047

FILED
SID J. WHITE 3/8
FEB 16 1994
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,766

THE FLORIDA BAR,

Complainant,

vs.

YVONNE E. REED,

Respondent.

______________________________/

INITIAL BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR REVIEW

JEPEWAY AND JEPEWAY, P.A.
407 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Tele.: (305)377-2356
Fla. Bar No. 113699

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	1
Preface	1
Statement of the Case and of the Facts	2
Points on Review	20
Summary of the Argument	21
Argument	22
Conclusion	46
Certificate of Service	46

TABLE OF AUTHORITIES

Case	Page
The Florida Bar v. Dougherty, 541 So.2d 610 (Fla. 1989)	22
The Florida Bar v. Dunagen, 565 So.2d 1327 (Fla. 1990)	40
The Florida Bar v. Lumley, 517 So.2d 13 (Fla. 1987)	22
The Florida Bar v. Rogers, 583 So.2d 1379 (Fla. 1991)	22
The Florida Bar v. Stone, 538 So.2d 460 (Fla. 1989)	32
The Florida Bar v. Teitleman, 261 So.2d 140 (Fla. 1972)	32
The Florida Bar v. White, 368 So.2d 1294 (Fla. 1979)	40

INTRODUCTION

The Florida Bar was the Complainant. It will be referred to as the Bar. Yvonne Reed was the Respondent. She will be referred to as the Respondent.

They symbol "T". will be used to designate the transcript of the hearing before the Referee. The symbol "RR" will be used to designate the Report of the Referee.

PREFACE

This situation involves an attorney who acted in good faith to help all parties. The end results were most favorable to all, except the attorney. This case confirms the validity of the cynical observation that no good deed goes unpunished.

The overzealousness of the Bar cannot be countenced.

The Respondent respectfully requests that the Court review her actions, consider her good faith, and rule accordingly.

STATEMENT OF THE CASE AND OF THE FACTS

The Bar charged the Respondent, Yvonne Reed, in a four count complaint. Count I alleged misuse of trust account monies, Count II alleged the collection of an excessive fee, Count III alleged conflict of interest by dual representation, Count IV alleged conflict of interest with a client.

In August, 1990, Michael and Kathie Heller were selling a home located in Lighthouse Point, Florida. Dimetrio Garcia and Carol Sullivan were interested in purchasing the Hellers' home (RR,¶1).

Frederick Panton, a real estate agent, who holds a Florida Real Estate license and Broker's license (T.112), was working with Prudential Florida Realty in 1990 (T.113). The Hellers listed their home with Mr. Panton (T.115). Mr. Panton submitted the listing to the Board of Realtors and put it into the Prudential computer and submitted a signed request (T.116). He made flyers for all the people in his office, put them in their mail slots, and wrote newspapers adds (T.116).

The Hellers were anxious to sell (T.116). They told Mr. Panton that they had to get out of there because their business was not doing well and their landlord had just told them that they only had a short time left (T.116). They told Mr. Panton that they really needed the funds out of the sale of the house to help them in their business and to help them carry on their lives (T.116-117).

Mr. Panton received an offer on the house presented by the Respondent (T.121). She had a contract that she wanted to review with him and the Hellers (T.121). They met in the kitchen of the Hellers' house (T.121-122).

The discussion at the Hellers' kitchen table, between Mr. Panton, the Respondent, and the Hellers, concerned the price, terms, conditions, special clauses, and disclosures of who was who (T.122). As to disclosures, the Respondent totally let the Hellers know that the customer was her customer due to her real estate activity, that she was a lawyer and that she would probably be handling the closing, the documents and that stuff for the buyer, and she offered to do the same for the Hellers, to prepare their documents for them (T.122). She told the Hellers that she could not represent them as a lawyer (T.122). She said that there would be a conflict (T.122). She could handle their closing documents (T.122). She asked them if that would be okay, if they wanted to go that way (T.122-123). Mr. Panton suggested to them that if they wanted a quick closing, this is usually the way to do it with all the paper work done in one house (T.123).

The Hellers made a counter offer which was accepted (T.123-124). The Respondent represented the buyers, Sullivan and Garcia, as their agent, and she was also going to be their lawyer (T.124). She told this to the Hellers while they were at the table presenting the first offer (T.124).

The Respondent was not involved in the negotiations over price (T.125).

The Respondent testified that she told Mr. and Mrs. Heller that she had known Carol Sullivan for approximately five years (T.343). She told them that she was bringing the offer to them as a realtor and that she had been requested to close the transaction for Carol Sullivan (T.343). She told the Hellers that she was an attorney (T.343). She told the Hellers that she was representing clients (T.343). She did not tell the Hellers that she was able to represent them as a lawyer (T.343-344). She told them if they had a problem with her representing Carol Sullivan at the closing that she would withdraw and would have someone else do it (T.344). Mr. Heller said "I owned a Century 21 franchise. I have been

through these closings hundreds of times. That is not necessary." (T.344). Mr. Heller started talking about the title documents (T.344). Respondent said "I would not be able to represent you at the closing if you are giving me permission to represent Carol." (T.344).

Mr. Heller asked the Respondent what the normal charge was in the community for the preparation of closing documents (T.345). She told him approximately $200.00 (T.345). He asked the Respondent if she would prepare his closing documents (T.345). He said it would be much cheaper than his having to have an attorney there (T.345). Mr. Heller was looking for the cheapest, fastest way out (T.345). Since it would be cheaper, and Mr. Heller wanted to avoid any costs whatsoever, Mr. Heller agreed that she do so (RR,¶39).

She disclosed to Mr. Heller that she was an attorney; that she represented Sullivan and Garcia; Mr. Heller was a realtor; he told her that he was a realtor; and he told her that he had done this many times (T.345).

On August 12, 1990, Garcia, Sullivan, and the Hellers reached an agreement on the purchase of the Hellers' home, in which Garcia and Sullivan agreed to pay $290,000.00 in cash for the home (RR,¶2). The Respondent, acting as realtor and attorney for Garcia and Sullivan, participated in the preparation of the contract which memorialized the terms of the parties' agreement (RR,¶3).

On August 30, 1990, the Hellers executed a warranty deed and all other necessary documents to conclude the sale of their home. The closing documents were prepared by the Respondent (RR,¶4).

On or about August 30, 1990, or August 31, 1990, the Respondent was informed by Sullivan and/or Garcia that they were having difficulties securing the cash necessary to close the transaction. They would only be able to bring a check for $90,000.00 to the closing table. They further represented that the rest of the cash necessary to conclude the

transaction would be forthcoming in several days. The Hellers demanded to close by August 31, 1991, creating a potentially unstable financial situation (RR,¶5).

This caused the parties and Respondent, on August 31, 1990, to restructure the parties' agreement, such that Sullivan and Garcia would pay $90,000.00 and take the property subject to the two mortgages covering it and satisfy the mortgages within thirty days of closing. Both of the mortgages contained due on sale clauses and were not assumable by Sullivan or Garcia (RR,¶6). The Respondent also prepared an addendum, Bar's Exhibit "A" (RR,¶7).

Joanna Youngblood, a broker for Prudential Florida Realty in Lighthouse Point, testified (T.160). She knew of the Hellers because their property was listed with her office (T.160).

At some point it became obvious that the total $290,000.00 was not going to be forthcoming by the time of closing (T.165). She had several telephone calls with Mr. Heller (T.165). Mr. Heller said: "We've got to close" (T.165). They said that they had reviewed the problems with their attorney, Mr. Joseph Hubert (T.165). The Hellers very urgently wanted to close this deal and they were that way from the day that Prudential took the listing (T.166). The Hellers had consulted with their attorneys about what to do if the mortgages were not paid off at the closing (T.167).

There was a tremendous sense of urgency to close on the part of the Hellers (T.168). Mr. Heller called her to say that: "We have to close on this house. Even if you don't get paid, you've got to do this for us." (T.168-169). She told him that they would (T.169). She was willing to give up her commission if need be (T.169).

When she realized that the full amount of cash was not available for the closing, and that they only had $90,000.00 to work with, they also realized the risk that was involved if

the other money did not come in (T.169). They would have to close subject to the mortgages on the property (T.170). All of that was reviewed with the Hellers (T.170). That was when Mr. Heller said: "We've got to close no matter what. You've got to do this for me." (T.170).

She reviewed with Mr. Heller the time he would have to wait to see if the mortgages would be paid off (T.170). Despite the fact that the property was being sold subject to the mortgages, Mr. Heller said: "We've got to close this." (T.170). There was no question about it, it was urgent, urgent that they close (T.170).

The Respondent testified that after Mr. Heller learned that it would not be an all cash closing, he spoke to his attorney, Joseph Hubert (T.358). He then insisted on closing (T.359).

As to the $90,000.00 cashiers check, on or about August 31, 1990, Mr. Garcia presented the Respondent with the check, drawn on the Banco de Credito Argentino payable through the Bank of New York, in the face amount of $90,000.00 (RR,¶19).

After 5:00 P.M. on August 31, 1990, the Respondent went to Capital Bank with the cashiers check and presented it to Capital Bank. Capital Bank, after discussing the check and the situation with the Bank of New York, approved the check and allowed the Respondent to deposit the check in her trust account and to draw checks against the cashiers check. This approval by Capital Bank allowed the Respondent to provide the net sale proceeds to the Hellers (RR,¶20).

The closing took place at Ms. Youngblood's office at 9:00 in the evening (T.170). A check was written for Mr. and Mrs. Heller (T.170-171). The Hellers cashed out (T.170-171). Capital Bank agreed to cover the $35,000.00 check paid to the Hellers (T.171). The

Hellers received exactly what they bargained for in the sale of their home and were very happy (T.171).

Ms. Youngblood repeated that everything was disclosed to the Hellers by the Respondent (T.178). She had a dinner party waiting for her, it was Friday evening, and all that time was spent explaining these circumstances to the Hellers (T.178). There was nothing that they were not told, advised of, or had disclosed to them in this transaction (T.178).

Her commission was the only thing that was not guaranteed that night (T.178).

Everybody was happy because the Hellers were receiving their money (T.178).

The Respondent prepared an addendum to the deposit receipt contract for purchase and sale and an escrow agreement (RR,¶7) (Bar Exhibit "A").

On redirect, the addendum (Bar Exhibit "A", Respondent's Exhibit 15), was discussed in detail.

Ms. Sullivan, Mr. Garcia, the Respondent, Michael Heller, Kathie Heller, and she (Ms. Youngblood) were present when the addendum was reviewed (T.185).

The addendum was reviewed line by line, and in great detail with Mr. and Mrs. Heller, with all of them sitting there going through the whole thing (T.185).

Bar's Exhibit "A", which is also Respondent's Exhibit 15, was reviewed with the Hellers on the night of the closing (T.185). It had to be typed (T.186). Everything was done in a scrambling to get the matter closed by the 31st (T.186).

The second whereas clause, which involved the two mortgages on the property from Gold Coast and Barnett Mortgage Company and the fact that the purchaser was taking the property subject to these two mortgages was discussed with the Hellers (T.187).

The next whereas clause, in which the purchaser and escrow depositor presented to the escrow agent a cashiers check in the amount of $90,000.00 drawn on the bank of Argentina was discussed with the Hellers (T.187-188).

The next whereas clause, in which the Hellers agreed to accept a trust check from the escrow agent in the amount of $35,924.30 was discussed with the Hellers (T.188). The Hellers knew exactly how much they were going to receive (T.188).

The next whereas clause, which stated that the purchaser and escrow depositor agreed to bring additional funds necessary to pay the closing costs and mortgage principal and interest of the two mortgages, within ten (10) business days or a reasonable time after September 3, 1990, was explained to them (T.188). Ms. Sullivan and Mr. Garcia agreed to this but it did not happen (T.188-189). The Hellers agreed to this as well (T.189).

The next whereas clause stated that the sellers, purchasers, and escrow depositor agreed that the monies deposited into the escrow agent's account would remain the money of the purchaser and escrow depositor and would be disbursed to satisfy the obligations of the agreement at the discretion of the escrow agent with all parties agreeing that there would be no further disbursements of monies until the funds from the cashiers check was deposited into the escrow agent's account, was explained to the Hellers (T.189).

The last whereas clause acknowledged that the purchaser had executed a quit claim deed in blank to be held in escrow by the escrow agent pending the satisfactory compliance with the agreement and the deposit and receipt contract, and this was explained and discussed with the Hellers (T.189-190). They knew that the quit claim deed had already been executed (T.190).

On the second page, the first agreement, that the purchaser would pay off all mortgages on the property was discussed with the Hellers (T.190).

The second agreement, that the disbursement of the remaining monies would be disbursed at the discretion of the escrow agent, with the understanding that an effort would be made to bring all mortgages current, record the deed and satisfy the expenses of the sale, was discussed with the Hellers (T.190).

The third part of the agreement, that the escrow agent would give the purchaser a closing statement detailing the disbursement of all monies at the conclusion of all transactions, was explained to the Hellers (T.190).

That is what they were doing there for hours (T.190). Everybody put themselves out to conduct the closing that evening in order that the Hellers could be paid (T.190).

Moreover, Mr. Panton refused to attend the closing because he did not think it was in the best interests of the Hellers to go ahead and close with somebody from whom they did not have guaranteed funds (T.129). He told that to the Hellers (T.129). The Hellers said: "No, we've got to close. We've got everything set up, our moving trucks." (T.129).

Mr. Panton was aware that there were mortgages on the property (T.129). On the first contract for sale, the Hellers' mortgages were supposed to be paid out of the cash at closing (T.130). He informed the Hellers that all the cash was not going to be forthcoming (T.130). At that time he told them that his advice was not to go forward with the closing when it was obvious that the cash was not coming in (T.130-131).

Even though Mr. Panton's advice to them was not to close, the Hellers went full steam ahead (T.135). They wanted to get out of there, get closed, and get their money (T.135). They told him that they had outstanding obligations and that they definitely wanted to close at the time that the contract required because they had set up their payments for whatever they were doing in the hopes that they would have that escrow check in the bank (T.135-136).

Mr. Panton discussed the status of the Gold Coast mortgage with Mr. Heller (T.136). Mr. Heller told him that he was in hot water (T.136). He told Mr. Panton that: "We're a couple of months behind here. We've really got to get the show on the road, Fred. Do whatever you can, sell the house, we're in a bind." (T.136).

Although neither party executed the addendum, the closing proceeded and Ms. Sullivan took title to the property (RR,¶8). The addendum was the agreement of the parties (RR,¶39). Mr. Garcia provided the $90,000.00, but he was not placed on the warranty deed at the closing (RR,¶8).

The Hellers received that to which they were entitled, $35,924.30, (T.170-171). They cashed out (T.171). The Hellers received exactly what they bargained for in the sale of their home and they were very happy (T.171).

The amended sellers' closing statement executed by the Hellers, dated August 30, 1990, sets forth how the closing proceeds were to be disbursed (RR,¶21; Florida Bar Exhibit "B").

The Respondent disbursed the $90,000.00 from her trust account in the manner set forth in the Referee's Report (RR,¶22). All of the checks mentioned in Paragraph 22 of the Referee's Report were for expenses related to the property involved (RR,¶23).

In late September, 1990, Capital Bank told the Respondent that her trust account was going to be overdrawn by $60,000.00 (T.270-271). The next day Capital Bank said that it had made a mistake and that there was no problem with the check (T.271). The bank of Argentina had raised a question (T.271). Capital Bank said there was a problem then they said it was not a problem (T.272). Capital Bank first said there was a problem and the next day said that there was no problem (T.272).

When Capital Bank told her that the check was not any good she said that they had already approved the check (T.276). The bank said that she had to decide what to do with the overdrawn trust account (T.276).

She told her secretary to liquidate her retirement account at Merril Lynch (T.276-277). She did (T.277). The Referee found that immediately the Respondent began to liquidate assets so that the bank's threatened action in charging $90,000.00 against her trust account (despite the bank's agreement and confirmation on August 31, 1990, that the check was good through correspondent Bank of New York) would not adversely affect other clients' monies held in trust (RR,¶26).[1] Before the Respondent received the money, Capital Bank said that it had made a mistake, and the amount was not going to be overdrawn (T.277). The Respondent stopped writing checks on the amount of the cashiers check until her bank, Capital Bank, informed her the problem was resolved and confirmed that the funds were available (RR,¶28).

Ms. Sullivan realized that there were many problems and that she and Mr. Garcia were not going to be able to come up with the money to pay off the mortgages on the property (T.284). Indeed, the Hellers were at the doorstep of foreclosure at the time of closing (T.336). Ms. Sullivan asked the Respondent initially to remarket the property (T.284).

Ms. Youngblood tried to hold an auction to sell the property when it was still in Ms. Sullivan's name to pay off the mortgages (T.285). Mr. Garcia would not let people into the house to see it (T.285). At that point, there was nothing else they could do (T.285). They

---

[1] An audit of the Respondent's trust accounts was undertaken by the Bar. No violation of the trust account rules of the Florida Bar was found in any of the Respondent's accounts. All were found to be in compliance with the Bar rules (RR,¶26).

sat down and talked to Ms. Sullivan (T.285). They counseled with her and told her essentially that if she wanted to, she could quitclaim the deed over to the Respondent and the Respondent could market it (T.285). The Respondent should have put "Trustee" at the end of her name as the grantee on the quit claim deed (T.285).

She did not tell Ms. Sullivan to seek independent counsel (T.285). Ms. Sullivan was very emotional at the time (T.285-286). She realized that there were tremendous problems that were going on (T.286). She realized that the whole thing was costing everyone a tremendous amount of heartache and this was the way Ms. Sullivan wanted to handle it (T.286). The Respondent took title to the property in her own name (T.286). She paid no consideration (RR,¶10).

The Respondent was forced to evict Ms. Sullivan and Mr. Garcia (T.286-287). The Respondent helped Ms. Sullivan vacate the premises (T.288).

She rented the house to a tenant (T.289). He paid $200.00 (T.289).

The house was in bad condition when Ms. Sullivan and Mr. Garcia left (T.328). Joanna Youngblood testified that the house was in very bad shape when Ms. Sullivan and Mr. Garcia left (T.174). It had been lived in very hard and cosmetically it was a disaster (T.174).

The Respondent disbursed over $28,000.00 to conserve the property (RR,¶28). The largest check was to Gold Coast to stop foreclosure (T.333-334). The Respondent paid the remaining money from the cashiers check, as well as using her own money for contractors and for building materials (RR,¶29). She paid off the mortgages and the expenses incurred in the maintenance of the property as well as recovering approximately $31,000.00 for the benefit of the Bank of New York, when the property was sold to Roseanna Martino (RR,¶28). This was $2,000.00 more than if the account had been turned over to that bank

when the problem first arose with the cashiers check (RR,¶29). Although the Hellers, the complainants, were the driving force in creating this problem by their insistence in closing the real estate deal, despite the warning signs that were beginning to appear, it was the Hellers whose financial interests were completely satisfied both on August 31, 1990, and later when the mortgages were paid off in the Reed to Martino sale in January, 1991 (RR,¶29).

Prior to this, the Respondent sought legal advice as to what to do. She spoke to Attorney Lance Thibideau (T.293). She sought Mr. Thibideau's advice because he was a former attorney for the Florida Bar (T.338-339).

She told Mr. Thibideau that the bank had said there's a problem with the check and then it said that the check was okay (T.338). She told Mr. Thibideau that she had heard various things from different people, but nothing other than third hand (T.338). She told Mr. Thibideau how insistent the banks were about paying off the mortgages (T.338).

Mr. Thibideau said the money should be used to conserve the property (T.338-339). They discussed the provisions of the disciplinary rules referring to disputed trust monies and determined that they were not applicable (T.294). The funds were paid out after that to conserve the property (T.339). She was a conservator of the funds (T.340). She conserved the property or funds for whichever bank might be entitled to it (T.340).

She also consulted with Attorney John Phillips (T.295). He gave her the same advice that Mr. Thibideau did (T.296).

Attorney Adams gave her the same advice (T.296-297).

The advice that all these attorneys gave her was to conserve the property (T.297).

The Respondent brought both mortgages current and continued to make mortgage payments to forestall the threatened foreclosure action (RR,¶13).

On or about December 18, 1990, Roseanna Martino agreed to purchase the home for $265,000.00. The Reed to Martino transaction closed on January 17, 1991 (RR,¶15). The closing agent for the Reed to Martino transaction, on or about January 17, 1991, satisfied both of the mortgages (RR,¶17).

The proceeds received from the Martino sale were reimbursements and, without contradiction by the Bar, constituted a net loss to the Respondent from funds expended to repair the property from her own money (RR,¶35). Additionally, the proceeds of the purchase money mortgage are currently being held for the Bank of New York (RR,¶35).

The Respondent called several character witnesses, including attorneys, private citizens, a career police sergeant, an Assistant State Attorney and a Circuit Judge. They all attested to her compassion, integrity and honesty and are indicative of her credibility (RR,¶18).

As to Count I, the Referee found that on or about September 25, 1990, but no later than September 28, 1990, the Respondent was advised that the check she had received from Garcia was altered and the Bank of New York was making a claim against her bank, Capital Bank, for a return of the $90,000.00 (RR,¶24).

The Referee further found that the check that Garcia gave the Respondent was a $90.00 cashiers check that was altered by persons unknown to the Respondent (RR,¶25).

The Referee further found that upon knowledge of the alteration of the cashier's check the Respondent had an absolute obligation to cease issuing checks against the $90,000.00 that had been credited to her trust account, as the ownership of the $90,000.00 was now in dispute (RR,¶27).

The Referee further found that the Respondent stopped writing checks on the amount until her bank, Capital Bank, informed her the problem was resolved and confirmed

that the funds were available. However with actual knowledge that the ownership of the $90,000.00 was in dispute, the Respondent continued to write trust account checks against the cashier's check. The disbursements of over $28,000.00 began on November 16, 1990 with the intent of conserving the property. At that time the Respondent was the title owner to the property (RR,¶28).

The Referee further found that the Respondent paid these monies, as well as using her own money for contractors and for building materials. She paid off the mortgages and the expenses incurred in the maintenance of the property as well as recovering approximately $31,000.00 for the benefit of the Bank of New York, which was $2,000.00 more than if the account had been turned over to that bank on September 21, 1990. Although the complainants, the Hellers, were the driving force in creating this problem by their insistence in closing the real estate deal, despite the warning signs that were beginning to appear, it is the Hellers whose financial interests were completely resolved both on August 31, 1990, and later when the mortgages were paid off in the Reed to Martino sale in January, 1991 (RR,¶29).

The Referee further found that an attorney who is in possession of disputed trust monies must either hold the money in trust or interplead the funds into the court registry. The Referee found that the Respondent technically violated the Rules of Trust Accounting. However, the Referee found that the Respondent took the prudent course of conduct to expend the monies only to conserve the property when it was confirmed the monies were available (RR,¶30).

The Referee found that the Respondent technically violated Rules 3-4.2 [violation of the Rules of Professional Conduct is cause for discipline.] and 3-4.3 [the commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of

Discipline; Rules 4-1.5(a) [a lawyer shall hold in trust, funds belonging to clients of third parties.], 4-1.5(c) [when a lawyer is in possession of disputed funds, those funds must be held in trust], 4-1.15(d) [an attorney shall comply with the rules regulating trust accounts.], 4-8.4(a) [a lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct and Rule 5-1.1 [money entrusted for a specific purpose must only be used for that specific purpose.] of the Rules Regulating Trust Accounts (RR,pp.11-12).

However, the Referee also found that the Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. The Referee further found that the Respondent's actions insured that the least harm would come to the most people from a situation for which she was neither responsible nor which she promoted (RR,pp.11-12).

As to Count II, the Referee found that there was no clear and convincing evidence adduced that the fee was excessive. The Referee heard evidence that the closing took hours and hours of Respondent's time both before and after regular business hours and prior to, during, and after the actual closing until the time of disbursement (RR,¶35).

The Referee also found that the proceeds received from the Martino sale were reimbursements, and, without contradiction by the Bar, constituted a net loss to the Respondent from funds expended to repair the property from her own monies (additionally, the proceeds of the mortgage are currently being held for the Bank of New York) (RR,¶35).

The Referee recommended that the Respondent be found not guilty of charging an excessive fee (RR,p.12).

As to Count III, the Referee found that the Respondent represented both sides in the Heller to Sullivan and Garcia transaction to a very limited extent (RR,¶36).

The Referee further found Mr. Heller had advised the parties, as early as August 12, 1990, and as late as the first closing itself on August 30, 1990, that he was represented by Attorney Joseph Hubert. In fact, a November 5, 1990, letter from Mr. Hubert sent to Respondent confirmed that the Hellers were "my (Hubert's) clients", (Defendant's Exhibit 1). Mr. Heller also advised Fred Panton on August 28, 1990, that he would be firing Respondent "as his *closing agent* and will let Attorney Joseph Huber (sic) handle his side of the deal" (RR,¶37).

The Referee found that the Respondent requested a quit claim deed, in blank, on the day of the closing, disclosing that fact to everyone by the addendum which is Bar's Exhibit A "pending satisfactory compaince (sic) with this agreement and the deposit and receipt contract." The Referee noted that contrary to Mr. Heller's testimony that he had never seen the letters accompanying the unexecuted addendum (which were sent to his wife's business address), several witnesses testified that it was fully discussed with him, and Bar counsel conceded in his summation that he believed Heller had probably seen it, and that it was the agreement of the parties. The Respondent's name was not inserted into the quit claim deed until late October, 1990 (RR,¶38).

The Referee found that both Mr. Panton and the Respondent testified that on August 12, 1990 at the Heller residence, the Respondent advised Mr. Heller that she was the attorney for the purchasers and could not represent the Hellers. She told the Hellers that if they wished, she would prepare the closing documents. Since it would be cheaper, and Mr. Heller wanted to avoid any costs whatsoever, he agreed that she do it. Respondent prepared the closing documents for the Hellers (RR,¶39).

The Referee found that Mr. Heller's testimony that he considered the Respondent to be "his attorney" was not credible in light of all the other testimony and since disclosures

were made. The Referee further found that these actions were insufficient to avoid the problems inherent in the conflict of interest. The Respondent failed to explain the implications of common representations, the advantages and risks involved and failed to mention the potential adverse consequences, which is not full disclosure (RR,¶40).

The Referee found that the Respondent's dual representation adversely affected the Hellers in that they remained liable for one of the mortgages on the property for approximately six months after they sold their interests in the property, during the time that the property was owned by the Respondent (RR,¶41).

The Referee found that by reason of the conflict of interest caused by the dual representation, the Respondent violated Rules 3-4.2 [violation of the Rules of Professional Conduct is cause for discipline.] and 3-4.3 [the commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline and Rules 4-1.7(a) [a lawyer shall not represent a client if the representation will be directly adverse to the interests of another client.], 4-1.16(a) [a lawyer shall withdraw from representation if the representation will result in violation of the Rules of Professional Conduct.] and 4-8.4(a) [a lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct. The Referee found that although disclosures were made, the prudent lawyer should have mentioned the potential adverse consequences and its implications.

As to Count IV, the Referee found that the Respondent performed the following roles in the transaction: a. Sullivan and Garcia's realtor; b. Sullivan and Garcia's attorney; c. the Hellers' attorney to a limited extent; d. closing agent; e. escrow agent; f. property owner; g. landlord (RR,¶42).

The Referee further found that the Respondent's own interests were inherently in conflict with the interests of her clients in the transaction (RR,¶43).

The Referee further found that the conflict became more apparent with the subsequent transfer of the title of the property to the Respondent (RR,¶44).

The Referee further found that the Respondent admitted at the hearing that she should have become "trustee" of the property rather than owner (¶45).

The Referee further found that when the Respondent made demand upon Sullivan for the title to the property, she did not advise Sullivan to seek independent counsel, nor did she secure Sullivan's written consent for the Respondent's continued representation (RR,¶46).

The Referee did not find that Ms. Sullivan suffered any harm.

The Referee found that based upon the conflict of interest caused by the Respondent's interests being adverse to her clients, she violated Rules 3-4.2 [violation of the Rules of Professional Conduct is cause for discipline.] and 3-4.3 [the commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline and Rules 4-1.7(b) [a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interests.], 4-1.8(a) [a lawyer shall not enter into a business transaction with a client or secure an ownership interest adverse to the client unless certain enumerated steps are taken.] and 4-8.4(a) [a lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct (RR,p.13).

The Referee made no reference to the Florida Standards for Imposing Lawyer Sanctions.

The Referee recommended that the Respondent be suspended from the practice of law for two years (RR,p.14).

This Petition for Review followed.

POINTS ON REVIEW

I

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT I BECAUSE THE RESPONDENT ACTED IN GOOD FAITH AND TOOK THE ONLY RATIONAL, PRUDENT PATH THAT WOULD PROTECT ALL PARTIES.

II

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT III BECAUSE THE RESPONDENT ACTED IN GOOD FAITH AND ANY PREJUDICE WAS EPHEMERAL, AT WORST, AND NOT HER FAULT.

III

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT IV BECAUSE THE RESPONDENT ACTED IN GOOD FAITH, ANY PREJUDICE WAS EPHEMERAL, AT WORST, AND SHE SAVED THE PROPERTY.

SUMMARY OF THE ARGUMENT

I

The Respondent acted in good faith. She sought the advice of counsel. She disbursed money from her trust account after her bank confirmed that it was proper to do so. She conserved the property and she protected all parties. There is much in mitigation. The Referee found only a technical violation. A public reprimand is the stiffest discipline which may be imposed.

II

The Hellers were fully informed of the potential difficulty arising from the purchasers failure to proceed with an all cash closing. Anything the Respondent could have told them would have been merely repetitious. The Hellers were insistent on closing. The Respondent protected their interests and insured that the mortgage was paid, when the purchaser was unable to do so. An admonishment is the stiffest discipline which may be imposed.

III

The Respondent acted to protect the interests of Ms. Sullivan, the purchaser. Ms. Sullivan suffered no harm whatsoever. The Respondent lost money. The Respondent sought legal advice. The Respondent conserved the property. The stiffest discipline which may be imposed is an admonishment.

ARGUMENT

I

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT I BECAUSE THE RESPONDENT ACTED IN GOOD FAITH AND TOOK THE ONLY RATIONAL, PRUDENT PATH THAT WOULD PROTECT ALL PARTIES.

In *The Florida Bar v. Lumley*, 517 So.2d 13 (Fla. 1987), the attorney temporarily used trust funds for personal purposes. This Court found that the evidence implicitly showed that the lawyer knowingly used the trust funds for his own purposes. There was no intent to defraud or deprive the clients of their money and in every instance the lawyer restored the balance in the trust account in time to meet his obligations to his clients. This Court imposed a public reprimand on the attorney.

A public reprimand is appropriate when there is a technical violation of trust accounting rules without willful intent. In *The Florida Bar v. Rogers*, 583 So.2d 1379, 1382 (Fla. 1991); *The Florida Bar v. Dougherty*, 541 So.2d 610 (Fla. 1989).

Here, the evidence shows only good faith on the part of the Respondent in conserving the property and money involved, and protecting the interests of all parties.

Standard 9.3, Mitigation, of the Florida Standards for Imposing Lawyer Sanctions also provides support that the discipline of the Respondent should be much less than that recommended by the Referee. The Referee did not utilize these Standards.

Standard 9.32 lists the factors which may be considered in mitigation.

Standard 9.32(b) is an Absence of a Dishonest or Selfish Motive. There is absolutely nothing in the record that even hints of a dishonest or selfish motive on the part of the Respondent.

Standard 9.32(d) is Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct. The Respondent took timely action to rectify the misconduct of *others*:

> "...Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. Respondent's actions ensured that the least harm would come to the most people from a situation for which she was neither responsible for, nor did she promote." (RR,p.12)

Standard 9.32(g) is Character or Reputation. The Respondent called several character witnesses, including attorneys, private citizens, a career police sergeant, an assistant state attorney, and a circuit judge. The Referee found that: "...These individuals attested to her compassion, integrity and honesty and are indicative of her credibility." (RR,¶18).

The facts here establish that the Respondent acted in good faith with the intent to protect all parties.

The Hellers listed their home with Frederick Panton, a real estate agent (T.115). The Hellers were anxious to sell (T.116). They told Mr. Panton that they had to get out of there because their business wasn't doing well and their landlord had just told them that they had a short time left (T.116). They told Mr. Panton that they really needed the funds out of sale of the house to help them in their business and to help them carry on their lives (T.116-117).

On October 12, 1990, Mr. Garcia, Ms. Sullivan, and the Hellers reached an agreement on the purchase of the Hellers' home, in which Mr. Garcia and Ms. Sullivan agreed to pay $290,000.00 cash for the home (RR, ¶2).

On or about August 30, 1990, or August 31, 1990, the Respondent was informed by Sullivan and/or Garcia that they were having difficulties securing the cash necessary to close

the transaction. They would only be able to bring a check for $90,000.00 to the closing table. They further represented that the rest of the cash necessary to conclude the transaction would be forthcoming in several days. Additionally, the Hellers demanded to close by August 31, 1991, creating a potentially unstable financial condition (RR,¶5).

This caused the parties and Respondent, on August 31, 1990, to restructure the parties' agreement, such that Sullivan and Garcia would pay $90,000.00 and take the property subject to the two mortgages covering it and satisfy the mortgages within thirty days of closing. Both of the mortgages contained due on sale clauses and were not assumable by Sullivan or Garcia (RR,¶6). On or about August 31, 1990, Mr. Garcia presented the Respondent with the check, drawn on the Banco de Credito Argentino, payable through the Bank of New York, in the face amount of $90,000.00 (RR,¶19).

Joanna Youngblood, a broker, knew of the Hellers because their property was listed with her office (T.160).

At some point it became obvious that the total $290,000.00 was not going to be forthcoming by the time of the closing, she testified (T.165). She had several telephone calls with Mr. Heller (T.165). Mr. Heller said: "We've got to close" (T.165). They said that they had reviewed the problems with their attorney, Mr. Joseph Hubert (T.165). The Hellers very urgently wanted to close this deal and they were that way from the day that Ms. Youngblood's company took the listing (T.166). The Hellers had consulted with their attorney about what to do if the mortgages were not paid off at the closing (T.167).

There was a tremendous sense of urgency to close on the part of the Hellers (T.168). Mr. Heller called her to say: "We have to close on this house. Even if you don't get paid, you've got to do this for us." (T.168-169). She told him that they would (T.169). She was willing to give up her commission if need be (T.169).

After 5:00 P.M., on August 31, 1990, the Respondent went to Capital Bank with the cashiers check and presented it to Capital Bank. Capital Bank, after discussing the check and the situation with the Bank of New York, approved the check and allowed the Respondent to deposit it in her trust account and to draw checks against it. This approval by Capital Bank allowed the Respondent to provide the net sale proceeds to the Hellers (RR,¶20).

The closing took place at Ms. Youngblood's office at 9:00 o'clock in the evening (T.170). A check was written for Mr. and Mrs. Heller (T.170-171). The Hellers cashed out (T.170-171). Capital Bank agreed to cover the $35,000.00 paid to the Hellers (T.171). The Hellers received exactly what they bargained for in the sale of their home and were very happy (T.171).

The addendum to the contract was reviewed line by line and in great detail with Mr. and Mrs. Heller, with all of them sitting there going through the whole thing (T.185). It is Bar's Exhibit "A".

The second whereas clause, which involved the two mortgages on the property from Gold Coast and Barnett Mortgage Company and the fact that the purchaser was taking the property subject to these two mortgages was discussed with the Hellers (T.187).

The fourth whereas clause, in which the Hellers agreed to accept trust check from the escrow agent in the amount of $35,924.30 was discussed with the Hellers (T.188). The Hellers knew exactly how much they were going to receive (T.188).

The next whereas clause which stated that the purchaser and escrow depositor agreed to bring additional funds necessary to pay the closing costs and mortgage principal and interest of the two mortgages, within ten business days or a reasonable time after September

3, 1990, was explained to them (T.188). Ms. Sullivan and Mr. Garcia agreed to this but it did not happen (T.188-189). The Hellers agreed to this as well (T.189).

The next whereas clause stated that the sellers, purchasers, and escrow depositor agreed that the monies deposited into the escrow agent's account would remain the money of the purchaser and escrow depositor and would be disbursed to satisfy obligations of the agreement *at the discretion of the escrow* agent with all parties agreeing that there would be no further disbursements of monies until the funds from the cashiers check was deposited into the escrow agent's account, was explained to the Hellers (T.189). The Respondent was the escrow agent (Bar Exhibit "A",p.1).

The last whereas clause acknowledged that the purchaser had executed a quit claim deed in blank to be held in escrow by the escrow agent pending the satisfactory compliance with the agreement and the deposit and receipt contract, and this was explained and discussed with the Hellers (T.189-190). They knew that the quit claim deed had already been executed (T.190).

On the second page, the first agreement, that the purchaser would pay off all mortgages on the property, was discussed with the Hellers (T.190).

The second agreement, that the disbursement of the remaining monies would be disbursed *at the discretion of the escrow agent*, with the understanding that an effort would be made to bring all mortgages current, record the deed and satisfy the expenses of the sale, was discussed with the Hellers (T.190).

Although neither party executed the addendum, the closing proceeded and Ms. Sullivan took title to the property (RR,¶8). The addendum was the agreement of the parties (RR,¶39). Mr. Garcia provided the $90,000.00, but he was not placed on the warranty deed at the closing (RR,¶8).

The Hellers received what they were entitled to, $35,924.30, (T.170-171). They cashed out (T.171). The Hellers received exactly what they bargained for in the sale of their home and they were very happy (T.171).

The amended sellers' closing statement executed by the Hellers, dated August 30, 1990, sets forth how the closing proceeds were to be disbursed (RR,¶21; Florida Bar Exhibit "B").

The Respondent disbursed the $90,000.00 from her trust account in the manner set forth in the Referee's Report (RR,¶22). All of the checks mentioned in Paragraph 22 of the Referee's Report were for expenses related to the property involved (RR,¶23).

In late September, 1990, Capital Bank told her that her trust account was going to be overdrawn by $60,000.00 (T.270-271). The next day Capital Bank said that it had made a mistake and that there was no problem with the check (T.271). The bank of Argentina had raised a question (T.271). Capital Bank said there was a problem then they said it was not a problem (T.272). Capital Bank first said there was a problem and the next day said that there was no problem (T.272).

When Capital Bank told her that the check was not any good she said that they had already approved the check (T.276). The bank said that she had to decide what to do with the overdrawn trust account (T.276).

She told her secretary to liquidate her retirement account at Merril Lynch (T.276-277). She did (T.277). The Referee found that immediately the Respondent began to liquidate assets so that the banks threatened action in charging $90,000.00 against her trust account (despite the bank's agreement and confirmation on August 31, 1990, that the check was good through correspondent Bank of New York) would not adversely affect other

clients' monies held in trust (RR,¶26).[2] Before the Respondent received the money, Capital Bank said that it had made a mistake, and the amount was not going to be overdrawn (T.277). The Referee found that the Respondent stopped writing checks on the amount of the cashiers check until her bank, Capital Bank, informed her the problem was resolved and confirmed that the funds were available (RR,¶28).

The Respondent disbursed over $28,000.00 to conserve the property (RR,¶28). The Respondent paid the remaining money from the cashiers check, as well as using her own money for contractors and for building materials (RR,¶29). She paid off the mortgages and the expenses incurred in the maintenance of the property as well as recovering approximately $31,000.00 for the benefit of the Bank of New York, when the property was sold to Roseanna Martino(RR,¶29). This was $2,000.00 more than if the account had been turned over to that bank when the problem first arose with the cashiers check (RR,¶29). Although the Hellers, the complainants, were the driving force in creating this problem by their insistence in closing the real estate deal, despite the warning signs that were beginning to appear, it was the Hellers whose financial interests were completely satisfied both on August 31, 1990, and later when the mortgages were paid off in the Reed to Martino sale in January, 1991 (RR,¶29).

Prior to this, the Respondent sought legal advice as to what to do. She spoke to Attorney Lance Thibideau (T.293). She sought Mr. Thibideau's advice because he was a former attorney for the Florida Bar (T.338-339). She told Mr. Thibideau that the bank had said there's a problem with the check and then it said that the check was okay (T.338). She

[2] An audit of the Respondent's trust accounts was undertaken by the Bar. No violation of the trust account rules of the Florida Bar was found in any of the Respondent's accounts. All were found to be in compliance with the Bar rules (RR,¶26).

told Mr. Tibideau that she had heard various things from different people, but nothing other than third hand (T.338). She told Mr. Thibideau how insistent the banks were about paying off the mortgages (T.338).

Mr. Thibideau said the money should be used to conserve the property (T.338-339). They discussed the provisions of the disciplinary rules referring to disputed trust funds and determined that they were not applicable (T.294). The funds were paid out after that to conserve the property (T.339). She was a conservator of the funds (T.340). She conserved the property or funds for whichever bank might be entitled to it (T.340).

She also consulted with Attorney John Phillips (T.295). He gave her the same advice that Mr. Thibideau did (T.296).

Attorney Adams gave her the same advice (T.296-297).

The advice that all these attorneys gave her was to conserve the property (T.297).

The Respondent brought both mortgages current and continued to make mortgage payments to forestall the threatened foreclosure action (RR,¶13).

On or about December 18, 1990, Roseanna Martino agreed to purchase the home for $265,000.00. The Reed to Martino transaction closed on January 17, 1991 (RR,¶15). The closing agent for the Reed to Martino transaction, on or about January 17, 1991, satisfied both of the mortgages (RR,¶17).

The proceeds received from the Martino sale were reimbursements and, without contradiction by the Bar, constituted a net loss to the Respondent from funds expended to repair the property from her own money (RR,¶35). Additionally, the proceeds of the purchase money mortgage is currently being held for the Bank of New York (RR,¶35).

The Referee found that on or about September 25, 1990, but no later than September 28, 1990, the Respondent was advised that the check she had received from

Garcia was altered and the Bank of New York was making a claim against her bank, Capital Bank, for a return of the $90,000.00 (RR,¶24).

The Referee further found that upon knowledge of the alteration of the cashier's check the Respondent had an absolute obligation to cease issuing checks against the $90,000.00 that had been credited to her trust account, as the ownership of the $90,000.00 was now in dispute (RR,¶27). The Referee further found that the Respondent stopped writing checks on the amount until her bank, Capital Bank, informed her the problem was resolved and confirmed that the funds were available (RR,¶28).

The Referee then made a contradictory finding. She found that with actual knowledge that the ownership of the $90,000.00 was in dispute, the Respondent continued to write trust account checks against the cashier's check (RR,¶28). It cannot be both ways.

The Referee further found that the Respondent paid these monies, as well as using her own money for contractors and for building materials. She paid off the mortgages and the expenses incurred in the maintenance of the property as well as recovering approximately $31,000.00 for the benefit of the Bank of New York, which was $2,000.00 more than if the account had been turned over to that bank on September 21, 1990. Although the complainants, the Hellers, were the driving force in creating this problem by their insistence in closing the real estate deal, despite the warning signs that were beginning to appear, it is the Hellers whose financial interests were completely resolved both on August 31, 1990, and later when the mortgages were paid off in the Reed to Martino sale in January, 1991 (RR,¶29).

The Referee further found that an attorney who is in possession of disputed trust monies must either hold the money in trust or interplead the funds into the court registry. The Referee found that the Respondent *technically* violated the Rules of Trust Accounting

(RR,p.11). However, the Referee found that the Respondent: "...took the prudent course of conduct to expend the monies only to conserve the property *when it was confirmed the monies were available*" (RR,¶30). (Emphasis Added)

The Referee further found that:

> "The Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. The Respondent's actions ensured that the least harm would come to the most people from a situation for which she was neither responsible for, nor did she promote." (RR,p.12)

The Respondent acted in the utmost good faith. She sought legal advice. Her character is beyond approach. The Respondent's actions "...ensured that the least harm would come to the most people...." (RR,p.12). There is much in mitigation.

This Court must reject the Referee's recommendation and impose, at worst, a public reprimand.

II

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT III BECAUSE THE RESPONDENT ACTED IN GOOD FAITH AND ANY PREJUDICE WAS EPHEMERAL, AT WORST, AND NOT HER FAULT.

In *The Florida Bar v. Teitleman*, 261 So.2d 140 (Fla. 1972), this Court held that an attorney could represent the seller while also representing the buyer if there were:

> "...1) a client-attorney relationship between such attorney and the seller, 2) together with a full disclosure that the attorney also represents adverse interests in the closing, of which full disclosure must be made to the seller of all circumstances, relationships and interests involved and 3) after such full disclosure the attorney obtains the consent of the seller for an agreed representation by the attorney and only then 4) a fee which must be agreed upon between them prior to undertaking any services...." (261 So.2d at 143)

All this occurred here.

In *The Florida Bar v. Stone*, 538 So.2d 460 (Fla. 1989), the attorney engaged in dual representation of clients with conflicting interests in a business transaction. The attorney had practiced law for approximately thirty-three years with only one reported disciplinary matter, for which he received a private reprimand. He had been active in his church during the period of time he had lived in Ft. Pierce, Florida.

This Court publicly reprimanded the attorney.

Here, the Hellers were anxious to sell (T.116). They told Mr. Panton that they had to get out of there because their business wasn't doing well and their landlord had just told them that they had a short term of time left (T.116). They told Mr. Panton that they really needed the funds out of the sale of the house to help them in their business and to help them carry on their lives (T.116-117).

The discussion at the Heller's kitchen table, between Mr. Panton, the Respondent, and the Hellers, concerned the price, terms, conditions, special clauses, and disclosures of

who was who (T.122). As to disclosures, the Respondent totally let the Hellers know that the customer was her customer due to her real estate activity, that she was a lawyer and that she would probably be handling the closing, the documents and that stuff of the buyer, and she offered to do the same for the Hellers, to prepare their documents for them (T.122). She told the Hellers that she could not represent them as a lawyer (T.122). She said that there would be a conflict (T.122). She could handle their closing documents (T.122). She asked them if that would be okay, if they wanted to go that way (T.122-123). Mr. Panton suggested to them that if they wanted a quick closing, this is usually the way to do it with all the paperwork done in one house (T.123).

Mr. Panton and the Respondent were very out and open with the Hellers as to the contract and about their agency (T.123). The Respondent told the Hellers that she was going to be representing the buyers, Sullivan Garcia, as their attorney while they were at the dinning room table (T.124).

The Respondent was not involved in the negotiations over price (T.125).

The Respondent testified that she told the Hellers that she had known Carol Sullivan for approximately five years (T.343). She told them that she was bringing the offer to them as a realtor and that she had been requested to close the transaction for Sullivan (T.343). She told the Hellers that she was an attorney (T.343). She told them that she was representing clients (T.343). She did not tell the Hellers that she was able to represent them as lawyer (T.343-344). She told them that if they had a problem with her representing Carol Sullivan at the closing she would withdraw and would have someone else do it (T.344). Mr. Heller said "I owned a Century 21 franchise. I have been through these closings hundreds of times. That is not necessary." (T.344). Mr. Heller started talking about

the title documents (T.344). The Respondent said "I would not be able to represent you at the closing if you are giving me permission to represent Carol." (T.344).

Mr. Heller asked the Respondent what the normal charge was in the community for the preparation of closing documents (T.345). She told him approximately $200.00 (T.345). He asked the Respondent if she would prepare his closing documents (T.345). He said it would be much cheaper than his having to have an attorney there (T.345). Mr. Heller was looking for the cheapest, fastest way out (T.345). Since it would be cheaper, and Mr. Heller wanted to avoid any costs whatsoever, Mr. Heller agreed that she do so (RR,¶39).

The Respondent disclosed to Mr. Heller that she was an attorney, that she represented Sullivan and Garcia; Mr. Heller was a realtor; he told her that he was a realtor; and he told her that he had done this many times (T.345).

The Respondent, acting as realtor and attorney for Garcia and Sullivan, participated in the preparation of the contract which memorialized the terms of the parties' agreement (RR,¶3). On August 30, 1990, the Hellers executed a warranty deed and all other necessary documents to conclude the sale of their home. The Respondent prepared the closing documents (RR,¶4).

On or about August 30, 1990, or August 31, 1990, the Respondent was informed by Sullivan and/or Garcia that they were having difficulties securing the cash necessary to close the transaction. They would only be able to bring a check for $90,000.00 to the closing table. They further represented that the rest of the cash necessary to conclude the transaction would be forthcoming in several days. The Hellers demanded to close by August 31, 1991, creating a potentially unstable financial situation (RR,¶5).

This caused the parties and Respondent, on August 31, 1990, to restructure the parties' agreement, such that Sullivan and Garcia would pay $90,000.00 and take the

property subject to the two mortgages covering it and satisfy the mortgages within thirty days of closing. Both of the mortgages contained due on sale clauses and were not assumable by Sullivan or Garcia (RR,¶6).

The Hellers were well aware of the difficulties that might arise because of closing with less than all cash.

After Mr. Heller learned that it would not be an all cash closing, he spoke to his attorney, Joseph Hubert (T.358). Mr. Heller then insisted on closing (T.359).

Joanna Youngblood testified that she had several telephone calls with Mr. Heller (T.165). Mr. Heller said: "We've got to close" (T.165). They said that they had reviewed the problems with their attorney, Mr. Joseph Hubert (T.165). The Hellers very urgently wanted to close this deal and they were that way from the day that Prudential took the listing (T.166). The Hellers had consulted with their attorneys about what to do if the mortgages were not paid off at the closing (T.167).

There was a tremendous sense of urgency to close on the part of the Hellers (T.168). Mr. Heller called her to say that: "We have to close on this house. Even if you don't get paid, you've got to do this for us." (T.168-169). She told him that they would (T.169). She was willing to give up her commission if need be (T.169).

When she realized that the full amount of cash was not available for the closing, and that they only had $90,000.00 to work with, they also realized the risk that was involved if the other money did not come in (T.169). They would have to close subject to the mortgages on the property (T.170). All of that was reviewed with the Hellers (T.170). That was when Mr. Heller said: "We've got to close no matter what. You've got to do this for me." (T.170).

She reviewed with Mr. Heller the time he would have to wait to see if the mortgages would be paid off (T.170). Despite the fact that the property was being sold subject to the mortgages, Mr. Heller said: "We've got to close this." (T.170). There was no question about it, it was urgent, urgent that they close (T.170).

And, of course, the entire Addendum, which was the agreement of the parties (RR,¶38), and which fully explained the situation with the mortgages, was reviewed with the Hellers (T.185-190).

After it became apparent that Sullivan and Garcia were not going to be able to come up with the remainder of the purchase price in cash, Mr. Panton refused to go to the closing because he did not think it was in the best interests of the Hellers to go ahead and close with somebody from whom they did not have guaranteed funds (T.129). He told that to the Hellers (T.129). The Hellers said: "No, we've got to close. We've got everything set up, our moving trucks." (T.129).

Mr. Panton was aware that there were mortgages on the property (T.129). Mr. Panton informed the Hellers that all the cash was not going to be forthcoming to pay the mortgages on the property at the closing (T.130). His advice to them was not to go forward with the closing when it was obvious that the cash was not coming in (T.130-131).

Despite Mr. Panton's advice to them not to close, the Hellers went full steam ahead (T.135). They wanted to get out of there, get closed, and get their money (T.135). They told Mr. Panton that they had outstanding obligations and that they definitely wanted to close at the time that the contract required because they had set up the payments for whatever they were doing in the hope that they would have the escrow check in the bank (T.135-136).

Mr. Panton discussed the status of the Gold Coast mortgage with Mr. Heller (T.136). Mr. Heller told him that he was in hot water (T.136). He told Mr. Panton that: "We're a couple of months behind here. We've really got to get the show on the road Fred. Do whatever you can, sell the house, we're in a bind." (T.136).

The Referee found that Mr. Heller had advised the parties, as early as August 12, 1990, and as late as the first closing itself on August 30, 1990, that he was represented by Attorney Joseph Hubert. A November 5, 1990, letter from Mr. Hubert sent to Respondent confirmed that the Hellers were "my (Hubert's) clients" (Defendant's Exhibit 1). Mr. Heller also advised Mr. Panton on August 28, 1990, that he would be firing Respondent "as his closing agent and will let Attorney Joseph Huber (sic) handle his side of the deal" (RR,¶37).

The Referee further found that contrary to Mr. Heller's testimony that he had never seen the letters accompanying the unexecuted addendum (which were sent to his wife's business address), several witnesses testified that it was fully discussed with him, and Bar counsel conceded in his summation that he believed Heller had probably seen it, and that it was the agreement of the parties (RR,¶38).

The Referee also found that testimony from both Mr. Panton and the Respondent was that on August 12, 1990 at the Heller residence the Respondent advised Mr. Heller that she was the attorney for the purchasers and that she could not represent the Hellers. Subsequently, she told Mr. Heller that if the Hellers wished she could prepare the closing documents in the transaction. Since it would be cheaper, and Mr. Heller wanted to avoid any costs whatsoever, he agreed that she do so. She did (RR,¶39).

The Referee found that Mr. Heller's testimony that he considered the Respondent to be "his attorney" simply is not credible in light of all of the other testimony and *since*

disclosures were made (RR,¶40). However she found that the Respondent represented both sides in the Heller to Sullivan and Garcia transaction *to a very limited extent* (RR,¶36).

The Referee found that the Respondent failed to explain the implications of common representations, the advantages and risks involved and failed to mention the potential adverse consequences, which was not full disclosure (RR,¶40). The Referee further found that the Respondent's dual representation adversely affected the Hellers in that they remained liable for one of the mortgages that attached to the property for approximately six months after they sold their interest in the property, during the time that the property was owned by the Respondent (RR,¶41).

However, as shown *supra*, the Hellers were *fully* informed, by their attorney, Mr. Hubert, by Ms. Youngblood, by Mr. Panton, and through the Addendum, which Respondent prepared, of the difficulty that might arise because of the lack of all cash at the closing. Moreover, Mr. Heller is a realtor. He was quite familiar with mortgages. He went to the closing with eyes open and fully aware of all contingencies.

The mortgage on the property was satisfied when the property was sold to Martino (RR,¶29).

The Standards for Imposing Lawyer Sanctions make it clear that the worst penalty that should be involved is an admonishment. Standard 4.3 involves Failure to Avoid Conflicts of Interest. Standard 4.34 provides, even in the absence of mitigating circumstances, that:

> "Admonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interest, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client."

There was no harm to the Hellers. It was their insistence on closing that caused the difficulty.

Again, several mitigating factors are present. Standard 9.32 sets forth the factors which may be considered in mitigation. The following apply:

9.32(b) Absence of a Dishonest or Selfish Motive: There is not a syllable of testimony or of documentary evidence which in any way even hints that the Respondent acted from a dishonest or selfish motive.

9.32(d) Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct: The Respondent insured that the mortgage on the property was paid off when the property, through her efforts, was sold to Martino (RR,¶29).

9.32(g) Character or Reputation. The Respondent called attorneys, private citizens, a career police sergeant, an assistant state attorney, and a circuit judge as character witnesses. The Referee found that: "...These individuals attested to her compassion, integrity and honesty and are indicative of her credibility." (RR,¶18)

This Court must reject the Referee's recommendation and impose no more than an admonishment.

III

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT IV BECAUSE THE RESPONDENT ACTED IN GOOD FAITH, ANY PREJUDICE WAS EPHEMERAL, AT WORST, AND SHE SAVED THE PROPERTY.

In *The Florida Bar v. Dunagen*, 565 So.2d 1327 (Fla. 1990), the attorney prepared a closing document for a loan for clients. Among other things, he included his past due attorney's fees of $5,240.03 on the settlement statement. The attorney then attended the closing. He did not obtain the clients' consent to deduct his past due legal fees out of any loan proceeds. He never advised the clients to seek separate counsel; he gave no notice of his claim to attorney's fees prior to the closing; and he gave no notice about any conflict of interest.

The attorney also charged the clients interest on prior amounts billed, rather than on principal alone, resulting in interest on interest charges in excess of the statutory limit. The attorney had no prior agreement with the clients to charge interest on any outstanding balance, nor were they notified of his intention to begin charging interest.

The referee recommended a suspension of sixty days. This Court approved the recommendation stating that:

> "We reject respondent's contention that the recommended discipline is too harsh, because respondent to date still does not seem to understand that a conflict exists in representing clients at the closing of a loan which failing to advise those clients that he intended to deduct his past due legal fees from the proceeds." (565 So.2d at 1329)

In *The Florida Bar v. White*, 368 So.2d 1294 (Fla. 1979), the attorney purchased real property from a client. The referee found that a conflict of interest arose almost of necessity by the attorney's purchase of the property while at the same time representing his client, the seller. This was clear in the financing agreement, in which the attorney, in the

interest of his client, recommended and consummated the sale on the basis of an installment with twenty-nine percent down and the balance in five equal annual installments for income tax purposes, while at the same time, in his own interest, and against the interest of his client, he put in the purchase money note a prepayment clause permitting the attorney and his two co-purchasers to prepay the note anytime. The attorney in fact did prepay the note the following year with potential adverse tax consequences to the client for his estate. The adverse tax consequences never came to fruition.

The referee found that there was no fraud or deliberate concealment or any dishonest motive apparent.

In another matter, the attorney charged a clearly excessive fee for handling a minimal estate in which there were no probatable assets.

This Court approved a two month suspension for those violations.

Here, the evidence overwhelmingly shows a lack of bad faith on the part of the Respondent and that she acted most responsibly and indeed, in the words of the Referee:

> "...took the only rational path that would conserve the property and would reduce the exposure of all parties. Respondent's actions ensured that the least harm would come to the most people from a situation from which she was neither responsible for, nor did she promote." (RR,p.12)

It is clear that Ms. Sullivan suffered no harm whatsoever.

Ms. Sullivan realized that there were many problems and that she and Mr. Garcia were not going to be able to come up with the money to pay off the mortgages on the property (T.284). Mr. Sullivan asked the Respondent initially to remarket the property (T.284).

Ms. Youngblood tried to hold an auction to sell the property when it was still in Ms Sullivan's name to pay off the mortgages (T.285). Mr. Garcia would not let people into the

house to see it (T.285). At that point, there was nothing else they could do (T.285). They sat down and talked to Ms. Sullivan (T.285). They counseled with her and told her essentially that if she wanted to, she could quit claim the deed over to the Respondent and the Respondent could market it (T.285). The Respondent admitted that she should have put "Trustee" at the end of her name as the grantee on the quit claim deed (T.285). However, the Respondent acted at all times as trustee.

The Respondent did not tell Ms. Sullivan to seek independent counsel (T.285). Ms. Sullivan was very emotional at the time (T.285-286). She realized that there were tremendous problems that were going on (T.286). She realized that the whole thing was costing everyone a tremendous amount of heartache (T.286). This was the way Ms. Sullivan wanted to handle it (T.286). The Respondent took title to the property in her own name (T.286). She paid no consideration (RR,¶10). This was done in accordance with the addendum, (Bar Exhibit "A"), which was the agreement of the parties (RR,¶38).

This was necessary to prevent foreclosure, which the Respondent did (RR,¶13).

The Respondent was forced to evict Ms. Sullivan and Mr. Garcia (T.286-287). The Respondent helped Ms. Sullivan move (T.288).

The Respondent rented the house to a tenant (T.289). He paid $200.00 (T.289).

The house was in bad condition when Ms. Sullivan and Mr. Garcia left (T.328). Ms. Youngblood testified that the house was in very bad shape when Ms. Sullivan and Mr. Garcia left (T.174). It had been lived in very hard and cosmetically it was a disaster (T.174).

The Respondent disbursed over $28,000.00 to conserve the property (RR,¶28). The Respondent paid the remaining money from the cashiers check, as well as using her own money for contractors and for building materials (RR,¶28). She paid off the mortgages and

the expenses incurred in the maintenance of the property as well as recovering approximately $31,000.00 for the benefit of the Bank of New York, when the property was sold to Roseanna Martino (RR,¶29). This was $2,000.00 more than if the account had been turned over to that bank when the problem first arose with the cashiers check (RR,¶29).

The Respondent sought advise from three attorneys as to what to do. They all told her that the money held in trust should be used to pay the mortgages and conserve the property (T.338-339;296;296-297). All the attorneys advised her to conserve the property (T.297).

She was a conservator of the funds (T.340). She conserved the property or funds for which ever bank might be entitled to it (T.340).

The Referee found that the Respondent took the prudent course of conduct to expend the monies only to conserve the property when it was confirmed the monies were available (RR,¶30).

The Referee also found that the Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. The Referee further found that the Respondent's actions ensured that the least harm would come to the most people from a situation for which was neither responsible nor would she had promoted (RR,pp.11-12).

The Referee also found that the proceeds received from the Martino sale were reimbursements, and, without contradiction by the Bar, constituted a net loss to the Respondent from funds expended to repair the property from her own monies (RR,¶35). Additionally, the proceeds of the mortgage are currently being held for the Bank of New York (RR,¶35).

The Referee found that the Respondent's own interest were inherently in conflict with the interests of her clients in the transactions (RR,¶43). The Referee further found that the conflict became more apparent with the subsequent transfer of the title of the property to the Respondent (RR,¶44). The Referee further found that the Respondent admitted at the hearing that she should have become "trustee" of the property rather than owner (RR,¶45). And, the Referee further found that when the Respondent made demand upon Sullivan for the title to the property, she did not advise Sullivan to seek independent counsel, nor did she secure Sullivan's written consent for the Respondent's continued representation (RR,¶46). However, this was done in accord with the addendum, (Bar Exhibit "A"), which is the agreement of the parties (RR,¶38). Moreover, the Referee did not find any harm to Ms. Sullivan.

The Respondent gained nothing from the transaction. She indeed acted as a trustee and conserved the property and the funds. Benefit rather than harm resulted from her actions. The Respondent acted in utmost good faith.

No harm befell Ms. Sullivan. Foreclosure was upon her. There was nothing she could do to stop it. Only the Respondent's prompt actions conserved the property.

The Standards for Imposing Lawyer sanctions make it clear that the worst penalty that should be involved is an admonishment. Standard 4.3 involves Failure to Avoid Conflicts of Interest. Standard 4.34 provides, even in the absence of mitigating circumstances, that:

> "Admonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interest, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client."

Here, the interests of Ms. Sullivan were not affected at all, much less materially. She was about to lose the property. The Respondent did not pursue her own interest, but acted as a conservator of the property and funds. There was no injury or potential injury to Ms. Sullivan.

Again, several mitigating factors are present. Standard 9.32 sets forth the factors which may be considered in mitigation. The following apply:

9.32(b) Absence of a Dishonest or Selfish Motive: There is not a syllable of testimony or of documentary evidence which in any way even hints that the Respondent acted from a dishonest or selfish motive.

9.32(d) Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct: The Respondent acted to rectify the consequences of her clients misconduct. The Referee found that: "...Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. Respondent's actions ensured that the least harm would come to the most people from a situation for which she was neither responsible for, nor did she promote." (RR,p.12).

9.32(g) Character or Reputation. The Respondent called attorneys, private citizens, a career police sergeant, an assistant state attorney, and a circuit judge as character witnesses. The Referee found that: "...These individuals attested to her compassion, integrity and honesty and are indicative of her credibility." (RR,¶18)

This Court must reject the Referee's recommendation and impose an admonishment.