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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

v

CASE NUMBER 76,451

JOHN R. FORBES,

Respondent.

_____/

INITIAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The Appellant in these proceedings, JOHN R. FORBES, will be referred to by his surname or as Respondent in this Brief. Appellee will be designated The Florida Bar or the Bar.

The Report of Referee will be referred to by the designation RR followed by the appropriate page number. References to the exhibits entered into evidence before the Referee will be by the symbol EX followed by the appropriate exhibit number. References to the transcript of final hearing will be by the symbol TR 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.

On August 13, 1990, The Florida Bar filed its formal complaint in the Supreme Court alleging misconduct as a result of Respondent's conviction on April 20, 1990 in Federal court of Count 2 of an indictment filed on November 1, 1989.

Final hearing was held on February 22, 1991 before the Honorable Thomas M. Elwell, Circuit Judge. Judge Elwell's Report of Referee finding Respondent guilty of the misconduct for which he was convicted and recommending that he be disbarred was served on May 6, 1991.

Respondent timely filed his Petition for Review in this Court on June 17, 1991. Respondent limits this brief solely to the propriety of the Referee's recommendation of discipline.

On February 2, 1990, Respondent pled guilty to Count 2 of a twelve count indictment that had been filed against him on November 1, 1989. Respondent's indictment was entered into evidence before the referee as Bar's Exhibit one and his plea agreement was entered into evidence as Bar Exhibit three. Count Two of the indictment, EX 2, reads in its entirety as follows:

COUNT TWO

> In or about November, 1984, on or about a date after November 3, 1984, at Jacksonville and Green Cove Springs, in the Middle District of Florida, and elsewhere,
>
> JOHN R. FORBES

> the defendants herein, knowingly and willfully did make and cause to be made materially false statements in a Standard Form of Agreement Between Owner and Contractor, 1977 Edition, dated October 20, 1984 (hereinafter "Construction Contract"), for construction work and remodeling for a project known as The Hoyt House, located at 200 St. Johns Avenue, Green Cove Springs, Florida, which Construction Contract was prepared and submitted to First Federal Savings and Loan Association of Jacksonville (hereinafter "First Federal"), with intent to and for the purpose of influencing the action of First Federal, the deposits of which were then insured by the Federal Savings and Loan Insurance Corporation, upon an application for a loan submitted by JOHN R. FORBES to First Federal for said project, in that said Construction Contract stated that the contract sum was $350,000, identified the work that was to be performed, and stated that said agreement was made as of October 20, 1984, whereas in truth and in fact, as the defendants then well knew, those statements were false in that the true and actual contract sum for said work was $425,000 several items identified in the work to be performed were not included in the true and actual contract, and the Construction Contract was made on or after November 3, 1984.
>
> In violation of Title 18, United States Code, Sections 1014 and 2.

Drawing almost exclusively upon the Factual Basis section of Respondent's Plea Agreement, EX 3, the referee found that Respondent was a Jacksonville attorney who formerly served as chairman of the Downtown Development Authority and was a member of the Florida House of Representatives for ten years. Respondent was the developer of a real estate project in the Green Cove Springs, Clay County area, known as the Hoyt House, which was originally

planned as a 10-unit condominium project on the St. Johns River. It was ultimately financed by a $750,000.00 loan to Forbes from First Federal Savings and Loan Association of Jacksonville (hereinafter "First Federal"), the deposits of which were insured at all times relevant to these facts by the Federal Savings and Loan Insurance Corporation.

Forbes' loan with First Federal was based on a $350,000.00 preliminary estimate for the construction/renovation costs. When the actual bid came in on November 1, 1984 at approximately $650,000.00, Forbes obtained another bid from Michael Miller, a local contractor with whom he had dealt before. Miller gave Forbes an estimate of $547,000.00, but this still was not low enough. On November 3, 1984, Forbes, Miller, Miller's wife, and Harvey Manss, the project architect, met and eliminated two of the condominiums, the recreation room, the elevator, and various other features from the project, in order to get the construction costs down to $425,000.00, with Forbes telling Miller and Manss he would pay the $75,000.00 difference with his personal funds.

Manss prepared both contracts, which were signed later that week, although the $350,000.00 contract was backdated to October 20, 1984, and the $425,000.00 contract was backdated to November 3, 1984 (separate dates and different forms were used to make them look more authentic). Only the $350,000.00 contract was forwarded to the bank. The $350,000.00 contract was not only false and fraudulent as to its date and price, but also as to the scope of work. It included all of the items noted above that were deleted

from the true contract, even though it was drafted by Manss after it was agreed those items would be deleted. Thus, it represented to the bank a scope of work that would have been worth at least the $547,000.00 bid of Miller, before the deletions were made. Officers of First Federal have confirmed that these false statements were material to their loan decision.

Subsequently, Miller was unable to obtain from Forbes the additional funds due him. Miller and his subcontractors filed liens against the property in late 1985. In April 1986, First Federal filed a foreclosure suit against the property.

As part of Respondent's plea agreement, he admitted knowingly making or causing to be made a materially false statement in the construction contract that was submitted to First Federal Savings and Loan in an effort to obtain financing. Respondent also admitted he made or caused to be made a misrepresentation as to the amount of the contract sum in the construction contract upon which First Federal Savings and Loan relied upon in making its decision to approve the requested financing.

Respondent was totally responsible to First Federal Savings and Loan for the loan application and the contract submissions since the loan was being made to Respondent individually. It is clearly evident that he was well aware of the fact that there were two separate contracts reflecting different costs and that the contract submitted to First Federal Savings and Loan improperly reflected the actual contract cost.

From Respondent's testimony it is apparent that he has assisted the federal authorities in prosecuting this matter and investigating other matters. It also appears that Respondent is remorseful for what he has done. Respondent has no prior disciplinary record other than the present suspension he is under for the conviction that is the subject matter of this case.

Upon his conviction, Respondent was sentenced to two years in prison with the condition that he only serve six months in confinement to be followed by three years probation. He was also ordered to make $363,567.23 in restitution.

Because he drew almost exclusively upon the factual basis for the plea agreement, the referee did not allude to Respondent's unrebutted testimony (he was the only witness) presented at final hearing. That testimony included the following salient facts:

At the time that Respondent borrowed the money for the Hoyt House from First Federal, he had at least two other condominium projects under construction that were financed by that institution -- River Hills and Governor's Landing. TR 15. Furthermore, Respondent had borrowed from First Federal $175,000.00 of the $225,000.00 purchase price of the Hoyt House. TR 17. Respondent put $50,000.00 of his own money into the project as a down payment. TR 17.

At the time that he borrowed the money to buy the Hoyt House, Respondent entered into an agreement with First Federal that they would loan up to $350,000.00 to renovate the project. This agreement took place in approximately June, 1984, five months prior

to the contracts that were at issue in this case. TR 17, 29.

While the referee correctly stated that the condominium project was reduced from ten units to eight, he did not state that the square footage to be renovated stayed at 10,000 feet. Furthermore, he did not note that the reduction in the number of units was required by the appropriate city council to avoid violating density requirements. TR 16, 33.

The project was finished pursuant to the $425,000.00 contract, and, in fact, won awards from a local newspaper for overall excellence. TR 21.

When it appeared that all three of Respondent's condominium projects were going to fail due to a downturn in the condominium market, he went to First Federal and agreed to voluntary foreclosure of all three projects. He further agreed not to take personal bankruptcy and to sign a $500,000.00 note if the bank requested it. TR 22, 23.

SUMMARY OF ARGUMENT

Respondent has been convicted of the crime of making a false application to a bank for a construction loan. Nothing more. Lawyers who have engaged in misconduct virtually identical to that of Respondent, although without criminal convictions, have received disciplines ranging from a public reprimand, The Florida Bar v Beneke, 464 So.2d 548 (Fla. 1985) to 90 day suspensions, The Florida Bar v Siegel and Canter, 511 So.2d 995 (Fla. 1987), The Florida Bar v Nuckolls, 521 So.2d 1120 (Fla. 1988).

It would be improper to disbar Respondent for misconduct that has previously warranted only short term suspensions or reprimands. This is particularly true, when, as here, Respondent has a history of 22 years of practice without prior discipline, who has been a member of the Florida House of Representatives for ten years and who has served as chairman of the Jacksonville Downtown Development Authority. Respondent's misconduct was an isolated event that occurred in 1984 and does not warrant the "death penalty" of disciplinary proceedings.

Not all felonies warrant disbarment. In fact, not all felonies warrant the maximum suspension period of three years. The Florida Bar v Pavlick, 504 So.2d 1231 (Fla. 1987). Furthermore, when misconduct occurs outside the practice of law, as happened here, this Court is inclined to view the misconduct in a less severe light. The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986).

The mitigating factors involved in the case at Bar are substantial and warrant a reduction of Respondent's sanction from the ultimate penalty to the longest suspension available to the court. Those mitigating factors include 22 years of practice without discipline, public service in the House of Representatives and as Chairman of the Downtown Development Authority, Respondent's personal financial losses as a result of his projects failing, the length of time that has elapsed since the misconduct (seven years), his remorse and by the fact that his misconduct occurred outside the practice of law. When those factors are coupled with the fact that Respondent's misconduct was an isolated incident in an otherwise unblemished career, it becomes apparent that disbarment is inappropriate in the case at Bar.

ARGUMENT

THE PROPER DISCIPLINE FOR RESPONDENT'S CONVICTION OF ONE COUNT OF MAKING A FALSE STATEMENT OR REPORT WHILE APPLYING FOR A LOAN IN 1984, A FELONY, PARTICULARLY IN LIGHT OF THE MITIGATING FACTORS PRESENT, IS A THREE YEAR SUSPENSION.

Respondent stands before this Court convicted of the felony of "making false statements to a savings and loan association", a crime carrying a maximum sentence of two years in prison or $5,000.00 fine, or both. EX 3. He has been found guilty of no other crimes and the Bar's complaint alleging misconduct was limited to his conviction for the aforementioned crime. Respondent submits that disbarment for his offense, in light of all the circumstances involved, is totally inappropriate and that a three year suspension from the practice of law, with proof of rehabilitation before reinstatement, is the appropriate discipline to be handed down for his offense.

The only evidence presented at final hearing besides Respondent's testimony were the Bar's three exhibits. Exhibit 1 was the indictment handed down on November 1, 1989, just days prior to the running of the five year statute of limitations on Respondent's crime. Exhibit 2 was the judgment adjudicating Respondent guilty of a felony and sentencing him to incarceration for six months, followed by three years probation and restitution of $363,567.23 and Exhibit 3 was the plea agreement filed with the Court in which Respondent pled guilty to Count II of the Indictment. The factual basis of the plea, appended to the back

of the plea agreement, formed virtually the entire basis for the referee's findings of fact.

The first page of Exhibit 3 sets forth the two elements of Respondent's crime. The are:

> That the defendant knowingly made or caused to be made a false statement or report concerning a material fact to an insured savings and loan association, as charged; and
>
> That the defendant made or caused to be made the false statement or report willfully and with intent to influence the action of the savings and loan association upon an application, advance, commitment or loan, or any change or extension thereof.

Respondent's only offense is giving false and misleading information to a savings and loan. He did not misuse the loan proceeds in any way, shape or form. The facts leading up to Respondent's indictment and conviction are really rather simple and, other than presenting an improper construction contract, show no misconduct on Respondent's part.

In 1983 and 1984, Respondent was involved in at least three, and maybe four projects involving loans from First Federal Savings and Loan Association of Jacksonville, (hereafter "First Federal"). All of the projects involved construction or development of condominium units. The three projects that Respondent named at final hearing were River Hills, Hoyt House and Governor's Landing. Hoyt House was the project that resulted in Respondent's indictment. TR 15.

Respondent was not charged with any improprieties in the handling of River Hills or Governor's Landing.

Sometime prior to April 1984, Respondent purchased the Hoyt House, which had been built in 1890, for the purpose of renovating it and converting it into ten condominiums. Respondent borrowed $175,000.00 from First Federal, put it together with $50,000.00 of his own money, and bought the Hoyt House for $225,000.00. TR 17.

At the moment that Respondent purchased the property for $225,000.00, he had already put $50,000.00 of his own money into the project.

The evidence is unrebutted that at the time he borrowed the $175,000.00 to purchase the land, Respondent had an agreement with First Federal that allowed him to borrow up to $350,000.00 more money to renovate the project. TR 18, 29. In other words, in June 1984, five months prior to the events that led to Respondent's indictment and conviction, First Federal had already agreed to lend him the $350,000.00 to renovate the project.

The gravamen of the charges against Respondent are that in November 1984 he participated in the submission to First Federal in November 1984 of a misleading contract. Respondent did not draft the document. The contract indicated the work would be done for $350,000.00 when in fact, the work was to be done for $425,000.00. RR 3. It is undisputed that Respondent had agreed to pay, out of his own pocket the $75,000.00 difference between the $350,000.00 contract and the $425,000.00 construction costs. TR 20. The contract also was backdated and did not reflect changes in the plans to renovate the building.

The Hoyt House renovations were completed within the provisions of the $425,000.00 contract. In fact, the renovations were done so "very nicely" that they received an award from the Florida Times-Union newspaper for waterfront condominiums. TR 21.

Unfortunately, due to a downturn in the condominium market, TR 22, Hoyt House, River Hills and Governor's Landing all failed. TR 21, 22.

There is no evidence indicating that any of the three projects failed for any reason other than a downturn in the condominium market. There is no allegation that Respondent absconded with any construction funds, that he engaged in self-dealing or that he in any way caused any of the three projects to fail.

It is further noteworthy that of the three condominium projects, there were only improprieties associated with Hoyt House.

As it became apparent to Respondent that his projects were failing, Respondent approached Bob Smith, the president of First Federal, and revealed his financial problems and asked what course of action the institution desired him to take. Mr. Smith asked Respondent to (1) agree to voluntary foreclosure on all three projects, (2) to abstain from filing for personal bankruptcy, and (3) to sign a $500,000.00 note to pay for any deficiencies as a result of the sale of the property. Respondent agreed to all three conditions. TR 23. (However, Respondent was never asked by First Federal to sign the $500,000.00 note. TR 24.)

There is no evidence in the record indicating the amount of

First Federal's losses, if any, as a result of their taking over the three condominium projects. In fact, the only input from the Savings and Loan that appears in the record is the bald statement in the Factual Basis (appended to Exhibit 3) that "Officers of First Federal have confirmed that these false statements were material to their loan decision."

There is nothing in the record indicating the basis for the court's requirement that Respondent make restitution to First Federal in the amount of $363,567.00. Respondent has appealed that provision of his sentence. TR 30.

In December of either 1986 or 1987 Respondent learned that he was the target of a federal investigation into his actions surrounding the Hoyt House. TR 24. Subsequently, he was asked to cooperate with the federal government in their investigation into criminal activities in the Jacksonville area. For three years, Respondent cooperated with the federal government in their investigation including, at times, wearing wires to intercept conversations. TR 24, 25, 56, 57. Although the government had originally promised that Respondent would not be indicted, on November 1, 1989, immediately prior to the five year statute of limitations running on Respondent's offense, an indictment was entered. TR 26, EX 1.

In February 1990, Respondent entered a plea to count two of the indictment and on April 20, 1990, over five and one-half years after his misconduct, Respondent was sentenced. EX's 2, 3.

At Respondent's sentencing, Curtis Fallgatter, the managing U.S. Attorney on Respondent's case, stated to the sentencing judge that Respondent was the most remorseful person that Mr. Fallgatter had ever dealt with in his career as an Assistant U.S. Attorney. TR 31.

Respondent was suspended from the practice of law, pursuant to the automatic felony suspension rule, on September 12, 1990. RR 7.

Respondent has been convicted of making false statements to a savings and loan in procurement of a $350,000.00. Nothing more. He is not guilty of theft, embezzlement or misuse of funds. He is not guilty of mail fraud or perjury or any of the other federal crimes that are normally associated with disbarment. In fact, the only analogous offenses committed by lawyers have resulted in suspensions by this Court.

The three cases involving lawyer discipline that are closest to the facts at Bar are The Florida Bar v Beneke, 464 So.2d 548 (Fla. 1985), a public reprimand for obtaining a mortgage in an amount exceeding the purchase price of the property; The Florida Bar v Siegel and Canter, 511 So.2d 995 (Fla. 1987), 90 day suspension for engaging in a deliberate scheme to misrepresent facts to a senior mortgagee in order to secure complete financing of the purchase of the accused lawyers' law office; and The Florida Bar v Nuckolls, 521 So.2d 1120 (Fla. 1988), a 90 day suspension for

fraudulently obtaining 100% financing by misrepresenting the purchase price of a condominium and other misconduct.

The misconduct in each of the cases mentioned above was just as egregious as Respondent's and none of them resulted in a discipline requiring proof of rehabilitation before reinstatement. In fact, the only material distinction between any of those three cases and the case at Bar was that Respondent was charged and convicted of felonious conduct while none of the other lawyers were charged. (Respondent recognizes that the fact that he was convicted of a crime requires his suspension until his civil rights are restored. However, disbarring Respondent for misconduct identical to that resulting in 90 day suspensions or public reprimands, is simply unfair.)

In Beneke, the accused lawyer presented a sales contract showing a purchase price of $250,000.00 for an office building to officials of the Ellis National Bank of Clearwater. Respondent applied for a loan to buy the building. The $245,000.00 sales contract bore a date of either January 26 or 27, 1978 but it was appended to a loan application dated January 25, 1978.

Notwithstanding the $245,000.00 sales contract, on January 20th the seller and Mr. Beneke agreed upon a purchase price of $159,000.00 for the same building.

Ultimately, based on the $245,000.00 sales contract, Ellis issued a mortgage to Respondent in the amount of $160,000.00, a figure that was actually $1,000.00 more than the actual negotiated price of the property.

There was even testimony before the referee by Mr. Beneke's former secretary to the effect that Mr. Beneke exhibited "smug exultation" about his transaction and that Mr. Beneke engaged in "furtive attempts to conceal the original contract....".

Despite the fact that Mr. Beneke was found guilty of engaging in conduct involving deliberate misrepresentation, i.e., he lied to a federal financial institution to obtain financing, he received but a public reprimand.

In Siegel and Canter, the two accused lawyers were partners in the practice of law. They executed on October 7, 1983, a mortgage and security agreement with Southeast Bank N.A., an FDIC bank, which stated that no secondary financing on their purchase of a building for their law office would be obtained without the express consent of the lender.

Notwithstanding the averments on their mortgage and security agreement, the accused lawyers had agreed to obtain secondary financing from the seller in lieu of a cash down payment. On the same day that they signed the security agreement with Southeast Bank, the accused lawyers signed a mortgage agreement with the seller for $50,000.00 to be applied toward the purchase price.

Ms. Siegel and Mr. Canter applied for a $150,000.00 loan from Southeast Bank and represented that they would pay the additional $50,000.00 of the $200,000.00 purchase price. They did not reveal the $50,000.00 second mortgage to the seller. The accused lawyers even went so far as to state on a August 4, 1983 financial affidavit that they had made the $20,000.00 down payment on the

subject property. Clearly, that statement was a lie.

About seven or eight months later, on June 30, 1984, the partners submitted additional documents to Southeast Bank in support of an application for a $45,000.00 loan to be secured by a second mortgage. In their applications applying for the loan, they did not disclose their earlier second mortgage to the seller. On July 1, 1984 and August 10, 1984, the accused lawyers delivered documents to the bank, one of which was under oath, in which they did not disclose the second mortgage and in which they swore that they were aware of no other encumbrances on the property.

The referee in the Siegel and Canter case found that:

> Loan officers at the bank again believed respondents to have $50,000.00 cash equity in the property, and were unaware of the debt to Robert F. Bluck.

Ms. Siegel and Mr. Canter were guilty of almost exactly the same offense as was Respondent in the case at Bar. If there is a distinction, it is that their misconduct involved two separate acts of misrepresentation, extending over a seven month period of time, and which involved numerous false submissions to the bank, some under oath. Clearly, loan officials relied on representations by Ms. Siegel and Mr. Canter in making their loan. Yet, Siegel and Canter received but a 90 day suspension for their misconduct.

The Nuckolls decision is the final case in the trilogy of cases involving similar misconduct but resulting in lesser disciplines. Mr. Nuckolls was found guilty of three counts of misconduct, the first two of which involved "a scheme to fraudulently obtain 100% financing by misrepresenting the purchase

price of condominium units." The final count involved Mr. Nuckolls' violation of his obligations as a land trustee.

In the Supreme Court's opinion disciplining Mr. Nuckolls, the first two counts of misconduct were summarized as follows:

> As to counts 1 and 2, the record reflects that respondent represented a real estate partnership which was selling townhouse units. Although respondent knew that purchasers of seven units paid only $36,000 per unit, contracts and closing documents prepared by respondent reflected that the units would be sold for $45,000 each, with a $9,000 down payment.
>
> The referee found that lenders advanced mortgage loans on these seven units based at least partly on respondent's written representations that the purchasers,...had made or would make the down payments and that the $36,000 actually reflected 80% of the true purchase price. Subsequently, one of the partners wrote a check in the amount of $36,000 to cover four of the down payments, but respondent never cashed the check and the purchasers never paid the down payments. 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.

The Supreme Court found respondent's conduct to be a "serious ethical breach". The Court further found that Mr. Nuckolls deliberately attempted " to perpetrate a fraud on lenders" who relied on his misrepresentations in making a loan. Id., p. 1121.

Notwithstanding the fact that he made material misrepresentations to a lender in order to secure financing, (and that his misrepresentations were made in the course of his representation of a client), and that he engaged in "a serious ethical breach", Mr. Nuckolls received but a 90 day suspension.

Respondent in the case at Bar has engaged in virtually identical conduct as that engaged in by Mr. Beneke, who received but a public reprimand, and by Ms. Siegel and Messrs. Canter and Nuckolls, who received but 90 day suspensions. It is arbitrary and capricious to now disbar Respondent for exactly the same misconduct.

The starting point in the imposition of all disciplinary sanctions is set forth in The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970) at page 132. There, the Supreme Court stated that

> 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 time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the responndent,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.

Respondent submits that a three year suspension, retroactive to September 12, 1990, the date of his automatic suspension from the practice of law, will meet all three purposes set forth in Pahules. Respondent argues that disbarring him when 90 day suspensions were deemed sufficient punishment for similar actions in Siegel and Canter and in Nuckolls is patently unfair and violates the second principal enunciated in Pahules.

In The Florida Bar v Hirsch, 342 So.2d 970 (Fla. 1977) this Court denied the Florida Bar's demands that a lawyer be disbarred and imposed instead a three month suspension. In so doing, Justice

Drew, writing for a unanimous court, stated that:

> We cannot say that the record here establishes that this respondent is one that has been demonstrated to fall within that class of lawyers "unworthy to practice law in this State" as provided in Integration Rule 11.02. Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part.

Justice Drew then quotes from Henry S. Drinker's book, Legal Ethics. Justice Drew noted that Mr. Drinker, while discussing discipline, observed that:

> Ordinarily the occasion for disbarment should be the demonstration, by a continued course of conduct, of an attitude wholly inconsistent with the recognition of proper professional standards. Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. For isolated acts, censure, private or public, is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror, or court official, or the like, should suspension or disbarment be imposed.

Respondent stands before this Court convicted of but a single act of misconduct that occurred in November 1984. Such an isolated act does not demonstrate that Respondent is "unworthy to practice law in this State" and the nature of that act certainly does not warrant "the death penalty" of disciplinary jurisprudence.

This Court unequivocally stated in The Florida Bar v Pavlick, 504 So.2d 1231 (Fla. 1987) that the conviction of a felon does not automatically result in disbarment. On page 1235 of that opinion, the Court stated:

> We note further that neither the Integration Rule nor case law mandates disbarment for all attorneys who are convicted of a felony. See The Florida Bar v Chosid, 500 So.2d 150 (Fla. 1987); The Florida Bar v Carbonaro, 464 So.2d 549 (Fla. 1985). Nor does the Integration Rule require a three year suspension in such cases.

The thrust of Pavlick is that the underlying conduct that resulted in the felony conviction should be looked at when determining the appropriate sanction to be imposed. In the case at Bar, as was true with Pavlick, the misconduct involved does not warrant disbarment.

Respondent was admitted to The Florida Bar in 1968. TR 45. For 22 years he has had an unblemished career. He has never been disciplined by the Bar or charged with any other crimes. RR 7, 8, TR 14, 15.

His career until 1990 was a credit to the legal profession. He served as a member of the Florida House of Representatives for ten years and was chairman of the Downtown Development Authority of the city of Jacksonville for two to two and one-half years. TR 13. He has tried twelve capital cases and won eleven of them. TR 49.

Respondent gave his wholehearted cooperation to the federal authorities in investigating crime in the Jacksonville region, TR 25, 56, 57.

Respondent was not charged with any criminal conduct until five years after those events actually occurred. He received but a six month sentence when the judge had the option of sending Respondent to jail for two years.

All of these factors indicate that Respondent is not one unworthy to practice before the Bar and certainly is not an individual whose single offense, making misrepresentations to a bank, warrants disbarment.

This is particularly true when similar cases, i.e., Beneke, Siegel and Canter and Nuckolls received sanctions for virtually identical misconduct ranging from a public reprimand to 90 day suspensions.

The irony of the situation that Respondent finds himself in is that he had a long track record with First Federal and, at the time of the Hoyt House project, had two other projects funded by First Federal. The $350,000.00 loan had been virtually approved prior to Respondent's submission of the allegedly bogus contracts. Respondent borrowed $175,000.00 from First Federal toward the $225,000.00 purchase price of the property, putting down $50,000.00 of his own money. He then received approval in June 1984, five months prior to the events of November 1984, to borrow $350,000.00 to renovate the project. TR 17, 28, 29.

Respondent indicated that it was his intention to put $75,000.00 of his own money with the $350,000.00 to finalize the Hoyt House. TR 20.

Respondent submits that the referee in determining that disbarment was the appropriate sanction for the misconduct involved, did not give sufficient weight to the mitigating factors included within Rule 9.32 of the Florida Standards for Imposing Lawyer Sanctions. While the referee specifically noted several mitigating factors, including absence of a prior disciplinary record, full and free disclosure and cooperative attitude towards the Bar's proceedings, remorse, and Respondent's cooperation with the government's investigation, he failed to note Respondent's good character as evidenced by his many years of public service, Rule 9.32(g), and the interim rehabilitation that has occurred since November 1984, which is the obvious result of undergoing criminal proceedings, Rule 9.32 (j).

It is also noteworthy that Respondent's misconduct did not involve his practice. It had no effect on any of his clients. This Court has stated that it views misconduct affecting clients more harshly than conduct outside one's practice. The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986) at 1231.

Had there not been a downturn in the condominium market in the Jacksonville area in 1985 and 1986, there would have been no disciplinary proceedings in this case. The condominiums in Hoyt House, Governor's Landing and River Hills would have sold and the bank would have recouped its $350,000.00 and Respondent would have paid his contractor the additional $75,000.00.

Respondent lost at least $50,000.00 himself on the Hoyt House project. There is nothing in the record to indicate how much he

lost on Governor's Landing and River Hills. It is obvious, however, that Respondent had to relinquish his interests in all three projects. Respondent's personal losses are certainly, proportionately speaking, comparable to those of First Federal's. They were both taken down by a downturn in the market, not by Respondent's conduct.

Respondent urges this Court to heed prior precedent, to focus on Respondent's 22 year exemplary record as a lawyer, and to view his single isolated instance of misconduct in perspective. When all of those factors are considered together, Respondent submits that disbarment is an inappropriate sanction for his misconduct and that a three year suspension, retroactive to his temporary suspension, is the appropriate sanction to be meted out.

CONCLUSION

Respondent asks this Court to reject the referee's recommendation that Respondent be disbarred and that this Court order a suspension from the practice of law for three years, nunc pro tunc September 12, 1990, as the appropriate sanction for his misconduct.

Respectfully submitted,

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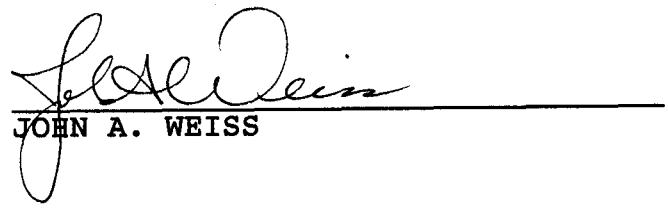
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief was mailed to James N. Watson, Jr., The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 31st day of July, 1991.



JOHN A. WEISS