IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOE G. HOSNER,

Respondent.
_____/

CASE NO: 68,645

(TFB File No: 01-83102)

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Statement of the Case	1
Statement of Facts	2
Summary of Argument	6
Argument	
I. DISCIPLINARY PROCEEDINGS AGAINST RESPONDENT SHOULD BE DISMISSED FOR THE BAR'S VIOLATIONS OF THE CLEAR REQUIREMENTS OF THE INTEGRATION RULE.	12
II. THE BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT MISCONDUCT OCCURRED.	22
III. RESPONDENT'S CONDUCT, EVEN IF IMPROPER, SHOULD NOT RESULT IN DISCIPLINE BECAUSE IT WAS UNRELATED TO HIS PRACTICE.	24
IV. RESPONDENT'S CONDUCT WARRANTS AT MOST A PRIVATE REPRIMAND.	26
Conclusion	28
Certificate of Service	29
Appendix	

TABLE OF CITATIONS

CASES	PAGE
Murrell v. The Florida Bar, 122 So.2d 169 (Fla. 1960)	16
Petition of Supreme Court etc., 373 So.2d 1 (Fla. 1979)	19
State ex rel The Florida Bar v. Oxford, 127 So.2d 107 (Fla. 1960)	17
The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985)	27
The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973)	25
The Florida Bar v. Collier, 435 So.2d 802 (Fla. 1983)	20
The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982)	19
The Florida Bar v. Fitzgerald, 491 So.2d 547 (Fla. 1986)	27
The Florida Bar v. Fussell, 474 So.2d 210 (Fla. 1985)	20
The Florida Bar v. James, 478 So.2d 27 (Fla. 1985)	20, 28
The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986)	27
The Florida Bar v. Kaufman, 347 So.2d 431 (Fla. 1977)	18
The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978)	21
The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986)	14
The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970)	26

The Florida Bar v. Papy,	358 So.2d 4 (Fla. 1978)	19
The Florida Bar v. Randolph,	238 So.2d 635 (Fla. 1970)	17, 28
The Florida Bar v. Rayman,	238 So.2d 594 (Fla. 1970)	22
The Florida Bar v. Rosenberg,	474 So.2d 1175 (Fla. 1985)	20
The Florida Bar v. Rubin,	362 So.2d 12 (Fla. 1978)	13, 19, 20, 21
The Florida Bar v. Staley,	457 So.2d 489 (Fla. 1984)	27
The Florida Bar v. Wagner,	197 So.2d 823 (Fla. 1967)	17

OTHER AUTHORITIES

Fla. Bar Integr. Rule, art. XI, rule 11.02(3)(a)	1,8
Fla. Bar Integr. Rule, art. XI, rule 11.03(2)(c)	5,6,12
Fla. Bar Integr. Rule, art. XI, rule 11.06(4)	7
DR 1-102(A)(4)	1,8

STATEMENT OF THE CASE

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

Because the events of this case occurred prior to January 1, 1987, all citations to disciplinary rules and rules of grievance procedure are to those existing before the current Rules Regulating the Bar.

After final hearing on October 6, 1986, the referee appointed to preside over these proceedings filed her report and recommendations with this Court. The referee made various factual findings and recommended that Respondent be found guilty of violating DR 1-102(A)(4) of the Code of Professional Responsibility and rule 11.02(3)(a) of Article XI of the Integration Rule of The Florida Bar. As discipline, the referee recommended that a public reprimand be administered.

Respondent appeals the referee's denial of his motion to dismiss, the referee's finding that Respondent violated various ethical rules and the recommendation of the referee as to discipline.

STATEMENT OF FACTS

A. Respondent's Conduct

In approximately April 1980 Wanda Lewis entered into a lease-purchase agreement with Blue Bird Leasing, Inc. to lease a 1979 Datsun. The lease called for 24 monthly payments of $171 with a balloon payment due at the end of the rental period.

Blue Bird was a leasing company owned by Hosner Enterprises, a corporation owned by Respondent and his family. Blue Bird leased 120 to 150 cars during a two to three year period as well as some computers. Although Respondent was president of Blue Bird, he was not involved in its day to day operations. Furthermore, it was not in any way connected with his law practice (TR 97).

Ms. Lewis was never Respondent's client (TR 96).

Respondent did not participate in the lease of the Datsun to Ms. Lewis (TR 97).

Ms. Lewis was periodically late in making her payments on the Datsun (TR 38). On at least one occasion, in August 1981, Respondent had to write her demanding she immediately make current a two month arrearage on her Datsun payments (App. A). In that same letter, Respondent also demanded that she bring current three months office rent she owed to Hosner Enterprises.

On June 30, 1982, Chig Findley, an employee of Blue Bird, wrote Ms. Lewis demanding payment of the $2,300.15 balloon payment due on the Datsun (App. B). On July 20, 1982, Mr. Findley again wrote Ms. Lewis demanding final payment on the

Datsun. (App. C). In that letter, Mr. Findley pointed out that Ms. Lewis had driven her Datsun almost two months since making her last payment in May.

On July 30, 1982 Ms. Lewis delivered her personal check to Blue Bird for $2,340.35, representing the payoff on her car. Shortly thereafter, Respondent deposited the check into the Joe G. Hosner Rental Account.

Ms. Lewis' title was not transferred to her name until June 22, 1983 (TR 82) -- the same day she mailed her complaint to The Florida Bar (TR 123). Respondent transferred the title prior to receiving notice on July 14, 1983 that a complaint had been filed (TR 128).

The referee found no prejudice to Ms. Lewis as a result of the delay in delivering her title.

Respondent's testimony is unrebutted (Ms. Lewis did not appear at final hearing) as to the nature and number of his contacts with Ms. Lewis after her payment of the amount due on the Datsun. His reasons for being unable to deliver her title more promptly are also uncontradicted.

At the time Ms. Lewis delivered her check on the Datsun, Hosner Enterprises was holding two bad checks from Ms. Lewis and she owed the corporation funds from a rental account (TR 65, 78).

Respondent testified that he originally did not consider Ms. Lewis' car to be paid in full because the sums she owed precluded delivery of the title. He spoke to her attorney on a number of occasions about the matter (TR 67, 102). Finally, in November

1982, Respondent decided to deliver the title to Ms. Lewis (TR 127).

Respondent's decision in November 1982 to deliver title to Ms. Lewis was stymied by the bank holding the lien on her car. That institution, West Florida bank, had a blanket lien on the titles to approximately 13 cars leased by Blue Bird (TR 75-77, 127). West Florida would not release any of the titles unless the entire lien balance of $25,000 to $30,000 was paid (TR 127). Unfortunately, Respondent "went broke in November of `82(sic)" and "couldn't feed my family" (TR 73,74). By the time Respondent gathered enough funds to retire the liens on the Blue Bird titles, involuntary bankruptcy proceedings had been filed against him which further delayed delivery of the title (TR 74, 120).

Respondent testified that Blue Bird started having financial difficulties in summer 1982 (TR 100). At that time, Respondent unsuccessfully tried to get all titles held by West Florida released (TR 129). However, the bank demanded full payment on the entire balance due before it would release any of the titles (TR 76,77,127).

Even had Respondent delivered Ms. Lewis' check directly to West Florida, they would not have released their blanket lien on her car title (TR 121).

The testimony is unrebutted that Respondent met with Ms. Lewis personally on only one occasion and at that time he explained to her the reason for his failure to deliver her title (TR 72).

Another factor which had substantial impact on all of Respondent's activities in the July 1982 to June 1983 period was the health problems being experienced by his family. Respondent's son has a congenital heart defect which was a "life-threatening situation" in 1982 (TR 113). In September 1982 the son had open heart surgery at Shands Hospital in Gainesville and in February 1983 he had a pacemaker implanted in Pensacola (TR 113).

In late November or early December, 1982, Respondent's wife (at that time they had been married 21 years) also had a heart attack (TR 114).

B. Grievance Procedures

Ms. Lewis' complaint to the Bar was dated June 22, 1983 (TR 123). On July 14, 1983, Respondent learned of the grievance when he received correspondence from Bar Counsel (TR 128). On April 17, 1984, the appropriate grievance committee conducted a probable cause hearing on Ms. Lewis' complaint. By a vote of three to two, with the chairman casting the deciding vote, the committee found probable cause for disciplinary proceedings.

At the time of the probable cause hearing, the committee was not composed of "at least one-third" nonlawyers as mandated by this Court. Fla. Bar Integr. Rule. Art. XI, rule 11.Ø3(2)(c). Furthermore, the committee did not comply with the requirement in that same rule that a list of grievance committee members be attached to the notice of hearing sent prior to any probable cause hearing (TR 13, 15).

Although probable cause was found on April 17, 1984, the Bar's complaint was not filed until April 22, 1986 -- two years after probable cause was found and almost three years after Ms. Lewis' complaint was filed.

Final hearing in this cause was originally set for July 1986 in Panama City. However, to accommodate its witnesses, the Bar moved for continuance resulting in final hearing being reset for October 6, 1986 in Pensacola. Ms. Lewis did not appear at final hearing despite being advised by Bar Counsel of the new date by letter in July. The Bar's investigator never served her with a subpoena although Bar Counsel timely delivered it to him and although at all times the Bar was in possession of her address and telephone number. On the date of final hearing in these proceedings, Ms. Lewis was testifying in a separate case as an expert witness in Mobile, Alabama -- a one hour drive from Pensacola.

SUMMARY OF ARGUMENT

A. Respondent's Motion to Dismiss Should Have Been Granted

Respondent's motion to dismiss was based on the Bar's failure in three instances to abide by this Court's requirements set forth in Article XI of the Integration Rule of The Florida Bar. Specifically, (1) the grievance committee finding probable cause was improperly impaneled in that it did not consist of at least one-third nonlawyers as required by rule 11.Ø3(2)(c); (2) a list of grievance committee members was not provided to Respondent at the time the notice of grievance committee hearing

was sent to him (thereby depriving him of notice that the committee was improperly impaneled) in violation of rule 11.Ø3(2)(c); and (3) the Bar has unduly delayed these proceedings, contrary to rule 11.Ø6(4) and numerous opinions by the Court.

The Integration Rule unequivocably requires that at least one-third of all grievance committee members be nonlawyers. As the agency responsible for appointing the committees, it is the responsibility of the Bar to obey the Court's dictates in this regard. For whatever reason, the grievance committee sitting on Respondent's case was not constituted in accordance with rule 11.Ø3 (TR 13). Its actions, therefore, are invalid and its finding of probable cause is a nullity.

The Bar's second failure to comply with the Integration Rule was its failure to attach a list of grievance committee members to its notice of probable cause hearing as required by rule 11.Ø3 (2)(c). The Bar's failure to attach such a list deprives a Respondent of the opportunity to challenge prejudiced members or to challenge the constituency of an improperly impaneled committee -- as was true with the case at Bar.

Finally, the Bar's failure to prosecute with "utmost diligence" Respondent's case resulted in this matter not going to final hearing until over three years after Ms. Lewis' complaint was filed. In other words, the Bar has once again shirked its duty to the public and to the Bar to handle a disciplinary case with dispatch.

The Court has repeatedly held over the years that the obligation to diligently prosecute grievances rests with the Bar. Despite this Court's declaration in 1979 that delay in disciplinary proceedings would be eliminated by new disciplinary rules adopted at that time, grievances are still being unduly delayed. Such delay is unfair to the public and it is unfair to the Respondent.

Respondent's case was factually and legally simple, involving but three witnesses and a few documents. Yet, it was almost three years from the date Ms. Lewis' complaint was filed before the Bar's formal complaint was filed in this Court.

Respondent argues that the Bar's tardy and irresponsible handling of disciplinary cases will continue until this Court starts dismissing unduly delayed cases.

B. The Florida Bar Did Not Prove Its Case by Clear And Convincing Evidence

Despite the fact that the complainant, Wanda Lewis, did not appear at final hearing, the referee recommended that Respondent be found guilty of violating DR 1-102(A)(4) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation) and Integration Rule 11.02 (3)(a) (which doesn't prohibit anything, but which is a definition of this Court's disciplinary jurisdiction).

The Referee makes no specific finding that any of Respondent's actions involved dishonesty, fraud, deceit or misrepresentation. There is nothing in the record to indicate he

ever made an untruthful statement to anybody, either in writing or personally, or that he ever intended to deprive Ms. Lewis of the title to her car.

The Bar must prove misconduct by "clear and convincing" evidence, a standard more stringent than the preponderance of the evidence standard used in civil cases. Respondent argues that the Bar has not met its burden of proving by clear and convincing evidence that he acted wrongfully.

At the time that Respondent's agent wrote Ms. Lewis demanding payment in full on the Datsun, she was already two months late in making the balloon payment on her car. When payoff was made on July 30, 1982, Ms. Lewis was obligated to Respondent's businesses for two NSF checks and for unpaid rent. After discussions with her lawyer resolved nothing, Respondent in approximately November 1982 decided to deliver title to Ms. Lewis anyway. Some of Respondent's time and attention in the interim between early August and November 1982 was taken up by his son's open heart surgery.

Although Respondent wanted to deliver Ms. Lewis' title to her in November or December, events beyond his control prevented him from doing so. Blue Bird had started undergoing financial difficulties in summer 1982 resulting in West Florida Bank, the lienholder, refusing to release any of the titles it held on Blue Bird cars until the entire $25,000 to $30,000 owed on all of them was paid off. In other words, paying off the balance on just Ms. Lewis' car would not have resulted in the banks releasing its

lien and delivering the title.

By about February 1983, notwithstanding his wife's heart attack three months earlier and his son's second open heart surgery that month, Respondent was able to gather the funds necessary to release the liens on Blue Bird titles. Unfortunately, in that month, involuntary bankruptcy proceedings were filed against him which prevented his transferring the title to Ms. Lewis until June 22, 1983.

C. The Facts of This Case Should Not Give Rise to Disciplinary Proceedings

It is undisputed that all the events in this case took place outside Respondent's practice. Ms. Lewis was never a client of Respondent's and never looked upon him for legal advice. Respondent's role in this case was limited to that of a businessman -- not a lawyer.

Respondent's sole wrongdoing in this case was his failure to deliver a title to an automobile owned by a corporation owned by Respondent. Respondent's testimony was uncontradicted that the bulk of the delay in delivery of the titles was due to his financial inability to deliver it.

The Bar should not have the power to professionally discipline a lawyer for conduct such as that before the Court in this case. There is no evidence of fraud and there was no crime committed. A lawyer engaged in business outside his practice with an individual dealing only with his company, and not in any way relying on the lawyer's standing as a member of the Bar,

should not have to worry about suffering professional discipline every time one of his businesses fails.

D. The Discipline Recommended by the Referee in This Case Should Be Reduced to A Private Reprimand

Respondent argues that the referee's recommended discipline, i.e., a public reprimand, is too harsh and should be reduced to a private reprimand.

Respondent's misconduct, if any, resulted in no prejudice to Ms. Lewis, occurred outside the practice of law, and resulted from financial reversals. When considered in light of the fact that the instant case is the first time Respondent has been found guilty of violating any ethical precepts and that his misconduct, if any, was in part due to serious health problems within his family, i.e., his son's two open heart surgeries and his wife's heart attack, it becomes apparent that the fairest sanction to be imposed should be the least harsh penalty available -- a private reprimand without appearance before the Board.

Even if a public reprimand is deemed appropriate for Respondent's conduct, the Bar's irresponsible delay in bringing this case (Ms. Lewis filed her complaint on June 22, 1983, almost four years ago) should reduce the discipline imposed to a private reprimand.

ARGUMENT

I.

DISCIPLINARY PROCEEDINGS AGAINST RESPONDENT SHOULD BE DISMISSED FOR THE BAR'S VIOLATIONS OF THE CLEAR REQUIREMENTS OF THE INTEGRATION RULE

(At the outset of this argument, it should be emphasized to this Court that any violations of the Integration Rule discussed herein were not committed by the Bar Counsel that represented the Bar at final hearing).

On April 17, 1984, the date of Respondent's grievance committee hearing, Rule 11.Ø3 (2)(c) of Article XI of the Integration Rule of The Florida Bar stated in pertinent part:

> (c) Membership, appointment and eligibility. Each grievance committee shall be appointed by the Board of Governors and shall consist of not less than three members. At least one-third of the committee members shall be nonlawyers. . . .

At final hearing, the Bar conceded that the requirement of one-third nonlawyers was not met (TR 13). In other words, the Bar violated the clear dictates of the Integration Rule.

It is the responsibility of the Board of Governors of the Bar to constitute the appropriate committee. In the case at hand, despite the fact that the committee had been in session for over nine months on the date of the grievance committee hearing (terms begin on the first day of July. Fla. Bar Integr. Rule,

Art. XI, rule 11.Ø3(2)(d)) it still was not properly impaneled.

Nine months after the grievance committee's term began, the Board of Governors still had not named sufficient nonlawyers to the committee to comply with the Integration Rule!

We do not know the reasons for the Board's failure to discharge its duty, perhaps it does not consider it important to have "at least one-third non-lawyers" as required by this Court. But, whatever the reason, a rule promulgated by this Court was violated, and it should not be overlooked.

Coupled with the Board's failure to properly appoint the committee was the Chairman's failure to comply with the further requirement of rule 11.Ø3(2)(c) that the notice of probable cause hearing be accompanied by a list of the grievance committee members. Such a list would possibly be notice to a Respondent that the committee was improperly constituted.

Why did the Chairman or his designate fail to comply with rule 11.Ø3(2)(c)? We do not know. But, the rule was violated.

The Bar argued at final hearing that Respondent waived his right to attack the makeup of the committee by not objecting at the hearing. How could he? He had not received a current roster. But, more importantly, Respondent should have been able to assume that the Board of Governors had discharged its responsibility to the public and the Bar by naming a panel that complied with the rule. As this Court said in The Florida Bar v. Rubin, 362 So.2d 12, 16 (Fla. 1978).

> The Bar has consistently demanded that attorneys turn "square corners" in the

> conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.

In Rubin, after finding that the Bar violated numerous provisions of the Integration Rule, this Court dismissed the charges against the Respondent -- despite the fact that two separate referees had found Rubin guilty of misconduct in two different cases.

The Bar's argument against dismissed is basically "no harm, no foul." If Respondent was not prejudiced, dismissal is not appropriate. If that argument is valid, these proceedings should not be pending against Respondent at all. Ms. Lewis was not prejudiced. No harm, no foul.

The Bar further argued to the referee that its lapses were mere technicalities. Perhaps. But, the Bar prosecutes and this Court disciplines lawyers for violating technical provisions of our ethical rules. See, for example, The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986).

Had the grievance committee's vote been unanimous the Bar's arguments against dismissal might have been valid. But, the vote to find probable cause was three to two, with the Chairman casting the deciding vote to break the tie. It is entirely possible that one more appointee to the committee might have resulted in a three to two vote for no probable cause,

eliminating the necessity of the chair casting his vote.

If this Court does not penalize the Bar for failing to abide by this Court's rules relating to discipline, it is sending a clear message to the Board of Governors and to the Bar's staff: Don't worry about adhering to our rules, because no penalty will be imposed if you break them. Such should not be the case -- The Florida Bar should have to abide by this Court's technical rules in the same manner as do its lawyer members.

Respondent asks this Court to declare the grievance committee's finding of probable cause void ab initio. This Court has done that on at least one other occasion. Case No. 59,476 (July 15, 1981) (App. D). There, this Court dismissed disciplinary proceedings against a lawyer because the grievance committee never formally ratified the committee report prepared by its Chairman. Admittedly, a technical failing by the Bar. But, a fatal one nonetheless.

A third reason for dismissing these proceedings is the Bar's failure to prosecute this case promptly. Ms. Lewis' complaint was dated June 22, 1983 (TR 58). Ten months later, on April 17, 1984, after hearing, probable cause was found. Two years later the Bar's formal complaint was filed on April 22, 1986.

It took almost three years from the date of the complaint in this case for the bar to file its formal complaint in this Court. Why so long? Respondent did not hinder the case. It was not complex -- the Bar only subpoenaed two witnesses to final hearing and Respondent's only witness was himself.

The reason for the Bar's delay is simple. It knows that this Court will not hold its feet to the fire and demand responsible, expeditious prosecution of disciplinary cases.

For years Respondents have been complaining to this Court that the Bar unduly drags its feet in disciplinary proceedings. Yet, with the exception of Rubin, supra, this Court has not enforced its demands to the Bar that cases be prosecuted with diligence. Perhaps, now is the time to show the Bar that it not only should, but must, prosecute cases with dispatch.

It is said that deadlines make us all better lawyers. Towards this end we have the speedy trial rule in criminal proceedings, a one year failure to prosecute rule in civil cases, time schedules in the appellate rules and numerous other deadlines. Because the consequences of not abiding by those deadlines can be severe, lawyers tend to abide by them. If they don't, criminals can walk free, individuals can lose their savings or appeals can be dismissed.

The Florida Bar, however, knows that no matter how long they procrastinate, their case will not be dismissed. Hence, there is no incentive to prosecute promptly. A review of disciplinary cases over the last 27 years shows this to be true.

In 1960, this Court noted with disfavor in Murrell v. The Florida Bar, 122 So.2d 169 (Fla. 1960) that the case had been pending for five years. The Court observed on page 174 that

> the minute such a proceeding is instituted the lawyer's professional reputation is shadowed and in danger of being permanently impaired. Such charges should not be

> suspended in limbo. They should be dispatched and if found to be without merit the lawyer charged should be exonerated.

Several months later, in State ex rel. The Florida Bar v. Oxford, 127 So.2d 107 (Fla. 1960), this Court emphasized its position relative expediting disciplinary proceedings. There, it said:

> It is appropriate to call attention to the fact that this proceeding was instituted. . . more than four years ago. Disciplinary proceedings should be handled with dispatch. While they are pending, the defendant is suspended in limbo and should be expire while so suspended, it would be a tragedy.

Did delay in disciplinary proceedings end after Murell and Oxford? No! In 1967, in The Florida Bar v. Wagner, 197 So.2d 823 (Fla. 1967) a Respondent was again complaining of prosecutorial delay. This Court noted that the Bar had "procrastinated" on the case and gently chided the Bar with the following admonition:

> We think it necessary, from both public and professional standpoints, that such cases be promptly dispatched and, further, that the responsibility for diligence must rest with the Bar.

Did the Court's admonition in Wagner end tardy prosecutions in disciplinary proceedings? No! Three years later, and ten years after Oxford, this Court was again addressing such delay in The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970). After noting on page 637 that the Bar was guilty of "unexplained unreasonable delays" and of handling the case in a "slip-shod

manner", the Court observed on page 638 that

> Such inordinate delays are indeed unfair and even unjust to the one accused. They permit violators to remain active in practice. They dim the memories of witnesses. They mar effective and efficient enforcement of the canons of ethics. Worst of all, perhaps, they undermine the public confidence in the bar's announced determination to keep its own house in order.

The Randolph Court noted that under the newly adopted Integration Rule such delays would no longer exist. The Court then quoted some of Bar president Burton Young's comments on delay:

> Accordingly, with the powers of the new Disciplinary Rule, ... There will be no more two-and-a-half-year delays. Final disciplinary action will be complete within approximately six months.

The Randolph Court then repeated its position that the responsibility for diligent prosecution rests with the Bar and that if the Bar fails to fulfill its duty

> the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is true even though the record shows that the conduct of the lawyer merits discipline.

Did the Bar heed the Court's warning in Randolph? Was Burton Young's promise that there would be no more 2 1/2 year delays in grievance kept? No! In 1977, this Court reduced the referee's recommended discipline because the case had been pending for three years in The Florida Bar v. Kaufman, 347 So.2d

431 (Fla. 1977). The next year, this Court dismissed The Florida Bar v. Rubin, supra, in part for prosecutorial delay and reduced the discipline to be imposed due to four years "inordinate delay caused by the Bar" in The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978).

In June 1979, new disciplinary procedures were adopted by this Court after an intensive study of the grievance system was conducted by a special committee of the Court. That committee, dubbed the Karl Committee after its Chairman, Justice Frederick B. Karl, recommended sweeping changes in the Bar's disciplinary procedure. This Court adopted most of the committee's recommendations (including a requirement that all grievance committees be composed of "at least one-third nonlawyers"). One of the committee's proposals not adopted by this Court, however, was a "speedy trial rule". In rejecting the proposal, the Court stated:

> We find that such a speedy trial rule is not necessary at this time since the revisions to article XI, which we approve, are expected to expedite matters.

Petition of Supreme Court Special Committee etc., 373 So.2d 1 (Fla. 1979).

Three years later, this Court was still expressing optimistically its position that delay in disciplinary proceedings was a thing of the past in The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). On page 327, Respondent's claim of undue delay was rejected with the statement that, while the Bar's

delay in the case was "regrettable",

> it was not prejudicial and should not happen under the new rules.

The new Bar rules in 1970 that Mr. Young said would eliminate tardy grievance action did not live up to their expectations. The Karl Committee proposals did not either.

Has delay been eliminated under the new rules as opined by the Court in Davis, supra. No! The accused lawyer in the case at bar is complaining about delay today. This action began in 1983 four years after the Karl Committee report, and a year after Davis. Yet, it took the Bar three years (not six months as promised by Burton Young) just to file a formal complaint.

Is Respondent's case an isolated instance? Apparently not. In 1985 at least two respondents had their discipline mitigated due to the Bar's delay. The Florida Bar v. Fussell, 474 So.2d 210, 212 (Fla. 1985). The Florida Bar v. James, 478 So.2d 27 (Fla. 1985).

In urging dismissal of this case, Respondent asks this Court to note that lawyers have been disciplined by suspension for delay lasting less than the delay in the instant proceedings. The Florida Bar v. Rosenberg, 474 So.2d 1175 (Fla. 1985) (ten months neglect violated DR 6-101(A)(3)); The Florida Bar v. Collier, 435 So.2d 802 (Fla. 1983) (almost three years neglect). Respondent asks this Court to make the Bar turn "square corners" in the same manner as the Bar demands of its members. Rubin, supra.

The Bar has violated the clear requirements of the Integration Rule and has inexcusably delayed this case. This Court should not tolerate such conduct from the organization empowered to be "watchdog" over lawyers in this state. As this Court said in The Florida Bar v. McCain, 361 So.2d 700,705 (Fla. 1978):

> Whenever a lawyer feels that an unreasonable time has passed since the alleged misconduct for which the Bar brings charges, this Court will be open to address that problem. After all, The Florida Bar acts for and is an agency of this Court. When the child falters, the parent shall correct.

Years and years of warnings from this Court have not resulted in the elimination of irresponsible and tardy delay in bringing grievance cases before this Court. The delay will continue until this Court starts visiting the sanction of dismissal on such cases. Furthermore, such dismissals should be reported (in a sanitized manner) in the Souther Reporter and in the Bar News, just as a disciplinary order would be published.

Respondent's case is an example of the Bar faltering at its worse. It clearly violated two provisions of the Integration Rule in its initial processing of this case and then it delayed prosecution far beyond that necessary to prepare its case.

These proceedings should be dismissed with prejudice. The Florida Bar v. Rubin, supra.

II.

THE BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT MISCONDUCT OCCURRED.

Before a lawyer can be found guilty of unethical conduct, the Bar must prove by "clear and convincing evidence" that such misconduct occurred. The clear and convincing standard is more stringent than the preponderance of the evidence test used in civil cases. The Florida Bar v. Rayman, 238 So.2d 594, 597 (Fla. 1970). The Bar has failed to prove by any evidence that misconduct has occurred in the case at bar.

Respondent's testimony at final hearing was unrebutted. The complainant, Ms. Lewis, did not see fit to appear at final hearing although Bar counsel gave her three months advance notice of the hearing and moved the hearing site from Panama City to Pensacola to accommodate her.

There was absolutely no evidence to support the Bar's allegations in its complaint that Ms. Lewis made repeated demands for the title to her car or that she was ever told that she could pick up the title the next day. The only testimony on this point was Respondent's. And he testified that he only met with Ms. Lewis once and that he explained to her at that time the reason for the delay in getting her title to her (TR 72).

Although the referee recommended that Respondent be found guilty of a violation of DR 1-102 (A)(4) (dishonesty, fraud, deceit or misrepresentation), the record is devoid of any evidence showing such conduct. There is not a single statement

made by Respondent that has been shown to be false. There was not one dishonest act shown to have been committed.

Respondent's only sin was his failure to deliver a title for eleven months. That act, in and of itself, is not dishonest. Respondent did not gain from the delay. In fact, the testimony is unrebutted that he tried to the best of his ability to secure Ms. Lewis' title, but that events beyond his control prevented him from doing so.

Respondent did not deliver Ms. Lewis' title sooner because he did not have the financial ability to do so.

The referee points to no action by Respondent that was dishonest. Her finding that Respondent acted unethically because his employee wrote two letters to Ms. Lewis (App. B & C) demanding final payment on the car is not soundly based. Ms. Lewis owed Blue Bird over $2,000.00. And she was two months in arrears in making the payment. Respondent's employee had the right to make demand for payment.

The plain and simple fact is that Respondent lacked the ability, due to the financial collapse of Blue Bird, to promptly deliver Ms. Lewis' lease to her. That is not dishonest or fraudulent, or deceitful or misrepresentative.

Respondent's deposit of Ms. Lewis' payoff check into an account other than Blue Bird's could not be considered improper in light of the fact that West Florida bank could not have released the title anyway (TR 77). The bank was demanding payment of the liens on all of the titles before it would release

any of them.

The referee has made no factual findings pinpointing improper conduct by Respondent. Her inability to do so stems from the fact that there is no evidence in the record showing any misconduct.

The referee did find however, that Ms. Lewis was not prejudiced by the late delivery of her title.

The Bar has failed to prove misconduct by clear and convincing evidence. Accordingly, this case should be dismissed.

III.

RESPONDENT'S CONDUCT, EVEN IF IMPROPER, SHOULD NOT RESULT IN DISCIPLINE BECAUSE IT WAS UNRELATED TO HIS PRACTICE.

It was undisputed that Respondent's actions in this case were not in any way related to his practice. Ms. Lewis was not his client (TR 96). Neither the lease contract with Blue Bird nor Blue Bird's stationery showed Respondent as a principal in the endeavor. Respondent was not involved in the day to day operation of Blue Bird and did not participate in Ms. Lewis' execution of the lease-purchase agreement on her car (TR 97). Yet, the Bar claims Respondent is subject to professional sanctions.

The Bar's disciplinary jurisdiction should not be extended to cover every reversal in a lawyer's life. In the case at bar, Respondent is being subjected to a disciplinary sanction because a business he and his family owned went under. Respondent urges

this Court to draw the line on the Bar's jurisdiction before it reaches conduct such as that in the instant case. This Court has done so in the past. In The Florida Bar v. R.W.B., Case No. 60,005 (June 5, 1981) (App. E) this Court dismissed a referee's report finding misconduct because it involved a relatively minor landlord-tenant dispute.

At final hearing, the Bar cited The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973) for the proposition that discipline is appropriate in the case at bar. However, Bennett, is not applicable to the instant proceeding.

In Bennett, this Court found the record reflected:

> a mixed interest of participant and attorney, at least placing himself in such a position as an attorney that his associates . . . looked to him and relied upon him in this respect in some instances.

In the case at bar there is no evidence of Respondent's "mixing" his roles or of Ms. Lewis looking to him to act as an attorney. The Court in Bennett seemed to indicate that the Bar's jurisdiction over lawyers should be limited to those mixing of roles situations when they said:

> We do not mean to say that lawyers are to be deprived of business opportunities; in fact we have expressly said to the contrary on occasion;. . . .

Respondent should not be subject to a disciplinary sanction because a business his family owned, which was totally unrelated to his practice, failed, causing inconvenience to a customer.

IV.

RESPONDENT'S CONDUCT WARRANTS AT MOST A PRIVATE REPRIMAND.

If Respondent has erred, a private reprimand is the appropriate punishment to impose. This is particularly true when one considers the numerous mitigating circumstances.

Respondent's failure to promptly deliver Ms. Lewis' title was not willful misconduct on his part. He tried to deliver it to her, but, financial reversals precluded his doing so. Nonwillful misconduct, where there is no harm to an individual, and where there is no prior misconduct, should not give rise to a public discipline.

In discussing the appropriate discipline to be imposed, this Court in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) stated:

> 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 rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Imposing a public reprimand is emphasizing the third element, deterrence, and ignoring the first two. Will a public reprimand protect the public any better than a private one? Of

course not. Will a public reprimand, with its attendant opprobrium from fellow lawyers, encourage reformation and rehabilitation more than a private reprimand? Of course not.

Giving Respondent a public reprimand will lump his case into the same category as the following:

The Florida Bar V. Staley, 457 So.2d 489 (Fla. 1984).

Public reprimand for improper business dealings with a client and failure to maintain proper and adequate trust account records.

The Florida Bar V. Beneke, 464 So.2d 548 (Fla. 1985).

Public reprimand for lying to a bank about the purchase price of property when applying for a mortgage to buy that property.

The Florida Bar V. Jennings, 482 So.2d 1365 (Fla. 1986).

Public reprimand for giving two $30,000.00 mortgages on the same piece of property to two different individuals without advising either lendor that the other mortgage existed and that the property was already in foreclosure from a prior lien.

The Florida Bar V. Fitzgerald, 491 So.2d 547 (Fla. 1986).

Public reprimand for lying to an individual buying property, the closing of which was being conducted by Respondent. At the closing, respondent told the buyer that he was able to payoff outstanding encumbrances on the property. In fact, he did not have the money at the time of the representation but hoped to get it.

Respondent's misconduct, if any, is not nearly so serious as that of the four lawyers listed above.

There are mitigating factors involved in this case which, even if a public reprimand were normally appropriate, would reduce discipline. Those factors include the fact that Ms. Lewis

was not prejudiced, that the misconduct occurred completely outside the practice of law and, very importantly, that any lapses of judgment by Respondent had to have been influenced by his concern over his son's and his wife's health.

During the eleven month period involved, Respondent's son had two open-heart surgeries (in September 1982 and February 1983) and his wife had a heart attack. Obviously, Respondent had concerns far more important than his business.

The primary mitigating factor, however, is the Bar's delay in this case. Respondent's misconduct, if he committed any, last occurred in 1983. Four years have elapsed and these proceedings are still pending. This Court has time and again held that the Bar's delay will be a mitigating factor in the imposition of discipline. Randolph, supra, and James, supra.

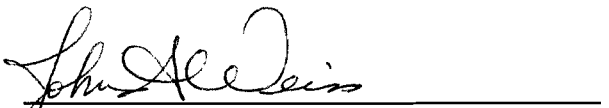
Respondent's conduct, ignoring any mitigation, warrants at most a public reprimand. When mitigation is considered, that reprimand should be reduced to a private reprimand without Board appearance.

CONCLUSION

This case should be dismissed for the Bar's failure to abide by the Integration Rule, for its delay, or for the Bar's failure to prove misconduct by clear and convincing evidence.

Should this Court find that a disciplinary sanction is warranted, it should impose, at most, a private reprimand.

Respectfully submitted,



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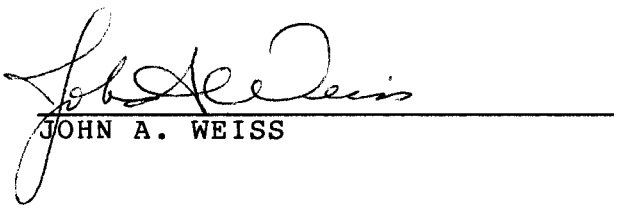
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been furnished this 2nd day of February, 1987, to Susan V. Bloemendaal, Bar Counsel, The Florida Bar, Tallahassee, Florida 32301-8226.



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