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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY H. NEELY,

Respondent.

Case No. 74,077 and 75,043
[TFB Case Nos. 89-30,271 (07A), 89-30,291 (07A) and 88-30,600 (07A)]

INITIAL BRIEF

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SYMBOLS AND REFERENCES

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

The Report of Referee dated May 18, 1990, in case number 74,077 shall be referred to as RR1.

The Amended Report of Referee dated May 29, 1990, in case number 74,077 shall be referred to as RRA.

The Report of Referee dated June 5, 1990, in case number 75,043 shall be referred to as RR2.

The two volume transcript of the hearing held on April 6, 1990, shall be referred to as TI and TII respectively.

STATEMENT OF THE CASE

With respect to case number 74,077, the Seventh Judicial Circuit Grievance Committee "A" voted to find probable cause on February 22, 1989. The Bar filed a two count complaint on April 26, 1989. The final hearing was held on April 6, 1990, and the parties submitted written final arguments concerning discipline as requested by the referee after he made his initial findings on May 3, 1990. The report of referee was filed on May 23, 1990, wherein he recommended the respondent be suspended for a period of sixty months. An amended report of referee dated May 29, 1990, was prepared to comply with Rule of Discipline 3-5.1(e) which limits the maximum term of suspension to thirty-six months.

The referee recommended the respondent be found guilty in count one of violating Intergration Rule 11.02(3)(a) for engaging in conduct contrary to honesty, justice, or good morals and Disciplinary Rules 1-102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and 1-02(A)(6) for engaging in any other conduct reflecting adversely on his fitness to practice law. [Note: this rule appears erroneously in the report as 1-102(a)(6)] The referee found the respondent not guilty of violating Intergration Rule 11.02(4) for charging a clearly excessive fee and Disciplinary Rules 2-106(A) and 2-106(B) for the same offense. The referee also recommended he

be found not guilty of violating Disciplinary Rules 3-104(C) for failing to assure that his non-lawyer personnel complied with the the Code of Professional Responsibility and 3-104(D) for failing to examine all work delegated to non-lawyer personnel.

With respect to count two, the referee recommended the respondent be found guilty of violating the following Rules of Professional Conduct: 4-1.15(a) for failing to preserve funds held in trust for a third person, which appears erroneously in the report as 4-1.14(a); 4-1.15(b) for failing to advise a third person upon receipt of funds in which that person had an interest; 4-5.3(a) for failing to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that a non-lawyer employee's conduct was compatible with the professional obligations of the lawyer; 4-5.3(b) for failing to ensure that a non-lawyer employee's conduct was compatible with the professional obligation of the lawyer having direct supervisory authority; and 4-5.3(c) for failing to take reasonable remedial action to correct improper conduct of a non-lawyer employee when he knew of the conduct at a time when its consequences could have been avoided and mitigated. The referee made no specific findings regarding rules 4-8.4(a) for violating the Rules of Professional Conduct, and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, or Rule 3-4.3 of the Rules of Discipline for engaging in conduct that was contrary to honesty or justice.

On or around May 18, 1990, the respondent made a motion to re-open the evidence to which the Bar responded on May 23, 1990. The respondent's motion was denied on May 24, 1990.

With respect to case number 75,043, the grievance committee found probable cause on April 21, 1989. The Bar filed a one count complaint on November 20, 1989, which the respondent answered on December 15, 1989.

The final hearing was held on April 6, 1990. The deposition of one of the respondent's witnesses was scheduled by the respondent for May 7, 1990. The Bar made an objection to consideration of this deposition on May 18, 1990, and a supplemental objection on May 23, 1990, both of which were denied on May 29, 1990. The referee made his preliminary findings on May 21, 1990, and requested the parties submit written arguments as to the appropriate level of discipline. The parties complied and the referee filed his report on June 11, 1990, wherein he recommended the respondent be found guilty of violating Intergration Rule 11.02(4) for failing to timely account to his client for the disposition of her trust funds; Disciplinary Rule 9-103(B)(3) for failing to maintain complete records of client funds coming into his possession and failing to promptly render an appropriate accounting to his client regarding same; and Rule 4-8.4(c) of the Rules of Professional Conduct for engaging in conduct that was contrary to honesty and justice by

rendering a falsified accounting to his client. The referee made no recommendation regarding the following: Intergration Rule 11.02(3)(a) for engaging in conduct that was contrary to honesty, justice, or good morals; Disciplinary Rules 1-102(A)(4) for engaging in conduct involving fraud, dishonesty, deceit, or misrepresentation; 1-102(A)(6) for engaging in any other misconduct that reflected adversely on his fitness to practice law; 2-106(A) and 2-106(B) for entering into an agreement for, charging, or collecting a clearly excessive fee under the circumstances; and Rule of Discipline 3-4.3 for engaging in conduct that was contrary to honesty and justice. As discipline, he again recommended a suspension for a period of thirty-six months, presumably concurrent with the other case.

Case numbers 74,077 and 75,043 were considered by the Board of Governors of The Florida Bar at its July, 1990 meeting. The Board voted to approve the referee's findings of fact and recommendations as to guilt, but to appeal his recommendations as to discipline and urge the court to enter an order of disbarment for both cases. The Bar petitioned for review on July 24, 1990 and also moved this court to consolidate the two cases.

STATEMENT OF THE FACTS

Except as otherwise noted, the following facts are taken from the referee's Amended Report dated May 29, 1990, for case number 74,077 and the Report of Referee dated June 5, 1990, for case number 75,043.

Case Number 74,077

Count One

The respondent was retained by Ronald J. Reynolds on or about February 26, 1986, to represent him on criminal charges. Mr. Reynolds initially was charged with felony possession of marijuana and possession of an open container of alcohol while operating a motor vehicle. In addition to the criminal charges, the respondent also agreed to handle the matter concerning the forfeiture of Mr. Reynolds' automobile and a certain amount of cash. In connection with the representation, the respondent required Mr. Reynolds to provide him with some collateral to secure his legal fees. Mr. Reynolds' mother, Ellen Plotts, (a.k.a. Ellen Reynolds) owned a modest home with a small first mortgage. When approached by her son, she agreed to guarantee payment of his fees.

The respondent asked Mr. Reynolds to obtain the deed to Mrs. Plotts' home and bring it to the respondent's office. Mr. Reynolds complied. (TI pp. 84 and 131-132) Thereafter, the respondent met with Mrs. Plotts and Mr. Reynolds in his office. The respondent's secretary brought in several documents and placed them in front of Mrs. Plotts. The respondent then instructed Mrs. Plotts to sign the documents. She did not read them prior to signing them nor did the respondent discuss the nature of the documents with her.

Mrs. Plotts unknowingly signed a warranty deed transferring her home to Refineco of America, Inc., a corporation solely owned by the respondent. Although Mrs. Plotts intended to assist her son in paying his legal fees if necessary, she never contemplated either selling or mortgaging her home in order to do so. The respondent failed to either explain the documents to Mrs. Plotts or advise her to seek the advice of another attorney prior to signing them.

The deed to Refineco was recorded on May 22, 1986, without any documentary stamps. Mrs. Plotts received no money from the respondent nor did she receive a copy of the deed. On August 15, 1986, Refineco executed a mortgage deed and note in the principle amount of $15,000.00 in favor of Edwin W. Odum. Refineco netted approximately $13,000.00. Refineco, through the respondent, made approximately seven monthly payments in the amount of $380.90

each to Mr. Odum. Thereafter, on February 16, 1987, at Mr. Reynolds' insistence, the respondent reconveyed the property to Mrs. Plotts via a quitclaim deed recorded on February 19, 1987. The deed put the property in the names of both Mrs. Plotts and her son. This was done without Mrs. Plotts' knowledge or consent. Furthermore, she was unaware of the existence of the second mortgage in favor of Mr. Odum. Mrs. Plotts never received a copy of this quitclaim deed.

Because Mrs. Plotts was unaware of the existence of the second mortgage, she made no payments toward it. (TI p. 93-94) As a result, Mr. Odum initiated foreclosure proceedings against her. The matter proceeded to trial and the judge determined that the original warranty deed to Refineco dated May 9, 1986, had been fraudulently procured and was therefore void. The final judgement was entered on August 15, 1988, and a later amended final judgement declared the original deed void.

The respondent knew that Mrs. Plotts had a limited education. She completed school only through the fourth grade. (TI p. 94) Her son, Mr. Reynolds, dropped out of school before completing the ninth grade. (TI p. 123) The respondent failed to explain to Mrs. Plotts that he wanted the deed to her home as collateral or to advise her to seek independent counsel. He also failed to advise her that he had reconveyed her property to her subject to a second mortgage.

Count Two

The respondent represented Lois Jordan in a personal injury claim arising from an automobile accident. From approximately October, 1984, through December, 1986, Dr. Lloyd A. Wright, D.C., treated Mrs. Jordan for her injuries. The respondent and Dr. Wright agreed that the respondent would protect and pay Dr. Wright's bill out of the proceeds of any settlement. For this reason, Dr. Wright continued treating Mrs. Jordan and did not bill her for his services. At some later time the respondent acknowledged this prior agreement by signing a Notice to Attorney of Assignment of Doctor's Lien Agreement.

On April 1, 1987, a member of Dr. Wright's staff spoke with the respondent's office by telephone and was advised that the approximate settlement date was May 28, 1987, and that the proceeds would be held in escrow. In January, 1988, Dr. Wright's office again spoke with the respondent's office by telephone and was assured that the respondent would forward the proceeds by that spring. (It appears that the date of January 1, 1988, in the Report of Referee is in error, for obvious reasons.)

The respondent settled Mrs. Jordan's claim during the fall of 1986. No funds were held back in trust for Dr. Wright. No monies have been paid to Dr. Wright by the respondent as of the

date of the referee's report of May 29, 1990. The referee specifically found that the respondent's actions violated the agreement he had with Dr. Wright.

Case Number 75,043

The respondent was retained by Kathleen Ross on or around December 4, 1984. Ms. Ross had embezzled money from her former employer in New Jersey, Dr. Harry L. Rohrer, Jr., DDS. She was concerned that Dr. Rohrer was investigating her and might press criminal charges. She wanted to repay the money and receive her pension benefits.

Ms. Ross entered into an Authority to Represent on or around December 4, 1984, wherein she agreed to pay the respondent $5,000.00 as an initial retainer with the total fee not to exceed $20,000.00. According to a handwritten note on the contract, the only costs Ms. Ross would be responsible for were expenses associated with travel to New Jersey. Ms. Ross paid the respondent $5,000.00 on December 4, 1984, and $15,000.00 on December 20, 1984. She paid an additional $636.00 on January 17, 1985, for airline tickets. In addition, she placed $20,070.00 in the respondent's trust account on December 4, 1984, to cover the amount she stated she had taken from Dr. Rohrer.

Although Ms. Ross disputed the amount of money claimed by Dr. Rohrer, the respondent advised she repay the $42,000.00 demanded by her former employer in order to avoid possible prosecution. Dr. Rohrer expressed willingness to sign a release and not to pursue the matter further if he was paid $42,000.00. On December 14, 1984, Ms. Ross placed an additional $22,313.60 into the respondent's trust account to cover the total amount claimed.

On February 27, 1987, Dr. Rohrer executed a complete release. The release did not acknowledge receipt of $42,000.00, but showed the sum of $10.00 and other valuable consideration without stating a specific amount. The respondent failed to timely provide his client with any documentation showing he dispersed $42,000.00 to Dr. Rohrer as he was required to do. It was not until after Ms. Ross complained to The Florida Bar in late 1987 that a settlement statement was provided to her by the respondent. The statement dated March 24, 1988, indicated Dr. Rohrer was paid $32,370.00.

The respondent's settlement statement from the period of December 4, 1984, through at least October 27, 1986, indicated a total of $1,871.63 for calls and travel expenses. At least three trips were indicated. Most of the expenses, however, were never incurred, particularly those listed on the "Costs and Travel Expenses" sheet. This sheet listed payments of $4,087.15 to a

James Richardson, $1,170.00 to Chris Cushman, $600.00 to Warren Cregar, $101.45 to The Law Source, $1,700.00 in transfer to the respondent, $500.00 as reimbursement to the respondent and $4,600.00 in travel costs for the respondent. Many of the listed costs were in round numbers with no further explanation whereas other sheets listed odd numbers for the most part. The referee specifically found that except for the transfers to the respondent most, if not all, of the expenses listed on the "Costs and Travel Expenses" sheet were fictitious. (RR2, paragraph II K)

SUMMARY OF THE ARGUMENT

The Bar submits that two factors in these cases warrant disbarment of the respondent as opposed to suspension. The referee's finding that the respondent engaged in fraudulent misconduct in two cases is bad enough. Add to it the respondent's extensive disciplinary history and disbarment is mandated.

The respondent's extensive prior disciplinary history consists of a ninety-one day suspension, two ninety day suspensions, a sixty day suspension and a public reprimand. In two cases the respondent was found guilty of engaging in fraudulent conduct. The respondent's prior history and the cumulative nature of the misconduct engaged in warrants the sternest measure of discipline.

The main concern of the Bar regarding the nature of the respondent's misconduct in the two pending cases is the referee's findings that the respondent engaged in two separate instances of fraud. In case number 74,077 he tricked Ellen Plotts, a woman with a very limited education, into deeding her home to him. He then obtained a second mortgage, pocketed the money and reconveyed the property to her. In case number 75,043 he prepared a falsified accounting for Kathleen Ross showing he had

incurred approximately $7,730.23 in costs associated with her case. On the "Costs and Travel Expenses" sheet, the respondent also listed $5,100.00 as being transferred to him for reimbursements and travel costs. Why the bill was concocted is not clear although it apparently was done to justify a fee found not to be clearly excessive given the result.

A lawyer who takes advantage of a client, especially one who is uneducated or in a desperate situation, for his own gain, commits a particularly egregious offense that warrants a stern form of discipline. When the respondent's prior history is also considered, it is apparent that nothing less than disbarment is warranted. The public must be protected from such unscrupulous attorneys who fail to learn from their past disciplines.

ARGUMENT

THE REFEREE'S RECOMMENDED DISCIPLINE OF A THIRTY-SIX MONTH SUSPENSION IS AN INAPPROPRIATE LEVEL OF DISCIPLINE CONSIDERING THE RESPONDENT'S EXTENSIVE PRIOR DISCIPLINARY HISTORY AND THE REFEREE'S FINDINGS IN THESE CASES.

The referee's recommended discipline of two thirty-six month suspensions, presumably to run concurrent, is an inappropriate level of discipline given the respondent's extensive prior disciplinary history. A referee's findings of fact are presumed correct unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Seldin, 526 So.2d 41, 43, (Fla. 1988). The Board of Governors of The Florida Bar does not argue with either the referee's findings of fact or recommendations as to guilt. It believes, however, that his recommendation of the thirty-six month suspension is inadequate, erroneous and unjustified given the respondent's prior disciplinary history, the cumulative nature of the misconduct and the current findings that he engaged in instances of fraudulent behavior on two occasions. This Court has considerable latitude in considering whether the referee's recommendation as to discipline is warranted because the ultimate responsibility to enter an appropriate judgment rests with this Court. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). Under the rules, it must review all recommendations, even those not appealed, to determine whether the recommended discipline is appropriate.

In case number 74,077, the referee has recommended the respondent be found guilty of fraudulently inducing Mrs. Plotts to sign away her home, using the resulting deed to procure a loan secured by the property and deeding the house back to Mrs. Plotts without her knowledge of the lien. The referee also has recommended the respondent be found guilty of failing to honor a protection agreement with Dr. Wright and allowing his office staff to mislead the doctor.

In case number 75,043, the respondent took a significant fee to exculpate a client from possible criminal charges as a result of her improper conduct in another state. The referee has recommended the respondent be found guilty of rendering to Ms. Ross after she complained to The Florida Bar a falsified accounting showing significant costs in her case. Apparently, the respondent provided her with the false accounting in an attempt to justify his fee.

In The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982), this Court stated the following:

> In rendering discipline, this Court considers the respondent's previous disciplinary history and increase the discipline where appropriate.... (citations omitted) The Court deals more harshly with cummulative misconduct than it does with isolated misconduct. Additionally, cummulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct. At p. 528.

The respondent has an extensive prior disciplinary history. Starting with The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979), the respondent received a ninety-day day suspension followed by six months' probation for engaging in self-dealing in a real estate matter to the detriment of his clients for his own personal gain. He was retained by Mr. and Mrs. Bennett to represent them in a mortgage foreclosure action on a contract for deed against Robert Vliet. The respondent met separately with the parties in his office and, according to the testimony of the Bennetts, offered to buy the property. The Bennetts declined his offer and stated their preference to pursue the foreclosure action. Some six weeks later, Mrs. Bennett called the respondent's office and was told that Mr. Vliet had tendered sufficient funds to pay off the balance due on the mortgage. The Bennetts were given the impression that they had no alternative but to accept Mr. Vliet's offer. Shortly thereafter, while at the respondent's office, the Bennetts executed a warranty deed transferring the property to Mr. Vliet and received a check drawn on the respondent's trust account for the mortgage balance. Although they believed the source of the funds to be Mr. Vliet, in reality, the respondent paid the Bennetts from his personal funds on deposit in his trust account. The Bennetts learned approximately one year later that the property had been deeded from Mr. Vliet to a corporation owned by the respondent. The respondent gave varying explanations at different stages of the disciplinary case for his conduct and the minimal amount of

consideration paid in his transaction with Mr. Vliet. The court noted that the respondent had been found guilty by the referee of either lying under oath before the grievance committee or the referee or both concerning the matter in an effort to hide the fact that he had taken advantage of his clients for his own benefit.

In The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982), the respondent was publicly reprimanded and placed on a one year period of probation for failing to prosecute a criminal appeal. The respondent had been representing a client up to the point he was suspended in Neely, supra. The respondent's associate filed an appeal on behalf of the client and a motion for extension of time, but thereafter the respondent was unable to continue handling the case due to his suspension. The respondent failed to timely find substitute counsel, no brief was filed and the appeal was dismissed. It was later reinstated, but the respondent still failed to take the necessary steps to protect his client's interests. Several rules to show cause were issued, but the respondent did little more than make motions for extension of time to file the brief. Ultimately, the respondent was found to be in contempt of court and fined $250.00.

In The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986), the respondent was suspended for sixty days and placed on a two year period of probation for trust account record keeping violations.

No dishonest motive was found to exist and no client was injured as a result of the respondent's gross neglect in managing his trust account. For these reasons, a less harsh discipline was imposed than that recommended by the referee, although the respondent's prior history mandated something more than a public reprimand.

In The Florida Bar v. Neely, 502 So.2d 237 (Fla. 1987), the respondent was suspended for three months followed by a two year period of probation. He represented Silas Conner in the settlement of a lawsuit by Ford Motor Credit Corporation where Ford had obtained a judgement against Mr. Conner. Mr. Conner was to pay Ford $100.00 per month and the respondent instructed his client to make all the payments to him. He assured Mr. Conner that he would deposit the payments to an escrow account from which he would then pay Ford. After making these payments to the respondent for approximately one year, Mr. Conner learned that the respondent had not forwarded any of the money to Ford. When Mr. Conner questioned the respondent about this, the respondent insisted that he had made the payments. Afterwards, Mr. Conner complained to The Florida Bar. The respondent then prepared a letter from his client addressed to the Bar which contained a number of false statements exculpating the respondent from any wrongdoing. The respondent insisted that his client sign the letter before the respondent would refund to him the payments totalling $1,350.00. It was determined that the respondent never

deposited the money to an escrow account, again maintained inadequate trust account records, failed to provide his client with an accounting and failed to properly supervise his bookkeeper. There was no competent evidence found to indicate that the payments were made for legal fees as claimed by the respondent.

In The Florida Bar v. Neely, 540 So.2d 109 (Fla. 1989), the respondent was suspended for ninety-one days with proof of rehabilitation required prior to reinstatement. To date, the respondent has not applied for reinstatement. In one case, the respondent was retained to represent a Ms. Kern in a personal injury claim and allowed the case to be dismissed without prejudice for failure to prosecute. The respondent failed to advised his client of this and, in fact, misrepresented to her that she had won. In another case, the respondent failed to promptly deliver to his former clients monies to which they were entitled upon demand. The respondent also overdrew his trust account by writing a $450.00 check to himself. In imposing discipline, this Court considered in mitigation that the respondent reimbursed Ms. Kern for court costs and suffered from severe diabetes during the course of representing his clients in these cases.

As the respondent's prior history clearly indicates, he has engaged in a long course of conduct of placing his own interests

before those of clients and taking advantage of situations when they present themselves to the detriment of his clients. His ability to tell the truth has been found questionable in the past and when faced with disciplinary proceedings on at least one occasion relied upon his health problems to mitigate his misconduct. The respondent engaged in fraudulent conduct in The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979), and The Florida Bar v. Neely, 502 So.2d 1237 (Fla. 1987). In the cases at Bar, he was found guilty of defrauding both Mrs. Plotts and a submitting a false accounting to Ms. Ross. Such misconduct, standing alone, is very serious indeed and is that much more so when considered in conjunction with the respondent's past conduct.

The practice of law in this state is a conditional privilege, not a right, and as such, is revocable for cause. See Rule of Discipline 3-1.1 of the Rules Regulating The Florida Bar and Petition of Wolf, 257 So.2d 547 (Fla. 1972). For a more recent opinion, see also The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985). One of the most important concerns of this Court in defining and regulating the practice of law is obviously the protection of the public from unethical, irresponsible, or incompetent attorneys. The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980). Disbarment is warranted when an attorney demonstrates a lack of understanding of his responsibilities as a lawyer. The Florida Bar v. McGovern, 365 So.2d 131 (Fla. 1978).

The respondent's prior history of misconduct and his present actions clearly reveal that he cannot or will not conduct himself in the manner that is consistent with the Bar's standards of conduct and is a continuing danger to the unsuspecting public.

The Bar recognizes that the respondent's actions in the matter concerning Dr. Wright, standing alone, would probably warrant at least a public reprimand. However, his actions of fraudulently inducing Mrs. Plotts to convey her home to his corporation and then fraudulently inducing Mr. Odum to lend the corporation money based upon the deed obtained from Mrs. Plotts and falsifying the expenses incurred in handling Ms. Ross' case warrant very severe discipline. When considered in light of the respondent's prior disciplinary history, nothing less than a five year period of disbarment should be ordered.

In The Florida Bar v. Pelle, 459 So.2d 1028 (Fla. 1984), an attorney was disbarred pursuant to a guilty plea for obtaining authorization through representation to trade securities owned by a client, failing to protect funds entrusted to him as an escrow agent, converting settlement payments to his own use, failing to comply with a witness subpoena duces tecum issued by the grievance committee and violating an order of suspension. The attorney was retained by a widow to probate her deceased husband's will. He obtained possession of certain securities which she owned and then obtained an authorization through

misrepresentation which enabled him to buy, sell, or trade the securities. He sold the securities without his client's knowledge or consent and collected the proceeds by forging an endorsement to certain checks. He also misrepresented that the securities would be returned although he knew they had already been sold. In another matter, the attorney represented a corporation in the purchase of real estate. He was designated as the escrow agent and disbursed the funds from the account without the authorization of the seller. In a separate matter, the attorney misrepresented his client's willingness to accept payments in settlement of a business dispute. He then converted the payments which were made to his own use. During the Bar's investigation, the attorney failed to comply with the witness subpoena duces tecum issued by the chairman of the grievance committee. Additionally, he violated an order of the Supreme Court of Florida suspending him from the practice of law due to irregularities in his trust account.

In The Florida Bar v. Powers, 458 So.2d 264 (Fla. 1984), an attorney was disbarred for failing to properly account for trust funds, using powers of attorney after they had been formally revoked, failing to make payments on behalf of a client, and failing to maintain property records. The attorney entered into a relationship with an elderly widow and took over the handling of her affairs. He never advised her that there could be a potential conflict of interest. He assisted her in revoking her

former will in favor of a new one naming himself as sole beneficiary to receive her home, then unencumbered, and personal property. He also assisted her in executing a power of attorney appointing himself to handle her various personal and property affairs. She deeded her home over to a corporation wholly owned by the attorney in exchange for his care-taking services. The attorney then mortgaged the property. At some point thereafter, the client became upset about the property transfer and the attorney gave her a quitclaim deed to the property. He retained the mortgage funds for himself. The client then revoked the power of attorney, but afterwards, the lawyer used the document, despite his knowledge of its revocation, to transfer the property back to his corporation. He sold the house at a profit and discontinued payment of his client's convalescent home bills. The attorney never established a trust account with respect to his client. The court found that the attorney's actions were inconsistent with membership in The Florida Bar. He was found to have preyed upon an aged and infirmed widow and maintained financial records in such a manner that it was impossible to determine the actual disposition of the client's funds.

In The Florida Bar v. Manspeaker, 428 So.2d 241 (Fla. 1983), an attorney was disbarred for defrauding a client and giving false testimony under oath to a Bar grievance committee. The attorney represented Lewis Sambataro who held a second mortgage as president and sole stockholder of a corporation as to certain

parcels of real property. The attorney advised his client that he had a party who was interested in purchasing some or all of the property and requested that Mr. Sambataro sign a blank statutory warranty deed transferring the lots in question. He told the client that he would fill in the blank spaces when the final agreement was reached with the buyers. The client complied with the attorney's request and the signed deed was filled out with the buyer purportedly being Motivational Management Services, Inc. The attorney, at the same time, had been engaged in negotiations with Samuel Herman, an out-of-state attorney for Motivational Management Services, Inc. Some two years before Mr. Sambataro signed the blank deed, the attorney had delivered four statutory warranty deeds to Mr. Herman transferring certain property from Paga Investments, Inc. to Motivational Management Services, Inc. The attorney assured Mr. Herman that the deeds were free from liens and encumbrances when such was not the case. After Mr. Herman discovered the liens, he so advised the attorney and for a two year period attempted to get the attorney to clean up the liens and encumbrances. Mr. Herman finally advised the attorney that his client wanted to either sell back the property to Paga or have other property which was free of liens transferred as a replacement. The attorney delivered to Mr. Herman the completed original of the warranty deed that Mr. Sambataro had signed in blank. Shortly thereafter, Mr. Sambataro requested that the attorney return the original blank warranty deed to him. The attorney gave Mr. Sambataro a zerox copy which

he claimed to be the original blank deed. In fact, the attorney was aware that the original was actually in Mr. Herman's possession. The attorney marked the copy given to Mr. Sambataro as being "void". Thus, he led his client to believe that the deed was an nullity when, in fact, the original deed had been given to Mr. Herman. The referee found that the attorney manifested a cavalier attitude during the Bar proceedings, offered no explanation for his conduct and there were no mitigating circumstances.

In The Florida Bar v. Zinzell, 387 So.2d 346 (Fla. 1980), an attorney was disbarred for perpetrating a fraud on a client. The attorney prepared a document for his client and led her to believe that it was a will when, in fact, it was a trust agreement conveying her property using trust power without her knowledge or consent, to himself. The client did not intended to convey any property to the attorney, but rather wanted all of her property to go to her children. The attorney, acting a trustee, executed a warranty deed conveying the real property to the corporation which he owned. A quitclaim deed was also executed by the client to the attorney conveying the same property. The property was mortgaged by the corporation without the client's knowledge or consent. The mortgages were then allowed to go into foreclosure and the corporation declared bankruptcy. The client's family stepped in and paid off the mortgages in order to save the property. The attorney made no restitution or payments

toward the reinstatement of any of the mortgages. He also failed to pay the property taxes. At the time the client executed the agreement, she was approximately seventy-seven years old. Neither the client nor the beneficiaries of the trust received any proceeds from the mortgages and the family ultimately lost approximately $75,000.00 to $80,000.00. The attorney failed to participate in the Bar proceedings and did not appear at the final hearing. There were no mitigating factors.

In The Florida Bar v. Rosenblum, 362 So.2d 947 (Fla. 1978), an attorney received a three year period of suspension for fabricating progress reports to a client concerning the status of a suit after the case had been dismissed for lack of prosecution, representing to the client that a summary judgement had been obtained and the case could be settled, and fabricating documents which purported to be the final judgement in the case. The client learned that the matter had been dismissed for lack of prosecution only after reviewing the court files. The attorney ultimately confessed his conduct to the client and the client thereafter retained another lawyer to reinstitute the suit. The attorney pled guilty to the charges contained in the Bar's complaint and in mitigation presented evidence that he suffered from psychological problems and was unable to cope with the practice of law. Although the referee recommended disbarment, the court ordered the attorney suspended due to the unusual circumstances surrounding the case including a prior disbarment

which had no salutory effect. As a condition for reinstatement from his suspension, the attorney was required to make full restitution, prove by clear and convincing evidence his complete mental, emotional and moral rehabilitation and pass all portions of The Florida Bar's examination.

In The Florida Bar v. Simons, 521 So.2d 1089 (Fla. 1988), an attorney was ordered disbarred for a period of twenty years for engaging in conduct that constituted theft in committing several acts in furtherance of an attempt to defraud an insurance company. The attorney did not respond to the Bar's complaint.

The Bar recognizes there are many cases in which discipline less than disbarment has been visited upon attorneys who engaged in similar misconduct to that charged here. However, there are not many, if any, such cases which involve fraud and misrepresentation and an extensive prior record.

With respect to the misconduct found in the respondent's dealings with Dr. Wright, the following case law is applicable.

In The Florida Bar v. Harris, 531 So.2d 151 (Fla. 1988), an attorney was suspended for six months for failing to honor an agreement with a client's physician regarding payment of the physician's fees from the judgement or settlement proceeds. The attorney represented the client in a personal injury claim and

requested medical records from the client's physician. The attorney entered into a written letter of protection with the doctor. The attorney then recovered a settlement but, despite repeated requests, failed to pay over any funds to the physician for services rendered. The attorney failed to attend the final hearing in the Bar matter and had a prior disciplinary history.

In The Florida Bar v. Greene, 515 So.2d 1280 (Fla. 1987), an attorney received a ninety-one day suspension followed by a two year period of probation for his negligent handling of a real estate transcation due in part to his failure to adequately supervise his non-lawyer employee. The title to the real property involved needed to be cleared due to the existence of judgment liens. The clients wished to sell the property and the attorney assured them he would take care of the problems. In preparation for the sale, one of the attorney's non-lawyer employees was instructed to check the property records. The employee did so, but erroneously advised the attorney that the title was now clear. The truth was discovered only after the closing and the attorney personally refunded the purchase price to the buyers. The attorney had an extensive prior disciplinary history.

In The Florida Bar v. Carter, 502 So.2d 904 (Fla. 1987), an attorney was suspended for three months and placed on two years' probation due to his failure to adequately supervise his office

staff with respect to record keeping for an estate. Because the records were inadequate, the attorney could not submit a reasonably accurate statement of expenses to the personal representative. The more serious measure of discipline was imposed due to the attorney's prior disicplinary history.

In The Florida Bar v. Chase, 467 So.2d 983 (Fla. 1985), an attorney received a public reprimand for his neglect of a client's criminal case due to the failure of his non-lawyer employee to relay messages to him from the client. As a result, the attorney failed to attend the client's arraignment, file a motion of appearance and waiver, and communicate with either the court or the client. Consequently, the client's bail was revoked and a warrant issued for her arrest. Despite the fact that the attorney became aware at some point of his employee's unsatisfactory performance, the attorney failed to take steps to correct the situation.

In The Florida Bar v. Merrill, 462 So.2d 827 (Fla. 1985), an attorney received a public reprimand for engaging in three counts of neglect, one count of failure to properly handle cost money advanced by the client, three counts of failure to refund unearned costs and fees and two counts of failure to adequately supervise his office staff.

In The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968), an

attorney was publicly reprimanded for failing to promptly disburse funds to pay a client's medical bills. The attorney had been retained to represent a client in four negligence cases. In each case, the attorney failed to promptly disburse the proceeds of settlements to creditors who had rendered services to the client and were looking to the attorney for payment. The creditors included doctors and an expert witness. There was no evidence of any other improper conduct.

A review of the Florida Standards For Imposing Lawyer Sanctions, which were adopted by the Board of Governors in 1986, also indicates that disbarment is the most appropriate level of discipline in this case. Standard 4.61 calls for disbarment when a lawyer knowingly or intentionally deceives a client with the intent to benefit himself or another regardless of injury or potential injury. Standard 5.11(f) calls for disbarment when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously and adversely reflects on his fitness to practice law. With respect to his dealings with Mrs. Plotts, he intentionally defrauded her into conveying her property to him to guarantee payment of her son's legal fees. The respondent then compounded the offense by fraudulently inducing Mr. Odum to lend his corporation money based upon the deed he had obtained from Mrs. Plotts. The respondent's corporation netted $13,000.00 of the $15,000.00 received from Mr. Odum and then reconveyed the

property to Mrs. Plotts subject to the second mortgage. Fortunately, Mrs. Plotts' situation was resolved to her satisfaction and she did not lose her home. On the other hand, Mr. Odum was not so lucky because the original warranty deed to Refineco was declared void by the circuit court in the civil suit.

The respondent knowingly and intentionally attempted to deceive Ms. Ross by providing her with a false accounting of the funds she had paid. Apparently the respondent did this in order to justify his fees by showing large amounts of costs which were never actually incurred. It is ironic that the respondent's attempt to justify his fee by inflating the costs appears to have been unnecessary in light of the referee's finding that the fee charged was not excessive.

With respect to Dr. Wright's case, the closest standard on point is 7.3 which calls for a public reprimand when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. The respondent voluntarily assumed a duty toward protecting Dr. Wright's bills, then either allowed or caused his office staff to mislead the doctor with respect to their payment from the settlement proceeds. Clearly the respondent's decision not to honor the protection agreement was wrong, but allowing his staff to make

misrepresentations to the doctor was unethical and warrants discipline.

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 judgement must be fair to both society and the respondent, protecting the former from an unethical attorney without unduly denying them the services of a qualified lawyer. The Bar is now crowded with qualified and ethical lawyers. Certainly society needs protection from those few attorneys who prey on their clients for personal gain.

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. These cases alone demand very severe discipline and, coupled with the respondent's prior record, simply mandate disbarment. Proof of reform and rehabilitation should be directed at the appropriate time to The Florida Board of Bar Examiners. The respondent's past and present conduct shows he refuses to learn that he must conduct himself within the rules. His conditional privilege should be revoked.

Third, the judgement must be severe enough to deter others who might be tempted to engage in similar misconduct. It is very

clear that less than disbarment will send the wrong message to others in the profession who might be like-minded or tempted to engage in similar misconduct. Indeed, how many chances should an attorney get?!

In addition, the creation and protection of a favorable image of the legal profession is an equally important consideration. The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984). In these cases, a discipline of less than disbarment simply does not advance that consideration at all.

The Bar submits that the respondent has failed to learn anything constructive from the prior disciplines imposed by this Court. He continues to engage in a course of conduct which reflects adversely on the Bar and jeopardizes the clients who may retain his services in the future. The respondent's actions clearly indicate that he is longer fit to be a member of The Florida Bar.

The referee was overly generous in his recommendations which are erroneous and unjustified. This Court should accordingly reject the recommended suspensions and, instead, order the respondent disbarred for five years and tax costs against him. They now total $2,800.27 for case 74,077 and $1,053.55 for case 75,043.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will approve the referee's findings of fact and recommendations as to guilt, but reject the two recommended suspensions for thirty-six months as being erroneous and unjustified and, instead, impose the discipline of disbarment for five years and order payment of costs in this proceeding currently totalling $3,853.82.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the The Florida Bar's Initial Brief and Appendix have been sent by Federal Express to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by certified mail, return receipt requested no. P 034 463 974, to Gary A. Bloom, counsel for respondent, at Post Office Box 350040, Palm Coast, Florida, 32135; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 23rd day of August, 1990.

Respectfully submitted,

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