

12-8

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
v.
GORDON S. SCOTT,
Respondent.

Case No. 73,211

FILED
SD J. WHITE
NOV 13 1989
CLERK, SUPREME COURT
By _____
Deputy Clerk

INITIAL BRIEF

JOHN A. WEISS
Attorney No. 185229
P. O. Box 1167
Tallahassee, FL 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

Table of Authorities	ii
Symbols and References	iii
Statement of the Case and Facts	1
Summary of Argument	7
Argument..	9
POINT I	
THE BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT ENGAGED IN IMPROPER CONDUCT.	
POINT II	
THE REFEREE'S RECOMMENDATION THAT RESPONDENT RECEIVE A NINETY-ONE-DAY SUSPENSION IS INORDINATELY HARSH AND UNJUSTIFIED BY THE FACTS BEFORE THE COURT.	
Conclusion	32
Certificate of Service	33

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>The Florida Bar v. Beneke,</u> 464 So.2d 548 (Fla. 1985)	29
<u>The Florida Bar v. Dougherty,</u> 541 So.2d 610 (Fla. 1989)	28
<u>The Florida Bar v. Hankal,</u> 533 So.2d 293 (Fla. 1988)	29
<u>The Florida Bar In Re: Inglis,</u> 471 So.2d 38 (Fla. 1985)	20
<u>The Florida Bar v. Lehrman,</u> 485 So.2d 1276 (Fla. 1986)	30, 31
<u>The Florida Bar v. Lipman,</u> 497 So.2d 1165 (Fla. 1986)	25
<u>The Florida Bar v. Nuckolls,</u> 521 So.2d 1120 (Fla. 1988)	30
<u>The Florida Bar v. Pahules,</u> 233 So.2d 130 (Fla. 1970)	23
<u>The Florida Bar v. Rayman,</u> 238 So.2d 594 (Fla. 1970)	9, 22
<u>The Florida Bar v. Roth,</u> 500 So.2d 117 (Fla. 1986)	29
<u>The Florida Bar v. Siegel and Canter,</u> 511 So.2d 995 (Fla. 1987)	30
 <u>Other Authorities</u>	
DR 7-102(A)(7) and (8)	8, 10, 20, 30
Earhardt, <u>Florida Evidence,</u> sec. 801.1 (2nd ed., 1984)	16
Florida Standards for Imposing Lawyer Sanctions, Rules 9.32(a) and (j)	24
Florida Statutes, sec. 120.58(1)(a)	15

SYMBOLS AND REFERENCES

Appellant, GORDON B. SCOTT, shall be referred to as such or as Responaent. Appellee, THE FLORIDA BAR, shall be referred to as such or as the Bar.

References to the transcript of the final hearing on April 25, **1989** shall be designated by the symbol TR followed by the appropriate page. References to the dispositional hearing on June 23, **1989** shall be designated by TR II and the appropriate page number.

The Bar's exhibits shall be designated as Ex. followed by the appropriate number. Respondent's exhibit shall be designated R.Ex.

STATEMENT OF THE CASE AND THE FACTS

Respondent seeks review of the findings of fact and recommendations as to discipline set forth in the referee's report filed on August 25, 1989. In that report, the referee found Respondent violated numerous provisions of the Code of Professional Responsibility and recommended a ninety-one-day suspension.

Respondent, Gordon Scott, was admitted to The Florida Bar in 1968 and has been continuously employed as an Assistant Public Defender since 1977. He has an excellent reputation in both the Second and Sixth Judicial Circuits. (TR 11, 12). Respondent has no previous grievance record. (TR 101).

In the early 1970s, Respondent met Stanley Lowe and they became extremely close friends. (TR 59). At that time, Respondent was employed by Jack White, who at one time represented Stanley Lowe in the dissolution of his marriage to Janice Lowe. (TR 76). Since December, 1977, there has not even been a vicarious attorney/client relationship between Respondent and Stanley Lowe. (TR 71). On occasion during their relationship they lived together in a house owned by Respondent and later were joined by Stanley Lowe's girlfriend in May, 1980. (TR 50, 59).

Stanley Lowe was a private investigator and real estate investor. He died August 22, 1981 without a will. (TR 48). Mr. Lowe had left instructions to Respondent to take of Mr. Lowe's step-daughter's education should he pass away before he

could do so. However, a falling-out occurred between the step-daughter and Mr. Lowe months before his death and Respondent was instructed not to follow through. (TR 61).

Stanley Lowe also had two sons, Stanley Lowe, Jr. and Jeffrey Lowe, with whom he had had no contact over the last ten years. (TR 91). Mr. Lowe did not want his sons to receive anything from his estate. (TR 54).

During the three years preceding his death, Mr. Lowe transferred into Respondent's name three pieces of property. Two transfers occurred on November 3, 1978 (Ex. 1 and Ex. 2) and the third occurred on July 21, 1980 (Ex. 7).

The first piece of property (Ex. 1) conveyed to Respondent on November 3, 1978 was commercial property described on the quit-claim deed as Magnolia Park Subdivision, Block 1, Lots 2 and 3. However, the property was commonly called the "Pirate's Table" property. It was also referred to as the "Boley Manor" property because it was leased to a government agency of that name. Mr. Lowe had owned this property as a tenant in common with Janice Lowe.

The second piece of property (Ex.2) conveyed on November 3, 1978 to Respondent was residential property described in the quit-claim deed as Unit 1, Island Estates of Clearwater. Mr. Lowe had owned this property individually.

Both of the November 3, 1978 quit-claim deeds were prepared by attorney Jack F. White, Jr. and were appropriately recorded.

Respondent testified that he did not learn of the above conveyances until 1979.

The third piece of property (Ex. 7) was conveyed to Respondent by Mr. Lowe on July 21, 1980. It was also commercial property and was described on the quit-claim deed as Magnolia Park Subdivision, Block 1, Lots 14 and 15. It was part of the Pirate's Table parcel once owned as tenants in common by Mr. Lowe and Janice Lowe. It was also referred to as the "Park Street" property or as the "Anchor" property (after a commercial tenant).

Attorney Nugent M. Walsh prepared the quit-claim deed to Respondent.

Respondent was not aware until early 1979 that the Island Estates conveyance had occurred. (TR 62). He became aware of the transfer when Mr. Lowe asked Petitioner to sign a warranty deed to convey the property to a purchaser. (TR 63). The check that was issued for the sale in the amount of \$53,000 was in the name of Respondent; however, Respondent testified that he endorsed the check to Mr. Stanley Lowe and did not receive any monies from this sale. (TR 65). There is no evidence showing a deposit of this sum to any of Respondent's accounts. Respondent has always maintained that this property belonged to M. Lowe. (TR 63).

Shortly after the sale of the Island Estates property, Mr. Lowe opened up an investigative business for himself and a

beauty shop for his girlfriend, Claire Schwartz (TR 83). In July, 1980, Respondent was approached by Mr. Lowe to co-sign a loan for \$17,500. **As** guarantee, Mr. Lowe transferred the two back lots of the Pirate's Table property (Ex. 7, TR 74, 75).

After Mr. Lowe's death, Respondent informed Mrs. Lowe that she could keep the rent generated from the Pirate's Table properties provided that she maintained the insurance and taxes current. (TR 26). Seven months later, Respondent learned that the taxes and insurance on the property were not current. (TR 26). Respondent then filed a suit against Mrs. Lowe for misappropriation of funds and was awarded a judgment against Mrs. Lowe for \$15,000. (TR 29). Had Respondent not brought suit, the property might have been lost at tax sale due to Mrs. Lowe's failure to pay property taxes (TR 86, 87).

Mrs. Lowe testified at final hearing that the conveyances to Respondent were done to avoid creditors' judgments against Mr. Lowe. (TR 21). However, the only creditor presented to the referee was a \$20,000 judgment against Mr. Lowe obtained by Dr. Charles Masten in approximately 1979. (TR 34, 80). Mrs. Lowe stated that she had conversations with Mr. Scott wherein he stated that these transfers were being done to protect the property. (TR 16). Claire Schwartz, Mr. Lowe's girlfriend, testified that she overheard conversations in which Mr. Lowe discussed transferring the properties to avoid creditors. (TR 49). However, neither Janice Lowe nor Claire

Schwartz could testify that Respondent was present at these conversations. (TR 32, 49).

Respondent also testified that other properties existed that were not transferred that could have been used to satisfy any liens or judgments against Stanley Lowe. (TR 97, 98).

Finally, Mrs. Lowe testified that she saw quit-claim deeds transferring all the properties from Respondent to Stanley Lowe which she said Mr. Lowe explained were to take care of things if something happened to him. (TR 21). Those deeds were never produced. Respondent maintains that these quit-claim deeds never existed. (TR 91). Respondent emphasized, however, that had Stanley Lowe ever asked, Respondent would have immediately transferred any of these properties into Mr. Lowe's name. (TR 68).

In March of 1985, Janice Lowe contacted Stanley Lowe's two sons. (Ex. 9, pp. 6, 7). Both sons were estranged from Mr. Lowe and neither had seen him in over ten years (Ex. 9, p. 19; Ex. 10, p. 3). Mr. Albert Evener, Mr. Lowe's business partner at the time of Mr. Lowe's death, said that Mr. Lowe had once told him that the sons were not to get anything from the senior Lowe's estate. (TR 54). Janice Lowe agreed. (TR 35).

The sons proceeded to open an estate represented by Attorney Stephen G. Nilsson. From this estate several creditors were paid and Mrs. Lowe filed a \$100,000 claim

against the estate, not, however, in time to collect any monies. (TR 38).

The sons also filed suit against Respondent for the proceeds of the Pirate's Table property. (The Island Estates property had been sold before Mr. Lowe's death). As an affirmative defense, Respondent argued that had the properties been transferred to defraud creditors, Mr. Lowe's sons, because they stood in their father's shoes, could not challenge that position and would have lost in a civil suit. (TR 95).

Despite his affirmative defense, Respondent chose to settle with Stanley Lowe's sons. (TR 92). All proceeds of the sale of the Pirate's Table properties went to the sons except for \$5,000 which went to Petitioner to cover attorney's fees. (TR 94).

SUMMARY OF ARGUMENT

The Florida Bar has failed to prove up its allegations of misconduct by clear and convincing evidence.

The Referee's finding that Respondent knew that the **1978** conveyances were to defraud Mr. Lowe's creditors is supported by no testimony whatsoever. The only evidence indicating that Mr. Lowe transferred the property to avoid creditors was hearsay testimony by Lowe's ex-wife.

The evidence shows that the **1978** conveyances were not intended to defraud creditors. Mr. Lowe owned at least three other pieces of property, two of which were valuable parcels adjoining the commercial property deeded to Respondent in **1978**. If Mr. Lowe was defrauding creditors, he would have transferred all his property.

A finding of intentional misconduct by a lawyer should not be based solely on hearsay evidence. In other administrative proceedings, hearsay can only be used to corroborate other evidence.

The Referee's finding that Mr. Lowe prepared quit-claim deeds at the same time that he conveyed property to Respondent in **1978** and in **1980** is supported by no evidence. The only evidence that any such deeds existed was Mrs. Lowe's testimony. And even she could not say when they were prepared, or by whom, or whether Respondent even knew of their existence.

Because the only competent evidence before the Court on the issue of the quit-claim deeds was Respondent's denial that he ever signed any such deeds, the Referee should not have found that Respondent's testimony was untruthful.

The Referee found that Respondent violated DR 7-102(A)(7) and (8). A violation of those rules requires a finding that an attorney/client relationship existed between Respondent and Mr. Lowe. In fact, there is no evidence in the record to support such a finding. Respondent has worked in the Public Defender's Office continuously from December, 1977 to date.

Even if this Court finds that Respondent engaged in misconduct, a ninety-one-day suspension is much too harsh, Respondent has practiced law since 1968 without any prior disciplinary action. The Lowe transactions are the only blemishes on his reputation during the past twenty-three years.

Respondent's good record both before and after the Lowe conveyances belies the necessity of his having to prove rehabilitation. He has been a valued member of the Public Defender's Office without problem for twelve years. The public does not need protection from Respondent. Any suspension requiring proof of rehabilitation is simply too harsh a punishment.

ARGUMENT

I. THE BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT ENGAGED IN IMPROPER CONDUCT.

The Florida Bar has the burden in disciplinary proceedings of proving by clear and convincing evidence that misconduct occurred. The Florida Bar v. Rayman, 238 So.2d 594, 598 (Fla. 1970). In reaching that conclusion, the Rayman court stated on page 596 that:

the quantum of proof suggested by a mere "preponderance of the evidence" as is the case in ordinary civil proceedings does not seem to wholly satisfy the requirements of a proceeding such as this. (Citations omitted).

Respondent submits that the Referee's findings of improper conduct as stated in her Report of Referee were not proved by clear and convincing evidence. In fact, they are not supported by any substantial, competent evidence.

In addition to contesting the Referee's conclusions that Respondent violated the disciplinary rules listed in her report, Respondent challenges the following findings of fact set forth on the second page of the Referee's report.

1. That Respondent knew that Mr. Lowe's November 3, 1978 conveyances (Ex. 1 and 2) were for the purpose of Mr. Lowe avoiding creditors.

2. That at the time of the November 3, 1978 conveyances and the July 21, 1980 conveyance (Ex. 7), Mr. Lowe prepared

quit-claim deeds in which Respondent reconveyed the property back to Mr. Lowe.

3. That Respondent was untruthful in his denials of the existence of the quit-claim deeds.

4. Although Respondent contests all of the Referee's conclusions that Respondent violated the disciplinary rules listed in her report, Respondent specifically challenges the inherent finding that an attorney/client relationship between Respondent and Mr. Lowe. Such a finding would be required for a violation of Disciplinary Rules 7-102(A)(7) and (8).

The Florida Bar has failed to present any competent evidence regarding factors two, three, and four. The evidence supporting the Referee's findings in paragraph one is indirect, consisting entirely of hearsay and insinuation.

A. Respondent did not know that the November 3, 1978 transfers were for the purpose of Mr. Lowe's avoiding creditors.

The Florida Bar has failed to prove that Mr. Lowe transferred the "Pirate's Table" (Ex. 1) and the "Island Estates residence (Ex. 2) to Respondent in an attempt to defraud creditors. Even if this Court finds that such conveyances were an attempt to defraud creditors, there is certainly no evidence before the Court that Respondent knew that the conveyances were for improper purposes.

At the outset of any discussion regarding the November 3, 1978 conveyances, one must keep in mind that property can be properly transferred to avoid creditors. For example,

property can be transferred to a spouse in such a manner as to set up a tenancy by the entireties. In other words, not every transfer of property to avoid creditors is a fraudulent transfer.

Dr. Masten's \$20,000 judgment is the only creditor produced in these disciplinary proceedings. (TR 34). And, Dr. Masten interpleaded Respondent in collection proceedings alleging a fraudulent transfer from Mr. Lowe to Respondent. (TR 81). That proceeding was dismissed for lack of prosecution and, despite the fact that it was before a tribunal, no finding was ever made that any such transfer was improper. (TR 81).

The Bar's only evidence regarding Mr. Lowe's November 3, 1978 conveyances (the Referee did not find that the July 21, 1980 conveyance was fraudulent) came from Mr. Lowe's ex-wife, Janice Lowe. And her testimony was exclusively hearsay. She testified at final hearing about conversations that she had with Stanley Lowe ten years earlier in which he allegedly told her, point blank, that he was transferring the property because of Dr. Masten's claim (TR 15). Allegedly, Mr. Lowe said that he was trying to get out of paying that judgment (TR 16).

No other evidence was presented. Dr. Masten did not testify. The judgment was not entered into evidence. No other creditors' testimony or judgments were entered into evidence.

Mrs. Lowe also said that Respondent talked about the transfer of the property and that its purpose was to "protect" the Lowes (TR 16, 17). Mrs. Lowe acknowledged that she was having difficulty pinning down the date of any such conversations because they took place eleven years ago. (TR 17).

At final hearing, Mrs. Lowe was adamant that Respondent was present when she spoke to her ex-husband in 1978 (TR 15). However, her testimony before the Referee was contrary to the testimony that she gave to the grievance committee on July 21, 1988. There, when asked if Respondent was ever present when Mr. Lowe talked about the conveyances, Mrs. Lowe answered, "I don't really know if he ever was." (TR 32). She further acknowledged that Mr. Scott never said that he knew that Mr. Lowe was making the transfers to avoid creditors. (TR 33).

Claire Schwartz, Mr. Lowe's live-in girlfriend at the time of his death, also testified at final hearing. Her testimony regarding the conveyance of the property was very limited. She testified that she became aware of Mr. Lowe transferring the property to Respondent in conversations that she overheard in the house when she was walking around. (TR 49). She did not remember who said what and acknowledged that she never had any personal conversations with Mr. Lowe about the transfers. (TR 51).

Nobody rebutted Respondent's testimony that he first became aware of Mr. Lowe's difficulties in 1980 (TR 67).

Obviously, Stanley Lowe, Sr. could not testify as to the motives behind his transfers. However, evidence before the Referee clearly indicated that there were other properties available for creditors to levy upon should they have valid liens to execute upon. For example, the back parcel of the "Pirate's Table" property, also referred to as the "Park Street" property or the "Anchor" property, was not conveyed to Respondent until July 21, 1980 (Ex. 7), almost two years after the initial conveyances and well after Dr. Masten obtained his judgment. That property was in Mr. Lowe's name alone. (TR 83).

In addition to the "Park Street" property, Mr. Lowe owned an addition parcel on the "Pirate's Table" plot referred to as the "Porter Paint" property. That property was the most valuable piece of real estate owned by Mr. Lowe. (TR 97). Mr. Lowe also owned a second mortgage on a piece of property on the beach called "Coquina Shores" and, apparently owned the Shalimar Apartments that were located on Cleveland Street (TR 98).

If Mr. Lowe had been trying to defraud creditors in November, 1978, he would not have just conveyed the "Pirate's Table," Lots 2 and 3, parcel and the "Island Estates" parcel. He would have also conveyed his interests in the other "Pirate's Table" pieces of land (the "Park Street" and "Porter Paint" properties) and his interests in the "Coquina Shores" and Shalimar Apartments properties.

The evidence is clear and un rebutted that there were other properties available for creditors to foreclose upon when Mr. Lowe conveyed the two parcels of property to Respondent on November 3, 1978.

When the Lowe sons sued Respondent, as his lawful heirs despite their failure to communicate with him for over a decade before his death, Respondent claimed that the parcels of land that had been conveyed to him were gifts. (TR 59). He raised **as** an affirmative defense, in light of the boys' claim that the properties were deeded to avoid creditors, that if, in fact, the conveyances had been to defraud creditors, the boys stood in their father's shoes and, therefore, could not recover the property. Respondent raised this matter as an affirmative defense and did not claim that he knew the conveyances were to defraud creditors. (TR 95, 99).

Clearly, the Bar's case is built upon the extremely prejudiced testimony of Mrs. Lowe. Her testimony primarily surrounded hearsay remarks by Mr. Lowe and should not be allowed to form the basis for a finding of intentional misconduct by Respondent.

That Mrs. Lowe is prejudiced in her attitude towards Respondent is beyond question. He obtained a \$15,000 judgment against her after she almost lost the "Pirate's Table" Property to tax sale for failure to pay taxes. (TR 26). A fair reading of her testimony shows her obvious attempts to put Respondent in as bad a light as possible. Mrs. Lowe

clearly testified at final hearing that when she spoke to Mr. Lowe about the conveyances, Mr. Scott was present. (TR 15). But, as pointed out by trial counsel during cross-examination, **she** had testified one year earlier that she was not sure if Mr. Scott was present during any of those conversations (TR 32). Apparently, **Mrs.** Lowe does not always tell the truth.

Another clear example of Mrs. Lowe's hostility towards Respondent occurred while she was testifying about any discussions with Respondent about the purpose of the transfer of the "Park Street" property in July, **1980** (a transfer that the Referee did not find was fraudulent). There, when asked if she had any discussion with Respondent about the transfer, she replied, "No. Not really. I assumed that they did that to defraud me." (TR **19**). It is beyond question that Mrs. Lowe would say anything she could to put Respondent in a bad light. Obviously, she resents the \$15,000 judgment that he properly obtained against her.

Mrs. Lowe's attitude towards her ex-husband and Respondent has also been clearly influenced by her failure to obtain a \$100,000 judgment against Stanley's estate. (TR **39**)

Respondent acknowledges that hearsay testimony is admissible in disciplinary proceedings. However, he submits that, just like administrative proceedings, hearsay testimony should not be the sole factor upon which a material finding can be made. In Florida Statutes, sec. 120.58(1)(a), the use

of hearsay is limited as follows:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

The purpose of such a rule is evident and is very sound. Hearsay should not be used to be the sole support of a material finding because the declarant is not subject to cross-examination by the opposing party's counsel. There is no cross-examination available to test the declarant's "perception, memory, sincerity and accuracy." Earhardt, Florida Evidence, sec. 801.1 (2nd ed., 1984). Other reasons given by professor Earhardt for not allowing hearsay are that the statements were not made under oath, depriving the statements of the reliability that an oath affords to testimony, and that the finders of fact cannot observe the demeanor of the declarant to determine his or her credibility.

Mrs. Lowe ~~says~~ that Mr. Lowe said the conveyances were to avoid creditors. Of course, nobody verifies her statements.

Even if this Court finds that Mr. Lowe's purpose in transferring the property was improper, there is no evidence before the Court that Respondent appreciated that fact. As pointed out above, Mr. Lowe had numerous other pieces of property that were not transferred. Furthermore, Respondent testified that he did not learn of Mr. Lowe's financial difficulties until 1980. (TR 67).

8. There is no evidence supporting the Referee's finding that quit-claim deeds were prepared simultaneously with the conveyances on November 3, 1978 and July 21, 1980.

The only evidence before the Court to support the Referee's finding that quit-claim deeds were prepared by Mr. Lowe at the same time that he conveyed the property to Respondent in 1978 and in 1980 is as follows:

BY MR. GREENBERG:

Q. Do you recall when Mr. Lowe showed you the deeds that you just mentioned?

A. In June of '81. I was at his office, and I said, you know, God forbid if something happens to you.

(Objections omitted.)

Q. Now, tell us about the conversation that you had with Mr. Lowe in June 1981?

A. I said to him, God forbid if something happens to you, what about the property?

And he said, Oh, don't worry about that. And he had in his briefcase in the back credenza, he had quitclaim deeds back from Gordon to himself, and he said, if anything ever happens file these.

Q. Did you actually see the documents?

A. Yes, I did.

Q. Was Mr. Scott present when these deeds were shown to you?

A. No, he wasn't.

Q. At any time did you have any discussion with Mr. Scott as to the existence of the deeds transferring the property back from Mr. Scott to Mr. Lowe?

A. No.....(TR 20, 21).

There was no testimony when these quit-claim deeds were prepared. There was no testimony if Respondent signed them. There was no testimony about who prepared them. And, most importantly, the deeds themselves were never produced.

Where in the world are the facts upon which a referee can base her finding that quit-claim deeds were prepared simultaneously with the conveyances? The Referee had no evidence to support that finding.

The deeds conveying Mr. Lowe's property to Respondent on November 3, 1978 were prepared by attorney Jack F. White, Jr. (Ex. 1, Ex. 2). The deed conveying Mr. Lowe's property on July 21, 1980 (Ex. 7) was prepared by attorney Nugent M. Walsh. If anybody prepared the quit-claim deeds about which Mrs. Lowe spoke, Messrs. White and Walsh did. However, they were not called to testify by The Florida Bar.

Even if Mrs. Lowe was telling the truth, and such deeds existed, she did not testify that Mr. Lowe told her who prepared them. She did not testify that they bore the signature of Mr. Scott. She did not testify when they were prepared.

And even Mrs. Lowe did not testify that Gordon Scott knew about the deeds.

The existence of quit-claim deeds being simultaneously prepared when the property was conveyed to Respondent is belied by the Bar's own exhibits. The "Island Estates" property was sold on May 1, 1979 to a Mr. and Mrs. Richard

Rodseth (Ex. 4). The seller was listed as Respondent. In the contract for sale of the property, dated February 14, 1979, the seller is listed as Stanley A. Lowe, Agent for Respondent. (Ex. 3).

The seller of the "Island Estates" property was Respondent and he had to give a warranty deed to convey title (TR 63).

If Mr. Lowe was in possession of quit-claim deeds prepared simultaneously with the conveyance of the property from him to Respondent, why was he having Respondent give a warranty deed to the Rodseths six months later? If those deeds existed, Mr. Lowe would simply record the quit-claim deed for the "Island Estates" property and sell it himself.

Respondent's testimony is un rebutted that he did not know about any such quit-claim deeds (TR 91, 92). Even Mrs. Lowe, who as pointed out in the previous argument had great reason to lie, did not state that she saw any quit-claim deeds bearing Respondent's signature.

The Referee had no evidence before her to support her finding that at the time of the three conveyances relevant to this action Mr. Lowe prepared quit-claim deeds where by Respondent was to transfer the property back to Mr. Lowe.

C. Respondent was not untruthful at final hearing.

The Referee made the specific finding that Respondent "was not being entirely truthful in his testimony" regarding the quit-claim deeds discussed in section B above. Basically,

Respondent denied the existence of the quit-claim deeds. (TR 91, 92).

Respondent submits that he was being perfectly truthful to the Referee when he denied the existence of any such quit-claim deeds. The Referee has taken evidence that merely indicates the existence of the deeds and transformed it into a finding that Mr. Lowe prepared them at the time of the conveyances. She then leap-frogged over an absence of evidence to conclude that Respondent knew of the deeds. Incredibly, she then finds that Respondent's un rebutted testimony is not "entirely truthful."

Respondent isolates his argument in this regard only to stress to the Court the seriousness with which he views any finding that he was not truthful. There is no evidence in the record to rebut Respondent's assertion that he did not know of any such quit-claim deeds. This finding should be overturned.

D. The Referee improperly concluded that Respondent violated Disciplinary Rules 7-102(A)(7) and (8).

The Referee concluded, from her review of the evidence, that Respondent violated various disciplinary rules including DR 7-102(A)(7) and (8). Unlike a Referee's factual findings, this Court has held that as to a Referee's conclusions

This Court's scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment.

The Florida Bar In Re: Inglis, 471 So.2d 38, 41 (Fla. 1985).

The pertinent portions of DR 7-102 read as follows:

(A) In his representation of a client, a lawyer shall not:

(7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

There is no evidence before the Referee to indicate that Respondent had any attorney/client relationship with Respondent at the time of the November 3, 1978 and the July 21, 1980 conveyances.

It is un rebutted that Respondent has been an assistant public defender since December, 1977 (TR II 17).

There is no testimony from anyone, and there is no documentary evidence indicating, that Respondent had any attorney/client relationship with Stanley Lowe after December, 1977. Accordingly, the Referee's conclusions that Respondent violated DR 7-102(A) (7) and (8) are totally without supporting evidence.

The deeds in question (Ex. 1, 2, and 7) were all prepared by other lawyers. There is no evidence that Respondent represented Mr. Lowe in any manner after December, 1977. Accordingly, the Referee's findings in this regard should be dismissed.

E. Respondent is not guilty of any misconduct.

The Florida Bar has failed to prove by clear and convincing evidence that Respondent is guilty of any

misconduct. The Referee based her conclusions primarily upon the prejudiced testimony of Janice Lowe, whose testimony should not form the sole basis for any finding of misconduct.

The Referee's findings as to the existence of simultaneously prepared quit-claim deeds back from Respondent to Mr. Lowe are wholly without support in the record. Accordingly, her finding that Respondent was not being entirely truthful when he denied the existence of those quit-claim deeds is improper.

The case at bar is analogous to the situation that existed in the Rarman case discussed earlier. On page 598 of that opinion this Court stated:

While we cannot say that there was no evidence to support the Referee's findings, we are constrained to the view that much of the supportive testimony is itself evasive and inconclusive so that when it is considered together with the above recited inconsistencies, the evidence does not establish the charges with that degree of certainty as should be present in order to justify a finding of guilt on charges as serious as those made against these Respondents.

The Court continued later on that page with the observation that it has

a continuing duty to require charges such as these to be supported by clear and convincing evidence where the charges have been denied by reputable members of the Bar.

Respondent should be found not guilty of any misconduct.

11. THE REFEREE'S RECOMMENDATION THAT RESPONDENT RECEIVE A NINETY-ONE-DAY SUSPENSION IS INORDINATELY HARSH AND UNJUSTIFIED BY THE FACTS BEFORE THE COURT.

The starting point in determining the appropriate discipline in any grievance matter has been set forth by this Court in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970). There, the Court stated the following:

In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. p. 132.

Respondent submits that the appropriate discipline for any misconduct that this Court might find is a public reprimand.

Respondent is not a threat to the public's well-being. He has practiced law in this state since 1968 (TR 57) without any prior discipline. He has served as an assistant public defender since December, 1977 in two different judicial circuits. His record has been exemplary and, other than the events of this case, there is not one single hint of a lack of character or trustworthiness in his career. Respondent's Exhibit 1, the affidavits attesting to Respondent's good character, and the testimony of his character witnesses all attest to this lawyer's sterling character. Even the Referee

listed as mitigation Respondent's reputation in the Public Defender's Offices in the Second and Sixth Judicial Circuits.

There are two very important mitigating factors that the Referee ignored in determining discipline. They are Respondent's twenty-one-year record without prior discipline and his interim rehabilitation. Florida Standards for Imposing Lawyer Sanctions, Rules 9.32(a, j). The November 3, 1978 conveyance of property to Respondent occurred eleven years ago. Mr. Lowe died in 1981. If, indeed, there was misconduct, it occurred during this period.

In light of Respondent's many years of practice, and his twelve years of service to the indigent criminal defendants in this state, all performed without blemish, it beggars the imagination for anyone to argue that Respondent must be suspended to protect the public.

Respondent submits that the three aggravating factors listed by the Referee in her report, i.e., his lack credibility, his dishonest and selfish motive, and his refusal to acknowledge the wrongful nature of his conduct, are all invalid.

Respondent is particularly offended by the Referee's finding that he lacked credibility at final hearing. This conclusion by the Referee was drawn entirely upon Respondent's refusal to acknowledge that quit-claim deeds were prepared simultaneously with the conveyances in November, 1978 and July, 1980. **As** discussed in I.B. above, there is no evidence

supporting the Referee's findings that those quit-claim deeds were prepared at the time of the conveyances, that Respondent knew of their existence or that he signed them. In all other regards Respondent's testimony was straightforward and to the point.

Respondent also argues that the Referee improperly listed as an aggravating Respondent's refusal to acknowledge the wrongful nature of his conduct. In essence, the Referee is saying that any Respondent who unsuccessfully argues that he is not guilty will receive an enhanced penalty. This philosophy has been squarely rejected by this Court.

In The Florida Bar v. Lipman, 497 So.2d 1165, 1168 (Fla. 1986), this Court stated:

We agree with Lipman that it is improper for a Referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct or on "lack of remorse" presumed from such refusal.

Finally, the Referee's finding of a dishonest or selfish motive belies the entire thrust of her findings. The genesis of this entire case, according to the Referee's findings, is Mr. Lowe's desire to avoid creditors. That does not benefit Respondent. Admittedly, Respondent stood to gain financially once Mr. Lowe died. However, the testimony is unrebutted that Mr. Lowe did not want anything to go to his estranged sons. The fact that he deeded property over to Respondent, and never asked for it back in the three years after the conveyance,

indicates that he must have wanted Respondent to have the property.

This Court must not overlook the close relationship between Responaent and Mr. Lowe. They lived together on several occasions during the last years of Mr. Lowe's life and, during the year immediately prior to his death, Mr. Lowe's girlfriend, Claire Schwartz, also resided with them. (TR 49). Respondent co-signed a note in which Mr. Lowe received \$17,500 for Mr. Lowe's personal use (TR 46, 86). During the six months immediately prior to Mr. Lowe's death, Respondent frequently gave him money (TR 77).

When Mr. Lowe passed away, it was Respondent who took care of his funeral and cremation (TR 71). It was not Mr. Lowe's ex-wife. It was not Mr. Lowe's estranged sons. They did not even come to the funeral.

After Mr. Lowe passed away, Respondent took care of Mr. Lowe's surviving mother. (Ex. 6).

After Mr. Lowe's death, it was Respondent, nobody else, that attempted to put Claire Schwartz on her feet. He gave her ten to fifteen thousand dollars to help her make the aownpayment on a house in which she could live (TR 97).

And, regardless of his motive, it was Respondent that kept the "Pirate's Table" property from being sold at tax sale after Janice Lowe squandered the rents and did not take care of it. (TR 86, 87, 94).

At one point in time, Respondent and Mr. Lowe had even entered into a reciprocal agreement to take care of each other's children should one of them die at an early age. (TR 61). It was this agreement that Respondent thought was the reason for Mr. Lowe's conveyance of the commercial property to him in 1978.

Mr. Lowe was generous not only to his good friend, the Respondent. He also gave Ms. Schwartz a car (TR 72) and used the money that he received from the sale of the "Island Estates" property to set up a beauty shop business for her. (TR 83, 99). And, as pointed out earlier, he never sought a return of the "Pirate's Table" properties that he deeded to Responaent in November, 1978 and July, 1980.

Stanley Lowe's intestate status resulted in a windfall for sons who, for over ten years, had had nothing to do with him. (TR 54, 91). One cannot help but wonder if Stanley Lowe is turning over in his grave because his sons got the "Pirate's Table" property instead of his best friend on earth, the Respondent.

It should not be held against Respondent that he litigated the ownership of the "Pirate's Table" property. That is what courts are for. It had been deeded to him. He knew that the sons had wanted nothing to do with their father during the last decade of his life. He had good title to the property and, if the sons' theory that the property had been deeded to avoid creditors was correct, they stood in the shoes

of their father and, therefore, could not negate the transaction. (TR 95).

Respondent ultimately settled the case, before it went to trial, not because he believed he would lose, but because he thought it would constitute the appearance of impropriety to litigate such a matter. (TR 93). The sons received Respondent's share of the sale proceeds of the "Pirate's Table" property, \$133,000, less \$5,000 in attorney's fees that Respondent had incurred property. (TR 94).

Lest anyone think the grievance proceedings influenced Respondent's settlement, the unrebutted testimony is that the settlement occurred before any grievance was filed. (TR II 20).

Even Janice Lowe had to acknowledge that Respondent immediately quit-claimed to her, without any pressure, her undisputed interest in the back parcel of the "Pirate's Table" property. (TR 47).

If this Court finds that Respondent acted improperly, a review of this Court's past decisions indicates that his discipline should be a public reprimand. For example, in The Florida Bar v. Dousherty, 541 So.2d 610 (Fla. 1989), the lawyer received a public reprimand after the Court found that he "invested substantial trust account funds without disclosure in ventures in which he held potentially conflicting interest." Id., p. 612.

Similarly, in the The Florida Bar v. Hankal, 533 So.2d 293 (Fla. 1988), a public reprimand was ordered for a lawyer entering into a loan transaction with a former client "for the purpose of evading or avoiding payment of income taxes on the interest income." Id., p. 294.

Interestingly, Mr. Hankal received a public reprimand in the prior case even though he had received two prior disciplinary orders. Although each prior discipline was but a private reprimand, this was still Mr. Hankal's third time before the Bar for misconduct.

In The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985), the lawyer made material misrepresentations to a bank regarding the purchase price of property he was buying. Despite his deliberate misrepresentation to his lender, he received but a public reprimand.

Even if this Court believes that a suspension is appropriate for Respondent's misconduct, imposing a suspension of ninety-one days is extreme. That one extra day that moves the suspension into one requiring proof of rehabilitation really adds an additional six to nine months to the penalty imposed. The Florida Bar v. Roth, 500 So.2d 117, 118 (Fla. 1986). There is no need to subject Respondent to any suspension requiring proof of rehabilitation. He has been no threat to the public in the past and there is no reason to believe that he will ever be a threat to the public in the future.

This Court has not required proof of rehabilitation of a lawyer who attempted to fraudulently obtain complete financing of the purchase price of real estate and who have violated his obligations as a land trustee. The Florida Bar v. Nuckolls, 521 So.2d 1120 (Fla. 1988). This Court ruled that the appropriate sanction for Mr. Nuckolls' conduct was a ninety-day suspension.

The Nuckolls Court also referred to The Florida Bar v. Siegel and Canter, 511 So.2d 995 (Fla. 1987) in which two lawyers each received ninety-day suspensions for deliberately lying to a mortgage lender in order to obtain full financing of their property.

Respondent submits the Referee's imposition of the one extra day of suspension may have hinged to some degree upon her conclusion that DR 7-102(A) was violated. To have violated that rule, Respondent had to have had an attorney/client relationship with Mr. Lowe.

In fact, there was no competent evidence before the Court to indicate that after December, 1977 Respondent had any attorney/client relationship with Mr. Lowe. This Court faced a similar situation in The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986). There, despite The Florida Bar's failure to prove up the existence of any attorney/client relationship (as is true in the instant case), the Referee concluded that the

respondent there violated several canons pertaining to such a relationship. The Court disapproved those findings and stated:

We choose not to adopt the referee's recommended discipline, **as** we feel it was based, at least in part, on his finding of an attorney/client relationship between Respondent and Guiking.

The Court then reduced the referee's recommended discipline to three months, thereby requiring no proof of rehabilitation.

Mr. Lehrman's misconduct involved participation in a fraudulent, and perhaps extortionate, demand for funds from an individual. Yet, he received no suspension requiring proof of rehabilitation.

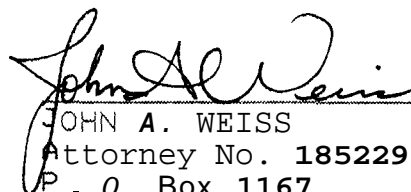
The theme inherent through all of the cases cited above is deliberate misrepresentations which, with the possible exception of Lehrman, are for the accused lawyer's direct financial benefit. Respondent argues there is no such situation in the instant case. If this Court finds that this single, isolated blemish on Respondent's career warrants a suspension, it should not require him to remain outside the practice of law for the nine months to one and one year that the Referee's recommended discipline would impose.

CONCLUSION

The Referee's findings that Respondent engaged in misconduct are unsupported in the record and should be reversed.

Even if this Court finds that Respondent has engaged in unethical conduct, a suspension for ninety-one days is patently unfair. Respondent's misconduct warrants a public reprimand. If this Court feels that some suspension is necessary as a deterrent to other lawyers, certainly no suspension requiring proof of rehabilitation is necessary.


Respectfully submitted,



JOHN A. WEISS
Attorney No. 185229
P. O. Box 1167
Tallahassee, FL 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been mailed to Richard A. Greenberg, Bar Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott hotel, Tampa, Florida 33607, this 13th day of November, 1989.



JOHN A. WEISS
COUNSEL FOR RESPONDENT