IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case Nos. **73,629** and **74,398**
[TFB Nos. **88-31,054** (07A)
and **89-31,289 (07A)**]

v.

WALTER B. DUNAGAN,

Respondent.
_____/

ANSWER BRIEF

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SYMBOLS AND REFERENCES

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

The two volume transcript of the evidentiary hearing held on October 6, **1989**, shall be referred to as T.

The transcript of the hearing on discipline held December **7, 1989**, shall be referred to as T 11.

The Report of Referee shall be referred to as RR.

The Bar's exhibits shall be referred to as B-Ex.

The Respondent's exhibits shall be referred to as R-Ex.

STATEMENT OF THE CASE

Respondent's Statement of the Facts and Statement of the Case are incomplete and argumentative in nature.

The Seventh Judicial Circuit Grievance Committee "A" voted unanimously with one abstention to find probable cause in case number 73,629 on November 18, 1988. The Florida Bar filed a three count Complaint on or around January 31, 1989.

Rather than attempting to delineate the extensive discovery and motions filed in this case, the Bar will summarize by stating that the respondent filed over one dozen motions, three Requests For Admission and two sets of Interrogatories. All motions were considered by the Referee in a timely manner.

On May 25, 1989, respondent filed a Motion to Dismiss, Disqualify, and Filing of Grievance to which the Bar responded on June 2, 1989. An addendum to the Bar's response was made on July 17, 1989. Respondent also filed a Counterclaim and Petition to Set Aside Previous Convictions which this Court treated as an interlocutory appeal in case number 73,629. Copies of both were furnished to this Court and the respondent's Motion to Dismiss, Disqualify, and Filing of Grievance was assigned case number

74,233. This particular matter was considered by this Court and on July 26, 1989, a confidential order was entered dismissing the respondent's motion. On August 4, 1989, respondent made a motion for rehearing to which the Bar responded on August 11, 1989. On August 21, 1989, the respondent filed a Motion to Strike and Motion to Strike as Sham to which the Bar replied on August 24, 1989. On September 28, 1989, this Court entered a confidential order denying respondent's Motion for Rehearing and Motion to Strike and Motion to Strike as Sham. The respondent's Counterclaim and Petition to Set Aside Previous Convictions was denied by the Court on July 5, 1989. His Motion For Rehearing was denied on August 30, 1989.

On June 16, 1989, the grievance committee reheard the allegations contained in Count II of the Bar's Complaint in case number 73,629. This was done to cure any possible procedural problems due to the fact that errors in the respondent's method for billing interest became apparent only during the first grievance committee hearing and those charges had not previously been noticed. The committee voted unanimously with one abstention to find probable cause for charging interest upon interest and, by the same vote, to find no probable cause that the respondent failed to provide the Antaleks with adequate notice that he intended to begin charging interest as earlier charged in Count 11. This became case number 74,398 and the

charge concerning failing to notify his clients of his intention to charge interest in Count II of the earlier case was dropped.

The final hearing for both cases was held on October 6, 1989. At that time the Bar moved that the Court dismiss Count II of the Complaint in case number 73,629 and the Referee orally entered an order so doing. On December 7, 1989, a hearing concerning disciplinary recommendations was held.

The Referee entered her report on December 20, 1989, finding the respondent innocent of Count I and guilty of Count III in case number 73,629. The Rules are: 5-101(A)(1) for accepting employment where the exercise of his professional judgment will be or reasonably may be affected by his own financial or personal interests, by his participation in the loan closing without notice to his clients of a conflict of interest nor consent of client; 5-104(A) for entering into a business transaction with his clients when they have differing interests therein and when the clients expect the lawyer to exercise his professional judgment therein for their protection; 5-105(A) for failing to decline employment when the exercise of his independent professional judgment in behalf of his clients will be or is likely to be adversely affected by the acceptance of the proferred employment; and 5-105(B) for continuing employment when the exercise of his independent professional judgment on behalf

of his clients will be or is likely to be adversely affected by his representation of himself in relation to his recovery of his past due attorney's fees. In case number **74,398**, the Referee recommended the respondent be found guilty of violating Disciplinary Rule 1-102(A)(6) for engaging in conduct that reflects adversely on his fitness to practice law.

Respondent filed his Petition for Review in case numbers **73,629** and **74,398** on January **17, 1990**. The Board **of** Governors considered the Report of Referee at its meeting which ended January **27, 1990**. Respondent filed a Motion For Extension of Time to file his Initial Brief on February **16, 1990**. On February **26, 1990**, this Court granted the respondent an extension until March **14, 1990**. Respondent filed his brief on March **9, 1990**.

STATEMENT OF THE FACTS

Except as otherwise noted, the following facts are taken from the Report of Referee.

Respondent represented Frank and Winifred Antalek in various legal matters over a period of approximately fourteen years. Beginning in or around 1983, the Antaleks claimed they began experiencing difficulty in interpreting the respondent's bills. Their main concern appeared to be centered around a bill dated September 23, 1986, that listed a charge for a formation of a corporation in the amount of $1,485.39. The bill was mislabeled and was, in reality, an aggregate of past due amounts. The Antaleks believed they were being double billed for the formation of two corporations for which they had already paid. The Antaleks were provided access to and copies of billing records and ledgers for each of their many cases handled by the respondent. Mr. Antalek did not realize that the bill was actually mislabled until his deposition was taken on September 12, 1989. See Deposition of Frank Antalek, R-Ex 9, pp. 18-20).

The Antaleks had a history of problems in keeping many of their accounts current and they were often behind in paying the

respondent's bills. Mr. Antalek testified at the final hearing that he refused to pay the respondent because of billing misunderstandings going back about four years. (T. p. 142). An audit of the respondent's accounts for Mr. Antalek by one Bernadine McBride revealed no irregularities. She was the respondent's bookkeeper. (B-Ex 1; T pp. 88; 91; 95).

By letter dated July 25, 1986, the respondent advised the Antaleks to consider declaring bankruptcy in order to alleviate the stress caused by their mounting financial obligations. Instead, the Antaleks decided to seek a loan to pay off their obligations. Their primary concern was a home improvement loan held by the FDIC which had begun foreclosure proceedings. The Antaleks also had outstanding medical bills owed to a local hospital. (T pp. 57-59). In addition, the Antaleks also owed the respondent for past due attorney's fees, the amount of which was in dispute.

The respondent recommended Frank Payton of Moneytree Financial Services to arrange a loan for the Antaleks. Mr. Payton, a mortgage broker, acted as middle man in finding a lender. When Mr. Payton discussed his contract with Mr. Antalek, he advised him that his broker's fee of $5,225 was payable once a lender was located regardless of whether or not the Antalek's went forward with the loan.

Mr. Payton was successful in obtaining a loan. The Antalek's situation was not the average refinancing. They did not hold clear title to their property. Instead they had an agreement for deed. (T. p. 108). The respondent obtained estoppel letters from the individual who held the agreement for deed and from the FDIC. (T. pp. 102, 156 and 158). The respondent also prepared the new deed for the Antalek's property. (T. pp. 64-65). Dependable Title Services, Inc. acted as the settlement agent.

When Dependable Title Service, Inc. called the respondent's office and inquired as to whether or not there was an attorney's fee in connection with the loan closing, the respondent's secretary advised that his fee totaled $5,240.03. (T pp. 104, 111; R. p.3). Respondent's secretary further advised that the fee related to other matters. (T p. 106). The respondent did not discuss including the past due fees on the settlement statement with either of the Antaleks prior to the closing. Apparently the respondent assumed the Antaleks were taking the advice given in his letter dated September 23, 1986, wherein he requested that they notify him as to their efforts to secure a loan to pay off the FDIC mortgage as well as their past due legal fees. (B-Ex 5 and T pp. 193-194). Neither of the Antaleks had any discussion with the respondent regarding paying his past due legal fees out of any loan proceeds. (T pp. 184-185). The

Antaleks did not realize the respondent had included the amount due for his past legal fees until they were presented with the closing statement at the closing table. (T p. 135). They were surprised and angered but elected to continue with the closing in order to avoid foreclosure by the FDIC and payment of Mr. Payton's fee without obtaining the loan monies. The Antalek's believed the respondent was representing them at the loan closing because it had been his suggestion that the Antaleks consolidate their debts, he was representing them in the FDIC case and had advised them of their legal rights and how to best protect their assets. (T p. 184). The respondent had advised Mr. Antalek that he must pay the mortgage held by FDIC in order to avoid foreclosure. (T p. 184). Shelley Benge, manager of Dependable Title Services, Inc., also believed that the respondent was representing the Antaleks at the loan closing. (T pp. 98-99, and 107). She remembered that the Antalek's were upset over the respondent's fee at the closing. (T pp. 106, 117). Although the Antaleks opted to continue the closing, Ms. Benge testified that there was a sense of urgency on their part for obtaining the loan. (T p. 116).

Respondent made no mention to the Antaleks of a possible conflict of interest presented by his representation at the loan closing and receipt of a payoff amount from the loan proceeds. He did not advise them to seek independent legal counsel and gave

no notice of his claim to payment of attorney's fees from the loan proceeds prior to the closing.

For case number 74,398, it was uncontroverted that the Antaleks were often delinquent in paying the respondent's fees for services rendered. In 1983 the respondent began charging interest at a rate of 1 1/2% per month (18% A.P.R.) on the Antaleks outstanding balance. Respondent had no prior agreement with the Antaleks to charge interest on any outstanding balance nor were they notified of his intention to begin charging interest. Mr. Antalek became aware of it when he received a bill indicating an interest charge. (T. pp. 126-127). The respondent computed his interest charges in a manner that resulted in his charging interest in excess of the statutory limit. He charged interest on prior amounts billed rather than on principal alone. The respondent ceased charging interest to his clients when it was brought to his attention by The Florida Bar that he computed it improperly. (T. pp. 190-191). Although the respondent has reimbursed other clients for their excess interest charges, he has not repaid the Antaleks. (T. p. 191).

UMMARY OF THE .F ;UMENT

The Report of Referee is to be viewed with a presumption of correctness. The Report sets forth facts found by the Referee that the respondent charged interest upon interest and involved himself in a loan transaction wherein he had conflicting interests with his clients without advising them to consult with another attorney.

After receiving considerable evidence from the Bar and the respondent, the Referee made a finding that the Bar had met its burden of proof as to Count III in case number **73,629** and case number **74,398** while finding that the evidence was not clear and convincing with respect to Count I in case number **73,629**. The Referee made her finding only after reviewing the numerous exhibits and observing the witnesses. Her report should be upheld and costs taxed against the respondent accordingly. The recommendations of guilt flow from these findings and her recommendation of a sixty day suspension for both cases is the appropriate measure of discipline under the criteria set forth in The Florida Bar v. Lord, **433** So.2d **983, 986** (Fla. **1983).** The Referee's findings of fact enjoy the same presumption of correctness as a civil trier of fact pursuant to Rule of Discpline **3-7.5(K)** (1)(l) of the Rules Regulating the Florida Bar. The referee serves as the Court's finder of fact and properly resolves the conflicts in the evidence. It is well settled that

a referee's findings of fact will be upheld unless they are without support in the record or are clearly erroneous. The Florida Bar v. Stalnaker, 485 So.2d 815, 816 (Fla. 1986). The respondent disagrees with the Referee's findings and is attempting to rewrite them. This is inappropriate under the Rules and settled case law. The Referee heard the witnesses, judged their demeanor and credibility and reviewed all of the evidence available to her. That evidence clearly and convincingly supports her findings of fact which should be upheld.

In his initial brief, the respondent fails to provide any case law to support his arguments that the Referee should have granted his Motion to Dismiss for failure to state a cause of action, that venue was improper, the recommended discipline too severe, or that his constitutional rights have been impaired.

ARGUMENT

I. WHETHER THE RESPONDENT'S ATTACK ON THE REFEREE'S FINDINGS OF FACT IS WELL FOUNDED IF THEY *ARE* NOT CLEARLY ERRONEOUS AND IF THEY ARE SUPPORTED BY THE EVIDENCE.

The respondent cannot successfully attack the Referee's findings if they are not clearly erroneous and are supported by the evidence.

The evidentiary standard in attorney discipline cases has long been a clear and convincing one. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). Further, it is well settled that a Referee's findings of fact will be upheld unless they are clearly erroneous or without support in the evidence. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). In The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978), the Court addressed its role in reviewing a referee's report and findings of fact where conflicting testimony had been presented at the evidentiary hearing. The Court upheld the referee's findings of fact, noting that such a determination was the referee's responsibility and would not be overturned unless it was clearly erroneous or without supporting evidence:

> It is our responsibility to review the determination of guilty made by the Referees upon the facts of record, and if the charges be true, to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence. [Citing The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968)]. At p. 857.

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

> Our responsibility in a disciplinary proceeding is to review the referee's report and, if his recommendation of guilty is supported by the record, to impose an appropriate penalty. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). The referee as our fact finder, properly resolves conflicts in evidence. See The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966). At p. 642.

In The Florida Bar v. Stalnaker, supra, the Court was presented with a credibility contest between Stalnaker and a witness. The Court declined to disturb the referee's findings after determining that the record supported them.

The court in The Florida Bar v. Rose, supra, noted that the referee is in the best position to consider and weigh the conflicting evidence. As a finder of fact the referee is charged with weighing the credibility of the witnesses when there is conflicting testimony or evidence. This is the task of a judge

or referee in any contested matter. The Bar submits the Referee appropriately weighed the credibility of the witnesses in this case. Shelly Benge, Manager of Dependable Title Services, Inc. in Daytona Beach, testified at the final hearing that she believed that the respondent was acting as attorney for the Antaleks. (T. p. 107). She recalled that Mr. Antalek questioned the respondent's fee on the closing statement and appeared to be upset. (T. pp. 106, 117). While it may have been clear in the respondent's own mind he was not representing the Antaleks, Ms. Benge's testimony clearly showed that at least she was under the impression he was the Antalek's attorney.

In order to successfully challenge a referee's findings of fact, the respondent faces a heavy burden indeed. He must prove that the referee's findings of fact are without support in the record. Given the weight of the evidence, the Bar submits his task is here highly improbable and the Court should approve the Referee's findings and conclusions in all respects.

In his initial brief, the respondent asserts that the Bar's response to paragraph 31 in his first Requests For Admission admitted that Count I of case number 73,629 was groundless. Respondent's interpretation of the Bar's response is in error. The respondent was charged with failing to communicate with his clients concerning the disputed amount of the legal fees owed by the Antaleks. This failure was alleged to have occurred over a

period of years and was not confined only to September, 1986. Evidence at the final hearing failed to prove this Count by clear and convincing evidence. Count III and case number 74,398 stand independently of Count I.

The respondent is also incorrect in asserting that Staff Investigator Charles Lee stated in his report that he found the respondent's records to be in order. Mr. Lee's report stated that "Mr. Dunagan's attention to his ledgers, billings and charging of interest are not of desired quality. Too, separate ledgers should be kept for each matter of a client." (B-Ex. 1). Furthermore, Mr. Lee did not make any assessment of Mr. Antalek's character. In his report, Mr. Lee stated that Mr. Payton described Mr. Antalek as "an articulate person with an ability to express himself with or without an attempt of restraint by others.'' The respondent is also incorrect in his interpretation of Mr. Antalek's testimony when he asserted in his initial brief that Mr. Antalek admitted that he intended to pay the respondent out of the loan proceeds. The testimony reads as follows:

> Q: Now, did you agree before the closing to pay Mr. Dunagan his outstanding fees from the closing?
>
> A: No sir. I had planned on giving him the $1,500 that I felt I owed him, but we never discussed even doing that. I didn't discuss giving one thing. It was just my wife and I thought we would pay him. As I say, it was about $1500 that we felt we owed him. (T p. 183).

The respondent argues that he supplemented his previous Motion to Disqualify the Referee at the hearing on December 7, 1989. The Motion submitted by the respondent was titled a Motion to Dismiss dated November 21, 1989. It was not a motion to disqualify the Referee although the respondent did include allegations that the Referee may have been prejudiced in another disciplinary matter she heard against the respondent and that her law clerk asked Bar Counsel at the final hearing in the instant case for directions how to get to a place from Daytona Beach. The Bar maintains that these two allegations do not constitute a supplement to the respondent's previous Motion to Disqualify the Referee. (T II pp. 4-5).

The respondent also argues that the Bar action is barred by the statute of limitations. The present action is not one for malpractice and therefore the statute of limitations does not pertain. Although generally applicable, latches does not apply to the instant case because the Antaleks' complaint to the Bar was received only on March 16, 1988. The Bar had no prior knowledge of the respondent's alleged misconduct.

With respect to the respondent's contention that the Referee erred in denying his Motion to Dismiss the Complaint for Failure to State a Cause of Action, the Referee duly considered the respondent's Motion to Dismiss as well as all of his subsequent motions to dismiss and entered her orders accordingly. The

Antaleks initially filed a complaint with The Florida Bar due to billing problems they were experiencing with the respondent. Further investigation uncovered the loan transaction conflict and the interest problems. A finding of not guilty by the Referee with respect to Count I has no effect on the allegations charged in Count III concerning conflict of interest in the loan transaction and case number 74,398 concerning the respondent's admitted charging of interest upon interest resulting in an usurious rate. Although the three matters flow together, the allegations of misconduct are separate and distinct.

With respect to the respondent's argument concerning the charging of fees and costs in the Bar proceeding, it should be noted that attorney's fees are not assessed in disciplinary proceedings. The Rules of Discipline provide for the taxation of costs against the respondent in Bar proceedings. See Rule of Discipline 3-7.5(k)(1). The discretionary approach to the assessment of costs should be used in disciplinary actions. The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). In other words, when assessing costs, the referee should use her discretion when an attorney has been acquitted on some of the charges or if the costs appear to be unreasonable. If this Court believes the costs associated with Count I of case number 73,629 should be adjusted to reflect the Referee's recommendation of not guilty. As to Count I, the Bar submits it should be remanded to the Referee on this point alone. It would be difficult, however, to

separate out the costs incurred in investigating the allegations of Count I as well as the transcript costs due to the fact that it is interrelated with the remaining Count and case in which the respondent was found guilty. In addition, the respondent has filed numerous pleadings and motions in this case. The merit of many of these is questionable although the respondent has been successful in unduly delaying this matter.

II. WHETHER THE RESPONDENT'S RIGHT TO VENUE WAS COMPROMISED.

The respondent also readdresses the issue of venue which he had previously argued in his Motion to Dismiss dated February 21, 1989, and his Motion to Strike and For Sanctions dated March 23, 1989. After consideration, the Referee denied both motions in orders dated June 27, 1989, and May 22, 1989. Venue for trial is governed by Rule 3-7.5(c) of the Rules of Discipline. Case law does not indicate that hearings which do not involve the taking of testimony must by held in the county of venue. See e.g. Taylor v. Taylor, 325 So.2d 63 (Fla. 1st DCA 1976). See also the discussion at 56 Fla. Jur.2d, Venue, section 13 (1985). The assignment of a referee from Duval County, Florida, in no way violated the respondent's right to venue. The final hearing was held in Volusia County where the respondent resides, practices law and the alleged misconduct occurred. The only hearings held in Duval County were motion and discipline hearings.

Furthermore, the respondent was not prejudiced in any way by Rule 3-7.5(g)(4) of the Rules of Discipline which provides that motion hearings may be deferred until the final hearing or that rulings on motions may be reserved until the end of the final hearing. As the record clearly indicates, several hearings were held in a timely manner on the respondent's numerous motions. The Referee ruled on all of the respondent's motions shortly after they were heard. In addition, the respondent conducted extensive discovery and the Bar fully complied with respect to providing information, includeding that information requested by the respondent which was clearly irrelevant to these proceedings.

III. WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE OF A SIXTY DAY SUSPENSION WITH AUTOMATIC REINSTATEMENT IS THE APPROPRIATE LEVEL OF DISCIPLINE.

The Bar maintains that the discipline recommended by the Referee is appropriate given the respondent's prior disciplinary history, his considerable experience in the practice of law and his continuing failure to recognize any conflict of interest in the loan transaction or that he owed a fiduciary duty to the Antaleks. It is well established that in rendering discipline, this Court considers a respondent's previous disciplinary history and increases the discipline where appropriate. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982). In considering her disciplinary recommendation, the Referee was aware that the misconduct charged in The Florida Bar v. Dunagan, 509 So.2d 291

(Fla. 1987), which resulted in the respondent receiving a public reprimand occurred prior to the alleged misconduct in the instant matter. (T II p. 10). Therefore, the respondent's prior public reprimand, was not considered a prior discipline pursuant to The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983). However, she did consider it, as urged by the Bar, as an aggravating factor indicating a pattern of behavior. (T II pp. 10-11; See also Appendix in this Brief, pp. A2-A3). She also considered his prior private reprimand for trust account record keeping violations. Although she did not mention it in her report, she was aware of its existence from sitting as Referee in The Florida Bar v. Dunagan, supra. She was also apprised of the respondent's private reprimand by Bar Counsel at the December 7, 1989, hearing. (T II p. 13).

Although inartfully worded, the Referee made the point in her report that the respondent still does not understand what constitutes a conflict of interest. Even though the facts of the instant matter occurred prior to the issuance of his public reprimand, he has utterly failed to learn and simply either cannot or will not see the conflict inherent in the instant case. (T II p. 15). The Referee did not consider the respondent's reprimand as evidence of a prior disciplinary history per se, but rather as a pattern of behavior in which the respondent is continuing to exhibit. The issue is not the fact that he attended the closing, but rather the fact that he failed to advise his clients in advance of his intention to seek payment

for his past due legal fees from the loan proceeds. Once they sat down at the closing table, the Antaleks faced a difficult choice between proceeding with the loan and paying the respondent what he believed was due him, or cancelling the transaction knowing that they were facing foreclosure, large medical bills and Mr. Payton's $5,000 brokerage fee.

In The Florida Bar v. Stein, **545** So.2d **1364** (Fla. **19891,** an attorney received a three month suspension for failing to issue receipts to his clients indicating all items received as collateral used to guarantee payments of legal fees, failing to maintain complete records of client property in his possession and using self help to acquire the collateral provided by his clients as a guarantee of payments for his legal fees. The attorney also failed to advise his clients that he would take possession of the collateral and sell it if they did not pay him his fees for services rendered by a specific date. The attorney sold a portion of the collateral without his clients' knowledge or permission. There was no indication that the attorney's actions involved dishonesty.

In The Florida Bar v. Fields, 482 So.2d **1354** (Fla. **19861,** an attorney received a public reprimand for failing to reach a fee agreement with his clients before representing them, failing to communicate with his clients concerning their legitimate

questions on legal fees he charged them and failing to properly supervise his non-lawyer employee. Because of his lack of supervision, the attorney's bookkeeper was charging clients a usurious rate of interest. She calculated the amount charged by using both the principle balance and the previous interest charges as well which resulted in her charging interest upon interest.

In The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984), an attorney received a sixty day suspension for failing to notify his business partner of the sale of property while acting as trustee for a group of investors and failing to make a timely accounting of funds received from the sale. The attorney failed to completely disclose essential matters in the business transaction with his client.

In The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982), an attorney received a ninety-one day suspension for entering into a partnership arrangement with a client while acting as attorney for the partnership, failing to provide his client with an accounting of the fees received and failing to turn over proceeds due the client from the sale of her property. The client had been facing foreclosure and bankruptcy when the attorney offered to enter into the partnership agreement with her which allowed an attorney and an investor to take title to his client's property

and sell it to pay off the creditors. The attorney had a prior disciplinary history.

In The Florida Bar v. White, 368 So.2d 1294 (Fla. 1979), an attorney received a two month suspension for purchasing real property from his client in conflict with his client's interests in charging a clearly excessive fee for handling the estate of a former client.

In The Florida Bar v. Hornbuckle, 347 So.2d 1030 (Fla. 1977), an attorney received a sixty day suspension and two years' probation for entering into private business transactions with his clients. The attorney assisted one of his clients in investing money by representing to her that her investment would be secured by the property of another client for whose property the attorney was trustee. When the investing client became dissatisfied and wanted her money back, the attorney was unable to personally repay the loan and the investing client was required to accept a sixth mortgage on the attorney's home. The attorney also obtained a personal loan from another client which he secured with another mortgage on his home. This client did not realize that there were at least four other mortgages on the same home. The attorney obtained yet another loan from a client which he was unable to repay. After the loan went into default, the attorney secured it with a note and mortgage with the intent of finding a purchaser for that note and mortgage. The client

never agreed to the terms and the loan was never repaid. There was no finding that the attorney engaged in any dishonest or fraudulent conduct. The attorney had considerable experience in the practice of law and had no prior disciplinary history.

In The Florida Bar v. Pahules, 334 So.2d 23 (Fla. 1976), an attorney received a three month suspension for entering into a business transaction with a client wherein he had an irreconcilable interest. The attorney's conduct did not involve any dishonesty, fraud, deceit, or misrepresentation.

As in the above mentioned cases, the respondent's clients believed that he was representing their interests at the loan transaction. It makes little difference that the respondent was clear in his own mind that he was not representing them. What matters is what the Antaleks believed due to the respondent's failure to make it clear to them that although he had acted as their attorney for the past fourteen years, he was not representing them with respect to the loan. The issue is not what, if any, fees the respondent was owed. The issue is the coercive tactics the respondent used in obtaining payment for his past due legal fees. Unless they closed the loan, the Antaleks believed they would be responsible for paying Mr. Payton's commission of $5,225. (T. pp.26, 61-62). This occurred at a

time when the Antaleks were involved in numerous lawsuits in which the respondent was representing them as well as facing foreclosure on their home. (T. pp. 57-59, 128-129).

The Referee's recommended discipline meets the test as enunciated in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). First, the judgment must be fair to both society and the respondent, protecting the former from unethical conduct and not unduly denying them the services of a qualified lawyer. While the respondent is qualified, the offenses plainly merit the recommended suspension and the growth of the Bar in recent years has undermined this particular argument. The public will not be unjustly deprived if this Court imposes a suspension.

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 continues to fail to recognize the conflict in representing his clients of some fourteen years in the loan transaction wherein he received all the past due legal fees he felt he was entitled to or conflict in general. A short term suspension may provide the respondent with the time to more objectively reflect upon why his conduct was inappropriate.

Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misconduct. Self help

in obtaining past due legal fees by coercing clients into obtaining loans simply should not be tolerated. A suspension would put other members of the Bar on notice that such actions are not acceptable.

The Standards for Imposing Lawyer Sanctions also support the Referee's recommended discipline. With respect to the the loan transaction, standard 4.32 calls for a suspension when a lawyer knows of a conflict and causes injury or potential injury to the 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 his own interests or whether the representation will adversely affect another client, and causes injury or potential injury to a client. In aggravation, the respondent has a prior disciplinary history for a private reprimand, his public reprimand indicates a pattern of conduct and he refuses to acknowledge the wrongful nature of his misconduct. In addition, the respondent has considerable experience in the practice of law. In mitigation, the respondent was dealing with difficult clients and he was, in all probability, owed the fee he took.

With respect to improperly charging interest, Standard 7.4 calls for a private reprimand when a lawyer is negligent in determining whether his conduct violates a duty owed as a professional and causes little or no actual or potential injury

to a client, the public, or the legal system. This would be appropriate if this case wasn't being considered in conjunction with the more serious misconduct in case number 73,629.

The Bar submits that the Referee's recommended discipline of a sixty day suspension with automatic reinstatement and payment of costs is the appropriate level of discipline in this matter and should be sustained.

CONCLUSION

Wherefore, the Board of Governors of The Florida Bar respectfully prays this Honorable Court will review and approve the Referee's findings of fact, recommendation of guilt and the recommended discipline of a sixty day suspension with automatic reinstatement and further order the respondent pay costs in these proceedings currently totalling $3,352.42.

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 Answer Brief and Appendix have been sent by regular U.S. mail 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 866 939 070, to Walter B. Dunagan, respondent, at 307 South Palmetto Avenue, Daytona Beach, Florida 32014; 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 30th day of March, 1990.

Respectfully submitted,

David G. McGunegle

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