IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 76,066

L. VAN STILLMAN,

Respondent.

_____/

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

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PRELIMINARY STATEMENT

Respondent, L. VAN STILLMAN, the Appellee and Cross-Appellant in these proceedings, will be referred to by his surname or as Respondent. Appellant and Cross-Appellee will be referred to as The Florida Bar or the Bar.

References to the final hearing on January 8, 1991, will be by the symbol T followed by the appropriate page number. References to the supplemental hearing on April 24, 1991 will be by the symbol T II followed by the appropriate page number. References to the Report of Referee will by the symbol RR followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

This case is a matter of original jurisdiction before the Supreme Court of Florida pursuant to Article V, Section 15 of the Constitution of the State of Florida.

The final hearing in this matter was held on January 8, 1991. When new counts of similar nature arose subsequent to the final hearing, Respondent waived probable cause on the new matters and stipulated to the facts involved an those counts. A joint report of referee was submitted to the referee and a supplemental hearing was held on April 24, 1991.

Complainant has extensively set forth the factual findings of the referee in its initial brief. However, Respondent wishes to summarize the events of this case in this brief for ready reference and to cover certain matters not set forth by the Bar.

Respondent was admitted to The Florida Bar in 1973. He is also a member of the Bars of the states of New York and Pennsylvania. He has no prior disciplinary history. T 18, 19, 108. Except for his initial year in practice, during which time he did strictly probate work, Respondent's practice through 1980 was 90% criminal defense work. T 94, 95. In 1980, Respondent took a one year sabbatical from practice with his wife. Afterwards, he practiced law in Pennsylvania and New York. In early 1985, Respondent returned to South Florida to practice. In the latter part of 1987, Respondent relocated his practice to Boca Raton. T 97.

Respondent found when he moved to Boca Raton that there was not sufficient work in the vicinity for him to limit his practice to criminal defense cases. Because he wanted to stay in the Boca area, he started to do real estate work. T 98. While in temporary quarters in Boca, awaiting the opening of his new office, he was approached by a mortgage broker who asked if he did closings. T 98. Ultimately, through those mortgage brokers, Respondent acted as a closing agent in which loans by the Greater New York Mortgage Company (hereinafter Greater New York) were given to various individuals. Respondent closed approximately one dozen loans for Greater New York. T 99. Of these twelve loans, five of them became the subject of the instant disciplinary proceedings. Those five closings occurred during the period from November 24, 1987 through August 8, 1988. RR 2-16.

The first two transactions to come to the Bar's attention were the Tag and Kaiser closings that occurred on June 13, 1988 and August 8, 1988 respectively. The facts surrounding each closing were undisputed (Respondent admitted most of the Bar's initial allegations and then, after the Bar amended its complaint, Respondent admitted to all of the facts alleged in the complaint). Both the Tag and the Kaiser transactions were in foreclosure by Greater New York, hence, the grievance to the Bar.

In both the Tag and the Kaiser purchases, Respondent acted as the closing agent on the real estate transactions. Respondent represented Mr. Tag at his closing and represented the sellers in the Kaiser closing. In each case, Greater New York's mortgage was

primary and was approximately 75% of the appraised value. In each instance, Respondent participated in the buyers giving second and, in some instances, third mortgages contrary to the closing instructions of Greater New York.

Subsequent to final hearing, a third foreclosure by Greater New York resulting from a closing handled by Respondent was brought to the Bar's attention. Respondent, whose files were listed not by the lending institution but by the parties to the transactions, was able to go to the mortgage brokers that initially handled the transactions and was able to determine those transactions in which Greater New York had been the lender. He then discovered two other closings that he handled in which secondary financing contrary to Greater New York's instructions was accomplished. These three new closings constituted the additional findings of the referee that began on page eight of his report. The three new closings, involving Kathleen White (the foreclosure), Wanda Godfrey and Cecile Blackwood occurred in January 1988, November 1987 and June 1988 respectively. Apparently Ms. Godfrey was in arrears but foreclosure proceedings had not begun and Ms. Blackwood was current. T 2, 7, 8.

Respondent did not testify as to his role on the last three transactions. However, he testified about the Tag and Kaiser transactions before the referee in January 1991. Respondent testified that in a standard Greater New York loan transaction, he was approached by a mortgage broker shortly before the closing. By then, the buyer was already approved for the mortgage, his

credit was checked and established, the appraisal was done, and Greater New York had determined the amount of its first mortgage. Respondent had nothing to do with the preparation or the submission of the loan application by the buyer; he had nothing to do with the credit background check; and he had nothing to do with the appraisal. T 100. Greater New York prepared the bulk of the closing documents. T101.

In all five of the closings, Greater New York's instructions were that there was to be no secondary financing. Notwithstanding those instructions, Respondent participated in the preparation of second and third mortgages. However, there is no evidence that the secondary financing in any way jeopardized the primary mortgage lien held by Greater New York.

There is no evidence that Respondent received anything other than the normal closing fees for handling such transactions and his share of the title insurance premiums charged for the closing. Generally, Respondent's total receipts on each closing totaled $500.00 to $600.00.

In each transaction, there was sufficient equity in the property to protect Greater New York's first mortgage position. T 113.

At final hearing, Respondent presented six witnesses who testified as to his sterling reputation in the community, both business and legal, for honesty and fair-dealing. Among those witnesses were two non-lawyers, Lawrence Ginsberg and Daniel Mendicino. Both men testified that Respondent's reputation in the

business community is excellent and that both of them have found Respondent to be an excellent and honest lawyer.

Four lawyers also testified on Respondent's behalf. Among them was Marc Gaylord who met Respondent approximately two years ago when they were adversaries on a difficult case. Mr. Gaylord found Respondent to be a lawyer that he characterized as:

> Very good person, very honorable, very interested in getting the matter resolved without the necessity of going through a lengthy legal process. T 67.

Subsequent to their case being resolved, Mr. Gaylord took over three of Respondent's files when Respondent went on vacation one summer. He found all of the files thoroughly, professionally and competently worked and he found nothing that smacked of unprofessional practices in them. T 69. Mr. Gaylord feels that Respondent has a "high level of integrity" and that everybody "has the highest regard for him as a person and as a lawyer". T 70.

Thomas Edward Sliney, who was admitted to the Michigan Bar in 1968 and to The Florida Bar in 1971 also testified on Respondent's behalf. Mr. Sliney is a past president of the South Palm Beach Bar Association, currently serves on a Judicial Nominating Committee and has served in various civic activities including being on the Board of Overseers of the College of Boca Raton. He has also been the city attorney for the community of Highland Beach for approximately seventeen years. T 73-75.

Mr. Sliney testified that Respondent has a good reputation for legal ability and for honesty and that Mr. Sliney trusts him without reservation. T 77, 78.

During cross examination, upon being apprised in detail of the nature of Respondent's misconduct, Mr. Sliney stated that Respondent's actions in the case at Bar did not generally reflect his character. T 80. Upon continued questioning, Mr. Sliney stated that:

> I think it's a mistake and probably poor judgment. I don't know necessarily that it means that the person has bad character. T 81, 82.

Michael Winer, admitted to The Florida Bar in 1974 and who met Respondent when they were opposing counsel in litigation in 1989, also testified on Respondent's behalf. Mr. Winer's case was hotly litigated due to Respondent's very difficult client. Notwithstanding the nature of Respondent's client, Mr. Winer testified that he

> found Mr. Stillman to be of the highest professional caliber, especially under the circumstances of this case....
>
> It's very rare these days when you come across somebody who's a gentleman and a professional. T 86, 87.

Mr. Winer testified that Respondent could be dealt with on a handshake and that he is a very forthright lawyer.

William Gardiner, III, was Respondent's last witness. Mr. Gardiner was admitted to The Florida Bar in 1977 and promptly went to work for the State Attorney's office. At that time, he became aware of Respondent although they were never adverse counsel. Mr. Gardiner testified that Respondent's reputation in the State Attorney's office was excellent. Respondent was considered a "fair guy" and one from whom you "got a fair shake from". T 90.

In 1988, Respondent and Mr. Gardiner were adverse counsel in a family law matter that was "about as hot as they get." T 91. Despite the difficult nature of the case, Mr. Gardiner characterized Respondent as follows:

> His legal ability was fine, good, above average. His ability to advocate was also above average. He has, in a very difficult case, always been straightforward. And I never at any time caught him short in dealing with me by way of telling me who his witnesses were going to be, what his evidence was going to be. We were able to work out as many things as possible. And he always treated me in a very gentlemanly fashion under the worst of circumstances. T 92.

Mr. Gardiner also testified that Respondent has a very good reputation for speaking the truth. T 93.

Other than the normal fees and charges attendant to handling a real estate closing and writing a title insurance policy, there was no evidence that Respondent benefited in any way from his handling of the five Greater New York closings at issue. In fact, the referee specifically found on page 20 of his report that:

> As mitigation, I find that neither personal gain nor greed was the motive for respondent's misconduct and I further find it unlikely that any such conduct will be repeated.

UMMARY OF ARGUMENT

Respondent's misconduct does not warrant the harsh sanction of a suspension requiring proof of rehabilitation. A 90 day suspension, with automatic reinstatement but followed by two years probation will guarantee the protection of the public in the case at Bar.

Respondent, on five occasions during the period from November 1987 through August 1988, participated in closings in which secondary financing occurred on residential purchases in which Respondent acted as a closing agent for Greater New York. Prior to Respondent's involvement, Greater New York had approved each buyers' loan application. Greater New York did the credit check on the applicant, secured an appraisal verifying the legitimacy of the sales price and authorized a first mortgage in the amount of approximately 75% of the appraised value of the property. They approved the loan, prepared most of the closing documents and forwarded them to Respondent to act as closing agent. No funds were taken from the bank without their authorization. No funds were used for any purpose other than that stated in the loan application. They were used to buy a residence at the price stated and the loan was secured by a first mortgage as demanded by Greater New York. Respondent acknowledges wrongdoing in participating in the obtaining of secondary financing. However, such misrepresentation does not result in Greater New York being "victimized".

There is substantial mitigation involved in the case at Bar which militates against a suspension requiring proof of rehabilitation for Respondent. He has never been previously disciplined during his eighteen years of practice. The referee specifically found that his motive was not personal gain or greed and the referee further found that Respondent's misconduct was not likely to be repeated.

Respondent has a sterling reputation in the legal and business community in which he practices. Both businessmen and lawyers testified that Respondent was honest and one could operate with him on a handshake. The lawyers, most significantly, pointed out that Respondent was a gentleman as an adversary and was one who did all that he could to defuse acrimonious litigation.

The case law most analogous to Respondent's situation call for suspensions of 90 days or less. While the Bar argues that the current "crisis" amongst financial institutions should result in this Court departing from precedent and imposing a discipline more appropriate with the current climate, Respondent urges this Court to reject that position. Allowing the vagaries of current cause celebres to be the determining factor in the imposition of a discipline is to substitute caprice for reason.

ARGUMENT

THE PROPER DISCIPLINE FOR RESPONDENT'S MISCONDUCT, ALL OF WHICH TOOK PLACE DURING THE PERIOD NOVEMBER 1987 THROUGH AUGUST 1988, AND WHICH WAS NOT MOTIVATED BY PERSONAL GAIN OR GREED, AND WHICH IS UNLIKELY TO BE REPEATED, IS A 90 DAY SUSPENSION TO BE FOLLOWED BY TWO YEARS PROBATION.

The referee initially recommended that Respondent be suspended for sixty days for his misconduct. After the three new closings came to light, the referee increased his recommendation to a six month suspension. Respondent submits that the substantial mitigation present in this case reduces the appropriate discipline for his misconduct to a 90 day suspension, i.e., one not requiring

proof of rehabilitation before reinstatement. To insure the public's welfare, Respondent has no objection to the Court imposing probation for two years after Respondent's suspension is completed.

The considerations for the determination of the discipline to be imposed in disciplinary cases are set forth in The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970) at page 132. There, the Supreme Court stated:

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same not denying the public the services of a qualified lawyer as a result of undue harshness in imposing the penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Nowhere in Pahules is it stated that a discipline should be enhanced, as argued by The Florida Bar, because it falls within the parameters of an alleged national crisis that happens to be in vogue in the media at the time of the offenses. In fact, in The Florida Bar v Hirsch, 342 So.2d 970 (Fla. 1977) this Court stated exactly the opposite. In Hirsch, the Supreme Court rejected the Bar's demand for disbarment and imposed, instead, a three month suspension for conversion of trust proceeds. In so doing, the Court observed that past considerations relevant to discipline should not be abandoned during times of controversy. At page 972 of that opinion, the Court stated that those considerations

> are just as pertinent in times where the bar sails on placid seas as when it is caught up in the storms of criticism of public servants and all those in positions of trust, such as we are now experiencing in the aftermath of Watergate. We are cognizant of the difficulty of the bar, or this Court, being completely objective in disciplinary cases where the whole profession, including those charged with enforcing its moral codes and concepts, are affected by whatever judgment is rendered. For this reason great care should be exercised to the end that the ultimate judgment does not become an expression of frustration. (Emphasis supplied).

As set out by the cases below, the appropriate discipline for Respondent's misconduct is no more than a 90 day suspension.

Respondent, as the referee found, did not close the five problem transactions with Greater New York in an effort to feather his own nest. Neither personal gain nor greed was his motive. The Bar hammers away at Respondent's "fraud" on Greater New York. Respondent respectfully submits that, notwithstanding the referee's finding of fraud as a matter of law, that Respondent participated in no conspiracy to defraud Greater New York.

Respondent handled twelve transactions for Greater New York. Apparently, three of those matters are in foreclosure (Tag, Kaiser and White), Godfrey is in arrears and Blackwood appears to be fine. There is no evidence as to whether any of the seven transactions that did not involve secondary financing are in foreclosure.

There is no evidence that any of the five borrowers were attempting to defraud Greater New York. In each instance, prior to Respondent's involvement in the case, the respective buyers submitted their loan applications, and after a credit check, were

approved for first mortgages in the amount of approximately 75% of the selling price of the property. Appraisals were secured by Greater New York and, before Respondent's involvement, they were satisfied that their primary lien status would be protected based on the appraised value of the residence being sold.

Nothing was done that jeopardized Greater New York's primary lien status. T 113. No buyer received any funds that were not approved by Greater New York's loan officers, prior to Respondent's involvement. All funds were used for the purchase of the residence at issue. Had there been no secondary financing, no one would argue that there was any fraud.

Respondent has acknowledged that hie participation in the buyers giving second and, in some instances, third mortgages, contrary to Greater New York's closing instructions was improper. Respondent has acknowledged this despite the fact that he had no attorney-client relationship with Greater New York and that he was acting as their closing agent.

The Bar argues that Greater New York was "victimized." Respondent strenuously objects to such a characterization. Greater New York got what it bargained far; a first mortgage on a residence that equalled approximately 75% of the appraised value of the residence. Greater New York, before Respondent was involved in the transaction, approved all twelve transactions after they had investigated the buyers' financial position.

Most importantly, however, is the fact that all of the money loaned by Greater New York was used to purchase the residence at

issue. In each instance, there is no evidence that the purchase was for any purpose other than residential use by the buyers and that those individuals had nothing but the best of intentions towards making their mortgage payments. There is certainly no evidence indicating that Respondent knew of any intent by the buyers to do anything but live in and buy the house they were purchasing.

Respondent respectfully submits to this Court that had each purchaser waited a short period of time after the closing on the first mortgage, and then secured second or third mortgages, that there would have been no impropriety whatsoever.

The Bar argues on page 27 of its brief that some of the borrowers were funded for more than 100% of the sales price. In so arguing, the Bar totally disregards the substantial closing costs attendant to any such closing.

The Bar repeatedly, through the use of inflammatory language, tries to give the impression that Greater New York was, for all intents and purposes, the victim of theft. Nothing can be further from the truth. The fraud, if such it was, is that the buyers did not have enough money to make the down payment on the property. The funds nought by the buyers were legitimately used to buy a house, for the price stated, at the premises stated, and, as far as can be determined, made no misrepresentations as to their credit worthiness. Yes, there were misrepresentations made to the bank about the value of the cash put into the house. However, the bottom line is that Greater New York had a first mortgage that was

25% less than the fair market value, as determined by their appraisers, and their equity position was sound.

Fraud is a broad and, probably intentionally, vague term. It is a fraud to embezzle ten million dollars from a bank. It is also a fraud to deliberately give a bank a roll of 49 pennies and state on the deposit slip that 50 cents should be credited to an account. Both actions are wrong, yet nobody would argue that the penalty for the former should be the same as the penalty for the latter. Similarly, Respondent should not be given a discipline that would be meted out to an individual who stole money.

In the case at Bar, Complainant argues that Greater New York was victimized by Respondent's actions in five closings. (Actually, at this point in time, there have only been three foreclosures. As of April, 1991, the other two transactions appear to have caused Greater New York no losses.) In fact, there is no evidence showing how much Greater New York lost on their three foreclosures--if anything.

There are but three cases in Florida disciplinary jurisprudence which involve lawyer misrepresentations to lending institutions. They are The Florida Bar v Beneke, 464 So.2d 548 (Fla. 1985), in which the lawyer received a public reprimand; The Florida Bar v Nuckolls, 521 So.2d 1120 (Fla. 1988), in which the lawyer received a 90 day suspension; and The Florida Bas v Siegel & Canter, 511 So.2d 995 (Fla. 1987) in which two lawyers received a 90 day suspension.

Respondent submits that the discipline imposed for his misconduct should be no more than that imposed in the aforementioned three cases. This is particularly true in light of the referee's specific finding that neither peraonal gain nor greed was Respondent's motive.

In Beneke, the accused lawyer was trying to buy an office building for his practice in Clearwater, Florida. He presented a sales contract showing a purchase price of $245,000.00 to loan officers at the Ellis National Bank in that community. The contract was appended to respondent's loan application dated January 25, 1978. (Mysteriously, the contract that was appended to the loan application was dated either one or two days after that application, i.e., January 26th or 27th, 1978).

Mr. Beneke testified that after applying for the loan with Ellis, he tried to negotiate a lower price. However, the contract indicating the lower price for the sale of the building was dated January 20, 1978 and bore a sales price of $159,000.00. The last contract involved in the transaction, dated January 23, 1978 for that $159,000.00 precedes the $245,000.00 contract.

Regardless of the dates involved on the transactions, Mr. Beneke never advised Ellis that the $245,000.00 sales contract was invalid. He asked for a loan of $175,000.00. Ultimately, in February 1978, Ellis lent respondent $160,000.00, based on the $245,000.00 sales contract. In actuality, that loan was $1,000.00 more than the actual negotiated price of the property.

In the Beneke case, there was absolutely no doubt of Respondent's intent to profit from his deception. In fact, Respondent's secretary testified at Respondent's final hearing as to his "smug exultation after concluding the transaction" and about "his furtive attempts to conceal the original contract". Id. 549.

Notwithstanding Mr. Beneke's deliberate fraudulent acts, which were clearly designed far his financial gain, he received but a public reprimand.

The Siegel and Canter case, like Beneke, involved lawyers who lied to financial institutions for their personal gain. Ms. Siegel and Mr. Canter were partners in the practice of law. On October 7, 1983, they executed a mortgage and security agreement with Southeast Bank which stated that no secondary financing on their purchase would be obtained without the express consent of the lender. Despite their representations to Southeast, however, the partners had already agreed to obtain secondary financing from the seller in lieu of a cash dawn payment. On the very same day that they signed their security agreement with Southeast, the accused lawyers signed a second mortgage agreement with the seller for $50,000.00 to be applied towards the purchase price.

Mr. Canter and Ms. Siegel applied for a $150,000.00 loan from Southeast with the condition that they would pay $50,000.00 down for a total purchase price of $200,000.00. To further their fraud, the accused lawyers submitted a financial statement to Southeast dated August 4, 1983, in which they falsely represented that they had already paid $20,000.00 down on their office building.

Approximately seven or eight months after their loan closed, on June 30, 1984, the partners applied for a $45,000.00 loan to be secured by a second mortgage on their office building. In their applications for the second loan, neither partner disclosed their earlier $50,000.00 mortgage to the seller. In fact, on July 1, 1984 and on August 10, 1984 the partners presented documentation to Southeast, some of which was under oath, in which they swore there were no other encumbrances on the property.

The referee in the Siegel and Canter case specifically found that the loan officers at Southeast believed that they had $50,000.00 cash equity in the property when the second loan was made.

Mr. Canter and Ms. Siegel on two separate instances over a one year period lied to a financial institution to further their own interests. The second mortgage they secured from Southeast raised the indebtedness on the building that they purchased for $200,000.00 to a total of $245,000.00. Southeast not only was not told about the $50,000.00 second mortgage in the first transaction, but documents were submitted under oath seven or eight months later in which the partners swore that there was no secondary financing.

Notwithstanding the numerous acts of misrepresentation to Southeast by the partners, such acts deliberately designed to profit the accused lawyers, Ms. Siegel and Mr. Canter were suspended for 90 days.

In Nuckolls, the accused lawyer received a 90 day suspension after being found guilty of three counts of misconduct. The first

two counts involved Mr. Nuckolls' participation in a "scheme to fraudulently obtain 100% financing by misrepresenting the purchase price of condominium units". The third count involved Mr. Nuckolls' violation of his obligation as a land trustee.

The Supreme Court summarized Mr. Nuckolls' misconduct as to counts one and two as follows:

> As to counts one and two, the record reflects that the respondent represented a seal estate partnership which was selling townhouse units. Although respondent knew that purchasers of seven units paid only $36,000.00 per unit, contracts and closing documents prepared by respondent reflected that the units would be sold for $45,000.00 each with a $9,000.00 down payment.
>
> The referee found that lender advanced mortgage loans on these seven units based at least partly on respondent's written representation that the purchasers, Bayoan C. Mateo and Donald C. Williamson, had made or would make the down payments and that the $36,000.00 actually reflected 80% of the true purchase price. Subsequently, one of the partners wrote a check in the amount of $36,000.00 to cover four of the down payments, but respondent never cashed the check and the purchasers never paid the down payment. Respondent nevertheless sent lenders copies of the check as proof the down payments had been received, knowing that the down payments had not been made.

Respondent, in his representation of his clients, and in an attempt to secure 100% financing of those units, dramatically inflated the sales price of the condominiums. He perpetrated his fraud by photocopying a $36,000.00 check and forwarding it to the lending institution with the representation that it was a down payment. In fact, that check was bogus.

In addition to the aforementioned misconduct, however, the referee also found that Mr. Nuckolls violated his obligation as a land trustee. Apparently, he closed a real estate transaction for the benefit of sellers, who were both Mr. Nuckolls' partners and his clients. He failed to consult the purchaser, for whom Respondent acted as trustee, about the terms and the conditions of the sale. As a result of his deception, Respondent freed his partnership of numerous mortgages that became liens against the property of the purchaser. Ultimately, that purchaser was forced to sue the partnership.

Mr. Nuckolls, unlike the case at Bar, submitted arguments "at great variance" from the referee's findings. He further ignored the referee's finding of deliberate misrepresentation. He considered his misconduct involving his breach of fiduciary responsibility as a de minimus violation. This Court rejected Mr. Nuckolls' position and found that he had engaged in "serious" misconduct. The Court specifically found, that unlike the case at Bar, Mr. Nuckolls deliberately attempted to perpetrate a fraud on lenders who, based on Respondent's misrepresentations, thought they were making an 80%, not a 100% loan.

This Court saw fit to suspend Mr. Nuckolls for 90 days for his misconduct.

This Court's reluctance to suspend any of the lawyers in the aforementioned three cases for longer than 90 days is understandable. In each instance, it appears that the accused lawyer had no prior disciplinary history and, inherent within the

opinion, was the recognition that there would be no repeat of their misconduct. In each instance the Court chose to impose a discipline that did not require proof of rehabilitation because, apparently, there was no threat to the public welfare by allowing the lawyers to be automatically reinstated.

The case at Bar is less egregious than that in either Beneke, Siegel and Canter or Nuckolls. All but Mr. Nuckolls engaged in conduct clearly designed to benefit them personally. Mr. Beneke exuded smug exultation about succeeding in borrowing $160,000.00 to buy a building for $159,000.00. The partners, after successfully perpetrating a lie, including documentation under oath, and securing 100% financing of their building then went back to the bank seven or eight months later and lied again to secure financing of their building well in excess of 100% financing. Notwithstanding their misconduct, however, the accused lawyers in theee two cases received but a public reprimand and a 90 day suspension.

Mr. Nuckolls' misconduct involved lying to a bank about seven real estate transactions in an attempt to obtain 100% financing. He even photocopied a bogus check for $36,000.00 and sent it to the lending institution with the representation that it constituted a down payment. He was also guilty of a blatant violation of his fiduciary responsibility as a trustee. Yet, Mr. Nuckolls received but a 90 day suspension.

Respondent's misconduct is not nearly so bad as that described in the aforementioned three cases. His discipline should not exceed that meted out to those lawyers.

The Pahules case, though 21 years old, is as valid a decision in 1991 as it was in 1970. The three purposes of discipline have not changed. The primary purpose, by far, is the protection of the public. Respondent submits that a discipline involving proof of rehabilitation, i.e., one lasting over 90 days, is not necessary to protect the public in the case at Bar. First, Respondent's last act of misconduct took place in August of 1988. There is no reason to believe that any such misconduct has occurred since. Second, Respondent has practiced law since 1973 and has engaged in no other misconduct. Third, and most important, however, is the referee's statement that "I further find it unlikely that any such conduct will be repeated." In short, there is no danger that the public has to worry about any future misconduct by Van Stillman.

The referee's finding as to the likelihood of repeat misconduct is so well grounded in the evidence beforehand that it is virtually irrebuttable. Respondent's misconduct in these five instances is totally out of character and is inconsistent with his superb reputation built up over 18 years of practice. It can be explained, at least in part, by the fact that he had just relocated his practice in Boca Raton in late 1987 and that he was just starting a real estate practice. T 97, 98. Respondent believed that, so long as Greater New York had determined that the buyer was credit-worthy prior to Respondent's involvement in the case, that

Greater New York's first mortgage position was not jeopardized in any way, and that the purchase price (consistent with Greater New York's appraisal) was truly that reflected on the closing documents, that there would be no harm to Greater New York in allowing secondary mortgages. Clearly, Respondent was wrong and he deserves to be disciplined for the misrepresentations and lack of candor that he disclosed. However, the discipline should be reasonable.

The second Pahules factor, a discipline that is fair the lawyer, while secondary to protection of the public, is still a very important consideration in the determination of a sanction. While the discipline imposed should "punish a breach of ethics" it should at the "same time encourage reformation and rehabilitation". Pahules, p. 132.

A 90 day suspension will certainly punish Van Stillman. Losing one's income for one quarter of a year is a harsh sanction indeed. Any suspension of that length of time virtually destroys a lawyer's practice and eliminates his entire clientele. Any such suspension requires the Respondent to send a copy of his order of suspension to all clients with matters pending with the result that most clients pick up their files and move on to different lawyers.

The financial consequences of a suspension are devastating and certainly enhance a suspension. Perhaps a quantification will help make this point. A lawyer making $80,000.00 per year, who loses 25% of his income due to a 90 day suspension, will lose no less than $20,000.00 in income. If the Rules Regulating The Florida Bar

allowed fines, would anybody argue that a $20,000.00 fine was not a stern punishment? Of course not.

The distinction between a 90 day suspension and a longer one, i.e., one requiring proof of rehabilitation, is very, very material. A lawyer suspended for 90 days can resume practice on the 91st day. One suspended for 91 days or longer, however, must petition for reinstatement. Such proceedings never take less than three months and as this Court observed in The Florida Bar, re: Roth, 500 So.2d 117 (Fla. 1986) generally take six to nine months. In other words, a lawyer suspended 91 days is really out of practice six months to perhaps as long as fifteen months. A 90 day suspension is a discipline that is fair to the Respondent based on the precedent involved and the circumstances of his misconduct.

Respondent is not so naive as to completely disregard the third facet of Pahules: deterrence. Respondent respectfully submits, however, that a 90 day suspension with its catastrophic financial consequences on his family together with the loss of esteem and the permanent blight on his reputation is sufficient deterrence to prevent other lawyers from engaging in similar misconduct.

This Court felt that the 90 day suspensions imposed in Siegel and Canter and in Nuckolls, and the public reprimand imposed in Beneke, were sufficient deterrence to prevent other lawyers from engaging in similar misconduct. (Lest the argument be made that the disciplines in those three cases did not prevent Respondent's misconduct, he would point out that Respondent's actions involving

Greater New York occurred before or about the same time as the Nuckolls and Siegel and Canter opinions were handed down.)

Respondent argues to this Court that precedent mandates the reduction of his discipline from the six months recommended by the referee to a 90 day suspension. In addition to precedent, however, Respondent submits that Standard 9.32 of the Florida Standards for Imposing Lawyer Sanctions, supports his arguments for a reduction of the referee's discipline. Unlike Beneke, Siegel and Canter and Nuckolls, there is substantial mitigation involved in the case at Bar that calls for a discipline not requiring proof of rehabilitation.

Standard 9.32, factors which may considered in mitigation, lists thirteen factors that can be considered in mitigation of a discipline. Respondent submits that seven of those factors are applicable to the case at Bar. Those factors include:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(e) full and free disclosure to disciplinary board or cooperative attitude towards proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(j) interim rehabilitation;

(1) remorse.

The referee specifically found that Respondent has no prior disciplinary record and that his motives were not selfish. RR 20, 21.

The Bar asks this Court to overturn the referee's finding that Respondent was not motivated by greed or personal gain. However, the referee's findings of fact "will be accepted as the findings of this Court'' if they are "supported by substantial competent evidence." The Florida Bar v Liroff, 582 So.2d 1178 (Fla. 1991). The referee clearly did not consider Respondent's receipt of routine closing fees of $200.00 to $300.00 coupled with his 60% share of the title insurance premiums to be a motive for his conduct. The only support for the Bar's allegation is the speculation that Respondent was unduly influenced because his temporary offices (for a period of four or five months) was located in the same building as the mortgage brokers.

The character testimony before the referee showed conclusively that Respondent has an excellent reputation in both the business and the legal community. His reputation is such that lawyers operate with him on a handshake. Perhaps, just as importantly, the testimony of Respondent's adverse counsel shows that even in difficult cases, Respondent does all that he can to defuse inflammatory situations, to soothe troubled waters and to keep legal proceedings as professional as possible.

Interim rehabilitation and remorse go hand in glove. It has been three years since Respondent's last act of misconduct. He recognizes his wrongdoing, the first step towards rehabilitation, and regrets his actions. All he can do now is swear that it will never be repeated. After observing the witness before him, the

referee obviously believed Respondent because he found "it unlikely that any such conduct will be repeated".

Respondent's attitude is similar to that as existed in The Florida Bar v Dougherty, 541 So.2d 610 (Fla. 1989). There, on page 611 of its opinion, the Court noted in mitigation of discipline that Respondent's

> candor and demeanor during the hearing on this case shows that he realizes his errors, he admits them and he has taken corrective steps to comply with the rules in the future.

Respondent's cooperation with The Florida Bar in these proceedings is evidenced by his stipulation to virtually all facts alleged by the Bar. Unlike Mr. Nuckolls, who protested the referee's findings and equivocated as to his misconduct, Respondent has been straightforward with the Bar and with the referee.

Respondent fully recognizes the irony in his declaring inexperience in the practice of law, Standard 9.32(f) as a mitigating factor. Respondent asks this Court to recognize, however, that Respondent had just begun hie real estate practice, upon relocating to Boca Raton, when the first of the Greater New York closings took place in November, 1987. Respondent, who now appreciates that the primacy of a first mortgage is not paramount to all other considerations, would never allow such a situation to arise.

Respondent asks this Court, in determining the sanction to be imposed, not to focus on the ten month period ranging from November 1987 until August 1988 and to consider it characteristic of

Respondent's professional practices. In fact, Respondent has practiced law for eighteen years without even an accusation if impropriety prior to his dealings with Greater New York. On the whole, his practice has been superb, he is held in high esteem by his fellow lawyers and he has done all he can to practice law in an honest, gentlemanly and professional manner. Imposing a suspension requiring proof of rehabilitation is simply not warranted. Accordingly, Respondent asks taht this Court discipline him by imposing a suspension of 90 days.

CONCLUSION

Respondent asks this Court to reject the referee's recommended discipline and to impose, instead, a 90 day suspension to be followed by two years probation as the appropriate discipline in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Request was mailed to David M. Barnovitz, Bar Counsel, The Florida Bar, Cypress Financial Center, Suite 835, 5900 N. Andrews Avenue, Ft. Lauderdale, Florida 33309 this 2nd day of October, 1991.

JOHN A. WEISS