IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CHARLES W. STONE,

Respondent.
_____/

Case No. 71,698
[TFB No. 87-27,700(19)]

COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be know as the Bar.

The amended Report of Referee dated July 13, 1988, shall be known as R.

The transcript of the final evidentiary hearing held on May 25, 1988, shall be known as T.

C.C. Auto Salvage, Inc., shall be know as C.C. Salvage.

STATEMENT OF THE CASE

Following a complaint to The Florida Bar in February, 1987, by Ernest B. Chick, Jr., and his wife, an investigation was undertaken. Probable cause was found on October 14, 1987. The formal complaint was filed on January 6, 1988.

The Respondent filed a motion to abate the disciplinary proceedings pending the final disposition of a related malpractice case brought by Mr. Chick. This court denied the respondent's motion by order dated February 1, 1988. Thereafter an evidentiary hearing or trial was held on May 25, 1988, in St. Lucie County, Florida, in accordance with the rules regarding venue. The referee filed his first report on June 14, 1988, recommending findings of guilt and setting a hearing on discipline. The respondent filed a petition for review of report of referee on June 17, 1988.

A separate hearing regarding recommended disciplinary measures was held on July 6, 1988, in Orange County, Florida. Thereafter the referee filed an amended report on July 13, 1988. The referee recommended the respondent be found guilty as to both counts and be suspended from the practice of law for a period of six months and thereafter until he proves his rehabilitation as provided by Rule 3-5.1(e) of the Rules of Discipline of the Rules

Regulating The Florida Bar. On August 15, 1988, the respondent filed an objection to amended referee report as well as a motion to disqualify the referee. The Bar filed it's response to the respondent's motion to disqualify the referee on August 23, 1988. On August 23, 1988, the respondent filed a request for oral argument, another petition for review of the amended report of referee and his brief. The court denied the motion to disqualify on August 29, 1988.

STATEMENT OF THE FACTS

The Florida Bar submits the following statement of facts based on the referee's finding in his amended report dated July 14, 1988.

On September 14, 1983, Christopher R. Lange entered into a lease with Carl and Mary Jo Ashton whereby he would lease certain property in St. Lucie County, Florida, to be used as an automobile salvage yard. On June 23, 1984, Mr. Lange entered into Articles of Incorporation for C.C. Salvage, Inc., whereby he would hold five of a total of fourteen shares of the stock. The remaining nine shares were held by Herman B. Chadwick, as trustee, Harmon D. Chadwick, and Claude C. Chadwick. Paragraph two of the referee's report erroneously lists the number as 5 which was pointed out to the referee. Harmon Chadwick kept the salvage license in his own name while Mr. Lange kept the lease in his name.

In June, 1985, Ernest B. Chick, Jr., entered into an agreement with Herman Chadwick to buy the nine shares of corporate stock owned by the Chadwicks. There was apparently some discussion to the effect that Mr. Chick would also ultimately purchase the five shares owned by Mr. Lange. Mr. Chick and Herman Chadwick went to the respondent to have him do the necessary paperwork for the purchase. The respondent

prepared a document entitled "Articles of Agreement" whereby C.C. Salvage, Inc., agreed to convey nine shares of stock to Mr. Chick. However, the corporation did not own the stock.

After Mr. Chick purchased the Chadwick shares, Mr. Lange refused to sell his stock. Thereafter, Mr. Lange brought a civil action to evict Mr. Chick and the corporation from the property on which he held the lease. Despite his prior role which the referee found was "extensive and contradictory," the respondent undertook to represent Mr. Chick. The eviction action was ultimately successful.

In October, 1985, prior to Mr. Chick being evicted, the respondent arranged a loan on behalf of an old friend and client, R.C. Lockhart, to C.C. Salvage in the amount of $4,000. The check was signed by Mr. Lockhart, but contained a notation on its face admittedly made by the respondent, requiring that $4,800 be repaid within ninety days. Such terms yielded an effective interest rate of 80%.

SUMMARY OF THE ARGUMENT

Although it is the duty of The Supreme Court of Florida to review a referee's findings of facts and conclusions, it is well settled that this court will not overturn the referee's findings unless it is shown that they are clearly erroneous or without support in the record. The respondent has failed to make such a showing.

The referee's findings of fact are fully supported by the clear and convincing weight of the evidence produced at the May 25, 1988, evidentiary hearing. He took all appropriate matters into consideration and properly concluded from the overwhelming weight of the evidence that the respondent engaged in dual representation of clients with conflicting interests in regard to the sale of C.C. Salvage, Inc. to Mr. Chick and later attempted to defend Mr. Chick in the civil action for eviction. The respondent also negotiated a loan that was clearly criminally usurious. Even had the referee chosen to believe Harmon Chadwick's testimony that the notation on the face of Mr. Lockhart's check that the $4,800 to be repaid in ninety days included $400 or $500 Harmon Chadwick owed Mr. Lockhart, the interest rate on the loan would still be usurious.

Furthermore, the second hearing held on July 13, 1988, was a disciplinary hearing at which no evidence was introduced other

than the respondent's prior reprimand and discipline case law. The only subject addressed was the appropriate level of discipline the referee ought to recommend if he determined the respondent was guilty. No court reporter was present as one is not normally required at discipline hearings as opposed to evidentiary hearings.

The evidentiary hearing or trial on May 25, 1988, was held in St. Lucie County, Florida, in accordance with the rules regarding venue. The discipline hearing on July 6, 1988, was held in Orange County, Florida. The Bar submits that holding the discipline hearing in Orange County rather than St. Lucie County did not violate Rule 3-7.5(c) as the trial or evidentiary portion was completed on May 25, 1988. Respondent and his counsel were made aware of the date and location of the hearing well in advance and failed to object to the location until respondent's counsel raised the issue in his Objection to Amended Referee Report filed August 15, 1988.

In addition, the respondent's counsel apparently does not fully understand the nature of the proceedings with regard to the costs set forth by the referee in his amended report. The referee's recommendation as to the handling of any future costs is not to arbitrarily punish the respondent to an excessive

degree. Rather, if this court grants oral argument in this case, further costs can be anticipated.

Finally, the Bar submits that a six month period of suspension is the appropriate level of discipline in this case given the respondent's disciplinary history and the nature of his misconduct. Had he merely engaged in an isolated instance of representing parties with conflicting interests, perhaps a public reprimand or short term suspension with automatic reinstatement would be appropriate. However, the respondent not only represented both Mr. Chick and the Chadwicks in the sale of C.C. Salvage, but he went on to represent Mr. Chick in an eviction proceeding brought by Mr. Lange, a shareholder in C.C. Salvage. He also either arranged for or participated in a loan for Mr. Chick from Mr. Lockhart in which a criminally usurious rate of interest was charged. The Bar submits that such misconduct warrants stern disciplinary measures.

ARGUMENT

POINT I

THE RESPONDENT'S ATTACK ON THE REFEREE'S FINDINGS OF FACT IS NOT WELL FOUNDED WHERE THE REFEREE'S FINDINGS ARE NOT CLEARLY ERRONEOUS AND THEY ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The evidentiary standard in attorney discipline cases has long been a clear and convincing one. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). Rule 3-7.6(c)(5), Rules of Discipline, specifically states that "[u]pon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful, or unjustified." Further, it is well settled that a referee's findings of fact and recommendations will be upheld unless they are clearly erroneous or without support in the evidence. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). Former Integration Rule, Article XI, Rule 11.06(9)(a)(1) and new rule 3-7.5(k)(1)(1) of the Rules of Discipline clearly state that a referee's findings shall have the same presumption of correctness as the judgment of the trier of fact in civil proceedings. In The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978), the court addressed its role in reviewing a referee's report and findings of fact where conflicting testimony had been presented at the evidentiary hearing. The court upheld the referee's findings of fact, noting that such a determination was the referee's

responsibility and would not be overturned unless it was clearly erroneous or without supporting evidence:

> It is our responsibility to review the determination of guilt made by the Referees upon the facts of record, and if the charges be true, to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). We have carefully reviewed the evidence and find that the reports of both Referees are supported by competent and substantial evidence which clearly and convincingly show that Hirsch has violated the Code of Professional Conduct in the respects charged. At page 857.

In The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980) the court held similarly where there was conflicting evidence and the respondent challenged the referee's findings of fact as not being supported by clear and convincing evidence. The court stated:

> Our responsibility in a disciplinary proceeding is to review the referee's report and, if his recommendation of guilt is supported by the record, to impose an appropriate penalty. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). The referee, as our fact finder, properly resolves conflicts in the evidence. See The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966). We have reviewed the record and the report of the referee, and we find that the referee's finding of fact and recommendations of guilt are supported by clear and convincing evidence. At page 642.

The court's role in these cases was more recently enunciated in The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). The

court reiterated its position that a referee's findings of fact are presumed to be correct and will be upheld unless it can be shown they are clearly erroneous or lacking in evidentiary support. Because there was conflicting testimony, the court went on to state:

> The evidence presented before the referee boils down to a credibility contest between Stalnaker and Jones. The referee listened to and observed both of them, and, as our fact finder, resolved the conflicts in the evidence. See The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). Our review of the record discloses support for the referee's findings, and, therefore, we will not disturb them. At page 816.

Rose, supra, noted that the referee is in the best position to consider and weigh the conflicting evidence. As a finder of fact, the referee is changed with weighing the credibility of witnesses when there is conflicting testimony or evidence. This is the task of a judge or referee in any contested matter. The Bar submits the referee appropriately weighed the credibility of the witnesses in this case.

The respondent basically does not contest the referee's findings of fact with regard to Count I. The main thrust of his argument appears to be that he did not intend to harm either party. Good intentions, however, do not excuse such misconduct. The Florida Bar v. Moore, 194 So.2d 264, 269 (Fla. 1966). The respondent placed himself in a position wherein he may have been

tempted to reconcile the conflicting interests rather than fully protect the interests of his client.

In his report, the referee found that the respondent's actions indicated he was either "woefully unprepared for the service he rendered to whoever his client was in the transaction or that he was clearly incompetent." (R p.3) The respondent drew up the Articles of Agreement by which the Chadwick stock was transferred to Mr. Chick. However, the Articles of Agreement were between Mr. Chick and C.C. Salvage which was not a party to the transaction. (R p.4)

At the evidentiary hearing on May 25, 1988, respondent's counsel stipulated that the writing on the October 1985 check from Mr. Lockhart to C.C. Salvage was that of the respondent. (T p.18) A staff investigator with The Florida Bar interviewed Mr. Lockhart regarding this particular check and testified at the evidentiary hearing as to what he had learned. (T p. 73) Mr. Lockhart had advised that he did not understand what the notation on the front of the check meant. (T pp. 73-74) The money was paid back through the respondent and Mr. Lockhart was not even certain if this particular loan had been repaid or not. (T pp. 74-75) The amount of interest charged on the loan was left up to the respondent (T p. 75).

Mr. Chick testified the respondent advised him that if he wanted the loan he would have to accept the terms as offered. (T pp. 19-20) Mr. Chick understood that he would borrow $4,000 with $5,000 repayable within 90 days. However, the notation on the check indicated $4,800 was to be repaid. (T pp. 17-18) The respondent testified that no interest was to be charged on the loan if timely paid unless Mr. Chick went out of business or sold the company. (T p. 101) He further testified that this sum included a previous outstanding loan from Mr. Lockhart to Harmon Chadwick of approximately $400 to $500. (T p. 97) Mr. Chadwick testified that he also believed this to be the case as Mr. Chick had agreed to pay off some of Mr. Chadwick's loans. (T pp. 116-117)

The Bar submits that the argument that the loan was not usurious as it included the repayment of Harmon Chadwick's outstanding loan lacks merit. Even if the amount to be repaid were taken to include the $400 or $500 Mr. Chadwick owed, the interest rate would still be usurious. The annual percentage rate on a $4,000 loan with $4,400 repayable at the end of ninety days is approximately 40% and for a $4,000 loan with $4,300 repayable at the end of ninety days is approximately 30%. Under Section 687.071(2), Fla. Stat. (1985), a person who knowingly makes a loan wherein the interest rate exceeds 25% per annum but is less than 45% per annum is guilty of a second degree misdemeanor. A person who knowingly makes a loan wherein the

interest rate exceeds 45% per annum is guilty of a third degree felony. Section 687.071(3), Fla. Stat. (1985). Further, plain usury applies to most loans where the interest rate exceeds 18% per annum. Sections 687.02 and 687.03, Fla. Stat. (1987).

Intent is an important element in proving a loan transaction is usurious. In Dixon v. Sharpe, 276 So.2d 817 (Fla. 1973), the court found that intent may be satisfactorily proved if the lender knowingly or willfully charged or received an excessive rate of interest. Even where a lender claimed he did not realize the rate of interest charged was usurious it was not regarded as a sufficient defense. Instead, the court must look to the circumstances surrounding the loan transaction. A mere mathematical computation is not sufficient to prove usury. However, the lender's actions are a good indication of his intent.

The referee, after weighing all the evidence, found the respondent knew he was charging a usurious rate of interest on the loan to Mr. Chick. In fact, the respondent did not plead that he was unaware of the usury laws. The respondent wrote the terms of the loan on the face of the check and no mention of a second loan to Mr. Chadwick was made. Even if Mr. Chadwick's outstanding loan was included, the interest rate charged on Mr. Chick's loan would still exceed the limit allowed by law.

The respondent also again objects to the fact that no court reporter was present at the July 6, 1988, hearing. The Bar reiterates its position as set forth in it's response to the respondent's motion to disqualify referee dated August 23, 1988. The respondent's counsel appears to be confusing the nature of this second hearing. It was a disciplinary hearing at which no evidence on the factual issues of the case resulting in the recommendations of guilt was taken. Respondent's counsel even referred to the July 6, 1988, hearing as a "sentencing hearing" in his letter dated June 28, 1988. (See Appendix) Normally, no court reporter is required for such a hearing. Rule 3-7.5(l)(1). Furthermore, venue was no longer an issue as the trial phase was completed. Neither the respondent nor his counsel objected to the July 6, 1988, hearing being held in Orlando.

The Bar submits that the referee's findings of fact are clearly and manifestly supported by the clear and convincing weight of the evidence which is the standard in Bar disciplinary proceedings. Respondent's arguments are without merit and the referee's findings of fact should be upheld by this court as to both counts.

ARGUMENT

POINT II

A SIX MONTH PERIOD OF SUSPENSION IS THE APPROPRIATE LEVEL OF DISCIPLINE IN THIS CASE GIVEN THE REFEREE'S FINDINGS.

Respondent argues that a six month suspension is too severe a discipline, especially in light of his advanced age and long membership in the Bar. The Bar submits that given the nature of the misconduct and the respondent's prior disciplinary history, at least a six month suspension is appropriate.

The respondent has actively practiced law in the State of Florida for some thirty-five years. He is not an inexperienced young attorney but an experienced veteran who should have known better than, in effect, to represent both the buyer and seller in the C.C. Salvage transaction and arrange for a loan with such a clearly usurious rate. In 1981 he received a private reprimand. (R p. 5) It is well established that the court considers the respondent's disciplinary history and deals more seriously with cumulative misconduct. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982).

Had the respondent only been engaged in a conflict of interest situation where there was no fraud, dishonesty, deceit or misrepresentation, a lesser discipline would be warranted. See The Florida Bar v. Madsen, 400 So.2d 947 (Fla. 1981).

However, engaging in criminal usury is a far more serious breach of ethics. In The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985), Justice Ehrlich pointed out in his dissent that it is the degree of departure from the ethical canons and not the degree of loss a client may suffer that should determine the appropriate level of discipline.

The purpose of discipline as been addressed by this court several times. The appropriate discipline in each case should be fair to society and protect it from future unethical conduct by the attorney without denying it the services of an otherwise qualified lawyer. It should also be sufficient to punish the breach of ethics and encourage reform and rehabilitation. Finally, it should serve as a deterrent to those members of the Bar who cannot or will not follow the rules. The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983).

The respondent had arranged other loans through Mr. Lockhart in the past. (T p. 74) Of course, it cannot be determined whether any of those were usurious. However, the loan arranged for Mr. Chick clearly was in excess of the annual percentage rate of 18% allowed by law.

In The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973) the Court stated:

> Some may consider it "unfortunate" that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. In a sense, "an attorney is an attorney is an attorney", much as the military officer remains an "officer and a gentleman" at all times. We do not mean to say that lawyers are not to be deprived of business opportunities; in fact we have expressly said to the contrary on occasion; but we do point out that the requirement of remaining above suspicion, as Caesar's wife, is a fact of life for attorneys. They must be on guard and act accordingly, to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing. At page 482.

In The Florida Bar v. Pitts, 219 So.2d 427 (Fla. 1969), an attorney was suspended for six months for borrowing a substantial sum of money from a client at a usurious rate and then pleading usury as a defense to a later suit brought on the note.

Although the respondent argues he did not charge or receive customary legal fees for his work, he did receive a benefit. While C.C. Salvage was owned by the Chadwicks, he received his payment for legal work in the form of automobile parts and business referrals. (T p. 17) Therefore, arranging a loan for Mr. Chick in order to keep C.C. Salvage in business benefited the respondent in that he could continue to have access to used automobile parts.

In The Florida Bar v. Seldin, 526 So.2d 41 (Fla. 1988), an attorney received a two year suspension for representing clients

when there was a conflict in interest, for paying a finder's fee from the sale proceeds of a client's property to a sales agent when the agent played no part in the transaction and taking an acknowledgement of a client's signature outside of her presence. The attorney had, among other things, requested and obtained money from an estate he was representing which he paid over to another client who may have had a claim against the estate for an outstanding debt. This was done without the knowledge of the personal representative or prior approval of the court.

In The Florida Bar v. Brigman, 307 So.3d 161 (Fla. 1975) an attorney was suspended for a period of six months for representing both the beneficiaries of an estate and the personal representative with whom the beneficiaries had a controversy, accepting a retainer to handle a divorce and thereafter doing nothing further, failing to account for client funds upon demand, failing to communicate with his client, and entering into an involuntary dismissal of a suit without his client's knowledge or consent. He also had prior discipline.

In The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988), an attorney was suspended for a period of two years for his misuse of client funds during a period of emotional instability due in part to drug and alcohol abuse. In addition to misusing client funds, the attorney arranged for a usurious loan between two of

his clients. The referee found he was aware that the interest rate charged was 80%.

Most recently, in The Florida Bar v. Swofford, 527 So.2d 812 (Fla. 1988), an attorney was disbarred for his role in arranging two usurious loans and for making an unconscionable profit on the sale of a home purchased from a client. The attorney arranged the loans, prepared the paperwork, and advised the lender.

Finally, respondent's counsel characterizes the respondent as nearing full retirement. However, respondent's testimony did not indicate he intended to retire from the active practice of law. (T p. 98) The rules apply equally to all attorneys, regardless of age. Respondent's argument that he deserves a lighter penalty simply because he is seventy-two years old lacks merit.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, recommendations of guilt and discipline, and uphold all and suspend the respondent for a period of six months and thereafter until he shall prove his rehabilitation and tax costs against him currently totaling $2,283.89.

Respectfully submitted,

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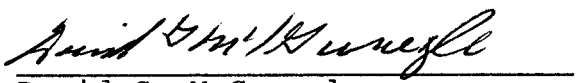
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original and seven (7) copies of the foregoing Brief and accompanying appendix by U.P.S. Next Day Air to the Clerk of the Supreme Court, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing by certified mail, return receipt requested no. P 938 917 835, to counsel for respondent, C.R. McDonald, Jr., Suite 200, First Citizens Federal Building, 1600 South Federal Highway, Fort Pierce, Florida, 32950; a copy by certified mail, return receipt requested no. P 938 917 836, to co-counsel for respondent, Jeffrey J. Colbath, Post Office Box 2069, West Palm Beach, Florida, 33402-2069; and a copy by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 15th day of September, 1988.

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