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**IN THE SUPREME COURT OF FLORIDA**

THE FLORIDA BAR,

Complainant-Appellant

v.

JOHN P. FITZGERALD,

Respondent-Appellee.

The Florida Bar File No.
86-20,045 (15D)

Supreme Court Case No. 71,348

**INITIAL BRIEF OF THE FLORIDA BAR**

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## STATEMENT OF THE CASE AND OF THE FACTS

This disciplinary proceeding was instituted by the filing of a complaint after a Fifteenth Judicial Circuit Grievance Committee made a unanimous finding of probable cause. It arises out of the following facts.

Appellee was retained, in or about 1977 or 1978, by Silvio Giannetti to attend to some corporate business. Mr. Giannetti was in the construction business and between 1977 and 1982, appellee had an on-going attorney-client relationship representing both the construction business as well as Mr. Giannetti and his wife in numerous transactions (21, 22).*

In or about August, 1979, appellee recommended to Mr. Giannetti that both men enter into a partnership for the purpose of acquiring an unimproved parcel of real estate at Jupiter, FL for investment purposes (See paragraph 2 of the bar's complaint admitted by appellee in paragraph 2 of his answer; 25, 26).

Mr. Giannetti agreed to enter into the proposed venture which precipitated five (5) letters from appellee to Mr. Giannetti culminating in a June 25, 1980 letter establishing a fifty-fifty partnership with title to be taken in appellee's name as trustee for the partnership (See paragraph 3 of the bar's complaint admitted to by appellee in paragraph 3 of his answer; the five (5) letters were admitted into evidence as the bar's composite Exhibit 1).

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* All page references are to transcripts of April 13, 14 and 15, 1988 final hearing unless otherwise specifically noted.

On or about September 5, 1979, appellee, as trustee for himself and Giannetti, purchased the partnership realty with both parties contributing their respective 50% shares of the purchase price, closing costs, mortgage payments, taxes and carrying charges (See paragraph 4 of the bar's complaint admitted to by appellee in paragraph 4 of his answer). Appellee, in addition to acting as partner and trustee, also acted as attorney for the partnership (37).

On or about May 1, 1981, appellee received $100,000.00 from one Lawrence Simon and, as trustee, made, executed and delivered to Mr. Simon a promissory note in the principal sum of $100,000.00 secured by a purchase money mortgage covering the partnership premises (See paragraph 5 of the bar's complaint admitted by appellee in paragraph 5 of his answer; see also the note and mortgage admitted as the bar's Exhibit 11 in evidence).

Appellee's receipt of the $100,000.00 and delivery of the note and mortgage to Simon, as aforesaid, were without disclosure to Mr. Giannetti and without Mr. Giannetti's knowledge or consent (265, 266).

In July, 1981, appellee entered into a written contract with Oceanside Development Corporation for the sale of the partnership property for the sum of $420,000.00 (See paragraph 7 of the bar's complaint admitted by appellee in paragraph 7 of his answer; see also the contract of sale admitted as the bar's Exhibit 7 in evidence). As in the case of the Simon note and mortgage, appellee did not disclose the contract of sale to Mr. Giannetti who neither knew about it or consented thereto (250).

In September, 1981, appellee closed title to the partnership property with Oceanside (See paragraph 9 of the bar's complaint admitted by appellee in paragraph 9 of his answer). The closing took place without disclosure to Mr. Giannetti and without his knowledge or consent (251, 252).

At the closing, appellee provided for repayment of the $100,000.00 Simon mortgage from the $420,000.00 sales proceeds (see paragraph 11 of the bar's complaint admitted by appellee in paragraph 11 of his answer; see also bar's Exhibit 16 in evidence). In addition, notwithstanding that the contract of sale (bar's Exhibit 7 in evidence) expressly provided for a second purchase money mortgage of $120,000.00 subject only to the $100,000.00 Simon mortgage, appellee, nonetheless, accepted, as a portion of Mr. Giannetti's share of the sales proceeds, a second mortgage in the principal sum of $170,000.00 subordinated to a $270,000.00 first purchase money mortgage in favor of Wedgestone Realty Investors Trust (See paragraph 13 of the bar's complaint admitted by appellee in paragraph 13 of his answer; see also the Giannetti mortgage admitted as the bar's Exhibit 13 in evidence).

Appellee took $7,200.00 of the sale proceeds and gave it to parties named Ensinger taking back a third mortgage in favor of Mr. and Mrs. Giannetti. This mortgage covered premises having no nexus to the partnership property (see paragraph 15 of the bar's complaint admitted by appellee in paragraph 15 of his answer). He did the same thing with respect to a $10,000.00 loan to parties named Morris, again taking back a third position mortgage in favor of Mr. and Mrs. Giannetti on property having no nexus to the transaction (See paragraph 18 of the bar's complaint admitted to by appellee in paragraph 18 of his answer). These

loans were not disclosed to Mr. Giannetti who neither knew about them or consented thereto (265). The Ensingers and Morrises were friends of appellee (100, 254).

Appellee appropriated to himself every bit of cash generated by the closing. According to a closing statement identified by appellee, the net proceeds realized upon the closing amounted to $109,000.00 (91; bar's Exhibit 12 in evidence). Appellee received all such cash less the $17,200.00 used to fund the Ensinger and Morris loans (91). Thus, appellee received and appropriated to his own use and purposes $100,000.00 from the Simon mortgage (bar's Exhibit 11 in evidence) plus $91,800.00 representing all of the net cash realized at the closing.

The foregoing constituted the predicate for the first two counts of the bar's complaint. To summarize, appellee, as attorney, partner and trustee, without disclosure to his client, who had no knowledge and gave no consent, sold the partnership asset, siphoned approximately $191,800.00 in cash to himself and left his partner, client and cestui que trust holding one $170,000.00 second mortgage subordinated to a $270,000.00 first mortgage and two (2) third mortgages aggregating $17,200.00. Appellee did not share with or distribute to Mr. Giannetti one cent from the cash realized upon the sale (91).

In his first report, devoted solely and exclusively to findings of fact and recommendations regarding guilt or innocence, the referee found, as fact, each and every allegation charged by the bar in the first two counts of its complaint. He recommended that the respondent be found guilty of each and every violation charged by the bar. The bar had charged that by entering into the various transactions regarding the partnership asset without disclosure to his client, partner and cestui

que trust, appellee violated Fla. Bar Integr. Rule, article XI, Rule 11.02(3)(a) proscribing the commission by an attorney of any act contrary to honesty, justice or good morals and that appellee violated Disciplinary Rules 1-102(A)(4) and 1-102(A)(6) of the Code of Professional Responsibility which, respectively, provide that an attorney shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation nor engage in any other conduct that adversely reflects on his fitness to practice law. The bar had additionally charged that by appropriating all of the cash and leaving his client, partner and cestui que trust with second and third mortgages without disclosure to or knowledge or consent by the client, respondent violated Disciplinary Rule 7-101(A)(3) of the Code of Professional Responsibility which provides that a lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship. Finally, the bar had charged that by appropriating all of the cash proceeds to himself appellee had violated Fla. Bar Integr. Rule, article XI, Rule 11.02(4) which provides that money entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose.

The epilogue to the foregoing is that all three subordinate mortgages which appellee created in favor of Mr. and Mrs. Giannetti, proved worthless. The Ensinger and Morris third mortgages, as appellee explained, "went bad" (102). The facts surrounding the demise of the $170,000.00 second mortgage given by Oceanside to Mr. and Mrs. Giannetti which appellee subordinated to a $270,000.00 first mortgage, are bizarre and spawned additional counts alleged by the bar.

As previously stated, Mr. Giannetti had no knowledge that the partnership property had been sold and knew nothing of either appellee's appropriation of the $191,800.00 in cash or the subordinate mortgage created in his favor (265). He did not discover these facts until approximately July, 1982 (the title closing had taken place in September, 1981) when Mr. Giannetti met appellee at Miami in connection with a trial involving Mr. Giannetti's construction business (252, 253). Upon the conclusion of the trial, Mr. Giannetti inquired about the partnership property and was informed by appellee that it had been sold. For the first time appellee informed Mr. Giannetti that he, Giannetti, had received the three (3) mortgages hereinabove referred to (254). At appellee's suggestion, Mr. Giannetti visited the property the next day and met Oceanside's principal, Fred Harney, for the first time (255-257). Mr. Giannetti was informed that he would soon be receiving interest upon the $170,000.00 mortgage (257). He requested that appellee send to him copies of the documents relating to the sale (257). Mr. Giannetti received from appellee, without cover letter, copies of the three (3) mortgages in question (257-258). Mr. Giannetti thereafter attempted to call appellee on numerous occasions, without success (258). He made attempts to contact Mr. Harney who assured Mr. Giannetti that he would receive payment (259).

After closing title and appropriating all of the cash, appellee entered into an attorney-client relationship with Oceanside's principal, Fred Harney, representing Mr. Harney in a variety of matters and introducing him to various investors (112). Appellee lived within 50 yards of the Oceanside property and visited Mr. Harney on a frequent and regular basis (137, 172, 387).

On or about December 15, 1986, appellee, at the behest of Fred Harney, prepared a satisfaction of the $170,000.00 subordinate mortgage, witnessed the execution thereof and notarized the instrument (see paragraphs 31 and 32 of the bar's complaint admitted by appellee in paragraphs 31 and 32 of his answer; see also the satisfaction of mortgage received as the bar's Exhibit 20 in evidence). The satisfaction of mortgage was recorded on December 21, 1986. Although purporting to bear the signatures of Mr. and Mrs. Giannetti, the satisfaction was executed through forgeries (127, 128). Appellee never informed his client, partner and cestui que trust of the recording of such satisfaction. Mr. Giannetti did not learn the truth regarding the fact that the $170,000.00 mortgage had been satisfied of record until after retaining counsel to investigate the transaction (260).

The bar charged appellee with several violations emanating from this transaction. Firstly, it alleged that appellee had committed a crime violating Section 117.09(1), Fla. Stat. which made it a second degree misdemeanor for any notary public to notarize an instrument without proof of the identity of the individual executing such instrument or notarizing such instrument outside the presence of the individual executing such instrument. In addition, the bar alleged that the forgeries were either performed by appellee or by a party or parties with appellee's knowledge, permission and consent (see Counts III and IV of the bar's complaint). Appellee admitted witnessing and notarizing the satisfaction without it being executed (see paragraph 37 of the bar's complaint admitted to the extent hereinabove recited by appellee in paragraph 33 of his answer). He denied either forging the instrument or participating to any degree in the forgeries.

The referee, addressing Counts III and IV of the bar's complaint found that there was "clear and convincing evidence that the respondent, displaying gross negligence towards the best interest of his partner, his trust beneficiary and his client, made it possible for a satisfaction of the $170,000.00 mortgage (bar's Exhibit 20 in evidence) payable to the Giannettis to be purportedly executed by forgeries and to be recorded in the Public Records of Palm Beach County causing his client to lose the face amount of such mortgage plus interest...." (See April 23, 1988 referee's report, page 6). The referee, reciting additional findings regarding such transaction, recommended that appellee be found guilty of each and every violation charged by the bar in Counts III and IV of its complaint (See referee's April 23, 1988 report, page 7).

It was not until Mr. Giannetti retained counsel that he learned that the $170,000.00 mortgage had been satisfied of record and that appellee had appropriated all of the cash to himself (260, 265). The disclosure led to two (2) litigations.

In the first, suit was instituted on behalf of Mr. and Mrs. Giannetti against appellee, the purchasing entity, Oceanside Development Corporation and the entity's principal, Fred Harney (See the complaint filed in that action admitted as the bar's Exhibit 23 in evidence). The suit culminated in a settlement whereby judgment was entered in the Giannettis' favor against appellee in the sum of $125,000.00 (See the transcript of settlement and the judgment entered thereupon received as the bar's Exhibits numbers 21 and 22 in evidence). The suit against appellee and the settlement arrived at thereunder were carefully designed to avoid any recovery to Mr. and Mrs. Giannetti relating to the

$170,000.00 mortgage in order that the Giannettis could thereafter institute a second litigation in an attempt to establish the $170,000.00 mortgage as a first lien against the partnership premises (320; bar's Exhibits 21 and 22 in evidence). To avoid even an appearance of double recovery the settlement in the sum of $125,000.00 provided that $60,000.00 thereof would constitute a credit to appellee should the Giannettis prevail in establishing a priority of lien as aforesaid (320; see paragraph 3 of judgment forming part of bar's Exhibit 21 in evidence). Pursuant to the terms of the judgment the trial court entered a separate decree in equity cancelling the forged satisfaction of mortgage purporting to reinstate the Giannettis' $170,000.00 mortgage.

After the forged satisfaction of mortgage was recorded, Fred Harney secured a new financing package from Sunrise Savings and Loan Association of Florida which took the form of a first mortgage against the subject premises. In advancing the loan, Sunrise relied upon the recorded satisfaction of the $170,000.00 Giannetti mortgage (See opinion in Sunrise Savings Loan Association of Florida v. Giannetti, No. 4-86-1787 (Fla. 4th DCA April 6, 1988) received in evidence as bar's Exhibit 25). In an attempt to recover their fair share of the closing proceeds, the Giannettis instituted an action against Sunrise to have their $170,000.00 mortgage declared prior in lien to the subsequently recorded Sunrise mortgage. The trial court determined priority in favor of the Giannettis. The trial court's judgment was reversed on appeal upon the ground that as between the two mortgagees, the Giannettis and Sunrise, Sunrise was the more innocent victim. The court observed:

> The facts reflect that appellee Giannetti was victimized by the misconduct of a lawyer, John P. Fitzgerald, who had induced appellee into a joint venture, then had repeatedly misled him as to what was and was not happening. His misconduct included preparation of a satisfaction of mortgage, on which appellee's signature was forged. Appellant relied, to its detriment, on the forged satisfaction. (Giannetti v. Sunrise Savings and Loan Association of Florida, supra.

As part of the stipulation of settlement in the action commenced by the Giannettis against appellee, the Giannettis and their attorneys agreed not to report any of the facts and circumstances involved in the litigation to The Florida Bar or to any criminal authorities (142, 329; transcript of settlement received in evidence as bar's Exhibit 22). It was only by virtue of a directive from the trial judge in the second litigation between the Giannettis and Sunrise that the facts underlying this disciplinary proceeding were reported to The Florida Bar (330). Notwithstanding that the bar was not privy to either of the two (2) litigations, appellee asserted, by affirmative defenses in the disciplinary proceeding, laches and estoppel claiming that the stipulation of settlement arrived at between appellee and the Giannettis somehow precluded the bar from prosecuting appellee (See appellee's answer and affirmative defenses). Upon the bar's pre-trial application to dismiss such affirmative defenses the referee reserved ruling. He addressed the application in his first referee's report, stating:

> While the referee finds that none of the affirmative defenses alleges anything that constitutes a bar to the complaint, he does determine that the matter set forth in such defenses may be pleaded and be considered in mitigation of any sanction or sanctions in the event the respondent is found guilty of any charge

> or charges. The bar's motion to dismiss is denied (See referee's April 23, 1988 report, pages 3 and 4).

In totally unrelated transactions, during the course of the attorney-client relationship between appellee and Mr. Giannetti, on two occasions, at appellee's special instance, request and behest, Mr. Giannetti loaned to appellee the sums of $12,025.00 and $20,725.00 for a total of $32,750.00 (See paragraphs 43 and 44 of the bar's complaint admitted to by appellee in paragraphs 43 and 44 of his answer). In requesting and receiving the two loans, appellee prepared no documentation of either such loan, did not secure the same and thereafter failed to repay any part of the loans until after Mr. Giannetti commenced the litigation against appellee hereinabove referred to (106-109). The foregoing facts form the predicate for Count V of the bar's complaint and constituted, in the bar's view, violations by appellee of Disciplinary Rules 1-102(A)(6) and 7-101(A)(3) of the Code of Professional Responsibility which provide, respectively, that an attorney shall not engage in any conduct adversely reflecting on his fitness to practice law and shall not, during the course of the professional relationship, prejudice or damage his client. In his April 23, 1988 report, the referee stated:

> The referee finds the evidence insufficient to support the charges set forth in Count V of the complaint and the respondent is not guilty thereof (See April 23, 1988 referee's report at page 7).

In his supplemental report rendered after a hearing on discipline, the referee recommended that respondent be suspended for three (3) years

but that such suspension be reduced to one (1) year provided that appellee pay the judgment secured against him by Mr. Giannetti, in full, within the first year of the suspension. The referee further recommended that in the event that the full amount of such judgment was not paid by appellee within the first year of the suspension that the suspension thereafter be terminated upon payment of such judgment at any time during the last two (2) years of such suspension (See the May 23, 1988 supplemental report of referee).

The Board of Governors of The Florida Bar has directed that the bar seek review of the referee's reports, seeking reversal of the referee's recommendation that appellee be found not guilty of the violations charged in Count V of the bar's complaint and that a disbarment be ordered in place of the contingent type suspension recommended by the referee.

## SUMMARY OF ARGUMENT

When an attorney abuses the special fiduciary position created by the attorney-client relationship to bolster his own and other interests at the expense of his client, he should be disbarred. There simply is no more fundamental breach of an attorney's ethical responsibilities than to victimize his client.

Thus, the fraud committed by appellee when he sold the partnership asset without disclosure to his client and then misappropriated all cash from the closing to his own use or to benefit others at his client's expense, constitutes, in its own right, cause for disbarment. Appellee's participation in or gross neglect in permitting the forgery scheme, together with appellee's borrowings from his client without provisions for security or other protections, are factors, which in the bar's view, should form the predicate for the court to consider an enhanced disbarment.

The fact that appellee extracted from his client an agreement not to reveal appellee's misconduct to criminal or bar authorities should play no part in the determination of an appropriate discipline. Such agreements, it is respectfully submitted, are contrary to public policy and should be declared nullities. The fact that appellee's acts of fraud and misappropriation occurred in a business transaction milieu should not be considered as mitigating. As a matter of fact, the business transaction in question created fiduciary relationships in addition to that of attorney and client. Appellee assumed responsibilities as a trustee and a partner, both of which positions entail special fiduciary obligations.

Absent expert testimony establishing some causation between alcohol consumption and appellee's acts of misconduct, the evidence offered by appellee regarding the nature and scope of his personal drinking habits should play no part in mitigation.

## ARGUMENT

### I. APPELLEE'S ACTS OF FRAUD AND MISAPPROPRIATION UPON THE UNDISCLOSED SALE AND CLOSING OF THE PARTNERSHIP ASSET, WARRANT DISBARMENT.

On May 1, 1981, while attorney for Silvio Giannetti, while a 50/50 partner of Silvio Giannetti, while a land trustee acting on behalf of Silvio Giannetti and while attorney for the partnership between himself and Silvio Giannetti, appellee, without disclosure to or consent from Mr. Giannetti, mortgaged the partnership asset and appropriated to his own use and purposes the $100,000.00 proceeds realized upon such transaction (See April 23, 1988 referee's report, page 4). It is respectfully submitted that the $100,000.00 received by appellee constituted a partnership asset and as such constituted trust funds which had to be applied to one purpose and one purpose only, viz., distribution to the 50/50 partners in equal amount. It is further respectfully submitted that appellee's appropriation of such funds constituted a fraud upon and a theft to the extent of $50,000.00 from his partner.

On September 15, 1981, occupying the same fiduciary relationships, appellee, without disclosure to or consent from Mr. Giannetti, closed title to the partnership asset realizing $109,000.00 in net cash proceeds from the sale. He appropriated $91,800.00 to his own use and purposes and loaned $17,200.00 to acquaintances (See April 23, 1988 referee's report, page 5; bar's Exhibit 12 in evidence 99-100). As above, it is respectfully submitted that the $109,000.00 in net cash proceeds came into appellee's hands for the sole and exclusive purpose

of being distributed to the partners on a 50/50 basis. Appellee's appropriation of the entire amount to his own purposes and for loans to his acquaintances constituted a theft from his partner to the extent of $54,500.00.

The evidence is overwhelming that appellee went to extreme lengths to insure that the sale would be consummated regardless of how the closing was effected. Even after he entered into a written contract providing specific payment terms, including an express agreement to accept a second mortgage in the sum of $120,000.00 subordinated to the $100,000.00 mortgage he had previously given, appellee, to insure that the closing would go forward, at the behest of the purchaser (77), increased the second mortgage to $170,000.00 and increased the burden of subordination from $100,000.00 to $270,000.00. It obviously was of no consequence to appellee what "paper" was involved as all such paper was allocated to Mr. Giannetti.

In disbarring Merrell G. Vannier, the court observed:

> If there is a more cardinal violation of the Code of Professional Ethics then undertaking the representation of a client and using that fiduciary position to promote the interests of an opposing party, Vannier has not pointed it out (The Florida Bar v. Vannier, 498 So.2d 899 (Fla. 1986)).

With respect, the bar suggests that there is a cardinal violation of at least equal magnitude, viz., the use of the attorney client fiduciary position to victimize a client to promote the attorney's greed. In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979) this court recognized that theft of client funds is one of the most serious offenses an attorney can commit and that disbarment should be imposed for such

misconduct. The court has enforced its warning, most recently, in The Florida Bar v. Roman, No. 69,358 (Fla. June 2, 1988) where the respondent was disbarred for various offenses occurring in 1979 and 1980. The court agreed with the bar that disbarment was warranted regardless of mitigating factors found by the referee; that theft, alone, merits disbarment. Rule 4.11 of Florida's Standards for Imposing Lawyer Sanctions, in complete accord with Breed and Roman, supra, provides:

> Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

Rule 5.11 of the Standards provides that disbarment is appropriate when "a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law." It is respectfully submitted that appellee's theft, his concealment of the $100,000.00 mortgage loan he received, his concealment of the title closing, misappropriation of all cash thereat and unauthorized loans to friends of appellee constitutes the intentional conduct as contemplated by Rule 5.11.

Rule 7.1 provides for disbarment "when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public or the legal system." Certainly appellee's misappropriation constitutes a violation of a duty owed as a professional. Equally certain is the fact

that such theft was intended to obtain a benefit for appellee. The prejudice to Mr. Giannetti was extreme. Not only was he deprived of his rightful share of the partnership asset but was subjected to protracted and laborious litigations. The bar suggests that any theft by any attorney, under any circumstances, causes serious injury to the public and the legal system. Nothing shakes public confidence more than the betrayal by an attorney of his special position of trust and confidence.

## II. WHILE APPELLEE'S EMBEZZLEMENT, ALONE, WARRANTS HIS DISBARMENT, THE ADDITIONAL MISCONDUCT ENGAGED IN BY HIM MERITS AN ENHANCED DISBARMENT.

Appellee's misconduct did not terminate with his embezzlement of partnership funds. Having created subordinate mortgage obligations running to the Giannettis, appellee acted in such a manner as to cause the only mortgage with any viability* to be discharged by the recording of a forged satisfaction. At the mortgagor's behest, appellee, without the knowledge of or consent by the Giannettis, prepared the satisfaction of mortgage. He admitted that he witnessed the instrument and notarized it. The only facts at issue concerned whether or not appellee participated in the forgeries. The referee determined that appellee was guilty of gross negligence in creating the circumstances permitting such forgeries to occur resulting in the recording of the satisfaction and the loss thereby occasioned by the Giannettis of the face amount of the mortgage plus interest (See April 23, 1988 referee's report, pages 6 and 7). By his own admissions, appellee violated Section 117.09(1), Fla. Stat. (1981) making it a misdemeanor for any notary to notarize an instrument outside the presence of the signatories.

Appellee readily admitted to borrowing $32,730.00 from Mr. Giannetti during the same period of time that the fraud and embezzlement were taking place. He further readily admitted that he did not render any advice to Mr. Giannetti regarding collateral for the loans, did not

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* The Ensinger and Morris third mortgages given by appellee's friends were worthless (100-102).

recall recommending that Mr. Giannetti be represented by independent counsel in connection with making either or both such loans and that it was only after litigation was instituted against him that repayment of such loans was incorporated in the settlement of the litigation between the Giannettis and appellee (109, 110).

It is respectfully submitted that such conduct by appellee was violative of his duties to his client and constituted exactly the type of misconduct for which a public reprimand was ordered in The Florida Bar v. Tunsil, No. 70,375 (Fla. September 24, 1987). Under the circumstances, the referee's recommendation that respondent be acquitted of any charges of misconduct in connection with such loans should be reversed.

Having stolen all cash from the closing and given his client/partner's funds to friends against worthless obligations, appellee demonstrated an attitude and course of conduct wholly inconsistent with approved professional standards. Having then created the means by which his client/partner's mortgage was rendered worthless and having, in addition, while all of the foregoing was concealed from his client, borrowed moneys in substantial amount without advice, documentation, collateral, or referral to independent counsel, appellee demonstrated such callous disregard and unscrupulous behavior as to merit an enhanced disbarment. This court has repeatedly held that a series of acts of misconduct which in aggregate constitute a serious breach of ethics warrant sterner sanctions. The Florida Bar v. Abrams, 402 So.2d 115 (Fla. 1981); The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

## III. AGGREGATING FACTORS WARRANT APPELLEE'S ENHANCED DISBARMENT.

As previously urged, the theft by appellee, alone, merits his disbarment. In The Florida Bar v. Roman, supra, the court determined that theft warrants disbarment even in the absence of client injury.

In this case, aggravating considerations exist which merit an enhanced disbarment. Rule 9.22, Florida's Standards for Imposing Lawyer Sanctions, define factors which may be considered in aggravation. Appellee's actions embrace eight (8) of the ten (10) factors enunciated. The factors will be dealt with in the order presented in the Standards.

(a) Prior disciplinary offense. Appellee's misconduct is not his only brush with the disciplinary process nor with conduct involving misrepresentation. In The Florida Bar v. Fitzgerald, 491 So.2d 549 (Fla. 1986), appellee was ordered to be publicly reprimanded for violating Disciplinary Rules 1-102(A)(4) and 7-102(A)(5) for knowingly misrepresenting the status of title to an individual who purchased a condominium unit from appellee's client.

(b) Dishonest or selfish motive. It cannot be disputed that in failing to inform his client, partner and trust beneficiary of the sale of the partnership property, concealing the appropriation of $100,000.00 from an undisclosed mortgage transaction and concealing the appropriation and distribution to third parties of $109,000.00 upon the title closing, appellee acted with most selfish and most dishonest motives.

(c) Pattern of misconduct. The scheme in defrauding his client in misappropriating the partnership funds entrusted to him establishes a

pattern of misconduct in its own right. The facts surrounding appellee's actions in rendering his client, partner and trust beneficiary's security worthless and his borrowings in conflict with his client establish a broader and sustained pattern of misconduct.

(d) Multiple offenses. The scope, number and extent of the many offenses for which the referee has recommended that appellee be found guilty establishes this aggravating factor.

(e) Refusal to acknowledge wrongful nature of conduct. Appellee has remained steadfast in his position that, save for notarizing a deed outside the presence of the signatories thereto, he engaged in no misconduct. A repetition of the numerous acts of fraud and misappropriation would constitute surplusage. Perhaps one of the most telling indicators of appellee's absolute disregard for his client's welfare is an action appellee took several years after discovery of the fraud and misappropriation during the course of the second protracted litigation spawned by appellee's misdeeds. During the course of the second litigation where Mr. Giannetti sought to attain a priority over Sunrise, it came to appellee's attention that the purchasing entity to whom he had deeded the partnership property in 1981, Oceanside Development Corporation, was a defunct corporation. It was suggested to appellee that as a result of the defunct status of such entity, the mortgages it had given were worthless. Upon learning such information, appellee chose not to attempt to benefit his client, partner and trust beneficiary but, instead, chose to execute a deed of the partnership premises to third parties (155-159; bar's Exhibit 25 in evidence).

(f) Vulnerability of victim. In the bar's view, lawyers should be

regarded by the world as individuals occupying special positions of trust who subscribe to a unique code of ethics. If the bar's view is correct, then all clients, regardless of their background and sophistication, are particularly vulnerable to the attorney who defrauds and engages in other intentional misconduct. Here the evidence demonstrates that Mr. Giannetti established an attorney client relationship with appellee which extended over a number of years. Unless it can be said that due to the wealth he had amassed, Mr. Giannetti thereby had a special obligation to expect to be victimized, his vulnerability was at least the same as that of any client.

(g) Substantial experience in the practice of law. At the time of his misdeeds, appellee had been practicing for approximately five to six years both as an associate and a partner in a firm.

(h) Indifference to making restitution. It was only after Mr. Giannetti retained counsel, commenced a litigation and then presented his case in chief in the civil action that appellee determined to effect a settlement. As of the date of the final hearing in this matter appellee still had not made all payments provided for by the settlement.

Finally, in what the bar views as an aggravating factor, after defrauding his client, partner and trust beneficiary, misappropriating partnership funds and borrowing monies from his client without any protections to his client and then defaulting in the repaying of such loans and after forcing his client to institute a civil proceeding to recoup any of the losses created by appellee's misbehavior, appellee insisted upon a stipulation whereby his client agreed to refrain from reporting any of the actions leading to his victimization to The Florida Bar as a quid quo pro for receiving partial restitution.

## IV. THE MITIGATING FACTORS RECITED BY THE REFEREE ARE INSUFFICIENT TO JUSTIFY HIS RECOMMENDED SANCTION.

In his first report, the referee succinctly identified the essence of this disciplinary proceeding. He observed:

> There was a partnership, trust and attorney-client relationship existing between the respondent and Giannetti at all material times in question. If one tried, it would be almost impossible to select three other relationships that require the exercise of a greater degree of trust, diligence and due care than is required between partners, between trustee and beneficiary, and between attorney and client, as was the case here (See referee's April 23, 1988 report, page 4).

In his supplemental report, however, the referee apparently deemed the additional relationships of partner and trustee assumed by appellee to be somehow mitigating. He stated:

> If there had been only an attorney and client relationship between the respondent and Giannetti, the evidence would require the referee to recommend the disbarment of the respondent in the referee's opinion. However, in addition to an attorney and client relationship, the two were in a business venture, as partners, which Giannetti voluntarily entered into, and the fact that the business relationship existed between the two must be given due consideration in the referee's opinion (See referee's May 23, 1988 report, page 2).

The bar cannot reconcile the two, seemingly contradictory, conclusions arrived at by the referee. Each of the positions assumed by appellee created a separate and distinct fiduciary responsibility. This court has recognized that misappropriation occurring outside an attorney-client milieu but within a fiduciary relationship is extremely

serious and has equated the two. In ordering a disbarment in The Florida Bar v. Bussey, No. 64,215 (Fla. August 18, 1988) the court stated:

> It is precisely this sort of conduct that tarnishes the reputation of attorneys in Florida. The respondent and his associates, by taking advantage of their positions of trust, have engaged in the type of conduct which damages the reputations of attorneys throughout the state. It is of no consequence that the respondent's conduct was not directly related to the practice of law. His conduct nevertheless reflects adversely on the practice of law and does irreparable harm to the public image of attorney's in this state. Indeed the public has been most vocal about the need for protection from dishonest lawyers. It is therefore without hesitation that we provide that protection.

The referee made reference to the fact that appellee had abandoned a swinging, heavy drinking lifestyle. While it is true that appellee had testified that he had been a heavy social drinker at the time of his misconduct, there was no evidence offered that his drinking had anything to do with his intent to defraud his client and indulge in misappropriation. His lifestyle was, presumably, the result of his free choice. The respondent in Roman, supra, established an actual acute anxiety syndrome stemming from severe domestic strife requiring strong medication and psychotherapy. The court did not find such evidence to overcome the mandate that theft requires disbarment.

The fact that the misconduct occurred several years ago should not constitute a mitigating factor. Firstly, with the stipulation of silence entered into, the bar had no way of learning of the existence of appellee's misdeeds until the circuit court judge involved in the Sunrise litigation specifically directed that the facts be brought to

the bar's attention. The bar proceeded immediately with all aspects of the disciplinary process upon learning the facts. In Vannier, supra, the court regarded it as absolutely unpersuasive that the events complained of occurred almost 10 years prior to its decision. There, the respondent was able to establish that he had no prior discipline and that his current character was honorable. In the case at bar, appellee has already been convicted of two very serious violations, both involving intent, viz., violations of Disciplinary Rules 1-102(A)(4) and 7-102(A)(5) which, respectively, prohibit conduct involving dishonesty, fraud, deceit or misrepresentation and proscribe the knowing misstatement of law or fact.

## CONCLUSION

Appellee should be disbarred. He defrauded and stole from a client. He created a circumstance which led to the extinguishment of a valuable property right in his client. He borrowed money from his client without affording any protections to him. He loaned his client's money to third parties against worthless paper without disclosure to or consent from his client. Such conduct individually and cumulatively establishes a basis for disbarment.

All of which is respectfully submitted.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief of The Florida Bar was furnished to Terence J. Watterson, Esquire, 11380 Prosperity Farms Road, Suite 112, Palm Beach Gardens, FL 33410 by regular mail on this 7th day of September, 1988.

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