FILED
SID J. WHITE
MAY 13 1991
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee,

v.

GRANVILLE H. CRABTREE,

Respondent/Appellant.

Case No. 75,119

TFB No. 88-10,904(12C)

______________________________/

AMENDED ANSWER BRIEF

OF

THE FLORIDA BAR

David R. Ristoff
Branch Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, FL 33607
(813) 875-9821
Florida Bar No. 358576

Bonnie L. Mahon
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Fl 33607
(813) 875-9821
Florida Bar No. 376183

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SYMBOLS AND REFERENCES	iii
STATEMENT OF THE FACTS AND OF THE CASE	1
SUMMARY OF THE ARGUMENT	20
FIRST POINT INVOLVED	23
SECOND POINT INVOLVED	40
THIRD POINT INVOLVED	43
CONCLUSION	44
CERTIFICATE OF SERVICE	46

TABLE OF AUTHORITIES

CASES	PAGES
The Florida Bar v. Crabtree, Supreme Court Case No. 74,740 (Fla.1989).	40
The Florida Bar v. Vannier, 498 So.2d 896 (Fla.1986)................	23
The Florida Bar v. Wagner, 212 So.2d 770 (Fla.1968)................	23

Code of Professional Responsibility Disciplinary Rules:

1-102(A)(1)............................	17
1-102(A((4)............................	17
1-102(A)(6)............................	18
5-104(A)...............................	18
5-105(B)...............................	18
7-101(A)(1)............................	18
7-101(A)(2)............................	18
7-101(A)(3)............................	18

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS:

Section 4.3...........................	41
Section 4.31..........................	41
Section 5.1...........................	41
Section 5.11..........................	41
Section 9.22..........................	40

SYMBOLS AND REFERENCES

In this Brief, the Appellant, Granville H. Crabtree, will be referred to as the "Respondent". The Appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "TR.I" will refer to the transcript of the Final Hearing held on November 1, 1990. "TR.II" will refer to the transcript of the Final Hearing held on November 2, 1990. "TR.III" will refer to volume I of the transcript of the Final Hearing held on November 9, 1990. "TR.IV" will refer to volume II of the transcript of the Final Hearing held on November 9, 1990. "RR" will refer to the Report of Referee dated November 29, 1990. "R" will refer to the record in this cause. "Joint Exhibit 1" will refer to copies of checks to Clayton Brown and Associates, which Complainant's and Respondent's counsel agreed to include as part of the Record in this cause subsequent to the filing of The Bar's Answer Brief bearing certificate of service of April 24, 1991.

STATEMENT OF THE FACTS AND OF THE CASE

The Respondent's rendition of the facts in his initial brief is accurate to a certain extent, however many of the facts as laid out are supported primarily by the Respondent's testimony which was contrary to the documentary evidence and the testimony of other witnesses in this case. In addition, the Referee obviously rejected Respondent's testimony as being unworthy of belief. The Respondent in his Statement of Facts fails to properly cite to the record in this cause. In the interest of clarity, the Bar sets forth the following facts:

In early 1980, Marjorie VanAntwerp, a client and friend of Respondent, had a discussion with Respondent in regard to repatriating some, but not all, of her European funds into the United States in a manner which would conceal the fact that the funds came from Europe. The Respondent advised Mrs. VanAntwerp that he would make the arrangements to have a portion of her European funds transferred back to the United States. (TR.III, p.17, L.3-25, p.18, L.1-4, p.28, L.17-21). Mrs. VanAntwerp never asked the Respondent to conceal the fact that the repatriated funds belonged to her. (TR.III, p.28, L.22-25, p.29, L.1-8). The Respondent advised Mrs. VanAntwerp that in order to keep the originating location of the funds confidential, the funds would need to be invested into a legitimate business venture in the United States. In 1980, Mrs. VanAntwerp, who was sixty-nine (69) years old (TR.III, p.22, L.20-24), trusted the Respondent so implicitly (TR.III, p.16, L.21-22) that she did not require the Respondent to disclose the details associated with Respondent's

means of repatriating her funds in Europe and investing the same in a United States business. (TR.III, p.5, L.18-25, p.6, L.1-4; TR.IV, p.17, L.19, p.18, L.3).

In 1980, the Respondent's law firm represented Robert Prine in regard to real estate matters and was the general counsel for Mr. Prine's development company called Trebor. (TR.II, p.6, L.7-25; p.7, L.1). In addition, the Respondent's law partner, Albert Sanchez, prepared Mr. Prine's Last Will and Testament. During the same period of time, the Respondent was personally involved in a number of business ventures with Mr. Prine. (TR.II, p.30, L. 10-25, p.32, L.2-7). Respondent denied that his law firm had an attorney/client relationship with Mr. Prine. However, Mr. Dumbaugh and Mr. Sanchez, Respondent's law partners testified that Mr. Prine was a client of Respondent's law firm. (TR.I, p.107, L.19-25, p.108, L.1-9; TR.II, p.6, L.7-16).

Prior to August 18, 1980, Mr. Prine was contacted by H. Stockton Massey and was advised by Mr. Massey that he wanted to sell some property, which will hereinafter be referred to as "The Orange Grove Property". (TR.II, p.28, L.6-13). Subsequently Mr. Prine contacted the Respondent and discussed the acquisition of The Orange Grove Property. (TR.II, p.27, L.10-25).

The Respondent and Mr. Prine believed that The Orange Grove Property would be a "good buy", as the property could be purchased at a price below the market value. (TR.II,p.27, L.24-25, p.28, L.21-25).

Between August 18, 1980 and December 1, 1980, a joint venture was formed between the Respondent, Robert Prine, and

Marjorie VanAntwerp. The joint venture was formed for the purpose of acquiring, developing and marketing The Orange Grove Property. (R. Complaint, paragraph 2, Answer, paragraph 2). A formal joint venture agreement was never entered into by the aforementioned parties: (TR.IV, p.32, L.8-17) however, each of the parties was to have a one-third ownership interest in The Orange Grove Property in return for the following consideration:

> a. Mrs. VanAntwerp was to provide $400,000.00 in cash as a partial payment of the purchase price for The Orange Grove Property. Mrs. VanAntwerp was to be reimbursed the $400,000.00 cash investment at a later date (R. Complaint, paragraph 6; Answer, paragraph 5(a) and (c));
>
> b. Mr. Prine was to acquire, develop and market The Orange Grove Property. (TR.II, p.34, L.13-18); and
>
> c. The Respondent was to arrange for the financing required to acquire and develop The Orange Grove Property. In addition, he was to provide the legal services required by the joint venture. (TR.II, p.37, L.1-5).

The Respondent did not advise Mr. Prine or Mrs. VanAntwerp of his potential conflict of interest in engaging in a business transaction with them, due to the attorney/client relationship. In addition, the Respondent did not advise his clients to seek independent legal advise in regard to their participation in a joint venture with Respondent. (TR.I, p.134, L.3-25, p.135, L.1-25). Although Mrs. VanAntwerp knew that she was investing funds in a joint venture relating to The Orange Grove Property, she was unaware of the Respondent's ownership interest in the same. (TR.III, p.9, L.7-10). Further, Mrs. VanAntwerp was aware of the fact that other investors were involved in The Orange

Grove Property, however, she was unaware of who those investors were. (TR.III, p.14, L.11-16). Mr. Prine knew that the Respondent would have an ownership interest in The Orange Grove Property. In addition, Mr. Prine knew that there would be an investor who would contribute $400,000.00 to the joint venture, however, he did not recall being advised that Mrs. VanAntwerp would be the investor. (TR.II, p.36, L.1-24).

On August 18, 1980, the Respondent wrote a sham letter addressed to Mrs. VanAntwerp. The August 18, 1980 letter set forth the potential sources for the financing needed to acquire The Orange Grove Property. (R. Bar Exhibit 2).

On October 3, 1980, Mr. Prine, as trustee, and H. Stockton Massey, Jr. entered into a Purchase Agreement whereby Mr. Prine agreed to buy and Mr. Massey agreed to sell The Orange Grove Property. (R. Bar Exhibit 1).

On December 1, 1980, the sale of The Orange Grove Property closed with the Respondent, as trustee, taking title to the land. (R. Bar Exhibit 3). The purchase price for the property was $1,379,450.00 (R. Bar Exhibit 3) and was paid as follows:

a. Mrs. VanAntwerp paid $400,000.00 by obtaining a signature loan from Southeast First National Bank of Sarasota. (TR.IV, p.26, L.4-8); and

b. A mortgage deed and note to Mr. Massey in the amount of $986,659.50 was executed by the Respondent, as trustee. (R. Bar Exhibit 4).

The Respondent charged and received attorney fees in the amount of $4,000.00 from the proceeds of the closing on The Grove Property (R. Bar Exhibit 3) even though his legal services were

his consideration for a one-third (1/3) interest in The Orange Grove Property. In addition, the Respondent never disclosed to Mrs. VanAntwerp that he was going to charge and receive a $4,000.00 attorney fee at the closing of The Orange Grove Property. (TR.III, p.9, L.13-20). Further, the closing costs on The Orange Grove Property transaction included real estate broker's commissions in the amount of $82,767.00. (R. Bar Exhibit 3). The real estate brokers commissions were to be split equally between TamBay Realty and SunCoast Development. Mr. Prine and the Respondent split the real estate broker's commissions which were to be paid to SunCoast Development with each receiving $20,983.32. (R. Bar Exhibit 26). Respondent and Mr. Prine did not receive their full share of SunCoast Development Commissions until the Massey mortgage was paid in full in approximately February, 1981. (R. Bar Exhibit 33). Mrs. VanAntwerp was not advised by the Respondent of the fact that he would receive a substantial portion of the real estate broker's commissions. (TR.III, p.9, L.25, p.10, L.1-7).

The mortgage note to Mr. Massey in the amount of $986,659.50 was due and payable in full on January 26, 1981, approximately two (2) months after the closing on the property. (R. Bar Exhibit 4).

After The Orange Grove Property was acquired, the Respondent engaged in a scheme to "freeze out" Robert Prine in regard to the joint venture. (RR. p.3, paragraph III). In addition, the Respondent engaged in a scheme to utilize, for his own personal gain, Mrs. VanAntwerp's European funds that were to be

repatriated to the United States, as he was unable to obtain financing to satisfy Mr. Massey's mortgage and Mrs. VanAntwerp's $400,000.00 loan. (TR.I, p.53, L.22-25, p.54, L.1-13).

On January 23, 1981, Respondent wrote another sham letter addressed to Mrs. VanAntwerp. The letter provided that the "Reed Consortium Group" would make all necessary funds available for the full acquisition and development of The Orange Grove Property, with a deferment of interest on the monetary investment in return for a fifty percent (50%) share of the profits obtained from the development and sale of The Orange Grove Property. (R. Bar Exhibit 6).

There never was a "Reed Consortium Group." The investor referred to in the Respondent's letter addressed to Mrs. VanAntwerp was Mrs. VanAntwerp. (TR.II, p.79, L.2-7).

On January 26, 1981, Jerry A. Reed, as President of Brown, Mendenhall and Williams Investments, Inc., a corporation formed by the Respondent's law partner, Albert Sanchez, (TR.I, p.110, L.16-18) prepared a letter addressed to the Respondent, wherein he confirmed that he had a group of "European Investors" who were interested in engaging in a joint venture with a United States developer for the purpose of acquiring and developing property located in Florida. (R. Bar Exhibit 8). The Respondent drafted the aforementioned letter for Mr. Reed, and the same was typed by the Respondent's secretary in the Respondent's law office. (TR. II, p.78, L.22-23). There was never a group of "European Investors". Again, the "European Investors" was Mrs. VanAntwerp. (TR.II, p.79, L.2-7). On January 27, 1981, the Respondent sent a

letter to Mr. Prine enclosing a copy of Mr. Reed's letter dated January 26, 1981. In the letter of January 27, 1981, the Respondent knowingly failed to disclose to Mr. Prine the fact that the Reed group of "European Investors" was, in fact, Mrs. VanAntwerp. (R. Bar Exhibit 7). In fact, the Respondent never advised Mr. Prine that Mrs. VanAntwerp was the "European Investor". (TR.II, p.42, L.14-16).

On January 29, 1981, the Respondent wrote a letter addressed to Mr. Reed which allegedly enclosed, among other things, a proposed joint venture agreement by and between Respondent, as trustee, and Jerry A. Reed, as trustee, and financial statements of Mr. Prine, Mrs. VanAntwerp, and Respondent. In the letter, the Respondent expressed to Mr. Reed that the financial statements were being provided merely to show the capacity of the individuals to undertake the project. (R. Bar Exhibit 9). Mr. Reed was acting as the trustee for Mrs. VanAntwerp, the "European Investor" that was to contribute 1.5 million dollars for the acquisition and development of The Orange Grove Property. Mrs. VanAntwerp was never advised of the fact that Mr. Reed was acting as her trustee. (TR.III, p.8,, L.15-18).

In addition, on January 29, 1981, the Respondent, as trustee, entered into a joint venture agreement with Jerry A. Reed, as trustee, for the group of "European Investors". (R. Bar's Composite Exhibit 11). The Joint Venture Agreement provided, in part, as follows:

a. The so-called "European Investors" were to invest 1.5 million dollars in cash in The Orange Grove Property;

b. The 1.5 million dollar investment of the "European Investors" was to be utilized for the acquisition and development of The Orange Grove Property;

c. The "European Investors" were to receive a return of their investment and one-half of the net profits resulting from the proposed development of the property; and

d. All mortgages attributable to the acquisition of the Orange Grove Property were to be satisfied prior to the commencement of the development of the land and the acquisition of a development loan. (R. Bar Composite Exhibit 11).

Between January 29, 1981, and February 2, 1981, the Respondent, along with his law partner, Albert Sanchez, and Mr. Reed, went to the Bahamas to open an account wherein Mrs. VanAntwerp's European funds were to be deposited on a temporary basis. (TR.II, p.82, L.18-21; TR.IV, p.29, L.15-24). Mr. Reed accompanied the Respondent to the Bahamas in order to sign documents pertaining to the transfer of Mrs. VanAntwerp's funds to the United States. (TR.I, p.92, L.18-21).

On or shortly before February 2, 1981, 1.1 million dollars of Mrs. VanAntwerp's European funds were transferred to the bank account in the Bahamas and then to the Respondent's trust account in Sarasota, Florida. (TR.IV, p.30, L.14-25; R. Bar Exhibit 13 and 33).

On or about February 12, 1981, the Respondent drafted and addressed a bogus letter to Mrs. VanAntwerp, which stated, in part, as follows:

> "Pursuant to the agreement that I entered into on January 29, 1981, with the Reed Investment Group, I have received funds in my

> trust account on February 2, 1981. The initial funds which I received were in the amount of 1.1 million dollars which was used for the retirement of the outstanding Note and Mortgage to Mr. Massey .... It was my hope that we would have received the remaining $400,000.00 at the same time, however, since it has not come forth as yet, I have not retired your bank loan. As soon as I receive the additional funds, I shall immediately notify you so that your records will be complete." (R. Bar Exhibit 12).

On February 20, 1981, another $400,000 of Mrs. VanAntwerp's European funds were transferred to the bank account in the Bahamas and then wired to the Respondent's trust account. (R. Bar Exhibit 13).

The Respondent disbursed the funds of the "European Investors" (Mrs. VanAntwerp's) in the amount of 1.5 million dollars as follows:

a. $945,755.02 was paid to H. Stockton Massey to satisfy the Note and Mortgage of December 1, 1980. (R. Bar Exhibit 33; TR.IV, p.31, L.6-8);

b. $416,547.93 was paid to Southeast First National Bank in satisfaction of Mrs. VanAntwerp's signature loan and the interest thereon. (R. Bar Exhibit 33; TR.IV, p.31, L.16-23);

c. $6,500.00 was paid to mortgage broker Reed. (R. Bar Exhibit 14, p. 3) allegedly for an advisory fee and costs. $5,000.00 was paid directly to Jerry Reed and $1,500.00 was paid to the law firm of Crabtree, Dumbaugh and Sanchez, P.A. as reimbursement of an advance made to Jerry Reed. (R. Bar Exhibit 33);

d. $32,373.91 was paid to the law firm of Crabtree, Dumbaugh and Sanchez, P.A. for attorney fees of $30,000.00 and costs of $2,373.91 (R. Bar Exhibit 33; TR.III, p.58, L.4-9); and

e. The remaining balance was used for other costs and real estate commissions which

were deferred from the closing between Respondent, as trustee, and Mr. Massey. (R. Bar Exhibit 3 and Bar Exhibit 33).

During April, 1981, a series of sham letters were exchanged between Mr. Reed and the Respondent, and the Respondent and Mr. Prine, indicating that the "European Investors" wanted out of the joint venture. (R. Bar Exhibits 15,16,17,18,19). The letters that were addressed to the Respondent and executed by Mr. Reed were drafted by the Respondent and were typed by the Respondent's secretary in the Respondent's office. (TR.II, p.80, L.13-19, p.82, L.11-17).

According to a letter from Mr. Reed to the Respondent dated April 1, 1981, (R. Bar Exhibit 15) the "European Investors" deemed their initial decision to invest in Florida real estate ill-advised. The letter also stated that the "European Investors" wanted a guaranteed return of their 1.5 million dollars at the earliest possible time in exchange for their relinquishment of any and all interest they had in the joint venture. (R. Bar Exhibit 15).

On April 3, 1981, the Respondent sent another sham letter to Mr. Prine which stated, in part, as follows:

> "I have received a letter today from the European investment group which was somewhat of a surprise. I am enclosing a copy of that letter for you which is dated April 1, 1981.
>
> This letter is quite self-explanatory inasmuch as the European investment group has reviewed their portfolio and have decided not to proceed with a joint venture and do not desire to make any further loans.
>
> I have responded to the group by letter dated April 2, 1981... I believe that if they do accept the counter proposal that we will be in great financial shape inasmuch as we will not have to have really borrowed the

> funds nor will we have to share in the potential profit proceeds. I will advise you when and if I receive a response to my letters from them." (R. Bar Exhibit 16).

The letter from the Respondent to Mr. Reed, dated April 3, 1981, which is referred to in Respondent's letter to Mr. Prine dated April 3, 1981, advised Mr. Reed that his (Respondent's) co-venturers were willing to guaranty the return of the 1.5 million dollars to the investors, if the investors would agree to relinquish any and all rights pursuant to The Joint Venture Agreement, including profits attributable to the development of the property. The letter from the Respondent to Mr. Reed dated April 3, 1981 was in the form of a contractual agreement and was accepted on April 17, 1981 by Jerry Reed, as trustee, for his purported "European Investors". The contractual agreement of April 17, 1981 did not provide a deadline for the repayment of the 1.5 million dollars, however, the agreement did state that the "European Investors" would not be entitled to any interest on the same. (R. Bar Exhibit 16-17).

Toward the end of 1981 and the beginning of 1982, the Respondent began suggesting to Mr. Prine that The Orange Grove Property needed to be sold because the development funds for the property had not been forthcoming and the "European Investors" were demanding the return of their 1.5 million dollars. (TR.II, p.42, L.17-25, p.43, L.1-4). Mrs. VanAntwerp never demanded the return of her 1.5 million dollars. (TR.III, p.10, L.19-22).

Although Mr. Prine did not want to sell The Orange Grove Property, he agreed to do so in order to accommodate the Respondent's need to repay the "European investors" 1.5 million

dollars. (TR.II, p.43, L.8-12). When Mr. Prine agreed to sell The Orange Grove Property, he specifically asked the Respondent whether or not he (Respondent) would have any future involvement in The Orange Grove Property development project. The Respondent assured Mr. Prine that he would not have a future involvement in the project except to possibly provide legal services. (TR.II, p.44, L. 13-25; RR. p.3, paragraph II).

In early 1982, the Respondent approached Neil Saunders, a client and business partner, (R. Respondent's Exhibit 4, p.4, L. 1-25, p.5, L.1-2) in regard to whether or not Mr. Saunders would be interested in purchasing The Orange Grove Property. (RR. p.3, paragraph II). In April, 1982, the Respondent, as trustee agreed to sell The Orange Grove Property to Neil D. Saunders, as trustee for a group of "Canadian Investors" (R. Respondent's Exhibit 4, p.6, L.17-25), in order to repay Mrs. VanAntwerp her 1.5 million dollars. The selling price was 1.8 million dollars. (R. Bar Exhibit 21).

The closing on the sale of The Orange Grove Property to Mr. Saunders, as trustee, transpired on April 29, 1982. (R. Bar Exhibit 20). However, at the closing, the Respondent did not receive sufficient funds to repay Mrs. VanAntwerp her investment of 1.5 million dollars as espoused by the Respondent. At the closing, the Respondent, as trustee received $811,060.75 in cash (R. Bar Exhibit 33), which Mr. Saunders obtained by executing a note and mortgage in the amount of $950,000.00 to Horizon Mortgage Corporation. (R. Bar Exhibit 21, 22, 23, 24). In addition, the Respondent, as trustee for Mrs. VanAntwerp took back a second mortgage on The Orange Grove Property in the amount

of $950,000.00. (R. Bar Exhibit 25). The terms of the second mortgage were that interest only would be paid in quarterly installments with all principle and accrued interest due and payable at the end of four (4) years. (R. Bar Exhibit 25).

Subsequent to the closing of the sale to Neil Saunders, as trustee, the Respondent distributed $66,666.67 to himself, $66,666.67 to Mr. Prine, and $66,666.67 to Mrs. VanAntwerp as their one-third (1/3) share of the profits. (R. Bar Exhibit 26). This distribution of profits was contrary to the Respondent's contractual agreement with Jerry Reed, as trustee for the "European Investors". The contractual agreement provided that Mrs. VanAntwerp was to be repaid her 1.5 million dollars investment prior to the distribution of profits to the developers. (R. Bar Exhibit 17). In addition, the remaining proceeds from the Saunder's closing were distributed in part, as follows:

a. $25,000.00 was disbursed to Neil D. Saunders. This sum was half of the real estate commissions payable to Mr. Saunders real estate company (R. Bar Exhibit 24; R. Respondent's Exhibit 4, p.10, L.8-22);

b. $25,000.00 was distributed to the Respondent, individually. This sum was the other half of the real estate commissions payable to Mr. Saunders real estate company (R. Bar Exhibit 25; R. Respondent's Exhibit 4, p.10, L.23-25, p.11, L.1-15; RR. p.3, paragraph II);

c. $50,000.00 was distributed to SunCoast Development Corporation as a brokerage fee. Mr. Prine received $25,000.00 of the funds (R. Bar Exhibit 25 and 26);

d. $34,000.00 was disbursed to the Respondent's law firm for attorney fees (R. Bar Exhibit 24 and 33);

e. $3,500.00 was disbursed to Brown, Mendenhall and Williams Investment, Inc. of which Jerry Reed was president (R. Bar Exhibit 33);

f. $361,000.00 was disbursed to the Respondent as trustee for Mrs. VanAntwerp (R. Bar Exhibit 33); and

g. $241,559.64 was disbursed to Julias Baer Securities, a New York Bond House. The bonds obtained with these funds were delivered to Mrs. VanAntwerp's trust account at Northern Trust Bank (R. Bar Exhibit 33; RR. p.3, paragraph II).

The "Canadian Investors" which Neil Saunders was allegedly acting as trustee for, allegedly decided not to invest in the Orange Grove joint venture. As a result, on May 4, 1983, one year after the initial sale to Saunders as trustee, Neil Saunders conveyed The Orange Grove Property to The Winthrop Group, Inc. by a Trustee Deed. (R. Bar Exhibit 28). The Respondent was the president and majority shareholder of The Winthrop Group, Inc. which began business as of December 1, 1981. (R. Complaint, paragraph 45; R. Respondent's Answer, paragraph 45). No money was exchanged in the sale between Saunders, as trustee, and The Winthrop Group.

On May 5, 1983, The Winthrop Group, Inc. obtained a 4.3 million dollar loan from State Savings and Loan Association of Lubbock for the construction and development of The Orange Grove Property. (RR. p.3, paragraph II). The construction loan was to be paid in installments. The Mortgage Note for the 4.3 million dollar construction and development loan was personally guaranteed by the Respondent, Albert A. Sanchez, and Neil D. Saunders. (RR. p.3, paragraph II).

In addition, on May 5, 1983, the Respondent received

$1,064,312.33 of the loan proceeds from State Savings and Loan Association of Lubbock. This sum was to be used to satisfy the mortgage and note of May 4, 1982 in the amount of $950,000.00 from Neil Saunders, trustee, to Respondent as trustee for Mrs. VanAntwerp. (TR.IV, p.75, L.20-25, p.76, L.1-6; R. Respondent's Exhibit 9). Between May, 1983 and July, 1983, the Respondent disbursed the $1,064,312.33 (along with another $107,761.40 owed to Mrs. VanAntwerp) to Clayton Brown and Associates on behalf of Mrs. VanAntwerp. (R. Joint Exhibit 1). At this point in time, Mrs. VanAntwerp was repaid the initial 1.5 million dollars that she invested in the Orange Grove Property in January, 1981. (TR.I, p.169, L.19-25, P.170, L.1-4). The Respondent, as trustee, executed a satisfaction of mortgage in regard to the $950,000.00 note and mortgage.

Also, from the loan proceeds, Respondent disbursed $90,000.00 to C & S Investments (Saunders, Trustee). In addition, $40,000.00 was disbursed to Respondent's law firm. (R. Complaint, paragraph 53, Answer, paragraph 53).

The Respondent's trust account ledger card for The Winthrop Group, Inc. reflected that from April 5, 1983 to May 9, 1984, The Winthrop Group, Inc. received loan proceeds of $2,100,601.70 from State Savings and Loan Association of Lubbock. (R. Bar Exhibit 33).

Between May, 1983 and September, 1984, State Savings and Loan Association of Lubbock was declared insolvent and ceased

making disbursements on the development loan to the Winthrop Group. This resulted in The Orange Grove project becoming stagnant. (TR.I, p.169, L.3-7; TR.IV, p.77, L.6-15).

On September 28, 1984, Mrs. VanAntwerp invested another $649,025.00 into the Orange Grove project. (TR.III, p.61, L.8-24). According to the Respondent, Mrs. VanAntwerp was to receive a percentage of the profits from The Orange Grove project in return for the $649,025.00 investment. (TR.I, p.173, L.2-5). The Respondent testified that Mrs. VanAntwerp was given a document which evidenced her entitlement to a percentage of the profits from the Orange Grove project, however, the Respondent could not produce a copy of the same. (TR.I, p.173, L.21-25).

A replacement loan for the loan from State Savings and Loan Association of Lubbock was obtained from Commonwealth Savings and Loan Association, which eventually went insolvent. Commonwealth Savings and Loan Association was taken over by Resolution Trust Company, which again ceased making disbursements on the development loan to The Winthrop Group. This again resulted in the Orange Grove project becoming stagnant. The Winthrop Group defaulted on the loan from Commonwealth Savings and Loan Association, which resulted in the foreclosure of The Orange Grove Property. (TR.IV, p.77, L.16-25, p.78, L.1-17).

Mrs. VanAntwerp was never repaid the $649,025.00 that she invested in The Orange Grove Property in September, 1984. In addition, she did not receive any profits from said investment. (TR.I, p.174, L.2-4).

The Florida Bar Complaint in this cause was filed with The Supreme Court of Florida on December 7, 1989. The Honorable Thomas E. Stringer was appointed by the Court on January 5, 1990, to act as the Referee in this disciplinary case. On August 13, 1990, the Referee filed with the Supreme Court a Motion For Extension of Time in regard to concluding this case within a six (6) month period of time. The Referee's Motion set forth the fact that discovery proceedings were delayed due to medical infirmities being experienced by Respondent's counsel. (R. Motion for Extension of Time).

The Final Hearing in this cause was held on November 1, 1990, November 2, 1990, and November 9, 1990. Subsequent to the Final Hearing, the Referee found the Respondent guilty of violating Disciplinary Rule 1-102(A)(1), Code of Professional Responsibility, in effect prior to January 1, 1987 (a lawyer shall not violate a disciplinary rule); Disciplinary Rule 1-102(A)(4), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Disciplinary Rule 1-102(A)(6), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law); Disciplinary Rule 5-104(A), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not enter into a business transaction with a client

if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure); Disciplinary Rule 5 -105(B), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client); Disciplinary Rule 7-101(A)(1), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules); and Disciplinary Rule 7-101(A)(3), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not prejudice or damage his client during the course of the professional relationship). In addition, the Referee found the Respondent not guilty of violating Disciplinary Rule 7-101(A)(2) (a lawyer shall not fail to carry out a contract for employment entered into with a client for professional services). (RR. paragraph III).

Further, the Referee recommended that the Respondent be disbarred from the practice of law in the State of Florida. (RR. paragraph IV).

The Respondent filed a Petition for Review on January 28, 1991. Respondent filed a Motion for Extension of Time to File

Initial Brief on February 26, 1991. This Court granted the Respondent's Motion and gave Respondent until March 30, 1991 to file his Initial Brief. The Bar was served with a copy of Respondent's Initial Brief on April 1, 1991. This brief is filed in Answer to the Respondent's Initial Brief.

SUMMARY OF THE ARGUMENT

The Respondent's Initial Brief presents several arguments alleging that the Referee's Findings of Facts and recommendations of guilt are erroneous; that the aggravating factor regarding Respondent's prior disciplinary offense should not have been considered by the Referee; and that delay by the Bar should have been considered by the Referee as a mitigating factor.

The Referee found that Respondent engaged in a business transaction (joint venture) with two of his clients, Robert Prine and Marjorie VanAntwerp. The Referee also found that the Respondent engaged in a scheme to freeze Robert Prine out of the transaction and to utilize Marjorie VanAntwerp's European funds for his own personal gain.

The evidence in this case showed that the Respondent froze Robert Prine out of The Orange Grove Property transaction for his own benefit once Mr. Prine was no longer beneficial to the joint venture by virtue of the fact that Mr. Prine's contact, Ryan Homes, was no longer interested in or able to purchase lots developed on the property.

A Summary of the Facts which support the Referee's finding that Respondent used Mrs. VanAntwerp funds for his own benefit are as follows:

a. The Respondent did not invest any of his personal funds into The Orange Grove Property;

b. Between October 1980 and September 1984 Mrs. VanAntwerp invested approximately $2,549,025.00 into The Orange Grove Property;

c. From October 1980 through July 1983,

Mrs. VanAntwerp did not receive any interest on her total investment of approximately $2,549,025.00 except for the one year worth of interest she received on the $950,000.00 note and mortgage from Neil Saunders, trustee;

d. The Respondent and or his law firm received attorney fees in excess of $110,000.00 for legal matters regarding The Orange Grove Property; and

e. The Respondent personally received real estate commissions in excess of $45,000.00.

The evidence in this case clearly showed that, in essence, the only benefit that Mrs. VanAntwerp received from her investment in The Orange Grove Property was the repatriation into the U.S. of 1.5 million dollars and $66,000.00 of profit in April 1982. On the other hand, she lost interest on approximately 2.5 million dollars over a 3 1/2 year period of time and, in addition, she lost $649,000.00 that she invested in September 1984.

The Referee's findings of facts are presumed to be correct and it is the Respondent's burden to demonstrate that the Report of Referee is erroneous, unlawful or unjustified. The Respondent has failed to rebut the presumption of correctness. The facts in this case, taken as a whole, clearly support not only the Referee's Findings of Facts, but also his recommendation of guilt and thus the same should be upheld.

The Respondent's argument that the Referee should not have considered Respondent's prior disciplinary offense as an aggravating factor is without significance since disbarment is the appropriate discipline for Respondent's misconduct notwithstanding Respondent's prior disciplinary record.

The Respondent's argument that the Referee should have considered The Bar's delay in prosecuting this case as a mitigating factor is without merit. Contrary to Respondent's argument, the disciplinary proceedings were delayed in part as a result of an illness suffered by Respondent's Counsel. The Bar prosecuted this case through the Final Hearing in less than three (3) years. Three years is not an unreasonable period of time in light of the convoluted facts in this case.

The Florida Bar respectfully requests that this Court approve the Referee's Findings of Facts, recommendations of guilt and the recommended discipline of disbarment.

FIRST POINT INVOLVED

The Respondent has challenged the Referee's Findings of Fact and recommendations of guilt and discipline. 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). The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). The Findings of Fact herein are based upon clear and convincing evidence and should be upheld. Respondent attempts to explain away all of his misconduct under the guise of repatriating 1.5 million dollars on behalf of Mrs. VanAntwerp. However, the Referee obviously rejected the Respondent's rendition of the facts as being totally unworthy of belief. The Referee's rejection of the Respondent's testimony was justified in light of the numerous contradictory and evasive statements made by the Respondent during the Final Hearing in this cause. A cursory review of Respondent's testimony clearly and convincingly supports the Respondent's lack of credibility.

The Referee had the opportunity to observe the demeanor and credibility of the witnesses in this case and simply and logically chose to find that Respondent engaged in a series of dealings that involved dishonesty, deceit, fraud, and misrepresentation.

Respondent's Initial Brief stated that "Mrs. VanAntwerp requested Respondent to repatriate from Europe one and-a-half million dollars of her assets...". (Emphasis added by The Bar). (Initial Brief p.3, paragraph 2). Respondent erroneously cited to the Report of Referee in support of this statement. The

Report of Referee instead stated that "... Mrs. VanAntwerp hired the Respondent to repatriate funds into the United States...". (RR. p.1, paragraph II).

While The Bar agrees that Respondent was retained by Mrs. VanAntwerp to repatriate funds into the United States, there is no evidence to establish that 1.5 million dollars was the agreed upon amount from the inception. To the contrary, Respondent initially sought $400,000.00 from Mrs. VanAntwerp for the down payment needed to acquire the Orange Grove Property. Respondent advised Mrs. VanAntwerp by letter dated August 18, 1980, that he intended to seek financing for those funds between $400,000.00 and the 1.4 million dollars needed to acquire the property. (R. Bar Exhibit 2).

Respondent concocted an after-the-fact defense by asserting that all of his sham letters and fraudulent conduct were intended to effectuate the repatriation of her 1.5 million dollars. It is an amazing coincidence that the amount needed by the Respondent for the acquisition of The Orange Grove Property was the same amount to be repatriated by Mrs. VanAntwerp. To coroborate this defense, Respondent testified at the Final Hearing regarding the <u>source</u> of the financing for the amounts between $400,000.00 and 1.4 million dollars as follows:

> Bar Counsel: Did you envision looking to other sources for those funds?
>
> Respondent: Basically to Mrs. VanAntwerp because that was her desire. (TR.I, p.39, L.6-9).

However, Respondent's deposition testimony was critically different. When questioned at the Final Hearing about his deposition testimony, Respondent was asked:

> Bar Counsel: Do you have a recollection of whether or not you were going to look to Mrs. VanAntwerp for the entire one point four million.
>
> Respondent: Only if we didn't place the funds elsewhere. We would talk, we would have done that and that was obviously broached and it did subsequently happen that way. (Emphasis added). (TR.I, p.39, L.17-23)

The Referee found in that regard that "Respondent was dishonest with Mrs. VanAntwerp in his representation of her in the repatriation of her funds in that he used her funds in obtaining The Orange Grove project for his own purposes". (RR. p.3, paragraph III).

Respondent's August 18, 1980 letter (R. Bar Exhibit 2) to Mrs. VanAntwerp was clearly designed to commit a fraud upon Mrs. VanAntwerp as well as Mr. Prine. The letter was filled with the following total fabrications. First, the letter advised of the acquisition of the Orange Grove property as a vehicle to acquire the Gulfstream Property in a section 1031 like/kind exchange. If the Orange Grove property had been acquired, developed, and sold to Ryan Homes as envisioned by Respondent, there would have been nothing left to transfer in a like/kind exchange.

The August 18, 1980 letter (R. Bar Exhibit 2) also sets forth that a source for financing the acquisition of The Orange Grove Property would be through "a mortgage broker with J. Reed who has represented some European investor groups". Jerry Reed was an individual that worked part-time for the Respondent doing bookkeeping on the Respondent's personal business ventures. Mr. Reed was not sophisticated in business matters. In addition, Mr. Reed was not a mortgage broker nor was he associated with a mortgage broker. Further, as of August 18, 1980, Mr. Reed had not represented any "European investor Groups". (TR.I. p.47, L.4-15, p.85, L.19-20). Mrs. VanAntwerp was the only "European investor". (TR.II, p.76, L.11-17).

Neither Mrs. VanAntwerp nor Mr. Prine recalled ever receiving the August 18, 1980 letter. (TR.II, p.32, L.15-21, p.3; TR.III, p.6, L.10-16). As evidence of their failure to receive the August 18, 1980 letter, neither was aware of the other's participation in the joint venture relating to The Orange Grove Property. (TR.II, p.33, L.1-17; TR.III, p.6, L.25, p.7, L.1-7). In addition, Mrs. VanAntwerp was not aware of Respondent's ownership interest in The Orange Grove Property. (TR.III, p.9, L.7-10).

If the August 18, 1980 letter were simply a ruse for third persons, as submitted by Respondent, whose existence was being concealed? Mrs. VanAntwerp was clearly identified as the source of the initial $400,000.00 down payment.

At the time Respondent created the joint venture with Mr. Prine and Mrs. VanAntwerp, both were clients of his law firm. It was readily admitted by Respondent that Mrs. VanAntwerp was a

close friend and client. (TR.I, p.17, L.10-16). In fact, Respondent categorized their relationship as "very close". (TR.I, p.22, L.21). Mr. Prine was also a client of Respondent's law firm. (TR.I, p.107, L.20 and TR.II, p.6, L.7). The Referee specifically found that "Mr. Prine was a client of Respondent individually and of Respondent's law firm at all times material herein". (RR. p.1, Paragraph II).

On October 3, 1980, Mr. Prine, as trustee, entered into a purchase agreement with Mr. Massey, as seller, for the sale of The Orange Grove Property. The Respondent's law firm was the escrow agent for the sale. (R. Bar Exhibit 1).

The purchase price for the property was 1.4 million dollars. The sale of The Orange Grove Property was completed on December 1, 1980. A loan for $400,000.00 was obtained by Mrs. VanAntwerp for the down payment. A mortgage and note for $986,656.50 to Mr. Massey was signed by Respondent, as trustee, with no personal liability on the note. (R. Bar Exhibit 1 and 4; TR.IV, p.26, L.4-8).

Respondent received $4,000.00 in legal fees from the aforementioned sale. Respondent's receipt of $4,000.00 was contrary to the alleged joint venture agreement. Respondent was to receive a one-third interest in the joint venture in consideration for his efforts to secure financing as well as his legal services. (TR.II, p.37, L.1-5). Respondent had no explanation as to what services were rendered in consideration of the $4,000.00 legal fee. (TR.I, p.60, L.7-12). Mrs. VanAntwerp was not aware that Respondent had taken attorney fees or

commissions relative to The Orange Grove Property. (TR.III, p.9, L.13-16).

Respondent also received one-half (1/2) of the real estate commission to Suncoast Development, with Respondent's share of the commission being $20,983.32. Neither Mr. Prine nor Mrs. VanAntwerp were aware of the other's part in this venture (RR. p.2, Paragraph II). On two (2) occasions during the Final Hearing Respondent intially denied sharing the commission fees with Mr. Prine. (TR.I, p.62, L.10-13 and L.21-25). Respondent was then impeached with his May 5, 1982 letter to Mr. Prine wherein it stated "Essentially my records indicate the following: Commissions paid to SunCoast Development Corporation of $41,967.44, which we divided leaving you an amount of $20,983.32". (R. Bar Exhibit 26). After being shown Bar Exhibit 26, Respondent was again asked whether he divided with Prine those commissions from SunCoast Development. Respondent testified, "I think you could conversely say he divided them with me...". (TR.I, p.63, L.12-16). Respondent's explanation for the sharing of funds with Mr. Prine was as follows:

> My receipt of funds from Mr. Prine was based upon an agreement that he had and I had regarding work that he put in and the work that I put in we'd both receive the same amount of money no matter what they were, except he would receive extra stuff for extra he did, and I would receive monies from my firm for the legal services. (TR.I, p.62, L.14-20).

Respondent's reference to funds received from Mr. Prine being based upon an agreement between Respondent and Mr. Prine illustrates a complete disregard for his fiduciary duty to Mrs. VanAntwerp. Mrs. VanAntwerp provided the $400,000.00 needed for

the down payment of The Orange Grove Property. Respondent, on the other hand, as of December 1, 1980 provided no cash nor any capital contributions to the joint venture. (TR.I, p.72, L.4-20). Yet, Respondent's fees were in excess of $24,000.00 as of December 1, 1980. (R. Bar Exhibt 3). At the Final Hearing, Respondent was asked to describe those services provided to the joint venture (in consideration for the $24,000.00) that were separate and distinct from those services provided to the joint venture (in consideration for his one-third (1/3) interest in the joint venture). Respondent was unable to differentiate between those services provided by him in consideration for his one-third (1/3) interest in the joint venture and those services that were attributable to the $24,000.00 in fees. (TR.I, p.75, L.1-25, p.76, L.1-25, p.77, L.1-25, p.78, L.1-13).

On January 27, 1981, Respondent corresponded with Mr. Prine (R. Bar Exhibit 7) and attached a letter dated Janaury 26, 1981 (R. Bar Exhibit 8) from Mr. Reed to Respondent. The January 26, 1981 correspondence from Mr. Reed was written on the letterhead of Brown, Mendenhall, and Williams. Brown, Mendenhall and Williams was incorporated for Mr. Reed by Mr. Sanchez, Respondent's law partner (TR.I, p.110, L.16-18). The January 26, 1981 correspondence was, in fact, drafted by Respondent, and addressed to himself (TR.IV, p.37, L.7-10 and TR.II, p.78, L.23). The January 26, 1981 letter also provided, in part, as follows:

> "I have spoken with a group of European Investors who have expressed an interest in...acquiring and developing property located in Florida. (Emphasis added by The Bar). Inasmuch as the investors with whom I have spoken believe that their monies will

> yield a greater rate of return by co-venturing with a developer rather than by taking the posture of a creditor, they would prefer to contribute the funds as part of a joint venture agreement in which they will receive a negotiated percentage of the profits, from the development, after the property has been subdivided and sold. However, they are not particularly interested in taking title to the property in any fashion, rather, they would simply prefer that you execute an agreement in which their rights and responsibilities are documented in an unrecorded agreement whereby your investors agree to distribute to them, upon the completion of the lot sales of the development, a percentage of the profits; provided you are able to demonstrate to me and to these European Investors that said profits will reflect an attractive rate of return on their investment." (Emphasis added) (R. Bar Exhibit 8).

Respondent testified that the purpose of the January 26, 1981 correspondence was to provide "a means of documentation...if any other source wanted to look at these as a business venture...". (TR.IV, p.38, L.4-7). However, the letter was factually bogus in that Mrs. VanAntwerp's repatriated funds were sufficient to acquire The Orange Grove Property, but clearly not adequate to also develop the property. In addition, in order to demonstrate to the "European Investors" (Mrs. VanAntwerp) that the investors would receive an attractive rate of return on their investment, Respondent provided Mr. Reed with the financial statements of himself, Mr. Prine and Mrs. VanAntwerp. (R. Bar Exhibit 9). The Respondent provided Mrs. VanAntwerp, the "European Investor" with a copy of her own financial statement to deceive Mrs. VanAntwerp, Mr. Prine or both.

Thereafter, Respondent used Jerry Reed to act as trustee on

behalf of Mrs. VanAntwerp to bring 1.5 million dollars into the United States. On January 29, 1981, the Respondent, as trustee, entered into a joint venture agreement (R. Bar Composite Exhibit 11) with Jerry Reed, as trustee for a group of "investors" (Mrs. VanAntwerp). Mr. Reed's "investors" (Mrs. VanAntwerp) agreed to invest 1.5 million dollars into the project in return for fifty (50%) percent of the future profits. The Respondent's principals (respondent, Mr. Prine, and Mrs. VanAntwerp) would share in the remaining fifty (50%) percent of the profits. (RR. p.2, Paragarph II; R. Bar Composite Exhibit 11).

While the Reed Joint Venture agreement provided for an additional fifty (50) percent interest in the future profits to the "European Investors" (Mrs. VanAntwerp), such was not the case. When the property was later transferred to Mr. Saunders, Mrs. VanAntwerp received only one-third of the profits. (R. Bar Exhibit 26). Mrs. VanAntwerp received no consideration for her additional 1.5 million dollars. Further, she received no interest on the funds provided to the joint venture. (TR.I, p.169, L.19-25, p.170, L.1-4). On April 9, 1981, Respondent's law firm, on the other hand received $32,373.91. This amount was comprised of $30,000.00 in legal fees and $2,373.91 in costs. (R. Bar Exhibit 33; TR.III, p.58, L.4-9). Mr. Reed was also paid $6,500.00 dollars for this role as "trustee" in the transaction. (R. Bar Exhibit 14 and 33).

Even though Respondent's one-third interest in the joint venture was in consideration for his legal and financing services, Respondent received the following sums for services allegedly rendered up to April 9, 1981: $4,000.00 received at the

December 1, 1980 closing; $20,983.32 received as one-half of the commissions to SunCoast Development; and $30,000.00 on April 9, 1981. Respondent provided no explanation at the Final Hearing as to what services were provided in consideration for his fees in excess of $50,000.00 that were separate and distinct from those in consideration for his one-third interest in the joint venture.

During April, 1981, a series of sham leters were exchanged between Mr. Reed and the Respondent and the Respondent and Mr. Prine, indicating that the "European Investors" wanted out of the joint venture. (R. Bar Exhibits 15, 16, 17, 18, 19). The letters addressed to the Respondent and executed by Mr. Reed were drafted by the Respondent and typed by the Respondent's secretary. (TR.II, p.80, L.13-19, p.82, L.11-17).

On April 3, 1981, the Respondent sent another sham letter to Mr. Prine which stated, in part, as follows:

> "I have received a letter today from the European investment group which was somewhat of a surprise...
> This letter is quite self-explanatory inasmuch as the European investment group has reviewed their portfolio and have decided not to proceed with a joint venture and do not desire to make any further loans..." (R. Bar Exhibit 16).

Respondent's April 3, 1981 letter, (R. Bar Exhibit 17) further advised Mr. Prine of his counter-proposal to Mr. Reed. Respondent's counter-proposal offered to guarantee the return of the 1.5 million dollars to the investors, provided the investors agreed to relinguish any and all rights pursuant to The Joint Venture Agreement, including profits attributable to the development of the property. The letter from the Respondent to Mr. Reed dated April 3, 1981, was in the form of a contractual

agreement and was accepted by Mr. Reed, as trustee, on April 17, 1981. The Agreement did not impose a deadline for the return of the 1.5 million dollars. The Agreement did state that the "European Investors" would not be entitled to any interest on the monies contributed to the project. Respondent advised Mr. Prine by correspondence dated April 20, 1981, (R. Bar Exhibit 19) of the April 17, 1981 agreement with Reed. Respondent advised that they had "struck a good bargain". (R. Bar Exhibit 19).

Toward the end of 1981, and the beginning of 1982, the Respondent began suggesting to Mr. Prine that The Orange Grove Property be sold. (TR.II, p.42, L.17-25, p.43, L.1-4). Mr. Prine was no longer a viable co-venturer to Respondent. Mr. Prine had served his objective. Mr. Prine was successful in acquiring The Orange Grove Property from Massey. However, Mr. Prine's contacts with Ryan Homes had run dry. Ryan Homes showed no interest in buying any of The Orange Grove Property. (TR.I, p.154, L.10-12).

Respondent told Mr. Prine that it was illegal for the "European Investors" to be investing in any kind of an agricultural venture in the United States, and that they wanted out. (TR.II, p.42, L.25, p.43, L.1-2). Although Mr. Prine did not want to get out of the project (TR.II p.43, L.9), he agreed to sell The Orange Grove Property to "accomodate" Respondent. (TR.II, p.65, L.2-3).

Respondent then arranged for Mr. Saunders, a client and business associate to acquire The Orange Grove Property. (RR. p.2, Paragraph II).

Mr. Saunders agreed to buy and Respondent agreed to sell The Orange Grove Property for 1.8 million dollars. The closing on

the sale of The Orange Grove Property to Mr. Saunders, as trustee, took place on April 29, 1982. (R. Bar Exhibits 20, 21). At the closing, the Respondent, as trustee, received $811,060.75 in cash, (R. Bar Exhibit 33) which Mr. Saunders obtained by executing a note and mortgage in the amount of $950,000.00 to Horizon Mortgage. Mr. Saunders executed the mortgage note to Horizon Mortgage and assumed no personal liability for the repayment of the note. (R. Bar Exhibit 23). Additionally, Respondent as trustee for Mrs. VanAntwerp, took back a second mortgage on The Orange Grove Property in the amount of $950,000.00. The terms of the second mortgage were that interest only would be paid in quarterly installments with all principle and accrued interest due and payable at the end of four (4) years. (R. Bar Exhibit 25).

Respondent took back a second mortgage that potentially tied up Mrs. VanAntwerp's "demanded" funds for a period of four (4) years. In addition, Mrs. VanAntwerp never consented to having her funds of $950,000.00 tied up for four (4) years by a second mortgage. Mrs. VanAntwerp did not receive the return of her funds at the closing with Mr. Saunders. (R. Bar Exhibit 33). Respondent again breached his fiduciary duties to Mr. Prine and Mrs. VanAntwerp. Respondent's plan to bring about the end of the joint venture with himself, Mr. Prine, and Mrs. VanAntwerp was accomplished at the closing with Mr. Saunders.

From the proceeds of the sale to Mr. Saunders, the Respondent distributed $66,666.27 to himself, $66,666.67 to Mr. Prine, and $66,666.67 to Mrs. VanAntwerp as their one-third share of the profits. The distribution of profits was contrary to the

contractual agreement (R. Bar Exhibit 17) with Mr. Reed, wherein the "European Investors" (Mrs. VanAntwerp) was to be repaid her 1.5 million dollar investment prior to the distribution of profits. In addition, from the proceeds of the Saunder's closing, Respondent received $25,000.00 individually, as one-half of the real estate commissions payable to Mr. Saunder's real estate company. (R. Respondent's Exhibit 4, p.10, L.23-25, p.11, L.1-15). Mr. Saunders also received $25,000.00 as his one-half of the commissions. (R. Bar Exhibit 24). Respondent's law firm received an additional $34,000.00 in legal fees. (R. Bar Exhibit 24 and 33). Approximately $602,559.00 was distributed to Mrs. VanAntwerp. Mr. Prine received $25,000.00 as one-half of the $50,000.00 distributed to SunCoast Development Corporation. And, $3,500.00 was disbursed to Brown, Mendenhall and Williams Investment, Inc. of which Jerry Reed was President. (R. Bar Exhibit 33).

Prior to the closing with Mr. Saunders, Mr. Prine asked Respondent whether or not he would have any interest in the new group. Respondent advised Mr. Prine that he would not have any interest, except that he may provide legal services to them in the future. (TR.II, p.44. L.20).

Mr. Prine was greatly concerned about Respondent having any future interest in the project because he always believed the property was a "very good buy", and that if Respondent was going to be in it, he felt as though he should be in it as well. (TR.II, p.45, L.5-8).

On the day of the closing to Mr. Saunders, Mr. Sanchez and Mr. Dumbaugh, Respondent's law partners, had a private

discussion. Mr. Dumbaugh was concerned about the financial stability of the law firm. Mr. Sanchez advised Mr. Dumbaugh not to despair regarding the firm's slow business as he (Mr. Sanchez) and Respondent had just completed a "classic freeze out" of Mr. Prine. Mr. Sanchez told Mr. Dumbaugh that they had just completed a deal that would make them ten (10) million dollars. In addition, Mr. Sanchez explained that the law firm would be busy with work on the closings for the real estate project. (TR.II, p.9, L.17-25, p.10, L.1-9).

Mr. Dumbaugh also testified that subsequent to the Saunders closing, Mr. Prine appeared at the law office regarding another legal matter. Mr. Dumbaugh had reviewed some loan papers regarding The Orange Grove Property which were on a credenza, and apparently easily observable. Mr. Dumbaugh, testified that Respondent, in uncharacteristic emotional behavior came "flying out of his office", dumped the files off the credenza, and made some comment about confidentiality. (TR.II, p.12, L.1-25). Mr. Dumbaugh later told Mr. Prine about Mr. Prine being frozen out, of the project in an effort to distance Mr. Dumbaugh from Respondent's activities. (TR.II, p.22, L.4-14).

Subsequently, the "Canadian Investors" for which Mr. Saunders was allegedly acting as trustee, decided not to invest in the Orange Grove project. As a result, on May 4, 1983, one year after the sale to Mr. Saunders, Mr. Saunders conveyed The Orange Grove Property to The Winthrop Group, Inc. (R. Bar Exhibit 28). The Respondent was the President and majority shareholder of The Winthrop Group, Inc. which began business in

December 1, 1981. (R. Complaint, paragraph 45; R. Respondent's Answer, paragraph 45). No money was exchanged in the sale between Saunders, as trustee, and The Winthrop Group. Mr. Sanchez, who confided with Mr. Dumbaugh about the freeze-out reappeared as a shareholder in The Winthrop Group, Inc. Parenthetically, Mr. Dumbaugh wisely and ethically chose to leave the law firm. Despite his promises to Mr. Prine that he would have no future interest in the project, Respondent emerged as the President and majority shareholder of The Winthrop Group, Inc, the vehicle holding title to The Orange Grove Property.

On May 5, 1983, The Winthrop Group Inc. obtained a 4.3 million dollar loan from State Savings and Loan Association of Lubbock for the construction and development of The Orange Grove Property. The Morgage Note for the 4.3 million dollar loan was personally guaranteed by the Respondent, Mr. Sanchez, and Mr. Saunders. Respondent personally guaranteed the 4.3 million dollar loan at a time characterized by Respondent's Initial Brief as a collapsed real estate market with exceedingly high interest rates, and no way of developing The Orange Grove Property. (Respondent's Initial Brief, p.30). In reality, Respondent personally guaranteed the 4.3 million dollar loan because, as Mr. Sanchez told Mr. Dumbaugh, they intended to make millions on the project.

On May 5, 1983, the Respondent received $1,064,312.33 of the loan proceeds from State Savings and Loan Association of Lubbock. This sum was used to satisfy the mortgage and note of May 4, 1982, in the amount of $950,000.00 from Neil Saunders, trustee, to Respondent as trustee for Mrs. VanAntwerp. (TR.IV,

p.75, L.1-6; R. Respondent's Exhibit 9). The Respondent, as trustee executed a satisfaction of mortgage (R. Bar Exhibit 29) in regard to the $950,000.00 note and mortgage.

Subsequently, State Savings and Loan Association of Lubbock was declared involvent. The Orange Grove Property was refinanced through Commonwealth Savings and Loan Asosociation. Commonwealth Savings and Loan Association was then taken over by Resolution Trust Company, which brought an action to foreclose its mortgage on The Orange Grove Property.

The mortgage was then foreclosed and the property sold at a loss. An approximately one (1) million dollar judgement was then obtained against the personal guarantors. (TR.IV, p.79, L.7-9). On September 28, 1984, at a time when the project became stagnant because of the collapse of the above-mentioned financial institution, Mrs. VanAntwerp invested another $649,025.00 in The Orange Grove Property. (TR.III, p.61, L.8-24). Exactly how Respondent induced Mrs. VanAntwerp to re-invest an additional $649,025.00 in a project near collapse is unclear. It was very clear from the entire record in this case that Mrs. VanAntwerp had a misplaced, yet unquestioned loyalty to Respondent. As a further affront to this loyalty, Respondent was unable to produce any documentary evidence of Mrs. VanAntwerp's entitlement to a percentage of the profits from The Orange Grove Property , ie. a stock certificate of otherwise. (TR.I, p.173, L.21-25).

In 1983, Respondent repaid Mrs. VanAntwerp the initial 1.5 million dollars invested in The Orange Grove Property. In addition, another $40,000.00 was disbursed to Respondent's law firm. Mrs. VanAntwerp has never received the return of her additional $649,025.00 investment.

SECOND POINT INVOLVED

The Respondent argues that the Referee should not have considered Respondent's prior disciplinary offense as an aggravating factor to enhance the disciplinary sanction imposed against Respondent. The Bar concedes that the prior discipline of a private reprimand was imposed against the Respondent subsequent to the misconduct in this case. However, contrary to the Respondent's argument in his Initial Brief, the Respondent's misconduct in the instant case occurred between 1980 and 1984 which was subsequent to the Respondent's misconduct which was the subject of the case wherein Respondent received a private reprimand.

The Referee in his report sets forth as an aggravating factor, "prior disciplinary offense (Supreme Court Case No. 74,740 - private reprimand - conduct similar in nature to the conduct herein)". (Emphases added) (RR.p.5, paragraph V). It is the Bar's position that the Referee acknowledged the Respondent's prior disciplinary offense not as an enhancement of the discipline herein but merely to show the existence of similar misconduct by Respondent. Section 9.22 of the Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as The Standards), states that a lawyer's pattern of misconduct may be considered as an aggravating factor. A comparison of The Florida Bar v. Crabtree, Supreme Court Case No. 74,740 (Fla. 1989) and the case sub judice evidences a pattern of misconduct engaged in by Respondent.

Nothwithstanding the foregoing, Respondent's misconduct in

this case warrants disbarment absent the Referee's consideration of Respondent's prior disciplinary offense as an aggravating factor. The Standards supports this contention. Section 4.3 of The Standards provides, in part, as follows:

> Absent aggravating or mitigating factors...the following sanctions are generally appropriate in cases involving conflicts of interest:
> 4.31 Disbarment is appropriate when a laywer, without the informed consent of the client(s):
> (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer...and causes serious or potentially serious injury to the client...

In addition, Section 5.1 of The Standards provides, in part as follows:

> Absent aggravating or mitigating circumstances... the following sanctions are generally appropriate in cases...with conduct involving dishonesty, fraud, deceit, or misrepresentation:
> 5.11 Disbarment is appropriate when...(f) a lawyer engages in...intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously reflects on the lawyers fitness to practice law.

The Referee found that the Respondent not only engaged in intentional conduct involving dishonesty, fraud, deceit and misrepresentation, but also that he had a conflict of interest that was not disclosed to his clients, Mr. Prine and Mrs. VanAntwerp. In addition, the Referee found that the Respondent's misconduct reflected adversely on his fitness to practice law. Further, the Referee found that Respondent's misconduct prejudiced both Mr. Prine and Mrs. VanAntwerp.

As established above through The Standards, even absent aggravating factors, disbarment is appropriate in this case since the Referee did not find any mitigating factors which could be used to reduce the appropriate discipline of disbarment in this case.

THIRD POINT INVOLVED

The Respondent argues that undue delay by The Bar should have been considered as mitigation by the Referee. There was no undue delay by The Bar. The Bar concedes that it formally began its investigation in this matter in approximately December 1987. From 1987 until the filing of the formal Bar Complaint on December 7, 1989, this case required extensive investigation by The Florida Bar. This case, as can be seen from the facts, was convoluted and was complicated by the Respondent's elaborate scheme to defraud his clients/co-venturers. In fact, the co-venturers and The Bar were initially unable to see through Respondent's veil of "European Investors", "freezing out", and subterfuge.

Respondent claims that memories have dimmed. To a certain extent that is correct. But one cannot remember what one is never told. Respondent's own testimony regarding Mrs. VanAntwerp was that he provided her only with a "general view" of the project, and not a "step by step" explanation. (TR.IV, p.17, L.19. p.18, L.3). Mr. Prine, equally kept in the dark, was never aware of Mrs. VanAntwerp's involvement in the project. (TR.II, p.36, L.24).

Respondent conceded in his Motion for Extension of Time to File Initial Brief that the issues herein are complex. This case was investigated and prosecuted with the utmost dispatch.

The delays in bringing this matter to a Final Hearing were in part due to the serious illness of Respondent's Counsel. While The Bar sympathizes with the delays occassioned by that illness, it cannot be held responsible for any mitigation to Respondent as a result thereof.

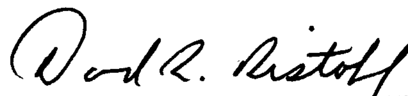
CONCLUSION

The issues before this Court are whether or not the Referee's Findings of Fact and recommendations of guilt in his report are supported by the record and whether the Referee's recommended discipline of disbarment is appropriate for the Respondent's misconduct. The Referee's findings of fact in his report are clearly supported by the record, and, in many instances, are supported by the Respondent's own testimony. In addition, the Referee's recommended discipline of disbarment is supported by the record and by the current Standards for Imposing Lawyer Sanctions.

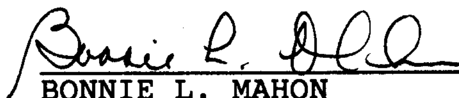
The Respondent seeks to obscure the facts of this case. However, the Referee heard the testimony of all witnesses and reviewed the exhibits. As the trier of fact, the Referee had the opportunity to assess the credibility and observe the demeanor of the witnesses. Accordingly, his finding of fact and conclusions of law should be upheld unless it can be shown that they are clearly erroneous or lacking in evidentiary support.

WHEREFORE, The Florida Bar asks this Court to uphold the Referee's findings approve the Referee's recommended discipline of disbarment.

Respectfully submitted,



DAVID R. RISTOFF
Branch Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, FL 33607
(813) 875-9821
Attorney No. 358576



BONNIE L. MAHON
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, FL 33607
(813) 875-9821
Attorney No. 376183

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amended Answer Brief of The Florida Bar has been furnished by U.S. Regular Mail to Richard T. Earle, Jr., Counsel for the Respondent, at 150 Second Ave. North, Suite 1220, St. Petersburg, FL 33701; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, FL 32399-2300, this 10th day of May, 1991.

DAVID R. RISTOFF