IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 73,905
[TFB No. 88-30,503 (18A)]

v.

THOMAS R. ROGERS,

Respondent.

______________________________/

INITIAL BRIEF

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SYMBOLS AND REFERENCES

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

RR will denote the Report of Referee.

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.

B-Ex will denote Bar Exhibits.

R-Ex will denote respondent's Exhibits.

STATEMENT OF THE CASE

The Eighteenth Judicial Circuit Grievance Committee "A" voted to find probable cause on December 7, 1988. The Bar filed its three count Complaint on March 27, 1989. The respondent moved for an extension of time to file the Referee's Report which was granted by this Court on October 11, 1989. The evidentiary hearings before the Referee were held on December 18, 19 and 20, 1989. The closing arguments and testimony in mitigation were presented at a hearing on December 28, 1989. The respondent's second motion for extension of time to file the Referee's Report was granted on February 5, 1990. A third motion for extension of time to file the Referee's Report was filed on March 21, 1990, and granted. The Referee was given until May 1, 1990, to file a report. The disciplinary hearing was held before the Referee on April 18, 1990.

The Report of Referee dated April 27, 1990, was filed with this Court on May 1, 1990. As to Count I of the Bar's Complaint, the Referee recommended the respondent be found guilty of violating Disciplinary Rules 1-102 (A)(6) for engaging in conduct that reflected adversely on his fitness to practice law; 5-101(A) for accepting employment where the exercise of his professional judgment on behalf of his clients was or could have been affected by his own financial, business, property, or personal interests;

and 5-104(A) for entering into a business transaction with his clients when they had differing interests therein and the clients expected the respondent to exercise his professional judgment for their protection. As to Count II of the Bar's Complaint, the Referee recommended the respondent be found guilty of violating Disciplinary Rules 1-102(A)(6) for engaging in conduct that reflects adversely on his fitness to practice law; 5-101(A) for accepting employment where the exercise of his professional judgment on behalf of a client was or reasonably could have been affected by his own financial, business, property, or personal interests; and 5-104(A) for entering into a business transaction with clients when they had differing interests therein and the clients expected the respondent to exercise his professional judgment therein for their protection. As to Count III of the Bar's Complaint, the Referee recommended the respondent be found guilty of violating Article XI, Integration Rule 11.02(4) for failing to furnish an accounting of the funds as requested.

The Board of Governors considered the Report of Referee at its meeting which ended on May 16, 1990, and voted to appeal the Referee's recommended discipline. The Bar filed its petition for review on May 24, 1990, and the respondent filed a cross-petition for review dated June 1, 1990.

STATEMENT OF THE FACTS

Because The Florida Bar does not challenge the Referee's findings of fact, the following facts, except as otherwise noted, are taken from his Report of Referee dated April 27, 1990.

In 1981 the respondent first met Father John Mitzi, a Catholic priest. Shortly thereafter, the respondent offered his assistance to the church as both a certified public accountant and as an attorney should the church require the services of either. Father Mitzi soon consulted with the respondent concerning rental property that Father Mitzi wished to purchase. For personal reasons, Father Mitzi did not want his name to appear in connection with the purchase. The respondent purposed he utilize a trust arrangement to accomplish Father Mitzi's goals including avoidance of public knowledge of the investment. Father Mitzi began utilizing the respondent's professional services in connection with a number of other real estate investment transactions as well. In connection with these various transactions, the respondent formed several trusts for Father Mitzi including the M-R trust on February 18, 1982. The respondent prepared the document and acted as trustee at Father Mitzi's request. Father Mitzi was both beneficiary and grantor and made all of the cash contributions to the M-R trust. The respondent had no monetary interest in the trust.

In 1982, Father Mitzi introduced the respondent to Frank Gorman. Mr. Gorman, a resident of Michigan, was a long time friend of Father Mitzi. Mr. Gorman was interested in investing in Florida real estate and the respondent was so advised. On or around July 13, 1983, Mr. Gorman sent a check in the amount of $30,000 to the respondent for investment purposes without specific instructions. Subsequently, on either August 6 or September 6, 1983, Mr. Gorman executed a general power of attorney appointing the respondent as his attorney in fact.

On October 31, 1983, Mr. Gorman and the respondent, acting as trustee for the M-R trust, entered into a partnership agreement to form the G-M partnership. The respondent drafted the agreement. The initial capital of G-M was $45,000 with Mr. Gorman contributing $30,000 and the respondent, acting as trustee for the M-R trust, $15,000. Mr. Gorman was allocated 90% of the tax benefits associated with the investments of the partnership. The respondent had the authority to make all ordinary managerial decisions and would be compensated by 20% of the gross rental amount of the investment properties. All legal services were to be provided by the respondent's law firm at a rate of $65.00 per hour. The respondent had a financial interest in G-M in that when an investment property was sold for a profit he would receive 1/6 of the appreciation as compensation for locating the property and directing repairs and interior decorating.

The sole investment of G-M was Sun Bay Condominium unit 236B. The purchase and sale agreement for the unit was signed earlier on August 20, 1983, for a purchase price of $99,900. The respondent represented the M-R trust at the closing and received a legal fee for doing so. The purchase contract was then assigned to G-M after the partnership was formed. The down payment on the unit was only $10,000. Father Mitzi was not made aware of this and stated he believed that the down payment would be $20,000. (TI p. 127).

The respondent charged G-M a monthly management fee from October, 1986, through October, 1988, totalling $3,965.00. Neither Mr. Gorman nor Father Mitzi received billings. Instead, the respondent took funds directly from the G-M account by adjusting bookkeeping entries and crediting himself with the capital contribution.

The respondent and his family resided in Sun Bay Unit 236B for approximately three months. (TII p. 79). While Unit 236B was rented, including the period the respondent lived there, it failed to generate sufficient income to cover the mortgage obligation.

To facilitate another investment purchase, the respondent suggested that he, Father Mitzi and Frank Gorman form the R-M-G partnership. The purpose of the new partnership was to purchase a town house unit at Sun Bay. On October 31, 1983, an agreement

to form the R-M-G partnership was entered into between the G-M partnership and the respondent. The respondent drafted the partnership agreement. The respondent was to receive 1/6 of the appreciation if an investment property was sold at a profit. The initial capital was $45,000 with G-M contributing $30,000 and the respondent $15,000. According to the agreement, contributions were to be made in cash or its equivalent. The Referee found Father Mitzi and Mr. Gorman believed that all contributions were to be made in cash. Father Mitzi understood the term "cash or its equivalent" to refer to the use of a cashier's check or money order in place of currency. Mr. Gorman testified that he understood that some of the respondent's contributions might be in the form of services. (TI pp. 135-136).

The respondent billed R-M-G for legal services without advising either Father Mitzi or Mr. Gorman. Transfers were made as accounting entries directly from the account maintained by the respondent for R-M-G. The respondent maintained the partnership books and records at his law office from October 31, 1983, until the latter part of 1986.

The sole investment of R-M-G was townhouse unit #8 at Sun Bay Club Condominium which was purchased on October 31, 1983, for $120,000 with a $6,000 down payment. Financing was contingent upon the unit being owner occupied for at least one year. The respondent lived in the townhouse because it was not possible for either Father Mitzi or Mr. Gorman to reside there. The

Referee found Father Mitzi was not aware that the respondent intended to live in the unit until after he had already moved in.

The respondent resided in townhouse unit #8 from November, 1983, to March, 1985. From March, 1985, through July, 1985, he lived in condominium unit 236B. During this time the respondent rented out his single family home and obtained a tax benefit on his personal income tax return. The respondent paid $600.00 per month to R-M-G for the townhouse although the fair market value was $900.00 per month. He determined this to be the appropriate rent by deducting his 1/3 ownership interest from the fair market value. Because the mortgage payments were $1,325.00 per month, this resulted in a negative cash flow of more than $700.00 per month for townhouse unit #8.

Commencing in September, 1984, the respondent periodically requested additional cash contributions from Mr. Gorman to cover the negative cash flow first for G-M and then R-M-G. The two Sun Bay units generated a $1,620.00 negative cash flow in 1983. In 1984, the amount grew to $13,470.00. In 1985, the total negative cash flow was $17,545. The period from January through August, 1986, saw a negative cash flow of $14,110.00. The approximate total negative cash flow for the two Sun Bay properties was $49,745.00. Mr. Gorman advised Father Mitzi that he, Mr. Gorman, was assuming the negative cash flow alone. Father Mitzi was not

made clearly aware of the monthly operating costs associated with either of the Sun Bay units.

The Referee found no evidence that the respondent contributed any cash to either of the partnerships. It appeared that his capital contributions consisted of attorney's fees, management fees, rent or mortgage payments and other minor services. The respondent did not adequately advise Father Mitzi and Mr. Gorman of his intention to contribute services in lieu of cash nor was it indicated on accountings prepared before June, 1985.

The respondent did not fully discuss any potential conflict of interest he may have had with Father Mitzi or Mr. Gorman prior to the execution of the G-M and R-M-G partnership agreements. Before entering into the agreements, he did not advise them of a possible conflict of interest between his role as the attorney for the partnerships and his role as an investor. He did not advise them that they should consider the advice of another attorney prior to entering into either partnership agreement.

In August, 1983, the respondent decided to purchase a condominium unit at The Moorings on Lake Maitland. This was a pre-construction development at the time. On September 2, 1983, the respondent entered into a condominium purchase and sale agreement for unit #101, building 2A, The Moorings, and signed said agreement as an individual purchaser. The contract was

non-assignable but the respondent testified that he secured a verbal agreement with the sales director, Eleanor Ecker, that the contract was assignable. The purchase price was $104,000 with an initial deposit of $10,400. Both the initial deposit and a later additional deposit of $2,250.00 were drawn by the respondent from funds belonging to Mr. Gorman maintained in the respondent's account. Both Mr. Gorman and Father Mitzi testified that the respondent made these decisions without first consulting them.

On April 17, 1985, the respondent and his wife signed a good faith estimate of borrower's settlement costs with Countrywide Funding Corporation, the mortgage lender.

On April 29, 1985, the respondent wrote to Mr. Gorman and indicated that he had previously offered to take over responsibility for The Moorings unit. The respondent requested that Mr. Gorman let him know in writing how he wanted to proceed with regard to The Moorings. The Referee found that this statement implied that Mr. Gorman was not an investor on April 29, 1985.

SUMMARY OF THE ARGUMENT

The Referee was unduly lenient in recommending a public reprimand as discipline. It appears that more emphasis was placed on the mitigating testimony concerning the respondent's general character than on the fact pattern and case law. The respondent's conduct shows self-dealing and lack of candor towards his clients. The recommended discipline is plainly erroneous and unjustified.

The failure to adequately disclose his conflicting interests in a business transaction with his clients, standing alone, would warrant a public reprimand. However, the respondent went beyond that in this case. He prepared the partnership agreement for R-M-G which allowed him to make capital contributions in the form of services. The respondent then took full advantage of this provision, and in effect, contributed no cash to the partnership other than rental or mortgage payments and some incidental expenses. The accountings provided to Father Mitzi and Mr. Gorman before June, 1985, failed to disclose his real contributions. Even during the Bar proceedings the respondent was reluctant to admit that he applied his rental and/or mortgage payments toward his capital contributions despite the fact that this was the main cash he paid. Note the Referee found no evidence of any cash contributions by him to any trust or partnership.

The respondent also utilized partnership assets, which consisted of funds paid in by Mr. Gorman, to purchase an investment property which ultimately became his personal residence after he maneuvered R-M-G out of the investment. The money used as the down payment was real. The money returned to R-M-G was nothing more than numbers on a piece of paper.

It appears that when the situation came to a head in 1985 and Mr. Gorman demanded a full accounting, rather than confront the situation and provide a full accounting showing his contribution of services in lieu of cash, the respondent refused to deal with the situation. Even now it appears from his testimony at the final hearing that he does not recognize the potential conflicts inherent in such a business transaction, that he had a duty to make a full accounting upon demand, especially after the dispute arose, and that it was improper for him not to return cash to R-M-G after Father Mitzi and Mr. Gorman indicated they did not want to invest in The Moorings.

Given the respondent's conduct, the Bar submits the Referee's recommendation of a public reprimand is an unjustified discipline and that either a sixty or ninety day period of suspension is required to better meet the goals of attorney discipline.

ARGUMENT

A SUSPENSION FOR A DEFINITE PERIOD OF SIXTY OR NINETY DAYS RATHER THAN A PUBLIC REPRIMAND IS THE APPROPRIATE DISCIPLINE IN THIS CASE GIVEN THE NATURE OF THE RESPONDENT'S MISCONDUCT.

A referee's findings of fact should be upheld unless clearly erroneous. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). This Court, however, exercises a broad scope of review in evaluating a referee's recommendation of discipline. The Florida Bar v. Patarini, 548 So.2d 1110 (Fla. 1989). The Florida Bar does not take issue with the Referee's findings of fact but believes his recommendation of a public reprimand is erroneous and unjustified given the respondent's refusal to provide an accounting upon demand, self-dealing and lack of candor with his clients. When an attorney abuses the special fiduciary position created by the attorney/client relationship to bolster his own interests at the expense of his clients, even if the abuse is unintentional, it should warrant a stern form of discipline. There is simply no more fundamental breach of an attorney's ethical responsibilities than to take advantage of clients even if it is done without the express intent to victimize the clients.

The Bar submits the Referee was unduly lenient in recommending discipline. This is yet another case of an attorney engaging in improper business transactions with clients. All of

the parties hoped to reap enormous profits but unfortunately this did not occur. The respondent's role throughout the relationship is suspect as exemplified by his reluctance to disclose to his clients the full extent of his contribution of services.

The respondent's involvement with Father Mitzi began with the formation of the M-R trust in 1982. The respondent drafted the trust agreement and named himself as trustee. (TI p. 30; B-Ex 1). Although this was done at Father Mitzi's request, the respondent did not advise his client to seek independent counsel prior to signing the trust document. (TI pp. 44, 68). This put the respondent in a position to enter into the later partnership agreements from which he ultimately benefited.

The G-M partnership was formed in October, 1983. (RR p. 2; B-Ex 3). The respondent drafted the agreement but did not advise either Father Mitzi or Mr. Gorman to consult with another attorney prior to executing the agreement. (RR p. 5). Although the respondent was not a partner, he had a financial interest in G-M. If one of the investment properties was sold for a profit he would receive 1/6 of the appreciation as compensation for locating the property and directing repairs and interior decorating. (RR p. 2; B-Ex 3). The respondent also received compensation for his managerial services in the amount of 20% of the gross rental amounts of the investment properties. (RR p. 2; B-Ex 3).

The respondent's involvement with the businesses of his clients did not end with the G-M partnership. He took matters a step further by becoming a full-fledged partner with Father Mitzi and Mr. Gorman in the R-M-G partnership which was formed in October, 1983. (RR p. 3; B-Ex 5). This was done at the respondent's suggestion in order to facilitate the purchase of investment property. (RR p. 3). The respondent drafted the agreement but did not advise either Father Mitzi or Mr. Gorman to seek the advice of independent counsel prior to executing the agreement. (RR p. 5).

The respondent's failure to disclose to his clients his conflicting interests at the outset, standing alone, warrants a public reprimand. But there is more to this case than a simple business transaction engaged in with a client. The respondent exhibited a lack of candor extending beyond his failure to disclose the conflict. It appears the accountings he provided until mid-1985 failed to disclose the true nature and extent of his capital contributions. Had they been adequate then the analysis performed by Campos and Stratis which was placed into evidence as Bar Exhibit 25 would not have been necessary. Furthermore, had Mr. Gorman and Father Mitzi known the respondent was not contributing any cash they most likely would have complained to the Bar at an earlier date. Although they were experienced investors they relied on the respondent's

professional judgment and integrity, a trust that now appears to have been misplaced.

The respondent took full advantage of the terms of the R-M-G partnership agreement he prepared. His capital contributions consisted of services rendered with the exception of his rental and/or mortgage payments and incidental expenses. He justified his payment of less than fair market value for rent by his position as a partner and manager. Despite the fact that the rental payments were most of the cash the respondent paid into the partnership, he was reluctant, even at the final hearing, to admit it. It is another example of the respondent's lack of candor with Father Mitzi and Mr. Gorman and his attempt to obscure his role to his partners.

The respondent's conduct concerning the purchase of The Moorings condominium unit is the most disturbing aspect of this case. He utilized $12,650 in cash contributed by Mr. Gorman to R-M-G to purchase a condominium unit which ultimately became his personal residence. He placed a non-refundable deposit on the unit in 1983 without first consulting with his clients and co-investors. Furthermore, he entered into the contract for sale and purchase as an individual and only procured an oral agreement from the realtor that the contract would be assignable to one of the partnerships. Because The Moorings was in a pre-construction phase, the actual closing did not occur until some two years

later when the unit was completed. During this time period the realtor who prepared the contract could have left the area or forgotten about the oral agreement to alter the terms of the written contract. Obviously, an attorney should know the importance of reducing any agreement to writing rather than relying upon oral promises in real estate matters.

During 1985 when Mr. Gorman anticipated retiring and believed he could no longer to handle the negative cash flow, he expressed his concern to the respondent about The Moorings investment. (TI pp. 144, 153). He knew the rent the respondent intended to pay was less than the fair market value. (TI p. 153). This would leave yet a third negative cash flow for Mr. Gorman to assume. (TI p. 153). The respondent advised Mr. Gorman not to invest in The Moorings and that he would assume the property himself. (RR p. 6). However, he did not tell his clients that he had already entered into the contract for purchase and sale as an individual. (TI p. 154). Mr. Gorman requested that the respondent return his share of the funds invested in The Moorings in cash. (RR p. 6). The respondent refused and Mr. Gorman testified that the respondent stated, "Do you want a bum check?" (RR p. 6). Although the respondent removed cash from the partnership account to make the down payment he returned no currency to the account. The funds were returned through nothing more than a bookkeeping entry. (TI p. 141). The respondent utilized his clients' funds to make a down payment on his

personal residence and in return did nothing more than reduce his partnership interest in R-M-G from 1/3 to 1/6. (RR p. 6).

The respondent compounded his difficulties with his accountings in 1985 which were composed of charts and summaries that did not adequately disclose his actual contributions in either cash or services. Prior to 1985 his accountings were fragmented and were mainly silent as to his role. Here the Referee correctly found the respondent failed to provide adequate accountings of the funds when requested.

Failure to account as well as misuse of client funds are serious issues. A public reprimand is more appropriate for isolated instances of neglect, technical violations of trust accounting rules without willful intent, or lapses of judgment. The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). This was no temporary lapse in judgment. The respondent's involvement in his clients' business transactions stretched over a two year period until the clients finally became concerned with the respondent's activities and decided to seek independent advice about the situations that had developed. As this Court stated in The Florida Bar v. Bennett, 276 So.2d 481, 482 (Fla. 1973):

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

The respondent has failed to live up to these standards in this case and a review of the case law indicates that a short-term suspension should be more appropriate than a public reprimand given the facts of this case.

In The Florida Bar v. Wagner, 497 So.2d 238 (Fla. 1986), an attorney received an eighteen month period of suspension followed by a three year period of probation for lending one client's trust funds to another client and becoming involved in an improper business transaction with a separate client. The attorney was acting as trustee for a trust beneficiary and was to send her monthly payments. After several months payments began arriving on an irregular basis. The trust beneficiary requested an accounting of the funds but the one submitted by the attorney was inadequate. The trust beneficiary was then forced to file a law suit in order to obtain an appropriate accounting. When it

was finally obtained, the accounting showed numerous questionable loans and payments made from the trust fund to a corporation owned by one of the attorney's clients. This "investment" resulted in a substantial loss to the trust beneficiary. In addition, the attorney was unable to account for $10,000 which should have been placed in his trust account but was never deposited. In addition, while representing a separate client, the attorney had him sign various documents involving numerous parties which ultimately led to mortgages against the client and his enterprise. The client was unaware that the documents provided for financing to construct a bowling alley in which the attorney was the sole owner and the client had no interest. Further, the attorney acted as counsel for the client during financial transactions between the client and a corporation solely owned by the attorney. In mitigation there was no evidence of illegal activity on the part of the attorney. The Court stated that had he stolen or profited from the unaccounted $10,000 then disbarment might have been the appropriate level of discipline.

In The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982), an attorney was suspended for ninety-one days for entering into an improper business transaction with a client. The more severe discipline was warranted because of the attorney's prior disciplinary history. In this instance, he had been retained by

a client who was facing foreclosure. Originally she intended to file for a Chapter 7 bankruptcy but instead entered into a partnership agreement with the attorney and a third party. The agreement provided that the client would deed title to the properties that were subject to the mortgage foreclosure actions to the attorney and the other investor who would then pay off the judgment creditors, sell the properties and split the profits. The client would receive 34% of the profits and the investor and attorney would receive 33% each. The accused attorney was the only attorney involved in the negotiations. He advised his client that she had the choice of either declaring bankruptcy or entering into this partnership agreement. After signing the agreement, the client requested an accounting. The one which she ultimately received failed to address the attorney's finder's fee or attorney's fee. The Court adopted the referee's finding that the accused attorney, "chose to ignore the fiduciary responsibility placed on an attorney entering into a business transaction with a client." Bern, supra at p. 527. He had a duty to advise his client that she should seek independent counsel prior to entering into the agreement because when he became a partner in the partnership his interests became those of maximizing his personal financial gain rather than ensuring his client's interests were protected.

An attorney received a sixty day suspension in The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984), for failing to notify

his business partner of the sale of some real property while acting as trustee for the group of investors and for failing to make a timely accounting of the funds received from the sale. In this instance, the investors were not clients.

In The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982), an attorney received a public reprimand and a three month period of suspension for his involvement in the sale of time share unit weeks at a vacation development. The attorney served as president, director and resident agent for Vacation Wonderlands of America, Inc., a corporation that purchased land in Florida. At the same time he served as an officer, director and resident agent of Encore Resorts International, Inc., whose purpose was to sell timeshare unit weeks. The attorney also acted as counsel for both corporations. Vacation purchased a tract of land and shortly thereafter entered into a contract for deed with Encore wherein Encore agreed to purchase the land. Prior to the conveyance, Encore began selling timeshare unit weeks for townhouses located on the property. The agreement for deed given to each purchaser provided that upon payment in full the purchaser would receive a warranty deed and title insurance coverage. The deed and title insurance were never provided to the purchasers due to the mortgage encumbrances and the fact that Encore did not own title to the property. Because the attorney

was closely associated with both corporations, it was found that he must have realized the impossibility under the circumstances of delivering the warranty deeds and title insurance to the purchasers. The original owners of the property eventually brought a foreclosure action against Vacation, but Encore continued to sell units after this time. The land was eventually sold pursuant to a foreclosure order and all of the purchasers lost their units. It was found that the attorney knew of the foreclosure suit and had a duty as a member of the Bar to insist that Encore immediately cease from selling unit weeks. There was no evidence that he benefitted financially from the operation of either corporation or that his actions were fraudulent in nature.

An attorney received a public reprimand and a two year period of probation in The Florida Bar v. Dougherty, 541 So.2d 610 (Fla. 1989), for investing substantial trust funds without disclosure in ventures in which he had potentially conflicting interests with the client. The attorney was remiss in his duties as trustee. On one occasion there was an acquisition of stock held by the trust but he failed to tender the shares to the purchaser for reissue. The annual accounting, which was prepared in an untimely manner, failed to show the acquisition. The attorney also neglected to return many of the lifetime beneficiary's telephone calls or tender quarterly payments in a timely manner and correct amounts. Some of the trust funds were

utilized to make a mortgage investment which involved one of the attorney's former clients. Fortunately, the investment proved to be a good one. The attorney then invested more trust funds in a corporation which the attorney represented. A mortgage secured the investment but the attorney failed to record it for a little more than one year. He entered into this business transaction without the consent of the lifetime beneficiary and without informing her of their potentially conflicting interests. The attorney also failed to keep adequate records which made it difficult to determine whether the lifetime beneficiary had received all of the money due her. Ultimately, the attorney was able to account for all the trust assets and they were turned over to a successor trustee. This Court stated that the attorney's actions could not be considered minor misconduct because the potential for self-dealing was too great. "Such actions constitute serious misconduct warranting substantial discipline." Dougherty, supra at p. 612. In imposing its discipline the Court considered the attorney's cooperation and his extensive personal and legal contributions to his community.

In The Florida Bar v. Johnson, 526 So.2d 53 (Fla. 1988), an attorney was publicly reprimanded and placed on four years' probation for trust accounting procedure violations and failure to account. This Court stated that, "a failure to account adequately for clients' money is a serious ethical breach even if

no financial harm ultimately accrues to them." Johnson, supra at p. 54. The Bar submits this should apply no less to a partnership arrangement such as R-M-G.

In The Florida Bar v. Johnson, 511 So.2d 295 (Fla. 1987), an attorney was publicly reprimanded for writing a "threatening" letter to his client expressing his religious beliefs as to what would happen if the client failed to pay a fee and misrepresenting in a public document his contribution to the limited partnership entered into with the client. The attorney had entered into a joint venture with his client to recover sunken treasure. The attorney drafted the partnership agreement which reflected that he would contribute $5,000 as a limited partner. He never contributed any money. Thereafter, a dispute arose as to the payment of his legal fees.

An attorney received a public reprimand in The Florida Bar v. Davis, 373 So.2d 683 (Fla. 1979), for misconduct in connection with a speculative real estate transaction entered into with another business man. There was no attorney/client relationship involved. The attorney received funds from the businessman for one purpose but used them for another. He commingled funds received for different purposes and used them to promote his own business objectives. When the real estate deal ultimately could not be consummated he failed to return the unpaid balance. It

was found that the attorney's conduct did not involve dishonesty, deceit, or misrepresentation although his conduct was not within the moral standards set by Rule 11.02(3)(a).

In The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978), an attorney received a public reprimand for failing to account to his client, commingling and improperly using trust funds. The attorney engaged in both an attorney/client relationship and a social relationship with an individual. He acted as attorney on behalf of his friend for collecting rents on certain property, handling the purchase and sale of certain property and handling through judgment a law suit involving the non-payment of rent. The attorney deposited the rents he collected and the monies he received from the judgment in his trust account. Although he made numerous efforts to effect a settlement and disposition of the funds with his client, including legal fees due, his efforts met without success. The client advised the attorney that he should use whatever funds were necessary from the trust account and that a settlement could be reached at a later date. The attorney then utilized his client's funds without the client's express knowledge and consent. Thereafter, the client died and his widow made a demand for an accounting and payment in full of all sums collected. Rather than providing an accounting or making repayment, the attorney attempted to settle the sums due him with the decedent's widow and as a result a grievance was

filed with The Florida Bar. The attorney eventually rendered a full accounting and all funds collected were paid over to the decedent's widow.

A review of the Florida Standards For Imposing Lawyer Sanctions, which were adopted by the Board of Governors in 1986, also indicates that a short-term suspension would be the most appropriate level of discipline in this case. The Standards define intent as the conscious objective or purpose to accomplish a particular result. Knowledge is defined as the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. Negligence is defined as the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard care that a reasonable lawyer would exercise in the situation.

Standard 4.12 calls for a suspension when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Standard 4.13 calls for a public reprimand when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. With respect to The Moorings transaction, the respondent clearly knew that he was utilizing Mr. Gorman's

funds to make the down payment on the condominium unit. Rather than returning cash to the account, the respondent merely made a bookkeeping entry and lowered his interest in the partnership.

Standard 3.2 calls for a suspension when a lawyer knows of a conflict of interest and does not fully disclose to the client the possible effect of that conflict and causes injury or potential injury to a client. Standard 4.33 calls for a public reprimand when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation would adversely affect another client, and causes injury or potential injury to a client. Clearly, the respondent was aware or should have been aware that there were conflicting interests between he and his clients. In his report, the Referee determined that, despite the respondent's testimony to the contrary, he failed to give adequate disclosure to either Mr. Gorman or Father Mitzi. With respect to the Sun Bay and The Moorings transactions, he failed to advise them to consult with independent counsel prior to entering into either the investments or the partnership agreements. This entire situation is quite similar to Bern, supra, in regard to the failure to advise of the conflict and lack of adequate accountings.

Standard 4.62 calls for a suspension when a lawyer knowingly deceives a client and causes injury or potential injury to the client. Standard 4.63 calls for a public reprimand when a lawyer negligently fails to provide a client with accurate or complete information and causes injury or potential injury to the client. The Bar submits that the respondent failed to fully account to his clients knowing that they most likely would disapprove of his contributing services rather than cash to the R-M-G partnership.

In determining the appropriate level of discipline, three considerations must be made as laid out in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). First, the judgment must be fair to society and the respondent, protecting the former from unethical conduct without unduly denying them the services of a qualified lawyer. The Bar submits that the suspension in the instant case is fair to the respondent considering the seriousness of the misconduct involved. Furthermore, the size of the Bar is such that the respondent's suspension would not unduly deprive society of the services of an otherwise qualified attorney.

Second, the discipline must be fair to the respondent with it being sufficient to punish the breach and at the same time encourage reform and rehabilitation. The respondent has failed to recognize that he owes a fiduciary duty to clients and must disclose his potentially conflicting position when entering into

a business transaction with clients even if at the time the transaction is entered into he believes their interests are aligned. Further, if the investment proves to be profitable it does not excuse an attorney's failure to live up to his ethical obligations. Note that under the current rules disclosure and client consent must be in writing. See Rule 4-1.8(a) of the Rules of Professional Conduct.

Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misconduct. A period of suspension should help to deter like-minded individuals by advising members of the Bar through this Court's opinion that they must comply with the requirements of the Rules when they decide to enter into business transactions with clients. The potential for self-dealing is simply too great even where interests appear to be aligned at the outset.

In summary, the Referee heard extensive evidence in mitigation from several witnesses. The magnitude of the respondent's actions in these business transactions with his clients, however, warrants a suspension, not a public reprimand. To reiterate, the failure at the outset to disclose his conflicting interests, standing alone, would warrant a public reprimand, and the mitigating testimony was insufficient to excuse the respondent's misconduct. Add to this the respondent's failure to adequately account upon request; the manner in which

he handled The Moorings transaction including the use of Mr. Gorman's money to make a down payment on property that became his personal residence; the paper return to the account and; his reluctance to disclose his capital contribution of services in lieu of cash. They all underscore the need of a suspension in this case.

Attorneys are not precluded from engaging in business transactions with clients. The potential for overreaching and self-dealing, however, has long been recognized. In The Florida Bar v. Simonds, 376 So.2d 853 (Fla. 1979), this Court noted the almost strict fiduciary standard on attorneys who enter into such transactions and enumerated several cases going back many years - discipline and nondiscipline alike. The temptation is natural, if not enhanced, when a venture is successful. Therein lies the danger, for absent an attorney's compliance with required disclosure at the outset, a client's interests are not fully protected and may even be somewhat compromised. When a deal turns sour, the lack of compliance becomes glaringly apparent. It is typically then that these cases are brought to the Bar's attention. Attorneys in the state of Florida must be made aware that potential conflicts of interest must be disclosed in writing at the outset and clients should be urged to consult with independent counsel prior to signing any documents even when their interests appear to be aligned. Moreover, current Rule of

Professional Conduct 4-1.8 is even more restrictive in its disclosure requirements than Disciplinary Rule 5-104(A) which the respondent was found guilty of violating here. Under 4-1.8 an attorney must now make a full disclosure in writing, obtain consent from the client in writing, and ensure that the terms of the transaction are fair and reasonable to the client. Disciplinary Rule 5-104(A), though somewhat less restrictive, still required full disclosure and client consent prior to entering into a transaction. The respondent did not do this here and the situation was made more egregious by his handling of The Moorings transaction and his "accountings". In sum, a suspension for either sixty or ninety days is the only appropriate recommendation and should be the discipline adopted by this Court.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will approve the Referee's findings of fact and recommendation as to guilt; but reject the recommended public reprimand as erroneous and unjustified and instead impose a suspension for a definite period of sixty or ninety days and order payment of costs in this proceeding currently totalling $4,792.90.

Respectfully submitted,

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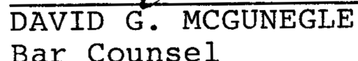
BY: 

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