IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

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| THE FLORIDA BAR, | : | |
| Complainant, | : | Case No: 68,956 |
| v. | : | TFB NO. 12A85H75 |
| MARTHA S. SIEGEL, | : | CONFIDENTIAL |
| Respondent | : | |

CROSS PETITION FOR REVIEW

BRIEF ON BEHALF OF RESPONDENT MARTHA S. SIEGEL

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Attonrey for Respondent

## REQUEST FOR ORAL ARGUMENT

The Respondent, MARTHA S. SIEGEL, hereby requests oral argument to be set in the above sytled cause and in support thereof states that:

1. This is an important proceeding for Respondent, as her livelihood and reputation are at stake. The Briefs submitted by the respective parties raise conflicting issues and interpret the facts differently. Many of these conflicting matters can be raised and discussed intelligently during oral argument.

2. The Florida Bar has asked for enhanced punishment of the Respondent in its Petition for Review, and the Respondent has asked that this Court dismiss the proceedings. These requests cannot be reconciled, but this Court would be best served if both parties were able to present their arguments and answer questions of the Court in oral argument.

3. Based on the foregoing, and on the extensive legal questions raised in our Brief, the Respondent respectfully requests oral argument in this review.

## STATEMENT OF THE CASE

On May 2, 1985, Robert F. Bluck filed a formal complaint with The Florida Bar against Respondent Martha S. Siegel and her partner, Laurence A. Canter (Complainant's Third Request for Admissions (TRA. 1)). As a result of said complaint, a formal Grievance Committee Hearing was held on November 20, 1985, and subsequent to said hearing, no probable cause was found with respect to any of the allegations complained of by Mr. Bluck. (TRA. 2) However, during the course of its investigation the Bar did subpoena certain records from the Southeast Bank N.A. and as a result of the documents obtained pursuant to said subpoena the Grievance Committee found that there was probable cause to believe one or more violations of the Integration Rule and Disciplinary Rules may have been committed by the Respondent. (TRA 2)

For reasons still unknown to the Respondent, The Bar failed to file a formal complaint for nearly seven months subsequent to the determination of probable cause. (Complaint) We do know that at no time during any of these proceedings did the Southeast Bank, N.A., file a complaint with the Bar alleging any violations by the Respondent and at all times the Florida Bar proceeded on its own initiative. (Tr. 58)

On June 25, 1986, a formal complaint was finally filed against Respondent and, as can be seen from the com-

plaint, no client-related allegations of wrongdoing were ever made or proved. (Complaint, Tr. 65) The entire complaint deals solely with matters concerning the Southeast Bank, N.A., which was not at any time a client of the Respondent. (Tr. 59)

On July 16, 1986, the Respondent denied each of the allegations of wrongdoing, (Answer) and the matter was scheduled for final hearing before the Referee on November 14, 1986. On August 7, 1986, Staff Counsel for the Florida Bar filed his First Request for Admissions, (FRA) primarily concerning documents acquired by the Florida Bar in its subpoena of the Southeast Bank. During this same time period, negotiations began between the parties for a settlement which would involve solely a public reprimand of the Respondent. (Motion for continuance (MC))

Pursuant to these negotiations and discussions, the parties in fact reached an agreement that provided the Respondent would neither contest the allegations of the complaint nor contest those matters which were sought to be admitted in the Bar's Request for Admissions. (MC at 3) Further, the parties specifically agreed that the Respondent would not enter a guilty plea to the alleged violations, but Respondent would agree to the imposition of a public reprimand. (Tr. 56. 65-66. MC) The agreement also provided that the complaint would be amended to remove any allegation that the Respondent had engaged in "illegal conduct." (MC at 3)

Based on this Agreement and Stipulation for a public reprimand, the Respondent waived her right to respond to the Requests for Admissions, and agreed to allow the Admissions to be entered into the record with the further understanding that the factual allegations would be limited to the matters deemed admitted in such request. (MC at 4)

On Tuesday, November 11, 1986, Counsel for the Florida Bar contacted Respondent's counsel and stated that the Agreement and Stipulation for a public reprimand, which had already been entered into, was being withdrawn. (MC at 6) The Respondent and her counsel were caught totally by surprise at this withdrawal since they had always been led to believe by The Florida Bar that the appropriate disposition was a public reprimand. (Tr. 56, 65-66, MC at 7)

On November 14, 1986, this matter came before Judge R. Wallace Pack, the designated Referee, for consummation of the Agreement and Stipulation for a public reprimand. Judge Pack had previously advised the parties by letter that the imposition of a public reprimand was acceptable to him since the Respondent had never been disciplined by the Bar in the past. (Letter from Judge Pack dated October 31, 1986) However, on the date of the hearing Judge Pack was advised by The Florida Bar that the Agreement and Stipulation previously entered into by the parties had not been approved by the Board of Governors, that Bar Counsel had been instructed to withdraw the agreement and that pursuant to such instructions he was reluctantly doing so. (MC 6, Tr. 64)

Judge Pack then entered an Order continuing the proceedings for thirty days and withdrawing all Orders deeming admitted the Second Request for Admissions filed by The Florida Bar. (Order of November 14, 1986) This continuance granted by Judge Pack was the only continuance ever granted during the course of these proceedings.

On December 19, 1986, this matter came on for a hearing before Judge Pack. No witnesses were called by The Florida Bar. The Bar's case consisted solely of introducing documents and relying on the failure of the Respondents to respond to the First and Third Requests for Admissions. The Respondent testified and introduced substantial mitigating evidence.

On January 20, 1987, Judge Pack entered his report recommending that the Respondent be found guilty of violating each of the provisions of the Code of Professional Responsibility cited by the Bar. (Referee's Report - RR). Although the Code had now been superceded by the Rules of Discipline, the Referee's Report was based on the Code which was at this time no longer in effect. (RR) The Referee also recommended that the Respondent receive a public reprimand and a two week suspension from the practice of law. He further held that said two week suspension could be served at a different time from her law partner's suspension so that their law practice might continue without jeopardy to Respondent's and her partner's approximately 500 clients.

On March 30, 1987, the Florida Bar filed a Petition

for Review of the Referee's Report. (RR) On April 8, 1987, a Cross-Petition for Review of Referee's Report was filed by the Respondent. On May 13, 1987, an Amended Cross-Petition for Review of the Referee's Report was filed by the Respondent. This matter is now before the Court pursuant to Rule 3-7.6, Rules of Discipline of the Rules Regulating The Florida Bar.

On May 6, 1987, Counsel for the Respondent received the Bar's initial Brief in support of her Petition. The Certificate of Service states that the Brief was mailed on April 23, 1987. This Brief is filed in response to the Florida Bar's opening Brief and in support of the Respondent's Cross-Petition and Amended Cross-Petition for Review of the Referee's Report and Order.

## STATEMENT OF FACTS

Respondent MARTHA S. SIEGEL was admitted to The Florida Bar in 1981. (Tr. 20). In that same month she began practicing law in partnership with Laurence A. Canter. The practice was and is dedicated almost exclusively to immigration law. (Tr. 21). She has no history of prior discipline. (RR at IV-4). Rather, she has been an exemplary contributor to both her community and the Bar. (Tr. 23-25, 31, 36-43, 49-53; RR at IV-4).

Respondent is a founding member of the Central Florida Chapter of the American Immigration Lawyers Association, a member of its Board of Directors and a past vice president. (Tr. 22) She is co-initiator with her partner of a recent Florida immigration seminar focusing on Business Immigration. This seminar was co-sponsored by the International Law Section of the Florida Bar Association. (Tr. 22) In the local Bar she served as a member of the public information committee. Her Bar activities have focused heavily on improving the public's image of the Bar and assisting to bring fellow-attorneys information for improved practice. (Tr. 22)

Respondent also has been an extremely active contributor to her local community. She is presently Chairman of the Sarasota County Arts Council, an organization she was instrumental in developing. (Tr. 24) She also served for two years as chairman of the Chamber of Commerce

Roads Committee and on the Chamber Board of Directors. (Tr. 23) In 1984, she was given the annual Chamber of Commerce President's Award as most outstanding Chamber member. (Tr. 23) For this effort and the positive view of lawyers it helped create, she received a letter of commendation from Joseph Reiter, current president of the Florida Bar Association (Respondent's composite Exhibit #1).

In addition, Respondent has been a fundraiser for the Southeastern Guide Dog Association, a regional organization providing guide dogs for the blind to the entire southeastern United States. (Tr. 39) Last year, she was also on the Executive Board and Special Events Chairman of the Sarasota Centennial, a six month celebration of Sarastoa heritage. (Tr. 23) Finally, she has been a project director for a special fundraising effort of the United Way Foundation. (Tr. 24)

Approximately two years after the Respondent and her business partner, Laurence A. Canter began their law practice in Florida, they decided to purchase the building which they had been renting for the past two years. The contract specified a total purchase price of $200,000.00 on property which had been appraised for at least $217,000.00 (Exhibit A and Exhibit C). The Contract for Sale attached as Exhibit A was signed by Robert F. Bluck as President of Robert F. Bluck Corporation. Robert F. Bluck was a client of Respondent's firm for immigration purposes only, and she did not act as Bluck's attorney in this or any other transaction.

(Tr. 59, Bar's Brief (BB) at 5)

The Contract for Sale of Real Estate acknowledged a deposit of $20,000.00. There has never been any question that this $20,000.00 deposit and the balance to close was to be in the form of a promissory note signed by the Respondent and her business partner. In any event, nowhere in any of the pleadings or findings of fact by the Referee is it alleged that this contract was presented to Southeast Bank.

On the Financial Statement which is shown as Exhibit B, the Respondent did reflect under the "ASSETS" column the following statement: "down payment on building - $20,000." This statement was never intended to mislead the bank, but only to state the terms of the Contract for Sale of Real Estate which had already been signed and agreed to by both the Buyers and the Seller. No testimony was elicited at any time from any individual that this representation appearing on the Financial Statement was fraudulent or otherwise intended to mislead the Southeast Bank. Furthermore, Respondent did in fact make the down payment as indicated on the Financial Statement by executing a Promissory Note for the full amount of the deposit and closing balance. (Exhibit G)

Further scrutiny of the Financial Statement also reflects that under the provision "CONTINGENT LIABILITIES," the Respondent showed a contingent liability of $20,000.00.

No other documents were alleged to have been given to Southeast Bank prior to the $150,000.00 loan transaction.

The Southeast Bank issued a Mortgage Loan Report dated August 15, 1983, which reflected a loan to be made of $150,000.00 at 13% interest amortized over 18 years with a balloon in three years. (Exhibit-C). Obviously, the loan would have to be re-negotiated in a short period of time and as such was not a long term commitment for the Bank. Moreover, the Referee, during the hearing, acknowledged that the loan was adequately secured by virtue of the appraisal and value of the property. (Tr. 74) This put the Bank in a protected position.

The Mortgage Loan Report does reflect under the heading "EQUITY," an entry in the amount of $50,000.00, however, there is no testimony presented by any witnesses as to how the Bank arrived at said figure or that the amount was to be in cash rather than by a promissory note. (T. 73) Most important, there is absolutely no testimony that the Respondent orally represented to anyone that she had paid $50,000.00 cash as a deposit and down payment on the property.

On September 12, 1983, the Respondent signed a loan commitment letter dated September 10, 1983 from Southeast Bank NA. The commitment letter from the Bank stated that any secondary financing to be arranged by Respondent would require Bank approval. (Exhibit D) This provision in the

loan commitment was then superceded by the Mortgage which specified as follows:

> "In the event any additional mortgage is placed upon the encumbered property, payment of the entire indebtedness secured by this mortgage shall be accelerated and become payable in full, at the option of the MORTGAGEE." (Exhibit F, p. 5)

Thus, the requirement for Bank approval was ultimately eliminated.

There is also no evidence that when the Southeast Bank NA learned of the agreement between Respondents and Mr. Bluck that the Bank enforced paragraph 10 of their Mortgage by utilizing the acceleration provision. Apparently the Bank was satisfied with their security as negotiated and agreed to by the parties. (See Exhibit F, Page 5, Paragraph 10).

On October 7, 1983, the Respondent executed a Promissory Note to the order of Robert F. Bluck Corporation in accordance with the terms of the Contract for Sale of Real Estate. (Exhibit H) Nowhere on the Contract for Sale of Real Estate does it state that the deposit and balance to close were to be in cash, and there was no testimony at the hearing that the Bank was ever advised by the Respondent that said amount was in fact paid in cash. Nor, as stated above, is there evidence that the Bank had ever seen the Contract for Sale. The Bar also knew and acknowledged at the hearing that the Bluck document was never recorded, although it was

always in Mr. Bluck's possession. (Tr. 68).

Prior to the loan transaction, the Respondent submitted a Balance Sheet to the Southeast Bank, NA, dated June 30, 1984 in connection with her efforts to obtain continuing financing of her monetary obligations. (FRA 36) Simultaneously with submitting the Balance Sheet, Respondent and Canter submitted additional individual Personal Financial Statements dated July 1, 1984, which reflected under the column "LIABILITIES" a secured liability of $25,000.00 each. (Exhibit L) These second Personal Financial Statements submitted by Respondent and Canter were not referred to by the Florida Bar in any way in its Complaint, and were never alleged to be false or misleading.

On or about August 10, 1984, Respondent and Canter executed a form Affidavit that stated "Nor is the Owner aware of any facts by reason of which the title to, or possession of, the property or any part of it, or any personal property located on it, might be disputed or questioned." (Exhibit J, Paragraph 5). The Affidavit also provided that the property was free and clear of all liens and encumbrances except for the lien secured by the first mortgage in the amount of $150,000.00. This Affidvit was not false as there were no such liens and encumbrances. On August 10, 1984 the Respondent and Canter did execute a second mortgage on the same property for $45,000.00 with the Southeast Bank, NA. (Exhibit K) At this time there still were no liens, encumbrances or title problems on the subject property.

The Referee's finding with respect to the Personal

Financial Statement of Respondent dated July 1, 1984 (which is not listed as a misrepresented document in the complaint) only states that the Respondent did not disclose the "unrecorded mortgage," with Bluck. (RR II) The Personal Financial Statement dated July 1, 1984 did, however, disclose a $25,000.00 liability, although not specifically identified as the Bluck unrecorded mortgage. (Exhibit L) A similar disclosure was made by Canter. The sum total of the two $25,000.00 liabilities disclosed is the exact amount owed to Bluck.

## SUMMARY OF ARGUMENT

I. The Rules of Discipline, Chapter 3, Rule 3-7.5(K) Procedures Before Referee, Referee's report specifically states that: "The referee's report shall include (1) a finding of fact as to each item of misconduct of which the respondent is charged."

The Referee's report in the instant case contains only one specific finding of fact or conclusion that would suggest misconduct, namely, Referee's Finding #3 that there had been a misrepresentation of a $20,000.00 down payment. The Respondent argues that indeed there was a down payment of $20,000.00, but that it was not in cash and was nowhere stated to be in cash. Therefore, no misrepresentations were made. There is no evidence either that in granting a first mortgage the Bank relied on the terms of the purchase contract, or that the Bank ever saw the purchase contract.

As to the other findings of fact, they are either erroneous or do not contain any element or conclusion of wrongdoing. To summarize, Finding #1 contains no conclusion of wrongdoing. Further, there is a misstatement by the Referee as to the requirements in the mortgage for express consent by the lender as to secondary financing. Indeed there is no such language.

Finding #2 contains no conclusion of wrongdoing. It addresses the execution of a mortgage and promissory note to Bluck. This is a perfectly legal act.

Finding #4 contains no conclusion of wrongdoing. Moreover, it fails to note that the balance sheet submitted for the second loan showed only the law firm's liability and not the personal liability of Respondent. The personal liabilities were disclosed in a separate statement.

Finding #5 contains no conclusion of wrongdoing. The personal financial statement discussed therein was not even presented by the Bar until 10 days before the Referee's hearing and no allegations of wrongdoing were ever pleaded with respect to it. The Referee's statements as to the knowledge of Bank Officers were made without benefit of documentary or testimonial report. No loan report was presented. Most significantly, these personal financial statements do in fact reveal the amount owed to Bluck as a secured liability.

Finding #6 contains no conclusion of wrongdoing. The one sworn affidavit which was submitted by Respondents to the Bank was not found to be false by the Referee.

II. The Bar's only arguments for enhanced punishment are based on the alleged submission of two false affidavits. The record shows that neither Bar Counsel nor the Referee ever mentioned such affidavits prior to the Bar's efforts at obtaining enhanced punishment of Respondent.

In fact, only one Affidavit of any kind was ever admitted into evidence, and it was never deemed false. Accordingly, the Bar's entire arguments for enhanced punishment are unsupported by the Record and not made in good

faith.

The Bar, in its Brief, has alleged that the Respondent and Canter executed a mortgage in which it was required that no secondary financing would be obtained without the Bank's express consent. In fact, no such requirement existed in said mortgage and as such the Bar has misstated this fact to the Court.

The Bar has also attempted to misstate the nature of the Respondent's practice and extent of knowledge concerning real estate matters.

The Bar also falsely stated that this case has dragged on for two years due to actions of the Respondent, when in fact all delays were the sole result of the Bar's inaction or breach of agreements.

The Bar has failed to proceed in accordance with the new Rules Regulating The Florida Bar, instead only citing violations of nonexisting rules, requiring Respondent to guess which sections of the Rules of Professional Conduct may have been violated.

Costs assessed against Respondent include substantial sums for matters not part of these proceedings and for types of costs not authorized by the Rules of Discipline.

The Bar has acted in bad faith by seeking enhanced punishment for the first time in its Petition for Review, and by misstating facts in the Record.

III. Finally, there are many mitigating circumstances to be

considered, especially the outstanding reputation of the Respondent in the Bar and her community, and her considerable number of unselfish Bar and civic activities.

The Record does not contain clear and convincing evidence of any wrongdoings by Respondent. Even if the Referee's only specific finding of misconduct is accepted, established precedent holds that the maximum discipline to be imposed should be a public reprimand.

In view of the lack of clear and convincing evidence of guilt, numerous examples of procedural irregularities and extenuating mitigating circumstances, the case should be dismissed, or in the alternative a private reprimand is the appropriate discipline.

## ARGUMENT

I. THE EVIDENCE SOLICITED AT THE HEARING BEFORE THE REFEREE AND THE REFEREE'S FINDINGS DO NOT SUPPORT A CONCLUSION THAT THE RESPONDENT VIOLATED THE RULES REGULATING THE FLORIDA BAR.

The first important thing for this Court to understand is that the Florida Bar did not produce any live testimony at the hearing held before Judge Pack on December 19, 1987. The Complainant's entire proof consisted of three sets of Requests for Admissions, only two of which were deemed admitted and considered by the Referee. Judge Pack set aside deemed Admissions to the Second Request for Admissions in his Order granting a continuance of the hearing originally scheduled for November 14, 1986. (Order of 11/14/86). Therefore, the only Requests for Admissions which remained for consideration were the First and the Third Requests for Admissions. The Respondent admitted none of the items contained in these requests, but merely did not respond to said requests.

The only witnesses who testified at the hearing before Judge Pack were the Respondent, Laurence A. Canter and character witnesses for the Respondent and Canter. On cross-examination, Counsel for the Florida Bar did not inquire of Respondent and Canter as to the facts and circumstances surrounding the execution and delivery of the their Personal Financial Statements and Affidavit to the Bank, and the

Florida Bar did not call any independent witneses concerning these documents. Nor is there any evidence that the underlying real estate contract was even submitted to the Bank.

In order for this Court to find support for the Referee's recommendations, it must look to the Requests for Admissions, the Bank documents which were admitted into evidence and the Referee's findings pursuant thereto. The Respondent submits that a careful review of these will lead the Court to conclude the Respondent did not violate the Code of Professional Reponsibility as alleged by the Complainant.

Findings of guilt must be established by clear and convincing evidence. The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978); The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973). This standard was not met.

Counsel for the Florida Bar quotes verbatim at page 7 and 8 of his Brief the report of the Referee contained under Part II entitled "Findings of Fact as to Each Item of Misconduct with Which the Respondent is Charged." A careful examination of each paragraph of the Referee's Findings of Fact will reveal that the documents and Requests for Admissions do not support such findings. There are six separate paragraphs in the Findings of Fact, each of which will be dealt with here separately.

REFEREE FINDING #1: "On October 7, 1983, respondent and Laurence Canter, her law partner, executed a mortgage and security agreement on property they were purchasing for use as their law office. The agreement required that no secon-

dary financing on that real estate would be obtained without the express consent of the lender, Southeast Bank, N.A., an F.D.I.C. bank."

The Respondent agrees that she did in fact execute a Mortgage and Security Agreement on property she and Canter were purchasing for use as their law office, and that such was done on or about October 7, 1983. However, nowhere on said Mortgage and Security Agreement does it state that no secondary financing would be obtained without the express consent of Southeast Bank. The Mortgage and Security Agreement (Exhibit F) only states as follows:

> "In the event any additional mortgage is placed upon the encumbered property, payment of the entire indebtedness secured by this mortgage shall be accelerated and become payable in full, at the option of the MORTGAGEE." (Emphasis added)

The First and Third Requests for Admissions also do not establish this Finding of Fact. Therefore, since there is absolutely no proof in support of this allegation, the Finding of Fact is not supported by clear and convincing evidence and should not be considered by the Court in rendering its decision.

REFEREE FINDING #2: On or before October 7, 1983, respondent and Canter had agreed with Robert F. Bluck, the seller, to secondary financing in lieu of a cash downpayment. On October 7, they signed a mortgage agreement with Mr. Bluck for $50,000.00 on the subject real estate, and as consideration for the mortgage, executed a promissory note for $50,000.00. Southeast Bank, N.A., was not informed of the mortgage agreement between respondent, Canter and Bluck, nor was the mortgage ever recorded."

The Respondent agrees that the mortgage to Mr.

Bluck's corporation was not recorded. This was always a part of the agreement between the Respondent, Canter and Mr. Bluck, and is the primary reason why Respondent did not believe that the agreement with Mr. Bluck was a lien or encumbrance on the property. (Tr. 66-67) This belief is supported by Florida law which states that no conveyance, transfer or mortgage on real property or any interest therein is good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration, and without notice, unless the same is recorded according to law. (See Florida Statute 695.01(1)). This is important, as the entire thrust of the Florida Bar's complaint against the Respondent is that she somehow misrepresented, deceived or otherwise defrauded the Southeast Bank, N.A.

As stated earlier, the document with Mr. Bluck for $50,000.00 has never been recorded. It is not and has never been a diminution of the Bank's interest in the subject property. Moreover, there is no allegation that the Southeast Bank, N.A., has suffered in any way as a result of said Promissory Note and alleged mortgage. Lastly, there is no evidence in the Record that Southeast Bank had seen or relied upon the sales contract between Respondent and Bluck.

It is also arguable from the documents admitted during the hearing that the Southeast Bank, N.A., was aware of the agreement between the Respondent and Mr. Bluck. Exhibit B attached to the Complaint does in fact show a

contingent liability of $20,000.00, which is the same identical amount reflected as the deposit on the contract between the Respondent, Canter and Mr. Bluck. The second Personal Financial Statement attached as Exhibit "L" to the Third Request for Admissions also lists on each financial statement a $25,000.00 secured debt under the category "LIABILITIES." These two liabilities add up to $50,000.00 which is the exact amount of the liability the Respondents owed to Mr. Bluck.

REFEREE FINDING #3: The contract to purchase from Robert F. Bluck specified a deposit of $20,000.00, a new mortgage of $150,000.00, and a balance of $30,000.00 to close. On a personal financial statement, dated August 4, 1983, and submitted in support of the application for the $150,000.00 loan, respondent and Canter misrepresented that they had made a $20,000.00 downpayment on the subject property. Based on representations made by respondent and Canter to Southeast Bank, N.A., the bank's mortgage loan report listed the equity of Canter and Siegel in the real estate as $50,000.00 and the source of equity as cash."

The Respondent admits that the terms of the contract to purchase the property from Mr. Bluck's corporation is as set forth in the Findings of Fact by the Referee. The Record contains no evidence nor any allegation that this contract was ever provided to Southeast Bank, or that the Bank relied on such contract when approving either loan. The Respondent vigorously contests the finding that she misrepresented having made a $20,000.00 cash down payment on said property. The Financial Statement (Exhibit B) only indicated under the category "ASSETS" the following: "down payment on building - $20,000.00." Nowhere on the Financial

Statement did the Respondent represent that she had paid $20,000.00 in cash as part of this down payment and the Financial Statement also lists under the category "CONTINGENT LIABILITIES" a business liability of $20,000.00. No evidence was produced by the Complainant that this $20,000.00 liability was not a balancing entry on the Financial Statement to reflect the deposit liability. The down payment was in fact made when the Respondent and Canter executed the Promissory Note to Mr. Bluck's corporation. (Exhibit H)

The Respondent does admit that the Bank's Mortgage Loan Report listed the equity in the real estate at $50,000.00 and its source as cash. This document was generated internally by the Bank and not normally seen by its customers. There is absolutely no proof of any kind whatsoever in this Record that such oral or written representations were made by Respondents.

REFEREE FINDING #4: On June 30, 1984, respondent and Canter submitted additional documents to Southeast Bank in support of an application for a $45,000.00 loan to be secured by a second mortgage on the subject real estate. On a balance sheet dated June 30, 1984, respondent and Canter listed the mortgage to Southeast Bank, N.A. as a liability, but did not disclose the mortgage to Bluck."

The Respondent admits that she and Canter submitted a Balance Sheet dated June 30, 1984, as part of their efforts to obtain an additional $45,000.00 loan from the Southeast Bank. It is also significant that the Balance Sheet, Exhibit I was the Balance Sheet from the law firm and not the personal Balance Sheet of the Respondent. The law firm did

not owe the money to Mr. Bluck. The Respondent and Canter owed this debt as individuals. Respondent and Canter each provided a second Personal Financial Statement to the Bank. Exhibit-L. As indicated below, the $50,000.00 liability was disclosed.

REFEREE FINDINGS #5: On a personal financial statement dated July 1, 1984, respondent and Canter listed the mortgage balance on the first mortgage with the bank, but did not disclose the unrecorded mortgage with Bluck. Loan Officers at the bank again believed respondent and Canter to have $50,000.00 cash equity in the property, and were unaware of the debt to Robert F. Bluck."

This paragraph of the Referee's Findings is the most difficult finding to understand. The Personal Financial Statement dated July 1, 1984 is not mentioned in the Bar's complaint against the Respondent. No allegations of wrongdoing were ever pleaded with respect to this financial statement and it was not until December 9, 1986, in the Florida Bar's Third Request for Admissions, that the issue of this financial statement was raised. The Third Request for Admissions were filed a mere 10 days before the Final Hearing held before Judge Pack and said requests could not be used by The Florida Bar unless the time period for a response was shortened by Order of the Court.

In The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985), this Court held that due process precluded a finding of guilt for an offense that was not charged in the complaint. In this case, not only did The Bar fail to allege in its complaint that the Financial Statement was false, but a

close examination of the Personal Financial Statements dated July 1, 1984, will reflect that the Repondent did in fact disclose to the Bank a secured liability of $25,000.00 which together with the companion document from Canter showed a total liability of $50,000.00. The Balance Sheet (Exhibit I) listed the remaining secured long term liabilities of the law firm. June 30, 1984 was the first time that the Balance Sheet of the law firm had been submitted, and the Financial Statement originally submitted on July 31, 1983, included both law firm and personal liabilities.

The statement in the Referee's findings to the effect that the loan officers believed that the Respondent and Canter had $50,000.00 cash equity in the property is again not supported by any additional documents other than the original loan report. There is no evidence of a second, updated loan report and the Bank's belief as to the form of the equity or its basis for approving this second loan is unknown.

Finally, the Referee made no finding that the failure to identify the unrecorded document to Bluck was done intentionally or was in any way fraudulent. The Referee's Findings of Fact drew no conclusions at all concerning this transaction, and it thus cannot be stated that there was a finding of fraud. In any event, according to the Price decision, this finding of fact and any conclusions based thereon cannot be considered by this Court.

REFEREE FINDING #6: On August 10, 1984, respondent and Canter submitted to the bank a sworn affidavit representing that they were aware of no facts by reason of which the title to, or possession of, the subject property or any part of it or any personal property on it might be disputed or questioned."

The Referee again does not make any finding that the sworn affidavit executed on August 10, 1984 was false or executed deliberately to defraud the bank. The Referee merely found that the Respondent and Canter submitted this affidavit and the affidavit stated that the Respondent and Canter were not aware of any facts by reason of which the title to or possession of the subject property might be disputed or questioned.

No evidence was submitted to the Referee establishing that the Respondent and Canter believed at the time they executed the Affidavit that it was in fact not true. The unrecorded document did not create a dispute to the possession or title to the property. Respondents held possession and title to the property by warranty deed and the Bank had a secured first mortgage which put it in a superior position to said unrecorded document. Under no circumstances could Mr. Bluck challenge the position of the Bank if he ever violated his agreement not to record the document.

It is clear from these facts that the Respondent did not in fact violate the three separate sections of the Code of Professional Responsibility, (now known as Rules Regulating the Florida Bar), and there is no clear and convincing evidence to support any such finding. The Referee

made only one finding of misconduct, at paragraph 3, to the effect that the Financial Statement of Respondent dated August 4, 1983, misrepresented that she had made a $20,000.00 down payment on the subject property. As discussed above, this finding is clearly erroneous and not supported by the necessary clear and convincing evidence. There certainly is insufficient evidence to support the Bar's position that the report of the Referee which recommended a public reprimand and a suspension of two weeks should be set aside for a more stringent punishment. Rather, the striking dearth of proof of wrongdoing in the record supports a dismissal or at the very maximum a private reprimand.

II. PROCEDURAL IRREGULATIES AND INCONSISTENCIES AS WELL AS FACTUAL MIS-STATMENTS MADE BY THE BAR THROUGHOUT THE ENTIRE GRIEVANCE PROCEEDINGS INDICATE THE BAR IS NOT NOW SHOWING GOOD FAITH IN ITS CURRENT REQUEST FOR MORE SEVERE PUNISHMENT OF RESPONDENT.

A. NO FALSE AFFIDAVITS FILED

The sole basis of the Bar's argument for an enhanced penalty by this Court is that the Respondent and Canter on two separate occasions submitted "false affidavits to an FDIC Bank, thereby committing illegal acts." (Petition for Review by the Florida Bar). Its Petition then states that because of the illegal conduct, the Respondent should be suspended for ninety-one days with proof of rehabilitation before reinstatement. The Bar's arguments regarding illegal conduct are not clearly and convincingly supported by the Record.

This is the first time that the Florida Bar has taken the position that the Respondent submitted on two separate occasions false affidavits. Firstly, only one Affidavit was ever admitted into evidence, (Exhibit J) and a careful review of the Complaint filed by The Florida Bar shows it never alleged that the Respondent intentionally filed any false affidavits (Complaint, Paragraph 21 and 22), or that in fact the one affidavit submitted was not true.

Even at the hearing before Judge Pack, Counsel for the Florida Bar did not argue to the Court that the Respondent had filed false affidavits. Rather, Counsel for the Bar limited his argument solely to the vagaries of a suggestion that a possibility existed that the unrecorded mortgage may have been recorded by Mr. Bluck which in turn may have caused some cloud on the title at a later date. (Tr. 67-68). At no time did he allege that the Respondent had submitted a false affidavit, and it is clear from the Referee's report (which was prepared by Counsel for the Florida Bar) that the Respondent did not in fact submit a false affidavit to the Bank.

For the Bar now to argue for the first time that the Respondent's punishment should be enhanced on this basis is entirely inappropriate. Indeed, Bar Counsel is basing the entire request for enhanced punishment on facts never presented or recognized and conclusions never evinced in the Record by either himself or the Referee. Moreover, if these allegations were so pivotal, one can only wonder why the Bar and the Referee failed to notice them before. One can also

wonder at the good faith of the Bar in raising them now.

B. BAR MISSTATED MORTGAGE AGREEMENT TERMS

The Florida Bar has also stated for the first time in its Brief, at Page 3, Paragraph 1, that the Respondent and Canter executed a mortgage and security agreement "in which it was required that no secondary financing on the real estate would be obtained without the Bank's express consent." (Exhibit F). This statement of fact by the Bar is absolutely untrue. A thorough review of Exhibit F reveals that nowhere was such a specific requirement made. The only language in Exhibit F discussing secondary financing states

> "in the event any additional mortgage is placed upon the encumbered property, payment of the entire indebtedness secured by this mortgage shall be accelerated and become payable in full, at the option of the MORTGAGEE."

Accordingly, it appears that The Florida Bar has made a mistake or a misrepresentation to the Court on this specific allegation. Is it an honest mistake, or does it constitute a misrepresentation that deserves a formal Bar proceeding?

C. BAR MISLEADS AS TO NATURE OF RESPONDENT'S PRACTICE

The Complainant also opines in support of his statement that the Respondent knew or should have known the Affidavits were false, that the Respondent's firm advertised an ability to practice real estate law. (Brief, Page 11) The Bar's statement of this point is misleading. It is clear

from the testimony of both the Respondent and Canter that although they may have at one time in the past sought such work, their efforts were unsuccessful and they never did in fact actively practice in the area of real estate law. Indeed, their practice was limited almost exclusively to immigration law at all times. As stated by Canter at page 17 of the Referee's Hearing Transcript, in response to questions concerning their real estate practice:

> "A. There was at one time, perhaps three or four years ago. I don't remember specifically when; that we were making efforts to expand our practice into other areas. We were not successful in expanding our practice to other areas, and we, in fact, never did. At one -- as I said, our practice has been one hundred percent immigration law for about three years."

It could hardly be argued from this testimony that the Respondent and Canter were experienced real estate lawyers who should have known the esoteric practices of real estate law. Further, Bar counsel stipulated at the hearing that Mr. Canter was an expert in immigration law, "and that he practices primarily, if not exclusively, in that area." (Tr. 9, emphasis added) Moreover, it should be remembered that both Respondent and Canter had only been practicing law in Florida for approximately two years. Given the obvious meaning of the testimony, one can only wonder at the Bar's efforts to drive home a clearly erroneous point.

D. BAR FALSELY STATES CASE DELAYED BY RESPONDENTS

Another false statement made by Bar Counsel during the course of the proceedings can be found on Page 64 of the transcript proceedings before Judge Pack. Counsel for the Respondent had advised Judge Pack that the Bar proceedings had gone on for nearly two years and consequently, the Respondent had already suffered greatly because of the fact that this matter had been hanging over her and her partner's heads for an extremely long period of time. (Tr. 61) In response to this, Counsel for the Bar indicated that the delays were the fault of Respondent and Canter and stated:

> "They have requested different continuances. Certainly the last continuance was the Bar's fault without question. But, prior to that, different continuances were occasioned by the Respondents in this case." (Tr. 64, 65).

This statement is untrue. The only continuance obtained by the Respondent or Canter was, as admitted by Mr. DeBerg, "The Bar's fault without question." (Tr. 64) That particular continuance was occasioned because the Bar, suddenly and without notice, withdrew the agreement and stipulation for a public reprimand three days before the final hearing (MC). The continuance which they obtained (as a result of the Bar's fault), was only for a period of thirty days even though the Respondent sought a period of ninety days in order to properly prepare for the final hearing. (MC, Order of November 14, 1986) At no other time in the two years of proceedings was a cotninuance granted to the Respondent. Again, can the Bar's statement to the contrary really be deemed an innocent mis-

take?

E. BAR'S BRIEF RECEIVED THIRTEEN DAYS AFTER CERTIFICATE OF SERVICE

Another disturbing event concerns the date which the Respondent's counsel received the Florida Bar's opening Brief. The Certificate of Service on the Florida Bar's brief states that it was "furnished by regular U.S. mail to Cecelia Bonifay on April 23, 1987." Counsel for the Respondent did not in fact receive the said Brief until May 6, 1987, nearly thirteen days after the Brief was allegedly sent. Is this simply a matter of a delay in the mail?

F. BAR ASSESSES EXCESSIVE AND IMPROPER COSTS

The taxing of costs to the Respondent and Canter in excess of $1,600.00 each is unjustified, unreasonable and contrary to the Rules of Discipline and established precedent, as well as a further example of procedural deficiencies. In the statement of costs prepared as part of the Referee's Report, The Florida Bar has requested costs against Laurence A. Canter totalling $1,679.51, including 64.9 hours for staff investigator, William Smith, and against Respondent for $1,630.01, including an additional 64.9 hours for Investigator Smith. (Statement of Costs)

It strains credulity that 130 hours were required for an investigator to obtain copies of bank documents. Respondent is not responsible for paying investigative costs

with respect to the initial grievance because probable cause was not found by the Grievance Committee in any matters originally complained of, and for which much, if not most of the investigator's time must have been used. (Tr. 65). Finally, and most disturbing, the Rules of Discipline Rule 3-7.5(K)(5) does not list investigator's fees as an allowable cost. Accordingly, any amount for this item charged to the Respondent is erroneous. Nor is there a catchall provision in this Rule giving the Bar or the Referee discretion on this point.

The statement of costs include $270.00 each for Court Reporter fees at the November 20, 1985 Grievance committee hearing. Most of the hearing, indeed 144 pages of a 167 page transcript, involved matters for which no probable cause was found. (TRA at 2; Tr. 64)

Lastly, the costs assessed on mileage, meals and lodging for Bar Counsel for a November 14, 1986 hearing are improperly charged. (Statement of Costs). By Bar Counsel's own admission, this hearing had to be continued, solely through the fault of The Florida Bar. (Tr. 64).

Discretion must be exercised in awarding costs where attorneys are not found guilty of all charges, or if incurred costs are unreasonable. Each party may be forced to bear its own costs. Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982), Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

Thus, in the present case, it is argued that no

costs be assessed against Respondents. If any costs are to be assessed, they should not include investigator's fees, Court Reporter and transcript fees for the Grievance Committee hearing, or travel expenses incurred by Bar Counsel for the November 14, 1986 hearing.

G. BAR IGNORES CURRENT RULES

The Referee failed to make any findings of misconduct under the Rules of Professional Conduct of the Rules regulating the Florida Bar, as required by the Rules of Discipline, Rule 3-7.5(K). On July 17, 1986, the Rules Regulating the Florida Bar were adopted by the court to take effect January 1, 1987, stating:

> All disciplinary cases pending as of 12:01 January 1, 1987, shall thereafter be processed in accordance with the procedures set forth in the Rules Regulating The Florida Bar."

At the time the Referee submitted his report, the Integration Rule and the Code of Professional Responsibility were inapplicable. This is another example of the Bar's failure to adhere to procedure.

The Report of Referee, prepared on January 20, 1987, found Respondents guilty of violating certain provisions of The Florida Bar Integration Rule and of the Code of Professional Responsibility. No violations of the Rules of Professional Conduct of the Rules Regulating the Florida Bar were cited. It is thus contended that the

Referee made no specific findings of misconduct under the Rules of Discipline of the Rules Regulating The Florida Bar.

The primary thrust of the Bar's argument, as stated in its Brief (P. 7), is that Respondents engaged in "illegal conduct" in violation of D.R. 1-102(A)(3). Apart from the fact that the Referee at no place in his report states specifically what conduct was illegal or which law was violated, the Rules of Discipline, as in effect at the time of said report, expressly removed "illegal conduct" from the list of wrongdoings. Clearly, some types of illegal conduct are no longer considered worthy of discipline. See Comment to Rule 4-8.4.

In any event, Respondents should not be required at this stage to guess which Rules of Professional Conduct have been violated, if any. Disciplinary actions constitute State action subject to both the Fourteenth Amendment of the U.S. Constitution as well as the Civil Rights Act. See Mack v. Florida State Bd. of Dentistry, 296 F.Supp. 1259 (D.C. Fla 1969), affirmed in part, vacated in part 430 F2d 862, cert. denied 91 S.Ct. 970, rehearing denied 91 S.Ct. 1365; The Florida Bar v. Fussell, 179 So.2d 852, Appeal after Remand 189 So.2d 881 (Fla. 1968). To discipline attorneys for violating non-existing rules and failure to properly advise Respondents of the specific grounds of misconduct as provided under the existing rules, flies in the face of all notions of fundamental fairness and should not be condoned by this Court.

## H. BAR'S CURRENT PETITION FILED IN BAD FAITH

Throughout the course of these proceedings, and prior to the Referee's Hearing, both parties were attempting to work out a public reprimand. (MC) Even during the Referee's Hearing itself, Bar Counsel did not vigorously argue for more than a public reprimand and suggested that if there were to be a suspension, it should be brief and nonconcurrent so that at all times one Respondent would be able to handle the case load of the other. (Tr. 18, 19, 25, 56, 70)

The Referee, based on all evidence, testimony and argument of counsel, determined that a public reprimand and a two week, non-concurrent suspension was appropriate. This is certainly not less than the level of discipline consistently sought by The Florida Bar. Now, on Petition for Review, The Florida Bar is in essence stating it disagrees with its own evaluation of the case, and complains that the Referee did not impose a higher degree of discipline than the Bar itself sought.

These events demonstrate a pattern of activities which supports the Respondent's position that the Bar is not now showing good faith in its current request for a ninety-one day suspension of the Respondent. Rather it would seem the Bar is motivated by the will to prosecute vigorously even at the expense of justice and its own integrity.

In the case of The Florida Bar v. Ellis Rubin, 362

So.2d 12 (Fla. 1978), this Court acknowledged that the Bar has consistently demanded attorneys turn "square corners" in the conduct of their affairs. Because of this standard, this Court in Rubin also acknowledged that an accused attorney in disciplinary proceedings "has the right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct." The Court also reminded The Florida Bar that when The Florida Bar fails to exercise diligence in its timely prosecution of attorneys, the accused lawyer suffers from such unjust delays, which delays might well supplant the more formal judgments as a form of discipline. In other words, this Court was informing The Florida Bar that disciplinary proceedings may be dismissed by this Court where there have been unjust delays or other irregularities in the Bar's handling of a grievance proceeding. In the Rubin case, the Bar's petition for review was stricken from the Record, the Referee's Report was quashed, and the disciplinary proceedings were dismissed.

The more than two year delay already occasioned in this case especially when coupled with the series of violations cited above is more than sufficient reason for this Court to dismiss the pending proceedings. In the alternative, this Court should reduce the discipline of the Respondent to a private reprimand.

III. THERE ARE AN EXTRAORDINARY NUMBER OF MITIGATING CIRCUMSTANCES IN THIS CASE IN THE OTHERWISE UNBLEMISHED RECORD AND EXEMPLARY PUBLIC SERVICE OF RESPONDENT COUPLED WITH THE

PRESENCE OF POTENTIAL HARM TO THE COMMUNITY AND CLIENTS THAT WOULD OCCUR IF RESPONDENT WAS PUBLICLY DENIGRATED OR SUSPENDED. ACCORDINGLY, GIVEN THE NATURE OF THE ALLEGED OFFENSE, QUESTIONABLE NATURE OF THE PROOF AND THE FACT THAT NO CLIENT OR ANYONE ELSE WAS HURT, THE FLORIDA BAR'S REQUEST FOR ANY PUNISHMENT INVOLVING PUBLIC RIDICULE IS HARSH, ARBITRARY AND UNJUST.

Respondent's record of service to the community stated in the Fact portion of the Brief is long and impressive. It shows years of continuous support for the arts, support of community pride and spirit, support for community improvement and charitable work. No less impressive is Respondent's contribution to her profession in running seminars and assisting the local Bar with disseminating public information.

To say, as The Florida Bar has, that Respondent is a high profile individual is to miss the point. What is significant is not the newspaper articles in which Respondent appears, but the respect and affection of her community that engendered such public attention and the meritorious work that earned the respect and affection. In short, Respondent is not so much high profile as an oustanding, exemplary and deserving individual.

Nowhere is this shown more eloquently than in the testimony (Tr. 28, 35, 44) and affidavits (Respondent's #2) of the other highly respected community members who testified at the proceedings before Judge Pack in her behalf. The feelings of all are well summarized in the Affidavit of Howell Melton, Jr. (Respondent's #2) who stated among other

things that Respondent had an outstanding reputation in the community for honesty and integrity. Florida case law makes it clear that:

> "This type of background does not excuse professional misconduct. However, it does tend to suggest that an individual so committed and so oriented professionally is not likely to do willful violence to the ethics of the profession. It further suggests that such an individual is amenable to minimal corrective measures ..." Florida Bar v. Goodrich, 212 So.2d 764 (Fla. 1968).

Given all this as measured against the alleged infraction herein, the destruction of Respondent's livelihood and reputation, the result that is now aimed at by the Bar, is harsh, arbitrary and thoroughly unjustified.

In its wish to severely punish Respondent, one must question whether the Bar, in its zeal, has given true consideration to the public interest consequences of its acts. At present, Respondent's name appears on a Brochure (Respondent's Composite #1) for the purpose of raising funds for United Way Charities. Respondent is credited as producer of this Brochure which cost the United Way some $20,000 to print. (Tr. 13, 14). She is also the chairperson of an organization to support the arts which numbers over 1,000 members. (Tr. 24). She is presently in the midst of a public fund raising effort to support the Southeastern Guide Dog School to aid the blind. (Tr. 24). If the Bar has no concern for Respondent's fate, they have also failed to consider the difficulty and unpleasantness it will cause the many members of the public involved with various undertakings

of which Respondent is an integral part. While punishment of any individual normally causes pain to their innocent friends and relatives, in the special case of Respondent and her partner, many more will be harmed.

Likewise, the Bar seems to show little concern for Respondent's clients. While the Bar has alleged in this case infractions that may show at most an error in judgment, Respondent stands blame-free in her treatment of clients and there is no evidence to show Respondent's clients are not being well served. In fact, there is much evidence to show that Respondent and her partner are highly competent, dedicated professionals. (Tr. 9, 28-33, Respondent's #2). Respondent and her partner are the only full-time immigration lawyers in the Sarsota area. (Tr. 9). With the current flood of activity in immigration law, proven competent attorneys of the caliber of Respondent and her partner are needed to serve the public. A change in attorneys, possibly to one located out of town, would cause extreme difficulty for Respondent's clients, especially given the crucial stage of many immigration cases right now and for the next year or two.

While the Florida Bar in its efforts to punish Respondent may do public harm to innocent clients and community members, it should be noted that Respondent has done harm to no-one. It has already been stated that no client - related harm has ever been attributed to Respondent. The Southeast Bank, N.A., the only possible recipient

of negative effects in this case, was fully secured at the time of making the loan. That the bank is not concerned with this case has been shown by the fact that this complaint is brought only by the Bar. Although the bank has known of the situation for two years, it has refrained from joining in the Bar's efforts. Where the Bar seeks to regulate its profession, the fact that no harm was done to a client or indeed anyone else, should be given weight.

In an effort to justify a more severe punishment, the Florida Bar in its brief has cited two cases. Interestingly and importantly, the punishment given in the only cases cited was a public reprimand. Indeed, the only two cases either side has found involving questionable loan transactions resulted in only public reprimands. No authority has been cited by the Bar for greater punishment. Likely if private reprimand cases were available for inspection we might find private reprimands to be the most common form of discipline administered in this type of alleged wrongdoing. Thus, a public reprimand is the most severe discipline appropriate.

Even more significantly, the Bar attempts to argue that the present case is a more serious matter than those contained in the cases it cites when in fact the exact opposite is true. The Florida Bar v. Barrow, 412 So.2d 862 (Fla. 1982) involved an admitted criminal act. There is no admission or finding of criminal guilt in the instant case and as shown earlier, it is inconceivable that the proof in

this case would support such a finding. Therefore, the nature of the act is considerably less clear than in Barrow. As such it is reasonable to conclude that the present case warrants less, not more punishment.

The Bar also cites Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985) where Respondent fraudulently misrepresented the value of a piece of property in obtaining a loan and ultimately acquired a loan in excess of the property's true value. In the present case, the mortgagee was fully secured at all times, and the value of the property was in excess of the loan secured. Accordingly, there was no harm to the mortgagee as there was in Beneke. Moreover, in Beneke there was no element of mitigation. In this case, mitigation in the form of a long history of service to the community and the profession is a significant factor fully recognized by all concerned.

The Bar has argued that similar to Beneke, the bank was mislead in this case as to Respondent's financial status. There is no clear and convincing evidence to support this argument. In distinguishing from Beneke, repeatedly the Bar cites the alleged existence of numerous false documents, attempting to create the erroneous picture of an avalanche of false documents as opposed to one in the Beneke case. We have already discussed at length how in this case no false documents have been plead or proved. Additionally, anyone familiar with normal banking transactions is aware of the number of documents involved. In the case under discussion,

there was one single item, not omitted or concealed, but merely unclearly identified as an unrecorded mortgage. Other documents were generated internally by the Bank. There was no flood of falsehoods as the Bar would indicate. It is not clearly and convincingly established that even one false statement or misrepresentation was made to the Bank.

Most disturbing of all in the Bar's argument to distinguish Beneke is the continuous referral to an allegedly false sworn affidavit. As discussed above, the Record contains no evidence that this Affidavit was false.

Finally, neither the Beneke nor the Barrow case contains the numerous elements of Bar error shown here. It is a factor that cannot be ignored in determining final dispositions.

The Bar in its Brief, acknowledges that an extended period of suspension is not warranted (Brief p. 12). However, the Bar is well aware that a ninety-one day suspension is tantamount to the dissolution of an attorney's law practice and in fact lasts considerably longer than 91 days, given the necessity to re-apply for admission. Indeed in such cases the attorney often remains unlicensed for a year or more. It is incomprehensible under the facts given that such a severe punishment should be given when it is clear that what is warranted in this case is a full dismissal or alternatively a private reprimand.

## CONCLUSION

The destruction of a career is a serious matter. The deprivation of livelihood is a terrible consequence to visit upon a life. Such proceedings morally and legally warrant the utmost care. Those who undertake to participate in such proceedings should be held to the highest and most rigorous standards of care in examining and presenting evidence, stating conclusions and adhering to procedures. In the case brought by the Bar against Respondent, the evidence is weak or non-existent, the procedures as executed by the Bar questionable and the conclusions murky. The "clear and convincing" standard of proof of guilt is not met and the ultimate conclusions of the Referee as to violation of the Disciplinary Rules are not supported by his own findings of facts.

In addition, it is clear that the extensive mitigation in this case has not been appropriately considered. The punishment sought by The Bar is not warranted in the case of an otherwise blemish-free and outstanding individual.

Given the quality of proof in this case and the numerous procedural defects and errors by the Bar and the Referee, it is concluded that the case should be dismissed for failure to have met the clear and convincing standard.

Alternatively, these factors should be considered together with the extensive mitigation recognized by all parties and the punishment requested by the Referee should be reduced to a private reprimand. If the Court does not agree that a Private Reprimand is the appropriate disposition, then Respondents respectfully request Oral Argument so that their position can be made clear to the Court.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the following this 15TH day of May, 1987.

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