ADEQUATELY SUPPORTED BY THE RECORD AND THEREFORE PRESUMED TO BE CORRECT.

Respondent asserts in his brief that the finding of guilty against him regarding Disciplinary Rule 1-102(A)(4) is not supported by the record and that, in fact, the Bar presented no evidence of any misconduct on his part. This Court has repeatedly held that a referee's findings of fact are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1980); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986); and The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985). Further, this Court has stated that its responsibility in a disciplinary proceeding is to review the referee's report and, if the recommendations of guilt are supported by the record, to impose an appropriate penalty. The Florida Bar v. Hoffer, 383 So.2d 642 (Fla. 1982) and The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978).

Evidence presented at the final hearing in this matter includes testimony of Respondent's former employee, Mr. Findley, the testimony of Respondent, and, exhibits presented by the Florida Bar. Mr. Findley testified that the complainant, Ms. Wanda Lewis, had made repeated demands, calling approximately every two to three weeks from the time the pay-off was made on July 30, 1982 until at least the end

of 1982. (TR 35) Mr. Findley further testified that these demands were passed on to Respondent through his secretary and to Respondent directly on at least one occasion. (TR 36) Respondent's own testimony acknowledges the fact that he was aware of Ms. Lewis' demands for the title and that at least one of these demands was made to him personally. (TR 72)

Copies of letters and documents were admitted into evidence and made a part of the record. The Referee specifically found that Respondent had, through his agent, Mr. Findley, sent two letters (Appendix 2 and 3) to Ms. Lewis pressuring her to make payment in full pursuant to the lease-purchase agreement, even when he knew he was in financial difficulty and unable to obtain title to the vehicle.

Respondent testified that he personally endorsed the check from Ms. Lewis and deposited the check into his account denominated "Joe Hosner Rental Account." (TR 67, 77, and Exhibit 3) Respondent further testified that there was never any transfer made from the rental account to the account at West Florida Bank in the amount of the pay-off from Ms. Lewis. (TR 77)

Respondent asserted at the final hearing, and in his initial brief, various excuses for his inability to produce the title for Ms. Lewis. Among the excuses were: his claim of financial difficulty, his family's medical problems, his claim that Ms. Lewis still owed money to him, and his claim that he was not involved in the

day-to-day operations of Blue Bird Leasing, Inc. These excuses are, at best, conflicting on specifics and the Referee noted in her report that regarding his claim of no involvement in the day-to-day operations of Blue Bird Leasing, Respondent's "protestations of ignorance [could not] be believed." (Report of Referee page 3) Conflicts in evidence presented at a trial before a referee are properly resolved by the referee, as finder of fact. The Florida Bar v. Hoffer, 383 So.2d 642 (Fla. 1980).

Respondent further argues that his only sin was his failure to deliver a title for eleven months, and that this act does not constitute dishonest conduct. However, the Referee specifically found that Respondent had demanded that Ms. Lewis comply with the terms of the lease-purchase agreement in making the final pay-off even when he knew that because of financial difficulties he was unable to produce the title to Ms. Lewis' vehicle. The Referee further found this conduct to be violative of Disciplinary Rule 1-102(A)(3) which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent's conduct was, at best, deceitful. Deceit is defined in Black's Law Dictionary 365 (5th ed. 1979), as: "a fraudulent and deceptive misrepresentation, artifice, or device used by one or more persons to deceive and trick another who is ignorant of the true facts, to the prejudice and damage of the party imposed upon." Clearly, Ms. Lewis was deceived by Respondent into believing that payment in full of her obligation under the lease-purchase agreement would result in her receipt of the

title to her vehicle. Demand for said payment was made even when Respondent knew he was unable to produce the title. Ms. Lewis fulfilled her part of the bargain under the contract and submitted full payment to Respondent. Respondent admittedly deposited Ms. Lewis' check into his Rental Account and had full use and enjoyment of this money during the eleven months in which he failed to produce the title to Ms. Lewis. Ms. Lewis was deprived of the use or benefit of having the title to her vehicle for the eleven months in question. This conduct on the part of Respondent is deceitful, dishonest, and is inconsistent with the high professional standards required of members of the Florida Bar.

The record contains sufficient evidence in the form of testimony and documentary evidence to support the Referee's findings of fact and recommendations as to guilt against Respondent. These findings should, therefore, be presumed to correct and the findings of guilt against Respondent approved by this Court.

ISSUE III

ATTORNEYS MAY BE DISCIPLINED FOR MISCONDUCT OUTSIDE THEIR PROFESSIONAL CAPACITY WHERE THE CIRCUMSTANCES INVOLVED DISHONESTY OR VIOLATION OF LAW

Respondent argues that he has improperly been subjected to disciplinary proceedings due to financial reversals. While it is true that no contention has been made that Respondent's misconduct was related to the practice of law, the charges against Respondent were not brought simply because he was the innocent victim of business reversals. Respondent has been found guilty of misconduct involving his demand for the pay-off of the lease-purchase agreement for an automobile and subsequent failure to provide the title to the vehicle for a period of eleven months. This conduct has been found to be violative of Disciplinary Rules involving dishonesty and deceit, and violation of Florida Statute.

Respondent seeks to distinguish The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973) which was cited by the Florida Bar at final hearing. However, the Bar cited the Bennett case for support of the proposition that attorneys are held to a higher standard of conduct in business dealings than are nonlawyers. As stated in the language from the referee's report set forth in the Bennett opinion, "an attorney is not, of course, immune from discipline merely because the acts complained of were not committed in the course of the strict attorney-client relationship." This fact is

specifically recognized in Article XI, Rule 11.02(3)(a) which states that an attorney may be disciplined for "any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise . . .." (emphasis added) As this Court stated in the Bennett case, "'an attorney is an attorney is an attorney', much as the military officer remains 'an officer and a gentleman' at all times." Bennett, at 482.

The Florida Bar v. R. W. B., Case No. 60,005 (June 5, 1981) (Appendix E to Respondent's Initial Brief) dismissed disciplinary charges against an attorney for misconduct arising out of a minor landlord-tenant dispute. However, this Court noted:

> There are circumstances where attorneys are subject to discipline for activities while not acting in their professional capacity. Those circumstances generally reflect dishonesty, violation of law, moral turpitude, fraud, or derelection of a fiduciary responsibility.

The misconduct Respondent has been found to have violated falls squarely within the exception noted by the Court in R. W. B. as it involves circumstances involving dishonesty, deceit, and violation of law. Clearly, this Court has not hesitated in the past to discipline attorneys for misconduct occurring outside of their professional capacity where the misconduct warrants such discipline.

ISSUE IV

A PUBLIC REPRIMAND IS AN APPROPRIATE DISCIPLINE FOR A RESPONDENT'S MISCONDUCT.

As previously enunciated in the Integration Rule, "the primary purpose of discipline is the protection of the public and the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar." Integration Rule 11.02 (1986). This Court has further elaborated on the purposes of discipline both in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) and in The State ex rel. v. The Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954). As stated in the Murrell case, discipline administered must be just to the public, fair to the attorney, and designed to deter other attorneys from similar misconduct.

Respondent argues that a public reprimand is too harsh a penalty in light of the misconduct involved. In support of his position, Respondent argues that to publicly reprimand him would be to place his case into the same category as other cases wherein the Court has issued public reprimands. However, this Court has repeatedly stated that each disciplinary case will be decided on its own facts and the appropriate level of discipline determined by considering the facts together with any aggravating or mitigating factors. In one of the cases cited by Respondent, The Florida Bar

v. Beneke, 464 So.2d 548 (Fla. 1985), the attorney was publicly reprimanded for conduct similar to that with which Respondent is charged. The attorney in Beneke misrepresented the status of a real estate contract to a bank. There were no clients involved and the referee specifically found that no complaint had been made by the bank and that Beneke had satisfactorily performed his obligation to the bank. Nevertheless, Beneke was found guilty of violating Disciplinary Rule 1-102(A)(4) and Article XI, Rule 11.02(3)(a), the same disciplinary provisions with which Respondent herein is charged. In The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986), the conduct involved was more serious than that charged in the instant case. However, for whatever reason, the Florida Bar chose not to petition for review of the referee's recommendation of a public reprimand. Notwithstanding, Justice Ehrlich, in a strongly worded opinion, concurred as to the respondent's guilt and dissented as to the appropriateness of the discipline. Justice Ehrlich would have recommended a suspension of ninety-one days as a minimum discipline appropriate in the Jennings case. The Florida Bar v. Fitzgerald, 491 So.2d 547 (Fla. 1986), also cited by Respondent is not dissimilar to the instant case. The attorney in Fitzgerald had misrepresented the status of a title on a title insurance policy. Again, there was no attorney-client relationship and the buyer in the real estate transaction was not harmed economically.

Respondent argues as mitigating factors that the Complainant, Ms. Wanda Lewis, was not prejudiced, that the misconduct occurred

completely outside the practice of law, and that any lapses of judgment had been influenced by Respondent's concern over his son's and wife's health. However, none of these factors were found to be mitigating factors by the Referee. In fact, the Referee specifically found that Respondent's excuse regarding the health of his family members to be merely one of many excuses given for the misconduct.

Imposition of a public reprimand in this case is appropriate based upon similar cases. In The Florida Bar v. Capodilupo, 291 So.2d 582 (Fla. 1974), the accused attorney had entered into a contract for the purchase of real estate but had failed to explain to the purchaser that his company merely held an option to purchase and was not the record owner of the real estate in question. Further, he knew that the conditions for exercising the option had not been met and that he was therefore prevented from transferring clear title at the time the contract was entered into. The referee found him guilty of violating the same disciplinary rules which Respondent has been found to have violated. A public reprimand was imposed by this Court in Capodilupo. A similar result was reached in The Florida Bar v. Davis, 373 So.2d 683 (Fla. 1979). In The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984), this Court followed the reasoning in Bennett and Davis, and suspended an attorney for sixty days for improper business dealings.

A public reprimand would be consistent with the purposes of discipline as set forth in both Pahules and Murrell. A public

reprimand would serve both as punishment to the Respondent and would be severe enough to deter other attorneys who might be tempted to engage in similar behavior, but would not deny the public the services of a qualified attorney due to an unduly harsh penalty.

CONCLUSION

Merely technical non-compliance with disciplinary procedure rules is not sufficient grounds to warrant dismissal of disciplinary charges against an attorney. The Referee therefore did not err in failing to dismiss this cause for alleged noncompliance. Further, the findings by the Referee as to fact and recommendations as to guilt are adequately supported by the record and therefore should be presumed to be correct.

Additionally, misconduct by Respondent which was found by the Referee to involve violations of Disciplinary Rule 1-102(A)(4) (dishonesty, fraud, deceit or misrepresentation), and Article XI, Rule 11.02(3)(a) (violation of statute) justifies imposition of a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by certified mail # P675 195 099, return receipt requested, to JOHN A. WEISS, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32302, this 6th day of March, 1987.

Susan V. Bloemendaal