IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 73,905

v.

THOMAS R. ROGERS,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF AND RESPONDENT'S INITIAL BRIEF ON CROSS-APPEAL

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SYMBOLS AND REFERENCES

In this brief, Complainant, The Florida Bar, will be referred to as the Bar and Respondent will be referred to as such or as Mr. Rogers.

RR, followed by the page and, if appropriate, the paragraph number will refer to the referee's report.

TI will denote volume one of the transcript of the final hearing on December 18, 1989.

TII will denote volume two of the transcript of the final hearing held on December 19, 1989.

TIII will denote volume three of the transcript of the final hearing held on December 20, 1989.

TIV will denote volume four of the transcript of the final hearing head on April 18, 1990.

sec will denote section(s).

B.Ex. will denote Bar Exhibit.

R.Ex. will denote Respondent's Exhibit.

J.Ex. will denote joint Bar and Respondent's Exhibit.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent supplements the Bar's statement of facts as follows:

In 1981, Respondent, a devout and active Catholic (TIV 50; TII 187), moved with his wife and one-year old daughter to Orlando. The family financial condition was difficult since Respondent had just opened his office. Respondent introduced himself to the pastor of the local parish, Father Mitzi (hereafter referred to as Mitzi), and offered to help teach Sunday school or do whatever he could around the Church in order to contribute something to the Church. TI 29; TII 188; TIV 52, 57.

As a result of Respondent's offer, Mitzi, who had invested in the past (TI 8;83) and received unwanted inquiries from his parishioners, approached Respondent for a method by which he could avoid public knowledge of his investments. Respondent suggested a trust (RRII, para 3). After much discussion Mitzi asked Respondent to be his trustee. During those discussions Respondent testified that he talked about conflict of interest and about Mitzi's right to talk to another lawyer. TIII 36-38. Thereafter, Mitzi executed a Power of Attorney (B.Ex. 2) and the M-R Trust (B.Ex. 1) authorizing Respondent to act in his behalf.

The M-R trust permitted Respondent to hold property without the trustee designation to accomplish Mitzi's goal. Both documents were revocable at any time. B.Ex. 1; B.Ex. 2.

Mitzi deposited money into an account at Dean Witter Reynolds in the name of Respondent, as Trustee for Mitzi. TI 68.

Later in 1982, Mitzi introduced Respondent to a close personal friend, Frank Gorman, a Michigan resident. Gorman had previously invested in real estate (TI 161) and wanted more property in Florida. Gorman's high salary placed him in a very high tax bracket (TI 35, 161) and Gorman needed tax shelters (TI 161; R.Ex. DD).

In July, 1983, Gorman wired $30,000 to Respondent for investment purposes. TII 14, 158-9. The funds were neither solicited nor expected by Respondent (TII 15). No specific instructions were given by Gorman except for the money to be invested in real estate (RRII, para 6). The funds had been wired directly to a separate account initially entitled "Rogers & Associates" and was later changed to "Rogers et al. Investments." RRII, para 29. A separate ledger card for Gorman Investments was posted with the date, source, and amount accordingly. RRII, para 30. Gorman, on his own and due to distance between Michigan and Florida, decided to give Respondent authority to invest on his behalf (TII 14, 28-9, 31) and signed a Power of Attorney (RRII, para 6; TI 132; TII 21, 31; R.Ex. CC).

At this time in 1983, the real estate market in Orlando was exploding (TIII 8) and subsequently Gorman made a number of investments through Respondent (TI 159, 163; TII 14). Mitzi also invested in these properties and others. TI 33,

68, 70, 80, 83-85, 89-90, 93; R.Ex. A, B, F, G, L, M K, N, O. P. Separate accounts under the ledger card system (TII 153) were set up as each property was purchased segregating the investment funds, receipts, transfers, and disbursements (RRII, para 30).

Gorman and Mitzi profited on some of their investments (TI 84-5, 169; TII 23, 163-6; R.Ex. DD, CCCC), and still maintain others. They have taken action against Respondent for the unsuccessful investments.

The unprofitable investments involved residential condominiums that were purchased in September, 1983, and are the subject matter of the grievance. At the requests of Mitzi and Gorman, Respondent located these properties (TII 31-2), negotiated the contracts, and arranged for the financing (R.Ex. EE, AAAA) under the authority given in the Powers of Attorney and trust agreement.

The intent of investing in these condos was to leverage the purchase with the minimum down payment, to take the maximum depreciation possible while renting them, and to sell them for a profit after a few years when the lower capital gain tax rates could be recognized as opposed to the higher ordinary income tax rates. It was understood that the rental income would not provide enough to cover the mortgage and other expenses associated with the units while they were being rented (TI 145, 181). Acordingly, almost all of the tax deductions were specially allocated to Gorman (TI 166), who

could write them off on his individual tax return (R.Ex. DD), generating large tax refunds which were to be used to pay the difference between the rental income and the expenses (hereinafter referred to as the "negative cash flow") (B.Ex. 23, Exhibit A).

Gorman realized, according to his own CPA, over $37,000.00 in tax refunds as a result of the tax benefits he received from his investments TI 169, R.Ex.DD.

The contract for the first unit, Sun Bay Condo 236, was signed on August 20, 1983 (B.Ex. 6) for $99,900 with a $10,000 down payment. The contract for the second unit, a pre-construction unit which was not yet built, the Moorings Condo, was signed on September 2, 1983 (B.Ex. 7) for $104,000 with a $10,400 initial down payment. The contract for the third unit, Sun Bay Townhouse 8, was signed on September 9, 1983 (B.Ex. 8) for $120,000 with a $6,000 down payment.

A tenant was secured by Respondent for Sun Bay Condo 236 prior to the closing and it was investor financed with a required minimum 10% down payment of $10,000 (TIII 12) providing the maximum leverage on investor owned property (TIII 11). It was anticipated that the Moorings Condo would not be finished for quite a while since it was purchased pre-construction. (Due to various delays attributable to the developer, the closing did not occur until almost two years later.) Financing for this unit was, therefore, not necessary at that time.

In order to reduce the down payment on Sun Bay Townhouse 8 to 5%, i.e., $6,000, rather than 10%, Sun Bay Townhouse 8 was to be financed as an owner-occupied unit providing even greater leverage. TIII 11, 12. To accomplish this, someone had to occupy the townhouse. Since it was not possible for Mitzi, who lived at the Church, or Gorman, who lived in Michigan, to reside in the townhouse, Respondent was made a partner and rented the townhouse to qualify the R-M-G Partnership for the owner-occupant financing. RRII, para 12.

The G-M Partnership was formed to take title to Sun Bay Condo 236. B.Ex. 3. The partners of the G-M Partnership were Gorman and the M-R Trust. The R-M-G Partnership was formed to take title to Sun Bay Townhouse 8. B.Ex.5. The partners of the R-M-G Partnership were the G-M Partnership and Respondent. The contract on Sun Bay Condo 236 was assigned to the G-M Partnership (RRII, para 8) and the contract on Sun Bay Townhouse 8 was assigned to the R-M-G Partnership (R.Ex. TTT).

Respondent testified that before the execution of the agreements and the closing of the Sun Bay units, he discussed with Mitzi and Gorman the potential for conflict of interest and their right to seek advice from independent counsel. Gorman, as stated above, had his own attorneys and CPAs. TIII 36-38. Respondent received their consent and obtained further authority from Gorman and Mitzi to act. His authority is documented by Mitzi's execution of his Amendment to the M-R Trust Agreement allowing Respondent, as Trustee, to enter

into partnership agreements (R.Ex. AA) and by Gorman's execution of another Power of Attorney (B.Ex. 24) authorizing Respondent to enter into partnership agreements on his behalf.

Closing for both Sun Bay properties took place on October 31, 1983. B.Ex. 7; R.Ex. TTT. Gorman attended the closing in person with Respondent. TI 163; R.Ex. TTT.

Respondent managed and cared for both properties as described in the partnership agreements and reported all progress to Gorman and Mitzi. R.Ex. II, LL. Gorman received the tax refunds and provided them to cover the negative cash flow. B.Ex. 23; R.Ex. DD; Exhibit A.

Approximately one year after closing Respondent put both Sun Bay units up for sale and attempted to sell them directly to prospective purchasers. The tenant in Condo 236 vacated the unit protesting the rent was too high and both units were additionally placed on the rental market. The Townhouse rented first and Respondent moved into and rented Condo 236 so that both units would be filled. TII 191.

In late 1984 and early 1985 Mitzi became ill and had open-heart surgery. TI 90-91; R.Ex. A. He advised Respondent that he wanted to "retract" from the Moorings investment (TI 127-128) and left the decision up to Gorman as to what to do about the investment (TI 128). Shortly thereafter, Gorman decided not to be involved further with the Moorings (RRII, para 25; TI 153; TII 25-26, 180; R.Ex. SSS). Gorman was about to retire (TII 29-30) and he did not want the additional

responsibility of negative cash flow on a third condo (TI 153, 180). Respondent offered to take over the responsibility of the investment in the Moorings Condo and give up an equal portion of Respondent's interest in Sun Bay Townhouse 8 for Gorman and Mitzi's interest in the Moorings Condo. R.Ex. SSS. Gorman accepted Respondent's offer. TII 26; R.Ex. LL.

When the Moorings Condo was completed, Respondent proceeded to finance the purchase. B.Ex. 9; R.Ex. LL, SSS. At this time, Gorman had second thoughts about his decision and Respondent gave him the opportunity to reconsider. TII 7, 25-26; R.Ex. SSS. Shortly before the closing, Gorman reaffirmed his decision to opt out of the Moorings Condo Investment and to make the exchange. TII 33-34. With Gorman's consent, Respondent purchased the Moorings Condo on June 12, 1985. B.Ex. 9. Respondent moved to the Moorings Condo and documented the exchange in the next accounting provided to Mitzi and Gorman. B.Ex. 17, 18. With respect to the Sun Bay units, Respondent continued to secure tenants, care for and manage the properties, and make attempts to sell the units during the balance of 1985 and 1986. He kept Mitzi and Gorman updated on his efforts. (See Appendices A and B).

During this time, Respondent unsuccessfully attempted to sell his prior residence to get rid of the debt service associated with that property. The home was vacant for periods causing financial strain on Respondent. TII 97-98.

Mitzi became quite ill around September, 1986 and was hospitalized again. R.Ex. ZZZ. Unbeknownst to Respondent, about this time Mitzi hired Attorney James Files. TII 52-53. Gorman, in the meantime, retired. Gorman then advised Respondent that he had decided that he wanted to handle the management of the properties because he had additional time due to his retirement. Mitzi was contacted for his approval and management was turned over to Gorman. TI 102, 145-146.

At the time that Respondent turned the management of the Sun Bay units over to Gorman in August 1986, both units were rented. The lease on the Townhouse had recently been renewed by a tenant interested in purchasing the unit. TI 95, 98, 101, 173; R.Ex. X. Respondent had just secured a year's lease for the G-M Partnership on Condo 236 and that tenant wanted an option to purchase that unit. TI 98, 102, 173-174. Interest rates had dropped substantially and Respondent repeatedly recommended that the partnerships consider refinancing the units to reduce the monthly mortgage payments (TIII 34; R.Ex. WWW, XXX), Gorman, as manager, rejected Respondent's advice to refinance the units (TII 11, 12).

Respondent neither charged, nor received credit for, any management fees after Gorman took over in August 1986. The $3,965 mentioned by the referee were condo assessments.

At about this time, during one telephone conversation with Respondent, Gorman asked for a cash refund of the funds he had initially deposited on the Moorings (RRII, para 32).

This request was made even though Gorman had agreed in 1985 to exchange the same for equity in Sun Bay Townhouse 8 (RRII, para 25). Respondent and Gorman discussed the situation during that phone call (TII 91-95) and Respondent never heard anything further from Gorman on that subject again.

Respondent remained in contact with Gorman and Mitzi after Gorman began managing the properties. Respondent still had no idea that Files had been retained and continued to cooperate by providing whatever was requested.

In January, 1987, Mitzi, without warning, sent Respondent notice of revocation of the M-R Trust (B.Ex. 2) and requested all of his documents be turned over to Mitzi's attorney, Files (TIII 34). Files was provided with Mitzi's documents and final accountings for all of the properties in which Mitzi had any interest (R.Ex. CCCC), but he never provided the accountings to Mitzi or Gorman. Files was also given opportunities to inspect all records. R.Ex. BBBB.

In March, 1987, Files requested the return of Gorman's Power of Attorney and Respondent complied. B.Ex. 4. No further demands were made.

Subsequently, Files filed a grievance and a civil suit against Respondent. TIII 56. During these proceedings, Respondent suggested through counsel that a "Big Eight" CPA firm be retained to audit the records to clear up any concern. TII 56. The offer was never accepted. TII 57. An independent CPA firm was then retained by Respondent to

examine all of his accounting records. The CPA found no commingling or wrongdoing. TII 150-152.

The tenant secured by Respondent for Sun Bay Townhouse 8 rented it for the ten months after Gorman took over. TI 174; B.Ex. 2, column 5. The tenant in Sun Bay Condo 236, also secured by Respondent, leased the unit for the next fifteen months. TI 173-174; B.Ex. 21, column 5.

After the tenants secured by Respondent vacated, both units were empty for a period of time. A tenant was finally acquired for Sun Bay Condo 236, but he did not pay rent. Attorney Files was hired on behalf of G-M Partnership by Gorman and Mitzi to evict the tenant, but failed to do so. TI 103-104; TII 59-60; B.Ex. 21, column 5. That tenant in Sun Bay Condo 236 was still occupying the unit at the time of the final hearing, even though substantially in arrears on the rent. TI 146.

A tenant was ultimately secured for Sun Bay Townhouse 8 who paid rent for a little over a year and then failed to make any further payments for the next year. TI 174-175; B.Ex. 22, column 5. Attorney Files was also hired by Gorman and Mitzi to represent R-M-G Partnership (without disclosure to Respondent) to evict this tenant, but again failed to do so.

Mitzi and Gorman just stopped making mortgage payments on both of the Sun Bay units. TI 57. This resulted in foreclosure of both units to the detriment of Respondent who had personally guaranteed the mortgage with Gorman. What

rents were collected during the majority of their control were not paid to the mortgage company, but commingled and deposited into another bank account under the advice of Attorney Files. TI 105. The security deposits of the tenants, held in escrow, were then used by Gorman and Mitzi to pay the condominium assessments. B.Ex. 21, columns 7 and 3; B.Ex., column 7 and 3.

SUMMARY OF ARGUMENT

This is a unique case that must be looked at on its own merits. The findings, which are based primarily on the testimony of Bar's main witnesses, do not match up with the exhibits. The testimony of the Bar's main witnesses is not credible because it is contradictory, inaccurate, confused, and lacking in precision. Their recall is admittedly poor and selective on the facts in issue.

The credibility of the witnesses is suspect in light of their actions relative to this matter and their vested self-interest in matters beyond the grievance. It is obvious from the citations made by the Referee and the charges alleged by the Bar that preferential treatment has been given throughout to the testimony of Mitzi because of his vocation in life. Besides the fact that much of his testimony is based on hearsay, he is the least credible and most confused witness.

The record must be looked at closely because the charges are not supported by clear and convincing evidence.

Respondent has documentary proof to support his testimony. Respondent accounted for all funds received from Mitzi and Gorman and the disbursement of those funds on properties titled in their names. Respondent accounted for his contributions to R-M-G Partnership to Mitzi and Gorman. No request was ever made to Respondent for a complete detail of his contributions into the R-M-G Partnership. Respondent responded to every request made even to the extent of providing the original records to Gorman with Mitzi's consent.

Respondent disputes the testimony of Mitzi and Gorman relative to disclosure and consent and can show that the recall of Mitzi and Gorman on this issue was selective, since both refused to acknowledge documentary evidence on the same issue. It should be noted that the rule did not require written disclosure at the time of this incident.

If this Court finds misconduct occurred, the referee's recommendation of a public reprimand should be accepted by this Court in light of the fact that no dishonesty, fraud, deceit or misrepresentation was either charged or proven.

POINT I

THE EVIDENCE AT THE FINAL HEARING DID NOT MEET THE STANDARD OF PROOF REQUIRED OF CLEAR AND CONVINCING EVIDENCE SHOWING THAT MISCONDUCT OCCURRED.

The Supreme Court has a continuing duty to require charges to be supported by clear and convincing evidence where the charges have been denied by reputable members of the Bar.

The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). Respondent is a reputable member of the Bar with no prior disciplinary record. RRV, section B. Respondent has a good reputation in the community and with other members of the Bar, RRV, section C, and is known to possess good morals, to be diligent, honest, trustworthy, and to have integrity by not only other members of the Bar (TIV 12-13, 28, 34; RRV, section C). This reputation is supported by a Catholic priest who has known Respondent for twenty-four years (TIV 47-55), a member of the accounting profession (TIV 21-22), and by Respondent's business partners (TIV 34, 36-37, 44).

The burden of proof in a disciplinary action is such that the Bar must prove misconduct occurred. The accused lawyer is not required to prove his innocence.

The standard of "clear and convincing evidence" is an intermediate standard of proof, stricter than the "preponderance of evidence" standard used in civil cases and less than "beyond a reasonable doubt" standard used in criminal cases. The Florida Bar v Rayman, 238 so.2d 594 (Fla. 1970) at 596. In Smith v. Department of Health and Rehabilitative Services, 522 So.2d 956 (Fla. 1st DCA 1988). the District Court defined clear and convincing evidence as follows:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind

> of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. (e.s.)

Respondent submits that the evidence adduced at final hearing is not clear and convincing because the witnesses are not credible and their testimony is both conflicting and confusing.

The Bar's three main witnesses were 1) Mitzi, 2) Gorman, Mitzi's close friend who invested with him in the properties in question, and 3) Files, their attorney who filed the grievance with the Bar. The credibility of all three of these witnesses is lacking.

Attorney Files is not a credible witness. For example, Files testified that he had never been given an opportunity to examine the documents in Respondent's office. TII 43. R.Ex. BBBB is a letter dated February 23, 1987 from Respondent to Attorney Files wherein Respondent provides Files the opportunity to inspect the records at Respondent's office. That letter clearly shows that Files was given the opportunity to examine the records. His denial of that opportunity is directly rebutted by documentary evidence.

Attorney Files even contradicted himself and testified he had been to Respondent's office on three occasions (TII 50-51) to inspect and pick up records of the Respondent. On two other occasions Attorney Files examined Respondent's records at Respondent's office. TII 43, 48-49. Also, Attorney Files received documents he requested from Respondent. TII 52, 56; R.Ex. CCCC 50. Files had every opportunity to examine all

records -- completely the opposite of what he was attempting to lead the Referee to believe.

Not only was Files given every opportunity to examine the records on January 30, 1987 he was given (on behalf of Mitzi and Gorman) accountings which provided details on all of the transactions. (R.Ex. CCCC) Apparently he never provided them to Mitzi (TI 118, 120; R.Ex. Y, Z, CCCC) or Gorman (TI 194; TII 13; R.Ex. KKK, YYY, CCCC). It is understandable why Mitzi and Gorman denied receiving accountings if Files withheld the accountings from them.

Another reason to discount Files' testimony is the fact that he has a vested interest by virtue of his representation in the civil action. It is to Files' financial benefit for Respondent to be found guilty of misconduct.

These are just a few examples and reasons that show that the testimony of Attorney Files is not worthy of belief.

Mitzi is not a credible witness either. On a number of matters he showed that he was not being sincere. For example, Mitzi was adamant about the fact that the only accountings that he ever saw were those shown to him by Bar Counsel at the Final Hearing. TI 53; B.Ex. 10, 11, 12, 13, 14. Yet when cross-examined, Mitzi was shown eighteen additional accountings (TI 92-122; R.Ex. A, D, G, J, K, L, M, N, O, P, Q, R, S, T, V, W, X, BB) that Mitzi admitted receiving. He so contradicted his previous testimony that it was obvious that Mitzi was not being truthful.

Mitzi says he never knew Respondent would be occupying Sun Bay Townhouse 8 until after Respondent had already moved in (TI 45). Not only did Respondent dispute this fact, but also Gorman testified that Mitzi surely knew Respondent would be occupying Sun Bay Townhouse 8 (TI 145).

When first asked by Bar Counsel whether the Power of Attorney was explained by Respondent to him Mitzi answered "no" (TI 32); yet, when cross-examined by Respondent's counsel, Mitzi directly contradicted his previous testimony and testified that it was explained to him, that he was provided a copy of it in advance before he signed it, and that it was provided to him to read, but he never read it (TI 65-66).

Mitzi said that he understood that the phrase "cash or its equivalent" used in the R-M-G Partnership Agreement to describe how contributions to capital could be made, meant "a certified check or whatever." TI 42. Yet, Mitzi said he never read the Partnership Agreement in 1983 when he received it (TI 38, 40, 42). He said he did not read the agreement until Files pointed it out to him. (TI 40-41).

Since the R-M-G Partnership Agreement was provided to Mitzi in 1983 and Mitzi admitted he never read the Agreement until 1987, Mitzi could not have had any understanding of what the phrase meant before 1987. Mitzi is not being candid here.

The referee's finding that Mitzi was a sophisticated investor contradicts the tenor of Mitzi's testimony. Mitzi

tries to give an impression of a lack of understanding. Respondent submits he was being deceptive.

Mitzi desperately wanted to make sure that his name did not appear in the public records or on documents. TI 30-32. Mitzi, a priest, did not want his parishioners to know about his large and numerous investments. (For example, he invested and lost $37,000.00 in a business before he met Respondent (TI 81). He invested in Shannon Woods, Camino Court and his niece's land. And, he could afford to lend $23,000.00 to his secretary for her home. All this in addition to his investments in the Sun Bay units and Maitland Investors). TI 66. For example, when Mitzi lent substantial funds to his personal secretary (TI 33-34) and took title to a townhouse jointly with her, he did so in such a manner that his name would not be disclosed immediately adjacent to his personal secretary (TIII 30-31, 83). Another example of his penchant for secrecy was when Mitzi made an agreement to purchase Gorman's Camino duplex through Respondent and never disclosed it to Gorman, his very close friend. TII 21.

Mitzi has a habit of concealing his actions when it is in his best interest to do so even at the expense of others. For example, while Respondent was still representing Mitzi, Mitzi did not even disclose to Respondent that he hired Files in August, 1986 to take action against Respondent. TII 52-54. This allowed Mitzi and Gorman, with the guidance of Files, to trick Respondent into turning over files, books, records, and

other correspondence (TI 87, 140; TIII 32-33; TIV 62-63) without Respondent seeing any necessity to make copies (TIII 33). Once the files and records were turned over, they were never returned.

When Mitzi was asked a very simple question at the final hearing about how much he invested in the M-R Trust, Mitzi could not answer the question other than to say that he presumed he put money in the Trust. TI 31. The fact that he could not answer such a basic question illustrates even more how his testimony is lacking in detail and candor, especially when Mitzi's testimony is compared with Files' testimony that Mitzi had provided him with a listing of the investment payments Mitzi had given Respondent (TII 48). Mitzi's own lawyer contradicts Mitzi's lack of knowledge as to how much Mitzi invested.

All of the above examples clearly show that Mitzi's testimony is not worthy of belief.

Gorman also lacks credibility. He admitted that he had made a false statement under oath in connection with this action when he testified at deposition that he was not in attendance at the closings on Sun Bay Condo 236 and Sun Bay Townhouse 8. In fact, Gorman had attended the closings. TI 163-164. Either he lied, or he has a terrible memory.

Gorman contradicted his own testimony on other facts at issue. For example, when Gorman was asked during direct what a General Power of Attorney is, he proved his understanding of

it when he stated it gives "someone power to do whatever they want with your money in your interest." TII 21. Then, later, when Gorman was asked about whether he realized that the General Power of Attorney that he had given Respondent provided Respondent with the authority to make a down payment on Gorman's behalf, Gorman stated he did not realize Respondent had such authority. TII 27. The latter testimony contradicts his previous testimony.

Another example of Gorman contradicting his own testimony is when Gorman testified that he never recalled any conversation with Respondent regarding conflict of interest or his right to seek independent counsel. TI 142; TII 25. This testimony is completely refuted by R.Ex VV, Gorman's Affidavit, signed personally by Gorman, which deals with the very issue of conflict of interest and the right to independent counsel.

Two other examples which illustrate contradictions between Gorman's testimony and the evidence supplied in the exhibits are the following:

1) Gorman denied documentary evidence provided by his own personal CPA when Gorman disputed his CPA's findings (R.Ex. DD) that Gorman received $37,280 in tax refunds as a direct result of Gorman's investment in the G-M Partnership alone. TI 169-170. Gorman did not want to admit to the referee that he received substantial tax benefits from the G-M Partnership. In fact, Gorman received tax refunds of $39,000

to $46,000. TI 167; TII 163-166; and

2) Gorman testified he (himself) revoked his Power of Attorney before he met with Files. TI 133. B.Ex. 4, a certified letter sent by Respondent to Files with Gorman's Power of Attorney attached, responds to a request that was made by Files, not Gorman.

Even the written evidence prepared by Gorman (B.Ex. 15) is clearly contradicted and shown to be unreliable by his testimony (TI 181) and other exhibits. For example, Gorman said that his check #121, dated June 26, 1984 (B.Ex. 15) represented payment of $2,333 to Respondent for services rendered. R.Ex. K, L, HH, YYYY, an explanatory letter and complete description of the expenses clearly show that the $2,333 was mostly for Gorman's mortgage payment and real estate taxes and not for services. TI 181. These examples among others clearly show that Gorman is not a credible witness.

Respondent submits that the examples cited above show that none of the Bar's three witnesses are credible witnesses whose testimony is worthy of belief. Certainly their testimony does not give rise to proof by clear and convincing evidence that misconduct occurred. Their testimony is confused throughout, imprecise and inconsistent with documentary exhibits.

Bar Counsel admitted in the opening sentence of his closing argument that the testimony and exhibits are

confusing. TIII 46. That is simply because the testimony of the Bar's witnesses does not line up with the facts shown by the exhibits.

With respect to Mitzi for example, he testified a number of times that he is and was confused as to the facts. TI 49. Upon receiving all of the tax returns, charts, and other accountings (TI 63, 107, 111; See Appendix B - Listing of Accounting Exhibits) and during the lengthy meetings where Respondent explained the accountings provided, Mitzi never indicated that he did not understand anything. At all times he expressed satisfaction. Now that the action has been filed against Respondent, he has reversed his story. Now Mitzi puts it "....maybe I'm stupid, but it is all Greek to me" (TI 49), "Let's say I just didn't understand...." (TI 51, 113-114), and "and I don't understand them right now" (TI 61). If Mitzi did not understand, why didn't he ever ask questions (TI 60-62, 99) and why did he state that he was satisfied with the explanations that Respondent provided (TI 97)?

Another example of confused testimony occurs when Mitzi was asked by Bar Counsel about his contribution to the G-M Partnership. Mitzi gave a non-responsive answer and testified that it was Mitzi's impression that Respondent was to contribute $20,000. Bar Counsel himself then had to remind Mitzi that Respondent was not a partner in the G-M Partnership and, therefore, Respondent would not have made any contribution to the G-M Partnership. TI 38-39. In fact,

there is no $20,000 figure anywhere in the G-M Partnership Agreement (B.Ex. 3) or the R-M-G Partnership Agreement (B.Ex. 5).

When asked about the trust agreement that was drawn up for Mitzi and his personal secretary, Josie, relative to the townhouse that was purchased for her (TI 33), Mitzi could not even identify the trust agreement. "M-G, I think, or G-M; yeah M-G," he said. TI 34. The name of the trust was the M-J Trust (TIII 30-31): "M" for Mitzi, "J" for Josie. Because all trusts and partnerships were labeled with letters representing the names of the participants, this testimony also proves Mitzi's lack of straight forwardness and/or selective memory.

When asked about how much was to be contributed by the partners (TI 39), Mitzi's response was again not responsive to the question. He said "I was under the impression that twenty thousand, twenty and twenty" were to be used as down payments for the three units. (TI 39). Not only was the answer confusing and non-responsive to the question, none of the partnership agreements or charts list a $20,000 figure (B.Ex. 5, 3, 10, 11).

On the issue of the down payments, Mitzi's confusion contrasts vividly with Gorman's recall of the figures on this issue. Gorman recalled the precise down payments: $10,000 on Sun Bay Condo 236 (TI 136) and $6,000 on Sun Bay Townhouse 8 (TI 137). Gorman lived miles away in Michigan and came to

Florida only about twice a year, whereas Mitzi met with Respondent on almost a weekly basis during this time (TIII 42) and received the identical documents that Gorman did.

Mitzi testified that he first heard the term "conflict of interest," a few years after the investments were made. TI 44-45. Then, during cross-examination, Mitzi stated that the first time that he ever heard the terminology about conflict of interest "wasn't during the Moorings." TI 85. When asked whether he recalled a lengthy meeting on the issue of conflict of interest which was documented by Respondent's December 22, 1983 time slip (TIII 37), Mitzi could not even recall the meeting (TI 87).

When Mitzi was asked whether he asked for an accounting, he admitted he did not make a request (TI 48). He testified to three different dates that he thought Gorman made the request. One time Mitzi said the request was made when the Mooring Condo incident came up, which was in the early part of 1985. TI 53. On another occasion, the request was supposedly made after Mitzi hired Attorney Files, i.e., sometime after August, 1986. TI 85-86. Then, on another occasion, Mitzi testified that the request was made in late 1985. TI 48.

Gorman testified that Gorman received everything he ever requested from Respondent through the time that Gorman picked up the books and records from Respondent's office in November, 1986 (TI 140, 162, 182, 196).

Gorman's testimony as to accountings is completely and

totally in conflict with Mitzi's testimony. The fact that Mitzi never made a request and does not know when a request was made is certainly not "clear and convincing" evidence. Yet, the Referee bases his 32nd finding of fact on Mitzi's testimony. RRII, para 32. This is but one example where preferential treatment is accorded to Mitzi's testimony, even though it directly contradicts Gorman's testimony.

Gorman also admitted that he was confused throughout. For example, Gorman, like Mitzi, admitted receiving the tax returns, accountings, and the other correspondence and having lengthy meetings with Respondent when he came down to Florida. (See Appendix B - Listing of Accounting Exhibits). Gorman said:

> I was always quite satisfied after we sat down in his office and discussed it. I thought, 'Oh, that's beautiful.' Then as soon as I left, I would get-- I would start worrying about it. It was very difficult to try to remember all the discussions that we had. TI 143. (e.s)

Yet, Gorman never asked any questions (TI 166) and received responses to any request that he or his representative made (TI 147, 162, 182, 196). His admitted lack of memory further substantiates the fact that his testimony is not clear, concise, or detailed.

Gorman testified that there were factual issues that Respondent probably mentioned or explained, but he just did not recall them at the time of the final hearing. For example, when Gorman was asked whether Respondent explained the advantages of leveraging real estate investments with low

down payments, Gorman responded, "He (Respondent) probably did, but I just don't recall." TI 165.

The above examples show that the testimony of the Bar's main witnesses was confused, disjointed, and contradictory. Most importantly, it was not credible.

Respondent argues that preferential treatment was accorded to anything that Mitzi said because of his vocation in life. But, as pointed out above, Mitzi's testimony frequently is contradicted by Gorman's or by documentation. Mitzi himself was inconsistent on the stand. When coupled with his, at best confused, and at worse selective memory, it becomes apparent that Mitzi should not be believed.

In conclusion, Respondent argues that the evidence presented by the bar through witnesses who were not credible was not clear and convincing evidence and did not prove the allegations against Respondent. The facts to which the witnesses testified were not precise. They were not distinctly remembered. The witnesses were obviously and admittedly confused.

POINT II

THE REFEREE'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS OR WITHOUT SUPPORT IN THE RECORD AND SHOULD NOT BE UPHELD.

A Referee's findings of fact and recommendations of guilt should not be upheld if they are clearly erroneous or without support in the record. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). It is the responsibility of the Supreme

Court in disciplinary proceedings to review the Referee's report and determine if his recommendations of guilt are supported by the record. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). In disciplinary matters, the ultimate judgment remains with the Supreme Court. Wagner

In this case, the Referee's findings of fact, which are the basis for his findings of guilt, are clearly erroneous or without support in the record. Examples of the most serious erroneous findings are given below, but space limitations do not permit a complete listing of all of the errors. Many of the Referee's findings of fact are supported only by the allegations of the Bar and not by the record.

Examples are the referee's most egregious errors are listed below.

Paragraph 9. The referee's finding that Respondent charged $3,965.00 in management fees from October 1986 through October 1988 is clearly erroneous.

The referee's mistake was based on his review of B.Ex.21. Column three of that exhibit listed $3,965.00 in fees paid to the manager of the condominium, not to Respondent. They were condo assessments for unit 236.

A similar exhibit B.Ex.22, summarizing expenses for Townhouse 8, by asterisk, indicates that column three represents condo assessments. R.Ex.TT, lines 8-11 indicate the regular condo assessment fee was $130.00 per month.

Paragraph 10. The referee's finding that Gorman and

Mitzi believed all contributions to R-M-G would be in cash is directly contradicted by the evidence.

Documentary evidence refutes this finding. Respondent clearly stated in the R-M-G partnership agreement, B.Ex.5, that contributions would be in "cash or its equivalent." In the G-M partnership agreement, B.Ex.3, just the word "cash" was used.

Respondent fully disclosed, in writing, that he might not be contributing cash to the R-M-G partnership.

Even Gorman admitted that there were discussions about Respondent substituting services for his $15,000.00 contribution. tI 135, lines 19, 20 and 21.

Paragraph 13. The referee's finding that Respondent only paid $600.00 per month for rent on the Townhouse is clearly erroneous.

The referee's confusion on this point stems from CPA Morgan's testimony relating to Morgan's calculations of Respondent's entitlement to management fees. Mr. Morgan's precise testimony relating to Respondent's rent was:

> That six hundred is my (Morgan's) number. What he (Respondent) actually paid based on the tax return would be nine hundred. TII 167.

Mr. Morgan further testified that he saw some checks for $900.00, and in one instance a double payment of $1,800.00. At times, however, Respondent would make mortgage payments himself rather than paying rent. TII 168.

There is no record evidence to support the referee's

finding that Respondent only paid $600.00 per month rent.

Paragraph 17. The referee's finding that Respondent made no cash contributions is wholly without evidence.

The only CPA to testify in the case in chief was J. Michael Morgan. He found that Respondent did, in fact, make cash contributions. Respondent wrote $17,363.00 worth of checks, from his own accounts, for the benefit of the partnerships. TII 155. In addition, Respondent made $6,788.00 of charges on his personal credit cards for the benefit of the partnership. TII 156.

Mr. Morgan's findings are confirmed by Bar Exhibit 16.

Even Mr. Files confirmed at final hearing that he had determined by the date of the civil trial that Respondent made cash contributions. TII 42.

Obviously, the referee erred when he found that Respondent made no cash contributions.

POINT III

THE REFEREE'S FINDINGS OF GUILT ARE IMPROPER.

A. THE REFEREE'S RECOMMENDATION OF GUILT OF ARTICLE XI, INTEGRATION RULE 11.02(4) FOR FAILING TO FURNISH AN ACCOUNTING AS REQUESTED SHOULD NOT BE UPHELD.

The Referee recommends finding Respondent guilty of violating Article XI, Integration Rule 11.02(4) because the Respondent failed to provide an accounting of the funds as required. (See Appendix B - Listing of Accounting Exhibits).

Respondent did not violate Integration Rule 11.02(4) because:

1) the Rule does not apply to funds received or disbursed by a Trustee or one in a similar capacity, such as an Agent or Manager, under a specific document where the funds are maintained in a separate or segregated account;

2) in the alternative, assuming that the Integration Rule is applicable, complete accountings were provided throughout the period in question; and

3) Respondent responded to all requests.

Integration Rule 11.02(4) was not violated by Respondent because it applies to trust funds received or disbursed by lawyers in the course of their practice of law. When Gorman wired funds directly to Respondent, Gorman was not a client. The funds were not solicited by Respondent. There was no agreement between Gorman and Respondent for legal services to be performed for Gorman. They were not trust funds. Gorman simply wanted the funds to be invested. Gorman provided a Power of Attorney to Respondent to act as his attorney-in-fact (as opposed to an attorney at law). R.Ex. CC. It was under the Power of Attorney and partnership agreements that the funds were received and disbursed.

The Integration Rule does not apply to lawyers who receive special funds as a non-lawyer Trustee or one in a similar capacity under a specific document where the funds are maintained in a separate or segregated fund. [See Florida Bar Integration Rule Bylaws, Article XI, Section 11.02(4)(c)(1)].

Likewise, the Integration Rule did not and should not apply to Respondent who received the funds of Gorman as his "attorney-in-fact" under Gorman's General Power of Attorney where the funds were maintained in a separate segregated account.

Respondent argues that it would not be appropriate, just because Respondent happens to be a lawyer, to require him to place any and all funds that he receives from anybody into his law office trust account. This is particularly true when the funds were sent for purely real estate investment purposes.

Respondent received special trust funds from Mitzi as Mitzi's Trustee under the M-R Trust Agreement (B.Ex. 1) and maintained the funds in a separate trust account at Dean Witter Reynolds (TI 68, 70). The Integration Rule did not and should not apply to these funds received from Mitzi because Respondent was acting as Mitzi's Trustee and he maintained these funds under the M-R Trust Agreement in a separate account. Dean Witter supplied the accountings.

When the funds of Gorman or Mitzi were needed for a down payment of property or for an expense related to the property, it was taken from Gorman's account or the M-R Trust account on a cash needed basis and utilized for its appropriate purpose through the ledger card system which maintained a record of the transaction. In other words, at the point in time when the funds of Gorman or the M-R Trust were needed for an investment, the funds were disbursed for the particular expenditure. Because the Sun Bay units were closed and titled

in the name of the G-M and R-M-G Partnerships (B.Ex. 3, 5), the funds for the Sun Bay units went through the accounts for the G-M and R-M-G Partnerships.

At final hearing, J. Michael Morgan, a CPA and accounting expert, said that he examined Respondent's records and verified that the funds were held in separate accounts, that there was no commingling (TII 166) or other indication of any wrongdoing, that the records were complete (TII 152) and that there was no problem with the paper trail that supported the transactions.

For the reasons stated above, Respondent submits that the Integration Rule was not applicable in this case.

Even if the Integration Rule was applicable, Respondent argues that Rule 11.02(4) was not violated because complete accountings of the funds were rendered to Mitzi and Gorman. (See Appendix B - Listing of Accounting Exhibits). The provisions of Rule 11.02(4)(c) provide for trust accounting procedures and outline minimum trust accounting records which are to be maintained. Respondent maintained the accounting records in accordance with the procedures. The Rule does not elaborate on providing accountings or the procedures of accounting for the funds.

CPA Morgan testified that he examined the records and found the records to be in order and complete. TII 152. Respondent was furnishing accountings on a regular basis to Gorman and Mitzi anyway. Mitzi and Gorman testified that they

were provided with the accountings listed on Appendix B- Listing of Accounting Exhibits except for those supplied to their attorney (Files) which were apparently not provided to Mitzi or Gorman. Likewise, Mitzi and Gorman received complete accountings.

Respondent did not violate the Integration Rule because Respondent maintained the records (which were at all times available for inspection by Gorman and Mitzi) and because Mitzi and Gorman were provided complete accountings.

Finally, we would submit that the referee improperly found that Rule 11.02.(4) was violated for failure to provide a requested accounting. To the contrary, Respondent responded to every request made.

Gorman and Mitzi testified they received accountings throughout the period in question. (See Appendix B - Listing of Accounting Exhibits). Mitzi further testified that he never made a request for an accounting. TI 48. Gorman testified he received everything that he requested (TI 196) through the time that he received the files and records at the end of 1986 (TI 140).

The Bar alleged that a request for an accounting of Respondent's contributions to R-M-G Partnership was made but never provided. It is upon this allegation that the Referee made his recommendation that Respondent be found guilty of violating the Integration Rule for not providing an accounting of the funds as requested. RRIII, Count III. There

apparently is no concern about the capital contributions of Mitzi or Gorman or the expenses of the properties for that matter.

First of all, Respondent was never asked to provide an accounting of Respondent's contributions. The record clearly reflects this. Mitzi testified that he never made a request of Respondent for an accounting. Mitzi said he had a discussion with Gorman and it was Gorman who requested the accountings. TI 48. Gorman was asked directly twice whether he ever made a request of Respondent for an accounting of Respondent's contributions. In no uncertain terms, Gorman said, "No." TII 16, 18. Nor was any request of Respondent for an accounting of Respondent's contributions ever made by anyone else on behalf of Gorman or Mitzi and there is no exhibit or evidence that verifies such a request was ever made.

It should be pointed out that Gorman testified that he and his representatives were provided with everything they requested through the time that he obtained the records. TI 140, 147, 162, 182, 196. Gorman made some mention of a friend of his in Little Rock who made some request, but his friend never testified nor was there any letter or other exhibit to substantiate what was requested.

Respondent testified he provided Gorman's friend with everything he requested and offered him the opportunity to inspect any records in Respondent's possession, since the

records had already been provided to Gorman.

Gorman also stated at one time he requested copies of cancelled checks. Respondent provided Gorman and Files with numerous opportunities to inspect the checks and even provided Attorney Files with copies of the checks. TI 155; TII 47.

Respondent provided Files with accountings for Mitzi and Gorman as documented by R.Ex. CCCC, Items 46-52, 54. These, however, were never provided to Mitzi or Gorman by Attorney Files as Mitzi and Gorman testified. TI 118, 120, 194; TII 13; R.Ex. Y, Z, KKK, YYY. Files apparently attempted to ascertain things on his own and had some success. TII 40. He was provided with the records that the accounting expert, CPA Morgan, examined. Mr. Morgan examined those records and found them to be complete. TII 152. Even Attorney Files testified that he was able to verify Respondent's contributions later. TII 42.

Respondent provided a complete accounting throughout the relationship. There were opportunities for Gorman and Mitzi and their representatives to inspect all of Respondent's records. Respondent responded to all requests for accountings. Therefore there is no evidence to support the Bar's allegation that Respondent failed to respond to a request of an accounting of his contributions to R-M-G Partnership, Respondent has not violated Integration Rule 11.02(4) for failing to provide a "requested" accounting of funds.

In conclusion, the Referee's recommendation of guilt of Article XI, Integration Rule 11.02(4) for failing to furnish an accounting as requested should not be upheld and should be reversed because:

1) the rule is not applicable;

2) complete accountings were provided all along; and

3) Respondent, having already provided complete accountings, responded to all further requests.

B. THE REFEREE ERRED IN RECOMMENDING RESPONDENT BE FOUND GUILTY OF DISCIPLINARY RULE 5-101(A) FOR ACCEPTING EMPLOYMENT WHERE THE EXERCISE OF RESPONDENT'S PROFESSIONAL JUDGMENT ON BEHALF OF CLIENTS WOULD BE OR REASONABLY MAY BE AFFECTED BY HIS OWN FINANCIAL, BUSINESS, PROPERTY, OR PERSONAL INTERESTS.

Disciplinary Rule 5-101(A) states:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment <u>if</u>
>
> the exercise of his professional <u>judgment</u> on behalf of his client will be or reasonably may be <u>affected</u> by his own financial, business, property or personal interests.

More simply stated, the Rule states that a lawyer should not accept employment <u>if</u> his judgment is affected by his interests unless the client consents.

In Mitzi's case, Respondent testified that he first made the disclosures at the time when Mitzi executed a Power of Attorney and M-R Trust Agreement. This is when Respondent first performed services for Mitzi. At this time,

Respondent's judgment would not have been affected by his own interests since he was simply acting as Trustee at Mitzi's request and representing Mitzi's interests as fully disclosed in the Trust Agreement.

Respondent nad no interest as Trustee and certainly not one that would affect his judgment on behalf of Mitzi. During the final hearing, Mitzi was never asked whether Respondent discussed the issue of conflict and the right to seek independent counsel at this time in 1982. On the other hand, Respondent specifically recalled making disclosure and receiving consent. This coincides with Mitzi's testimony that he would never have thought of hiring another attorney.

Because Respondent's judgment in 1982 would not have been affected by any interest that he might have in the M-R Trust as the Trustee, the Rule was not applicable.

In 1983, Mitzi and Gorman decided to make investments in residential condominiums and the G-M Partnership was formed to govern the ownership and management of Sun Bay Club Condo 236. Respondent, as Mitzi's Trustee and with Mitzi's consent as documented by the Amendment to the M-R Trust Agreement, entered into the G-M Partnership with Gorman to buy and rent the condos subject to the arrangement outlined and fully disclosed in the partnership agreement.

Respondent was not a partner in G-M. Mitzi and Gorman wanted Respondent to acquire the condo and oversee the interior improvements and repairs that were needed at the

inception. The fact that Respondent deferred part of his compensation for this work and made it contingent upon a one-sixth percentage of profit, if any, for services already performed does not create an adverse interest in the property. His charge was a fee for services. Respondent acted simply on behalf of the G-M Partnership and not for himself.

Gorman had his own attorneys and CPAs in Michigan who represented his matters and further acknowledged his consent by signing his October 31, 1983 Power of Attorney for Respondent to enter Gorman into the partnerships. Mitzi again indicated he would not have thought of hiring another attorney thereby indicating his consent to Respondent and the same is documented by his personal signature on Amendment to the M-R Trust dated October 31, 1983. Respondent's responsibility thereafter toward the caretaking of the condo was fully disclosed in the partnership agreement which provided the services to be performed and the compensation to be paid.

Respondent submits that DR 5-101(A) was not applicable because Respondent had no personal interest in the G-M Partnership. If the rule is applicable, however, disclosure was made using the example of wearing different hats and consent was freely given.

The R-M-G Partnership was created on October 31, 1983 also. Respondent's involvement was necessary to provide the G-M Partnership with the ability to acquire the unit for 5% down rather than 10%, a saving of $6,000.00. Ninety percent

of the tax benefits were provided to the G-M Partnership. The arrangement was fully disclosed and Respondent was subjected to the provisions in the partnership agreement. Respondent's interest was clearly in facilitating an investment opportunity for Mitzi and Gorman and not for himself. Gorman and Mitzi needed Respondent to accomplish their goal of investing in the Sun Bay Townhouse. Neither of them could reside in the unit and though Respondent resided in it, fair rent was paid for its use. R.Ex.JJ, p1, line 6(a); TII 167-168. More importantly, by residing in the unit, Respondent reduced the down payment by one-half.

Respondent's judgment was not affected by the way the partnership was structured. Respondent was required to act in the manner outlined in the agreement. Respondent could not change it without the consent of Mitzi and Gorman. Respondent further, as shown by his act of readily turning over the management in late 1986, did not let his judgment be affected by any interest he may have acquired signing the Partnership Agreement. As it has turned out, it was not in Respondent's best interests to turn over the management to Gorman, but he did so voluntarily at Gorman's request with Mitzi's consent. At the time the properties were turned over to Gorman, they were in excellent shape financially. (Both units were rented.) It is only through the mismanagement of Gorman and Mitzi that damage has been caused.

Finally, it should be noted that the Referee did not find

that Respondent failed to make disclosures. His findings stated Respondent did not fully disclose; in other words, the Referee found that disclosure was made, but it was not complete. We would submit that this finding has to be based on the testimony of Mitzi and Gorman versus the Respondent since the disclosure and consent was not reduced to writing in 1983. (It should be noted that the rule in effect at that time did not require consent in writing.)

In view of the confusion and lack of recall in the testimony of Mitzi and Gorman, especially where neither one of them can recall this same issue and where there is documentary evidence on disclosure and consent, we would submit that their testimony is not persuasive. Most importantly, on the issue of disclosure, Gorman's Affidavit and the December 23, 1983 time slip of the meeting with Mitzi specifically mentioning conflict of issue, provide documentary evidence that Respondent's custom was to discuss conflict. This is buttressed by the testimony of two of the character witnesses, Kenney (TIV 45) and Attorney Leklem (TIV 9-10).

C. THE REFEREE ERRED IN RECOMMENDING RESPONDENT BE FOUND GUILTY OF DISCIPLINARY RULE 5-104(A) FOR ENTERING INTO A BUSINESS TRANSACTION WITH CLIENTS WHEN THEY HAD DIFFERING INTERESTS THEREIN AND THE CLIENTS EXPECTED THE EXERCISE OF HIS PROFESSIONAL JUDGMENT THEREIN FOR THE PROTECTION OF THE CLIENTS.

Respondent did not violate DR 5-104(A) because the interests of Mitzi, Gorman, and Respondent were not different,

their interests were mutual. DR 5-104(A), which limits (not prohibits) business relations with clients, states:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Respondent had mutual interests with Mitzi and Gorman. They all wanted the property to be rented and to increase in value. The investment in Sun Bay Townhouse 8 was a mutual investment. Mitzi wanted to invest "secretly" in a residential condominium with Gorman, Mitzi's close friend, who wanted a Florida real estate tax shelter in an area that was booming. Mitzi and Gorman needed and wanted Respondent to handle the transaction and care for the property.

DR 5-104(A) prohibits entering into a business transaction with a client only if they have differing interests." It should follow that if the lawyer and client do not have differing interests, then the lawyer may enter into a business transaction with his client. The rule does not state that a lawyer is prohibited from entering into any business transaction with his client.

The Bar argues that notwithstanding the clear language ("if") of the rule, any time a lawyer enters into a business transaction with his client that there are differing interests. They cite The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982) as authority. However, DR 5-104(A) does not state that every time a lawyer enters into a business

transaction with his client there is automatically differing interests. If DR 5-104 meant any business transaction was a conflict, the rule should have said so. It did not.

Respondent should not be found guilty of violating DR 5-104(A) because the rule does not prohibit lawyers from entering into business transactions with clients when the interests of the parties are the same.

DR 5-104(A) allows a lawyer to enter into a business transaction with a client with a differing interest where there is full disclosure and client consent. Respondent argues that Respondent did make proper disclosure and client consent was given at the time that the partnership agreement(s) were signed, i.e., October 31, 1983. Respondent precisely recalls disclosing the issue of conflict of interest and right to seek independent counsel in terms of him wearing different hats. TIII 36-37. Respondent had met with Mitzi before the partnership agreements were executed to get Mitzi to sign the First Amendment to the M-R Trust (B.Ex. 1) and Gorman to sign a third Power of Attorney (B.Ex. 24). It was at this time that disclosure was made and consent was given.

Mitzi does not recall hearing the term "conflict of interest," but he never said that Respondent did not discuss the concept in the terms Respondent indicated he used, i.e., the wearing of different hats. Furthermore, Mitzi was confused as to when he heard the term "conflict of interest." At first, he said it was at the time" when the Moorings

(Condominium) closed" (TI 44), which was in June,1985 (B.Ex. 9). Then, Mitzi completely contradicted his own testimony on this issue when he testified that "(i)t wasn't during the Moorings" (TI 85), it was after he retained Files (TI 86), which was August, 1986 (TII 52). This is just one more example of how confused Mitzi is on the facts in issue and shows that his testimony is not credible.

Apparently, the Referee agrees that some disclosure occurred because in the Referee's Finding of Facts at paragraph 18, he found that Respondent did not fully discuss the issue prior to the execution of the G-M and R-M-G Partnerships.

Later in the hearing, Gorman does not even recall signing his own Affidavit which specifically addresses the issue of conflict of interest. R.Ex. VV. The Affidavit states, in part:

> 7. Attorney, Thomas A. Rogers, has been very frank in his discussions with me concerning the ethical requirements involved in said representation and has made it very clear to me that the representation would not be undertaken or continued without my consent.

This Affidavit, which was executed on June 11, 1985, was mainly dealing with another piece of property and it was almost two years after the R-M-G Agreement commenced, but if Gorman cannot even remember a written Affidavit in 1985 that he personally signed it is understandable that he cannot remember a conversation about issues of conflict of interest and the right to seek independent counsel in 1983.

Furthermore, that affidavit shows that it was Respondent's custom to discuss conflicts of interest.

Bar Counsel argues that the only way to have full compliance is to have written disclosure to the clients. However, in 1983 there was no rule that required Respondent to document that Respondent to make his disclosures in writing. Such a rule was ot adopted until January 1, 1987.

The record shows it would be out of character for Respondent not to disclose the conflict issue and obtain consent. [See the testimony of one of the character witnesses, Kenney (TIV 45), who points out the fact that Respondent discussed the issue with him on other occasions even though Kenney saw no differing interests. See also the testimony of character witness, Attorney Leklem (TIV 9-10), who also testified that Respondent is quite aware of when a client should seek independent counsel.

Mitzi and Gorman simply do not recall the events that occurred back in 1982 and 1983. Their lack of is due possibly to the time that has elapsed. Or, it is due to their desire to recoup from Respondent the financial losses they claim for their unsuccessful investments in the condominium market.

Finally, Respondent was not Gorman's lawyer. DR 501-4 only applies to lawyers doing business with their clients. It is not applicable to non-clients. As such, Respondent did not violate 5-104(A) insofar as Gorman is concerned.

For the reasons stated above, Respondent did not violate DR 5-104(A) as to Mitzi and Gorman because 1) Respondent's interests were not different from those of Mitzi and Gorman; 2) Respondent did make disclosure and receive consent; and 3) Because Gorman was not a client of Respondent, the rule would not be applicable.

POINT IV

(ADDRESSING THE BAR'S INITIAL BRIEF)

A PUBLIC REPRIMAND, AS RECOMMENDED BY THE REFEREE IS THE APPROPRIATE DISCIPLINE FOR RESPONDENT'S CONDUCT.

Respondent was found guilty in counts one and two of conflict of interest (DR5-101(A) and 5-104(A)) and for engaging in conduct adversely reflecting on his fitness to practice (DR 1-102(A)(6)). On a third count he was found guilty of violating Integration Rule 11.02(4) for failing to furnish an accounting.

Respondent was not found guilty, or for that matter even charged with, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(4).

Respondent was not found guilty of misuse of trust funds or charging a clearly excessive fee.

The referee's findings include only technical violations, i.e., conflicts of interest and failure to file a sufficient accounting. Such misconduct warrants, at most, a public reprimand. The Florida Bar v Welty, 382 So.2d 1220 (Fla. 1980).

The same referee who made factual findings the Bar endorses rejected the Bar's request for a suspension. That referee, after observing the testimony of Respondent's character witnesses, and, most importantly, of Respondent himself, determined that the appropriate sanction is a public reprimand. That decision should not be lightly overturned.

In cases such as this, where the facts are in material dispute, a referee's determination as to a sanction should be given great weight. He is in the best position to determine a Respondent's motive (and there was no dishonest motive found in this case).

Bar Counsel's statement on page 12 of his brief that Respondent is guilty of "self-dealing" and "lack of candor with his clients" are conclusions drawn by the Bar and are refuted by the Referee's findings and recommendations.

The Bar's suggestions that the referee was unduly lenient was based upon their conclusion, not the referee's, that Respondent engaged in the reprehensible conduct cited above.

Contrary to the Bar's assertion, this is not a case of a lawyer taking advantage of clients in a business transaction. Perhaps, there was a conflict of interest. Perhaps, Respondent did not sufficiently account. However, Respondent did not benefit to the detriment of these sophisticated investors.

Father Mitzi, despite his priesthood, had huge sums of money to invest. He lost $37,000.00 in an investment and it

did not deter him from making large investments immediately thereafter. He was still able to invest in four or five real estate enterprises and to lend $23,000.00 to his secretary.

Mr. Gorman wired the Respondent $30,000.00, without Respondent's request, with no directions save that they be invested in realty. Mr. Gorman was not a client.

Mitzi and Gorman benefited from Respondent's services. Obviously, they are only complaining about the investments that went awry.

The Bar complains on page 13 of Respondent's failure to advise Mitzi to seek independent counsel prior to signing the M-R Trust in 1982. There is no requirement that he do so. Respondent was not a beneficiary of the trust.

The Bar erroneously argues that disclosure requirements were necessary in the formation of the G-M partnership. Respondent was not a partner to that enterprise.

The worst allegation in the Bar's brief, made at pages 16 and 17, is the allegation that Respondent utilized his client's funds to make a down payment on his personal residence. That is not supported by the referee's findings. If it were, it would be misuse of trust funds. There was no such violation.

Respondent, on behalf of the partners, in 1983 signed an option to purchase the Moorings unit. Two years later, his partners decided they did not want to invest in it. At that time, Respondent bought it himself. Had he not done so, the

partnership would have had to forfeit the entire $12,600.00.

According to the Bar, rather than buying the Moorings, Respondent should have simply defaulted on the contract and the partnership would have been out the $12,600.00. That is simply not prudent. Respondent did reduce his partnership interest in R-M-G from one third to one sixth at that time. However, both Sun Bay units were rented at the time, the real estate crash had not yet occurred, and it appeared that the investments were going to be profitable. Respondent gave up a valuable interest when he reduced his interest in R-M-G by one-half.

The Bar states on page 17 of their brief that Respondent was guilty of "misuse of client funds". That is not true. The referee made no such finding.

The Bar cites numerous cases in its brief wherein lawyers received public reprimands for similar or more serious misconduct. Those public reprimand cases include The Florida Bar v Dougherty, 541 So.2d 610 (Fla. 1989). The Florida Bar v Johnson, 526 So.2d 53 (Fla. 1988), The Florida Bar v Johnson, 511 So.2d 295 (Fla. 1987), and The Florida Bar v Horner, 356 So.2d 292 (Fla. 1978). Respondent argues that those cases are on point and should be followed.

There was extensive mitigation presented pursuant to Rule 9.32 of the standards for imposing lawyer sanctions.

Standards 9.32(a) (no prior record) and 9.32(j) (interim rehabilitation) head the list of mitigation. Respondent has

been a lawyer since 1977 and has no prior disciplinary history. Furthermore, his last (and only) acts of misconduct occurred four years ago. Suspension is not necessary to protect the public.

Standard 9.32(g), excellent reputation, is also a mitigating factor.

The most important mitigation, however, is a lack of a dishonest or selfish motive. Standard 9.32(b). As emphasized above, there was no finding that Respondent engaged in dishonest conduct contrary to DR 1-102(A)(4). If Respondent made errors, they were good-faith mistakes.

The genesis of Respondent's dealings with Mitzi must be considered. He went to Mitzi upon joining the congregation and, in lieu of donating money, offered his services. This is consistent with his devotion to the church (testimony from Father Muzic, TIV, 49-51). Father Mitzi then asked Respondent for help in making secret real estate investments.

Ultimately, Mitzi introduced Respondent to Gorman, a wealthy Michigan resident with money to invest and who was seeking tax shelters. Mr. Gorman sent Respondent $30,000.00 for investment purposes in July, 1983. That money was not requested by Respondent.

Respondent did not embark upon his dealings with any sense of self-aggrandizement. He was not trying to take advantage of anyone.

The record is replete with numerous accountings and

disclosures made to the clients, including tax returns that were never audited or challenged. Respondent tried to comply with the rule. His clients simply did not, supposedly, understand his material. It was for this reason only that the referee found a violation of Rule 11.02(4).

CONCLUSION

The findings of the Referee should not be upheld and the charges against Respondent should be dismissed.

If this Court finds that Respondent has engaged in misconduct, this Court should adopt the Referee's recommendation that he receive a public reprimand.

Respectfully submitted,

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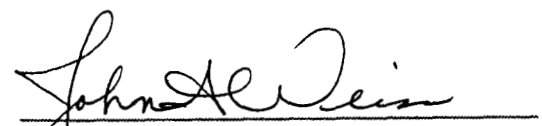

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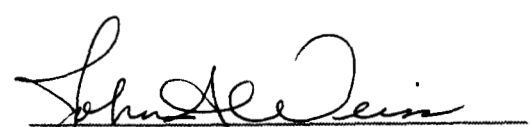
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the a copy of the foregoing Brief has been mailed to DAVID G. McGUNEGLE, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801 this 6th day of September, 1990.



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