IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant

Supreme Court Case
No. 79,766

vs.

YVONNE E. REED,
Respondent

_____/

REPORT OF REFEREE

I. Summary of Proceedings:

The undersigned was appointed to preside in the above disciplinary action by order of the Supreme Court of Florida dated May 12, 1992. The pleadings and all other papers filed with the undersigned, the evidentiary hearing conducted February 17, 1993 - February 18, 1993 and the evidence received, which are forwarded to the Court with this report, constitute the entire record in this case.

During the course of these proceedings, the Respondent, Yvonne E. Reed, was represented by J. David Bogenschutz, Esquire and The Florida Bar was represented by Kevin P. Tynan, Bar Counsel.

II. Findings of fact as to the misconduct of which the Respondent is charged:

Based upon the documentary evidence, testimony presented and the arguments of counsel, I find as follows:

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

2. On August 12, 1990, Garcia, Sullivan and the Hellers reached an agreement on the purchase of the Hellers' home, wherein Garcia and Sullivan agreed to pay two hundred and ninety thousand dollars ($290,000.00) in cash for the home.

3. 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.

4. On or about 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.

5. 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 this transaction. Sullivan and/or Garcia would only be able to bring a check for ninety thousand dollars ($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 situation.

6. This situation caused the parties and Respondent, on or about 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 which covered the property and satisfy said mortgages within thirty days of closing. Both of the mortgages contained due on sale clauses and were not assumable

by Sullivan or Garcia.

7. The Respondent prepared an addendum to the deposit receipt contract for purchase and sale dated August 12, 1990 and an escrow agreement which the Respondent attempted to have the parties execute and agree to the terms therein. See The Florida Bar's Exhibit "A".

8. Although neither party executed the addendum, the closing did proceed and Sullivan took title to the property. (Garcia was the source of the $90,000.00, he was not placed on the warranty deed at the time of the final closing.)

9. On or about August 31, 1990, the Respondent had her client, Sullivan execute a Quit Claim Deed, wherein the grantee was left blank.

10. On or about October 25, 1990, the Respondent inserted her name on the aforesaid Quit Claim Deed and took title to the property. No consideration was paid for the transfer of title to the property.

11. On or about October 31, 1990, the Respondent caused a three day eviction notice letter to be posted on the property. On or about November 19, 1990, Sullivan and Garcia left the premises before court action was initiated.

12. Shortly after taking title to the property, the Respondent marketed the home for resale and leased the residence to persons other than Sullivan and Garcia.

13. The Respondent brought both mortgages current and continued to make mortgage payments to forestall the threatened foreclosure action, this action was taken after she had title to the property.

14. The Respondent made the aforesaid mortgage payments with the proceeds of the $90,000.00 check that Garcia had presented for the Heller to Sullivan transaction.

15. On or about December 18, 1990, Roseanna Martino (Martino) agreed to purchase the home for two hundred sixty five thousand dollars ($265,000.00). The Reed to Martino transaction closed on January 17, 1991.

16. The Respondent was paid eight thousand one hundred twenty-three dollars and fifty-one cents ($8,123.51) by the closing agent and also took back a twenty-five thousand dollar ($25,000.00) mortgage which has now matured to over $30,000.00. This mortgage was placed in escrow in January, 1993 when the mortgage matured.

17. The closing agent for the Reed to Martino transaction, on or about January 17, 1991, satisfied both of the mortgages that were not satisfied at the time of the Heller to Sullivan transaction or the Sullivan to Reed transaction.

18. In addition, the character witnesses were called by the Respondent, including attorneys, private citizens, a career police sergeant, an Assistant State Attorney and a Circuit Judge. These individuals attested to her compassion, integrity and honesty and are indicative of her credibility.

COUNT I

19. On or about August 31, 1990, Garcia presented the Respondent with a cashiers check, drawn on the Banco de Credito Argentino payable through the Bank of New York, in the face amount

of ninety thousand dollars ($90,000.00).

20. After 5:00 p.m. on August 31, 1990, the Respondent went to Capitol Bank with the cashiers check and presented the same to the bank. Capitol Bank, after discussing the check with the Bank of New York, allowed the Respondent to draw checks against the cashiers check. This discussion allowed Respondent to provide the net sale proceeds to the Hellers. Whereupon, the Respondent returned to complete the closing.

21. The amended sellers closing statement executed by the Hellers and dated August 30, 1990, sets forth how the closing proceeds were to be disbursed. See The Florida Bar Exhibit "B".

22. The Respondent disbursed the aforesaid $90,000.00 from her trust account in the following manner:

DATE CHECK CLEARED BANK	PAYEE	AMOUNT
08/31/90	Michael & Kathie Heller	$35,924.30
09/11/90	The Prudential Florida Realty	17,400.00
09/11/90	Attorney's Title Service Inc.	310.00
09/11/90	Board of County Commissioners	1,601.00
09/12/90	Yvonne E. Reed, P.A.	3,000.00
09/14/90	Gold Coast Savings	755.33
09/28/90	Yvonne E. Reed, P.A*.	2,500.00
11/16/90	Gold Coast Savings	17,438.28
11/27/90	Environmental Services	105.00
11/27/90	Environmental Services	194.60
12/07/90	Barnett Mortgage	4,855.52
12/12/90	Gold Coast Savings	686.66
12/31/90	Accurate Survey	300.00
01/02/91	R/E Analysysts	305.00
01/01/91	Metro Home Inspection	300.00
01/02/91	Environmental Services	5.50
01/02/91	Barnett Mortgage	2,343.45
01/02/91	Gold Coast Savings	686.66
01/04/91	Board of County Commissioners	6.00
01/07/91	Joe Pomerico - Pool Service	50.00
01/09/91	Barnett Mortgage	1,231.70
01/09/91	Yvonne E. Reed, P.A.	1.00
	TOTAL	$90,000.00

23. All of the checks mentioned in paragraph 22 above, were for expenses related to the property in question.

*date of check is September 21, 1990

24. 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 that the Bank of New York was making a claim against her bank, Capitol Bank, for a return of the $90,000.00.

25. The check that Garcia gave the Respondent was in fact a ninety dollar ($90.00) cashiers check that was altered by persons unknown to the Respondent.

26. 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 the correspondent bank of New York) would not adversely affect other clients monies held in trust. (It should be noted that, by stipulation of the parties, an audit of Respondent's trust accounts was undertaken by The Bar during these proceedings. Except for The Bar's allegation herein, 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 those Rules.) These actions did not occur.

27. Upon knowledge of the alteration of the cashiers check in question, 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 said $90,000.00 was now in dispute.

28. The Respondent stopped writing checks on the amount until her bank, Capitol Bank, informed her the problem was resolved and confirmed the funds were available. However with

actual knowledge that the ownership of the $90,000.00 was in dispute, Respondent, continued to write trust account checks against the cashiers check. The disbursements of over $28,000.00 began on November 16, 1990 with the intent of conserving the property. At this time Respondent was the title owner to the property.

29. Respondent paid those 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 in this cause, the Hellers, were the driving force in creating this problem by their insistence to close this real estate deal, despite the warning signs that were beginning to appear, it is the Hellers whose financial interest 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.

30. 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. This Referee finds the Respondent technically violated the Rules of Trust Accounting. Respondent took the prudent course of conduct to expend the monies only to conserve the property when it was confirmed the monies were available.

COUNT II

31. The Respondent received the following as an attorney's fees in this real estate transaction:

DATE	REMITTER	AMOUNT
09/12/90	Sullivan/Garcia	$3,000.00
09/28/90	Sullivan/Garcia	2,500.00
unknown	Hellers	200.00
unknown	Hellers	100.00
	TOTAL	$5,800.00

32. The Respondent was paid approximately five thousand dollars, as a real estate commission for the Heller to Sullivan transaction.

33. Respondent testified that she received approximately $200.00 rent, from her tenant at the residence in question.

34. The Respondent also received eight thousand one hundred twenty-three dollars and fifty-one cents ($8,123.51), as the proceeds of the Reed to Martino transaction. Respondent also received a total of thirty thousand five hundred dollars ($30,500.00) when the mortgage she took back at the Reed to Martino closing was satisfied which is currently being held in escrow for the benefit of the Bank of New York.

35. The Bar has alleged that the fees received by Respondent in this real estate transaction were excessive. However there was no clear and convincing evidence adduced that the fee was excessive. The Referee heard evidence that the closing in this cause 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. The

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

COUNT III

36. The Respondent represented both sides in the Heller to Sullivan and Garcia transaction to a very limited extent.

37. 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".

38. Additionally 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 indexed Exhibit A. "pending satisfactory compaince (sic) with this agreement and the Deposit and Receipt Contract." [The Referee notes that contrary to Mr. Heller's testimony that he had never seen the letters accompanying the unexecuted Addemdum (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 is was the agreement of the parties.] Ms. Reed's name was not inserted into the Quit Claim until late October, 1990.

39. Testimony from both Panton and Respondent was that on August 12, 1990 at the Heller residence, Respondent advised Mr. Heller that she was the attorney for the Purchasers, and could not represent the Hellers. Subsequently, she advised, that if the Hellers wished, she would prepare the closing documents in this closing. Since it would be cheaper, and Mr. Heller wanted to avoid any costs whatsoever, he agreed that she do so. Respondent did prepare the closing documents for the Hellers.

40. Although Mr. Heller's testimony that he considered Respondent to be "his attorney" simply is not credible in light of all of the other testimony and since disclosures were made, these actions were insufficient to avoid the problems inherent in this conflict of interest. Respondent failed to explain the implications of common representations, the advantages and risks involved and failed to mention the potential adverse consequence which is not full disclosure.

41. The Respondent's dual representation adversely affected the Hellers in that the Hellers 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 Respondent.

COUNT IV

42. The Respondent performed the following roles in the transaction mentioned above:

possession of disputed funds, those funds must be held in trust].

a. Sullivan and Garcia's realtor;
b. Sullivan and Garcia's attorney;
c. the Heller's attorney to limited extent as discussed above;
d. closing agent;
e. escrow agent;
f. property owner;
g. landlord.

43. The Respondent's own interests were inherently in conflict with the interest of her clients in the transactions mentioned above.

44. The conflict became more apparent with the subsequent transfer of the title of the property to the Respondent.

45. Respondent admitted at the hearing she should have be come "trustee" of the property rather that owner.

46. 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.

III. Recommendation as to whether or not the Respondent should be found guilty:

Based upon the testimony present, I find the Respondent guilty of having violated the following rules:

1. AS TO COUNT I

By reason of the misuse of trust account monies, the Respondent has 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 4-1.15(a) [A lawyer shall hold in trust, funds belonging to clients of third parties.], 4-1.15(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. However 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.

2. AS TO COUNT II

There being no expert testimony presented on the reasonableness of the legal fees and thereby no proof offered that the fees charged herein were either illegal, prohibited or clearly excessive in the legal community in which Respondent practiced, Respondent must be found NOT GUILTY of a violation of any Rule relating thereto.

3. AS TO COUNT III

By reason of the conflict of interest caused by the aforesaid dual representation, the Respondent has 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. Although disclosures were made, the prudent lawyer should have mentioned the potential adverse consequences and its implications. See The Florida Bar v. Belleville, 591 So 2d 170 (Fla 1991); The Florida Bar v. Teitelman, 261 So 2d 140 (Fla 1972); In re Captain Creditors Trust, 104 B.R. 442 (Bankruptcy M.D. FL 1989).

4. AS TO COUNT IV

Based upon the conflict of interest, caused by the Respondent's interests being adverse to her clients, the Respondent has 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.

IV. RECOMMENDATION AS TO THE DISCIPLINARY MEASURES TO BE APPLIED:

Respondent's actions in obtaining title to her client's home, via a quit claim deed, without providing any advice to the client to seek independent counsel, in representing several adverse interests in a real estate transaction, including her own interest, and by her misuse of monies entrusted to her by using

monies that were in dispute and when Respondent became title owner to the property are prejudicial to the administration of justice which reflect adversely on the practice of law not unlike the misconduct found in Belleville, supra; The Florida Bar v. McAtee, 601 So 2d 1199 (Fla 1992); The Florida Bar v. Dunagan, 583 So 2d 1374 (1991); The Florida Bar v. Stone, 565 So 2d 1327 (Fla 1990); The Florida Bar v. Rogers, 538 So 2d 460, 462-463 (Fla 1989), Teitelman, supra.

In The Florida Bar v. Lord, 433 So 2d 983(Fla 1983), the Court noted there are three purposes for lawyer discipline. First the judgment must protect the public. Second it must be fair to the respondent. Third it must deter others from engaging in like conduct. Based on the foregoing I recommend a suspension for a period of two years be imposed for the breach of ethics that Respondent committed.

V. **PERSONAL HISTORY:**

The Respondent is 45 years of age and was admitted to The Florida Bar on December 17, 1976.

VI. **STATEMENT AS TO PAST DISCIPLINE:**

The Respondent was privately reprimanded in an unpublished opinion in September, 1986. The Reprimand was innocuous and does not affect this decision.

VII. **STATEMENT OF COSTS OF THE PROCEEDING:**

The costs of this proceedings are as follows:

Administrative Costs [Rules 3-7.6(k)]	$500.00
Court Reporter Costs	
Grievance Hearing on 1/23/92	90.00
Conference Call on 12/8/92	45.00
Deposition of Y. Reed on 1/5/93	586.00
Final Hearing on 2/17/93 & 2/18/93	$1,457.18

Miscellaneous Costs	
Copying charges and secretarial charge (the Prudential, Florida Realty)	50.00
TOTAL	$2,728.18*

I recommend that the above costs be taxed against the Respondent.

Rendered this 4th day of March, 1993 at West Palm Beach, Palm Beach County, Florida.

Nancy Perez
NANCY PEREZ, Referee

* The Bar sought recovery of investigative costs of $51.14 which is not an assessable cost. The Florida Bar v. Neely, 540 So 2d 109 (Fla 1989).

copies furnished to:
Kevin P. Tynan, Bar Counsel, at The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309
J. David Bogenschutz, Attorney for Respondent, 600 South Andrews Avenue, Suite 500, Fort Lauderdale, Florida 33301
John A. Boggs, Director of Lawyer Regulations, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300