IN THE SUPREME COURT OF FLORIDA

THE **FLORIDA BAR,**

Complainant,

vs.

MYRON C. PREVATT, JR.,

Respondent.
_____/

Case No. 77,271

TFB File Nos. **88-00077-04C**
and 91-00564-04C

COMPLAINANT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Complainant below, files this Brief in answer to Respondent's Initial Brief. References to Respondent's Response to the Bar's Complaint and Request for Admissions will be designated (Response). References to the transcript of the final hearing will be designated (TR-page number). References to exhibits received in evidence at final hearing will be designated (Ex. ___). References to the Stipulation entered into by the parties will be designated (Stip.). References to Respondent's Initial Brief will be designated (RB–page number). Finally, references to the Report of Referee will be designated (RR-page number).

STATEMENT OF THE CASE AND FACTS

Singleton McKay, Respondent's 81-year old client, suffered a stroke and was hospitalized on January 16, 1978. (Response) On January 24, 1978, Mr. McKay executed a general power of attorney in favor of Respondent and signed a bank signature card converting his individual savings account into a joint savings account with Respondent as co-signatory. (Response) These matters were accomplished while Mr. McKay was still in the hospital and, as described by his doctor, in a state of "intermittent and severe confusion, agitation and combativeness." (Ex. 1, Attchs. 5, 6)

After the stroke, Mr. McKay's niece wrote Respondent requesting that a guardianship be established for her uncle; however, no guardianship was ever sought or affected. (TR 149; Response) Instead, Respondent used the power of attorney to manage Mr. McKay's affairs without court supervision. (Response)

No substantial loans were ever made to Respondent when Mr. McKay was handling his own finances. (TR 145-146) While Mr. McKay was in various nursing homes during the next several years, however, Respondent, using the power of attorney and his co-signatory authority on Mr. McKay's bank accounts, made unsecured loans to himself in excess of $15,000.00 from his client's assets. (Response;

Ex, 1) Respondent also made loans to friends and other clients. These loans included a $5,000.00 loan that was discharged by the debtor's bankruptcy; a $15,578.37 loan in the form of a second mortgage that was written off when the proceeds of a foreclosure sale were insufficient to cover the mortgage; and a $4,000.00 loan on which $3,600.00 interest was never recovered. (Response; Ex. 1) In his answer to the Bar's Complaint, Respondent admits that Mr. McKay's assets exceeded $90,000.00 at the time of his stroke but amounted to less than $50,000.00 at the time of his death in September 1984. (Response) In fact, Mr. McKay's accountant, called by Respondent at final hearing, testified to having some concern about Mr. McKay outliving his income. (TR 57)

In order to give some color of propriety to the loans he made to himself, Respondent employed a facade of promissory notes, amortization schedules, and "guardianship fees." Instead of making direct payments on the loans, Respondent began charging Mr. McKay fees for handling his affairs. Respondent then used these fees to offset payments due on the loans. The loans were made and the fees charged without Mr. McKay's knowledge or consent, or the knowledge or consent of Mr. McKay's relatives. (Response; TR 176) In a deposition taken in the civil suit filed against him by Mr. McKay's estate, Respondent admits that the "guardianship fees" he charged were "arbitrary." (Ex. 3, p. 44) Respondent further admits that there was no statement of services rendered to support the fees claimed. **(TR 153)**

While Respondent ceased making loans to himself from Mr. McKay's assets after the latter's death in 1984, he continued to engage in conduct violative of the Rules of Professional Conduct: he failed to probate Mr. McKay's will for four years despite inquiries from relatives (Response; TR 18); he did not inventory assets (Response); he failed to contact potential beneficiaries (Response); and he continued to use the power of attorney though the agency relationship created by that instrument ceased by law at death. (TR 171) As a result of Respondent's four year delay in probating Mr. McKay's will, two named beneficiaries died before receiving their devises. (TR 21-22) Additionally, the loans Respondent made to himself from Mr. McKay's assets remained unrepaid for almost ten years (Response). The loans were repaid in 1991 only after civil suit was filed against Respondent on behalf of Mr. McKay's estate, an action that further delayed the probate proceedings. (TR 20-22)

Finally, it is without dispute that for 15 years Respondent failed to comply with the Rules Regulating Trust Accounts of The Florida Bar in that no monthly trust comparisons were prepared; significant shortages and overages existed; and commingling occurred. (Stip; Exs. 1, 2) Respondent's records were so poorly kept that the Bar auditor could not, with complete confidence, calculate the amounts of money involved. (Ex. 2)

Based on the evidence presented at final hearing, the Referee recommended that Respondent be found guilty of all *of* the rules cited in The Bar's Complaint. After additionally considering factors in aggravation and mitigation, the Referee felt "compelled" to recommend the ultimate sanction of disbarment. (RR 11) Respondent appeals that recommendation.

SUMMARY OF ARGUMENT

In his Report, the Referee specifically considered and rejected the defense of alcoholism posited by Respondent. The Referee's finding in this regard is supported by competent, substantial evidence. Such evidence centers around the continuing nature of Respondent's misconduct long after his recovery from alcoholism began.

The presence of numerous aggravating factors compelled the Referee to recommend that Respondent be disbarred. That recommendation is in accordance with previous decisions by this Court and should be adopted here.

ARGUMENT

ISSUE I

THE REFEREE'S FINDING THAT ALCOHOLISM IS NOT A MITIGATING FACTOR IN THIS CASE IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

In February 1983, Respondent was hospitalized for alcoholism, a condition he asserts as an almost complete defense to his misconduct in the instant case. While this Court has recognized alcoholism as a mitigating factor in Bar disciplinary matters, the Referee here specifically found that Respondent's misfeasance was not due in any substantial part to his alcoholism because "significant and onerous abuses of the client/attorney process continued unabated" long after Respondent's recovery from alcoholism began. (RR 10) These abuses include Respondent's failure to take any steps to administer Mr. McKay's estate after his death in September 1984 (Response); his failure to respond to inquiries from Mr. McKay's relatives in November 1984 regarding the estate (TR 14-16); his failure, until 1988-1989, to implement proper trust accounting procedures (Ex. 2); and his failure to pay back the loans for almost ten years (Response).

Respondent's ability to manage Mr. McKay's affairs and apparently those of other clients is further reason why Respondent's alcoholism cannot be afforded great weight as a mitigating factor here. If alcohol and not a dishonest motive was truly to blame far Respondent's actions, it would be only reasonable to ***see*** the whole of his practice affected. Yet, there is no clear evidence of an extensive pattern of neglect with respect to client cases. (TR 76) To the contrary, evidence presented at the final hearing indicates that despite his alcoholism, Respondent was able to manage his own and Mr. McKay's affairs well enough to carry out an elaborate scheme of loans to himself, involving promissory notes, refinancing arrangements, and amortization schedules. **(Exs. 1, 3)** It is inconsistent for Respondent to assert on the one hand that he "was under the influence of alcohol to the extent that it would have been impossible for him to have the necessary intent to commit a criminal offense" (RB **3**), then to claim on the other hand that he was able to keep records meticulously enough to demonstrate a lack of dishonest motive. (RB 4) Additionally, testimony at the final hearing appears to indicate that Respondent did not abuse alcohol while working. (TR **33-34,** 52) The Referee, having heard this evidence, correctly found that Respondent's alcoholism could not "account for the pattern, method, scope, nature nor duration of the misconduct present over this twelve (12) year process." (RR 10)

Finally, Respondent also asserts in mitigation that the informal manner in which the McKay matter was handled was due in large measure to the "long personal relationship" between the two. (RB 4) However, the Referee, citing no "historical basis in evidence" *to* support such a finding, rejected this argument "out of hand." (RR 9) The Florida Bar respectfully submits that there is nothing in the record to contradict the Referee's finding in this regard.

ISSUE II

THE **EGREGIOUS FACTS OF THIS CASE WARRANT** THE ULTIMATE SANCTION OF DISBARMENT.

In accordance with the Florida Standards for Imposing Lawyer Sanctions, a set of disciplinary guidelines adopted by The Florida Bar's Board of Governors, the following aggravating factors are relevant in determining what discipline to impose against Respondent:

Section 9.22(b) -- dishonest or selfish motive in that Respondent made loans to himself and then failed to probate Mr. McKay's will, possibly to conceal the existence of the loans for as long as possible (see Response; TR 18);

Section 9.22(c) -- pattern of misconduct in that Respondent did not dip into Mr. McKay's assets just once but made several loans to himself and others over an extended period of time (see Response; Ex. 1);

Section 9.22(d) -- multiple offenses in that Respondent has either admitted guilt or been found guilty of numerous violations of the Rules of Professional conduct stemming from the loans he made to himself, his failure to set up a guardianship, his failure to probate the will, and procedural trust accounting violations (see Stip., RR);

Section 9.22(h) -- vulnerability of victim in that Mr. McKay was an elderly client who suffered a stroke and was confined to nursing homes during the years Respondent was mishandling hi5 affairs (see Response ;

Section 9.22(i) -- substantial experience in the practice of law in that Respondent has been an attorney since 1968 and testified to having handled numerous probate matters (see TR 102, 139)

Section 9.22(j) -- indifference to making restitution in that the loans Respondent made to himself remained unrepaid for more than ten years (see Response).

This Court has often felt compelled to disbar attorneys for misconduct similar to that in the case at bar. In The Florida Bar v. Lewin, 342 So.2d 513 (Fla. 1977), for example, the Court agreed with the referee that disbarment was appropriate where an attorney invested estate funds without court authorization or consent of the beneficiary; failed to account properly for such funds; and filed a false receipt with the probate court to obtain an order of discharge. Similarly, in The Florida Bar v. Casler, 508 So.2d 723 (Fla. 1987), the Court disbarred an attorney for misappropriating a large amount of estate assets, commingling his own funds with those of a client, and failing to maintain adequate trust records.

Disbarment was also the discipline imposed in The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986). The accused attorney in Knowles had been found guilty of misappropriating large sums of money from clients and argued on appeal that the referee's recommended discipline of disbarment was too harsh given the role that alcohol had played in causing his misconduct. While acknowledging alcoholism as the underlying cause of the attorney's actions, the Court found that it did not "constitute a mitigating factor sufficient to reverse the referee's recommendation of disbarment." Id. at 142. In reaching this decision, the Court noted that despite his alcoholism, Knowles had worked regularly during the time period in question without a discernible decline in income. The Court further noted that the clients from whom Knowles stole were elderly individuals who trusted him and for whom he held powers of attorney. Id. Given those facts, facts strikingly similar to those in the instant **case**, the Court agreed disbarment was appropriate even though the respondent had no prior discipline and had made prompt restitution to his clients.

Finally, in The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989), the Court rejected the referee's recommendation of a three-year suspension and instead ordered that the attorney be disbarred for unauthorized removal of funds from an estate. The respondent in Golub had argued on appeal that his alcoholism, lack of prior discipline, cooperation throughout the disciplinary proceedings, and self-imposed suspension from the practice of law

warranted something less than a three-year suspension. In agreeing with The Florida Bar that Golub should be disbarred, the Court noted that "while alcoholism explains the respondent's conduct, it does not excuse it" and found that the mitigating circumstances did not "outweigh the fact that the respondent stole substantial sums of money over an extended period of time from a client who had bestowed his trust upon the respondent to see that the client's beneficiaries were cared for after his death." Id. at 456. In the instant case, Respondent violated the same trust and should be similarly disciplined. (TR 18, 171)

Based on the foregoing case law, The Florida Bar respectfully requests that this Court uphold the Referee's recommendation of disbarment and order Respondent to pay the costs of these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief regarding TFB File Nos. 88-00077-04C and 91-00564-04C has been forwarded by certified mail #P981-962-736, return receipt requested, to RICHARD E. WELTY, Counsel for Respondent, at his record Bar address of Post Office Box 995, Starke, Florida 32091, on this 5th day of February, 1992.

MIMI DAIGLE, Bar Counsel