IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARK DOUGLAS JASPERSON

Respondent.
----------/

CASE NO. 80,394; 80,621

TFB Nos. 92-10,621;
92-10,984 (13F)

ANSWER BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the Petitioner, Mark D. Jasperson, who was Respondent below will be referred to as the "Respondent". The Florida Bar will be referred to as "The Florida Bar" or "The Bar". "TR" will refer to the transcript of the Final Hearing held on February 4, 5, and 6, 1993. "RR" will refer to the Report of Referee.

STATEMENT OF THE CASE AND THE FACTS

Jerrels Matter, Case No. 80,621:

On January 18, 1991, a joint petition for bankruptcy was filed by the Respondent, Mark Jasperson, on behalf of Michael and Cecelia Jerrels. (TR, p. 104). Respondent filed a certification with the bankruptcy court indicating that he had advised both Mr. and Mrs. Jerrels that they could proceed under Chapter 7, 11, 12, or 13 of the Bankruptcy Code and that he had explained to them the relief available under each Chapter. (TR, p. 118). Mr. Jerrels later contacted the Bankruptcy Court and stated that he had no knowledge of the bankruptcy prior to the filing and that he had not signed the bankruptcy petition. (TR, p. 73).

The Bankruptcy Court filed a Petition to Show Cause which ordered Respondent to appear and show cause why he should not be sanctioned for an alleged violation of Bankruptcy Rule 9011.(TFB Exh. 4). Rule 9011 of the Federal Rules of Bankruptcy Procedure provides in relevant part:

> The signature of an attorney ... constitutes a certificate that the attorney ... has read the document; that to the best of the attorney's ... knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law; ... and that it is not interposed for any improper purpose, such as to harass, or to cause unnecessary delay, or needless increase in the cost of litigation or administration of the case.

Mr. Jerrels testified at the show cause hearing in Bankruptcy Court, and at the Final Hearing in this cause, that he had never met nor discussed the filing of a bankruptcy petition with Respondent or with anyone in his office. Mr. Jerrels further

testified that Respondent had never informed him telephonically nor in person of the procedures under the Bankruptcy Code for Chapters 7, 11, 12, or 13, or the relief available under these Chapters. Mr. Jerrels alleged the he had not authorized his wife or anyone else to sign a petition on his behalf. (TR, p. 73). At the show cause hearing, Mrs. Cecelia Jerrels had admitted that her husband had not signed the bankruptcy petition and that she had forged his signature. She further testified that Respondent had never met or spoken with Mr. Jerrels. Although Mrs. Jerrels testified that at some time Mr. Jerrels spoke with Mrs. Brittle, an attorney at Respondent's office, her testimony was that this conversation did not occur prior to the bankruptcy petition being filed. (TR, p. 251). Mrs. Jerrels admitted that she forged Mr. Jerrels name not only on the petition, but also on the other documents. (TR, p. 251).

Based on the evidence at the show cause hearing, the Bankruptcy Court of the Middle District of Florida, Tampa Division, imposed sanctions against Respondent for violation of Bankruptcy Rule 9011. (TFB Exh. 4). The Bankruptcy Court ruled that Respondent violated Bankruptcy Rule 9011 when he falsely certified by his signature that he had informed both Mr. and Mrs. Jerrels as to the alternatives available under the Code. The Court further ruled that the blind acceptance by Respondent of the representations of Mrs. Jerrels that the purported signature of Mr. Jerrels was, in fact, his signature fell far short of the reasonable inquiry which must be made by an attorney before

certifying in a document filed in the Court that material facts are true. The Court sanctioned Respondent for his violation of Bankruptcy Rule 9011 by publication of its opinion, a fine of $500.00, and referral of the matter to The Florida Bar.

Malmen Matter, Case No. 80, 621:

Mr. and Mrs. Ronald Malmen contacted Respondent in May, 1991, because they were facing a possible foreclosure on their home. The possibility of filing a bankruptcy petition was discussed. (TR, p. 142). The Malmens returned to Respondent's office on August 8, 1991 with a signed and completed Chapter 13 Petition for Bankruptcy. (TR, p. 143). However, the Malmens' Petition for Bankruptcy was not filed until August 12, 1991, approximately one hour after the foreclosure sale of the home. (TR, p. 145).

The Malmens received a phone call from a person wanting to know how much they wanted for their home, and advising Mrs. Malmen that her home was sold at foreclosure on the courthouse steps. (TR, p. 145).

The Malmens contacted Respondent regarding the foreclosure sale. Respondent advised that he could handle the situation and

advised the Malmens of some options to consider at that time. (TR, p. 145). Respondent advised the Malmens that they could: 1) proceed with the Chapter 13 case and appeal the anticipated denial of confirmation by the Court; 2) convert the case to Chapter 7 of the Bankruptcy Code; 3) apply for a loan and give a mortgage in an amount sufficient to satisfy the foreclosure judgment amount; or, 4) obtain funds sufficient to redeem the property from the foreclosure sale by selling the property to be redeemed.

Respondent offered to purchase the property by paying the judgment amount, paying off Debtor's unsecured indebtedness of approximately $22,000, and paying an additional $5000 to the Malmens for the remaining equity in the property. (TFB Exh. 20).

The Malmens elected to sell their home to Respondent. (TR, p. 146). The agreement with Respondent was that the Malmens would sell the house to him, and that he would pay off the foreclosure judgment for NCNB Bank, pay the Malmen's unsecured indebtedness, and give the Malmens $5000.00 cash. The full purchase price listed in the contract was $135,000. (TR, p. 147). The Malmens executed the contract for sale of their home with Respondent on September 17, 1991. (TR, p. 148). Although Respondent entered into this business transaction with his clients, he did not advise them of the possibility of a conflict of interest or the need to seek separate counsel. It was not until another attorney began to oppose the redemption of the property that Respondent verbally suggested to the Malmens that they may wish to consider seeking separate counsel. (TR, p. 150).

On October 3, 1991, the Malmens executed a Warranty Deed to Mark Jasperson. (TFB Exh. 7). On October 10, 1991, Respondent filed a petition for Emergency Hearing on behalf of the Malmens, implying that the money necessary to redeem the property had been borrowed by the Malmens at eighteen percent interest. (TFB Exh. 10) The Malmens moved out of the house and left the state during the first week of November, 1991. They had already received the $5000.00 payment from the Respondent. (TR, p. 149).

The Petition for Emergency Hearing that was filed by the Respondent read:

> The Debtors have obtained new employment in Chicago and cannot move until such time as the Redemption is completed. The Debtors have paid the money necessary to redeem the property. The Clerk of the Court refuses to allow redemption of this property without an order from this Court. The Debtors are suffering a financial loss as a result of this refund, since the final judgment continues to accrue interest at twelve (12) percent. In addition, the money necessary to redeem the property has been borrowed at eighteen (18) percent interest.

Respondent did not advise the Bankruptcy Court that the $100,000.00 had been borrowed by him at eighteen percent interest and that any financial hardship was being suffered by the Respondent and not by the Malmens. After execution of the Contract for Sale and execution of the warranty deed, Respondent deposited money from a personal loan with the Clerk of the Court in the amount necessary to redeem the property.

Respondent filed a Motion to Redeem Real Property on behalf of the Malmens on October 11, 1991. (TFB Exh. 8). Respondent sought permission of the Bankruptcy Court to complete the redemption process already begun in State Court. (TFB Exh. 20). The

Bankruptcy Court was not advised of the business transactions between Jasperson and the Malmens until almost a month after the contract for sale of the property had been signed and more than three weeks after the property had apparently been transferred to Jasperson. In fact, Respondent filed a second bankruptcy petition signed for the Malmens by him as counsel, doing so after he had entered into the Contract for Sale with the Malmens. (TFB Exh. 20).

On October 24th, the Bankruptcy Court entered orders granting the Malmens' Motion to Redeem Real Property, which extended the period of time within which Debtors could redeem the property by sixty (60) days pursuant to 11 U.S.C. § 108. (TFB Exh. 11). Also, on October 24th, 1991, Respondent on behalf of the Malmens initiated an adversary proceeding by removing the state court foreclosure action to the Bankruptcy Court. (TFB Exh. 20). On October 29, 1991, the Bankruptcy Court entered its Order Granting Motion to Redeem Real Property in an adversary proceeding. (TFB Exh. 11).

On November 8, 1991, Debtors filed a Motion to Dismiss the general Chapter 13 case. (TFB Exh. 12). On November 23, 1991, the Court issued a Notice of Hearing setting the Motion to Dismiss for hearing on December 23, 1991.(TFB Exh. 20) On November 27, 1991, more than two months after the property had been transferred by warranty deed to Respondent he filed, in the general bankruptcy case, a Notice of Intention to Sell Property of the Estate and a Motion to Approve Sale of Real Property to Respondent. (TFB Exh. 13, 14).

At a hearing on December 23, 1991, the Court denied the Motion to Approve the Sale of the Real Property and granted the Motion to Dismiss the Chapter 13 case. However, the Court retained jurisdiction to consider involvement by Respondent as Debtor's counsel in the redemption and sale of the property. (TFB Exh 20).

On February 11, 1992, the Bankruptcy Court entered an Order to Show Cause against Respondent directing him to appear at a hearing to show cause why he should not be sanctioned pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure, or under other federal laws. (TFB Exh. 20). Respondent appeared at the hearing and was heard.

In an Order dated May 29, 1992, the Bankruptcy Court found that Respondent acted in bad faith in the filing of the bankruptcy petition on behalf of the Malmens on September 24, 1991. (TFB Exh. 20). The Court imposed sanctions in the amount of $20,000 and referred the case to The Florida Bar. (TFB Exh. 20).

After a finding of probable cause by the grievance committee, a complaint was filed by The Florida Bar on October 15, 1992. The Final Hearing was held on February 3, 4, and 5, 1993 before the Honorable Charles S. Carrere, Referee. The disciplinary hearing was held on February 25, 1993. The Report of Referee was served on March 10, 1993, and a Petition for Review was filed by the Respondent on April 19, 1993. Respondent's Initial Brief in support of his Petition was served on June 18, 1993.

SUMMARY OF ARGUMENT

The evidence strongly supports the Referee's finding that the Respondent violated The Rules Regulating The Florida Bar as a result of his failure to conduct any consultation with Mr. Michael Jerrels. The Rules clearly establish the duty of counsel to provide the client with sufficient information to participate in decisions concerning the objectives of the representation. The evidence is uncontroverted that Respondent never met with or spoke to Mr. Jerrels prior to the filing of the joint bankruptcy petition. Therefore, Mr. Jerrels was denied an opportunity to make an informed decision about whether to file bankruptcy. The facts of this case reaffirm the importance of counsel meeting and consulting with all parties when undertaking a joint representation. Respondent blindly accepted the representations of Mrs. Jerrels although he admitted he had no rational basis to do so. (TFB Exh. 20). At a minimum he should have spoken with Mr. Jerrels to determine whether Mrs. Jerrels had the authority to act on his behalf.

Respondent's argument of a husband/wife agency relationship is not supported by the evidence since Mr. Jerrels categorically denied that he authorized Mrs. Jerrels to act on his behalf. At the show cause hearing Mrs. Jerrels did testify that Mr. Jerrels had authorized her to sign the petition on his behalf. Notwithstanding, the issue is not whether Mr. Jerrels knew or authorized the filing of the bankruptcy petition, but whether the Respondent fulfilled his duty to communicate with Mr. Jerrels and

allow Mr. Jerrels to make an informed decision based on the advice of counsel. Respondent clearly failed to fulfill his ethical duty since he never spoke to or met with Mr. Jerrels.

Respondent did not fulfill his obligation under the Bankruptcy Rules when he filed the joint petition for bankruptcy on behalf of the Jerrels without a sufficient basis to do so. Further, he filed a certification with the Bankruptcy Court that was not true. (TFB Exh. 4). The filing of this certification and the unauthorized bankruptcy petition clearly violates Rule 4-3.1, The R. Regulating Fla. Bar, as found by the Referee.

The portion of the Referee's Report concerning violations committed by the Respondent during the Malmens' transaction is clearly supported by the evidence. (RR at p. 5, 6). The Respondent, through his own admission, failed to insure that the voluntary petition was timely filed. Although the Malmens signed the petition on August 8th, it was not filed until August 12. (TFB Exh. 17). Further, the Rules specifically require that when an attorney does enter into a business transaction the terms should be fully disclosed to the client in writing prior to the transaction being completed. (Rule 4-1.8(a), R. Regulating Fla. Bar). The evidence is uncontroverted that Respondent failed to provide written notice or receive written consent from the Malmens prior to entry of the Contract for Sale. (TR, p. 151, 152). Additionally, Respondent deposited the necessary funds to redeem the property with the Clerk and provided the Malmens with $5000.00 during the pendency of the bankruptcy. Such actions are clearly in violation

of Rules 4-1.8(a) and 4-1.8(e).

The Respondent's failure to disclose to the bankruptcy court the transfer of title of the major asset from the Malmens to himself during the pendency of the bankruptcy is clearly established by the evidence. Such nondisclosure is totally inconsistent with any provision of Chapter 13 of the Bankruptcy Code. (TR, p. 40). Although Respondent's failure to carry malpractice insurance would not constitute a rule violation, such evidence would be admissible to establish Respondent's motives for his actions. However, evidence of Respondent's lacking malpractice insurance was not admitted until the discipline hearing. The Referee had already found that Respondent violated the Rules prior to this evidence being admitted. The record is replete with evidence, notwithstanding the malpractice issues to support the Referee's findings that Respondent violated Rules 4-1.3, 4-1.8(a), and 4-1.8(e).

Respondent filed a bankruptcy petition on behalf of the Malmens on September 24, 1991, approximately seven days after the Contract for Sale had been entered. The Respondent filed a Request for Emergency Hearing on behalf of the Malmens implying to the Court that the Malmens had borrowed the money to redeem the house even though he knew this was untrue. The actions of Respondent demonstrate his specific intent to mislead the Bankruptcy Court.

The Respondent filed a Motion to Approve the Sale and a Notice of Intent to Sell with the Court even though the sale of the property had already occurred and title had been transferred. This

continuing behavior by the Respondent demonstrates serious, intentional violations of Rule 4-3.3, lack of candor toward the tribunal, as found by the Referee.

ARGUMENT

I. THE REPORT OF REFEREE IS NOT ERRONEOUS AND IS SUPPORTED BY THE EVIDENCE ADDUCED AT THE HEARING BECAUSE RESPONDENT FAILED TO FULFILL HIS DUTIES AND RESPONSIBILITIES TO FULLY INFORM AND EXPLAIN THE BANKRUPTCY PROCEDURES AND RAMIFICATIONS TO MR. JERRELS.

The record fully supports the Referee's conclusion that Respondent violated the ethical rules requiring him to explain the bankruptcy procedures and ramifications to his client, Mr. Jerrels, so as to assist him in making an informed decision of whether to file bankruptcy. The evidence is uncontroverted that Respondent failed to conduct even one consultation, in person or telephonically with Mr. Jerrels to ascertain the wishes of his client. (TR, p. 118). This fact was clearly established not only at the show cause hearing in Bankruptcy Court, but at the final hearing in this cause. Although, it may be true that Respondent did a commendable job of explaining matters to Mrs. Jerrels, he undertook a joint representation.

A. The Referee did not err in concluding that Respondent violated ethical rules in the Jerrels matter because there was clear and convincing evidence that Respondent failed to explain matters to Mr. Jerrels and did not abide by Mr. Jerrels decision.

Respondent acted on behalf of Mr. Jerrels without determining whether Mr. Jerrels wished to engage his legal services and that he understood the nature of bankruptcy proceedings.

Respondent argues that the actions that he took in representing Mr. Jerrels are supported by Rule 4-1.4 (comment section), R. Regulating Fla. Bar, which addresses situations where practical exigency require a lawyer to act for a client without

prior consultation. However, this argument is flawed due to the eleven (11) day time period between the initial consultation with Mrs. Jerrels and the latest date on which the bankruptcy petition could be filed. (TR, p. 101). Respondent indicates that Mrs. Jerrels came to his office on three separate occasions without her husband. (TR, p. 115). Surely, Respondent had a duty to question whether Mr. Jerrels was committed to the bankruptcy procedure.

Respondent also argues that Mr. Jerrels was personally served with a summons and complaint regarding the foreclosure proceeding. (Respondent's Exh. 2). Again, this argument may by characterized as a "red herring". The issue is not whether Mr. Jerrels knew or authorized the bankruptcy filing. The issue for this Court and which the Referee determined was whether the Respondent complied with his ethical obligation to fully inform and ensure that his client made an informed decision. The evidence strongly supports the Referee's conclusion that the Respondent violated Rule 4-1.2(a) and Rule 4-1.4, R. Regulating Fla. Bar. As this Court has previously stated, "It is the function of the Referee to weigh evidence and determine its sufficiency, and the Supreme Court will not substitute its judgment for the referee unless it is clearly erroneous or lacking evidentiary support. The Florida Bar v. Weiss, 586 So. 2d 1051, (Fla. 1991).

Finally, the Respondent argues that the his actions are supported under a theory of "agency". Although Florida Law does recognize instances where a wife may act as the agent of her husband, it is permissive in nature. Florida Statute § 708.9

states in part, " a married woman may execute powers conferred upon her by her husband.....". Fla. Stat. § 708.09 (1991).

It is clear that the wife only has this authority if conferred upon her by her husband. Mr. Jerrels categorically denies that he ever conferred the authority to file bankruptcy on his behalf to his wife and clearly did not confer the authority to do so to the Respondent. (TR, p. 73). Respondent failed to address whether such authority if granted to Mrs. Jerrels could have been transferred to him. Nevertheless, Respondent had an ethical duty to determine whether Mrs. Jerrels had Mr. Jerrels' authority rather than to assume that she did just by nature of the fact she was his wife. Respondent admitted that he had no other basis for reliance on Mrs. Jerrels representation. (TFB Exh. 20). However, the fact is the Respondent failed to comply with his obligation to communicate with Mr. Jerrels regardless of any authority Mrs. Jerrels may have had to act on her husband's behalf.

B. The Referee's report contains clear findings of fact establishing rule violations and is not erroneous.

The Report of Referee includes findings of fact as to each item of misconduct of which the Respondent is charged and therefore complies with the requirements of Rule 3-7.6(k)(1)(a), R. Regulating Fla. Bar. In the case under review, the item of misconduct relates to the Respondent and his failure to provide legal services in accordance with Rule 4-1.2(a), 4-1.4(b), and 4-3.1 to Mr. Michael Jerrels and the bankruptcy court.

Respondent argues that the Referee relied solely on the

bankruptcy court's finding that Respondent failed to conduct a "reasonable inquiry" which is not a requirement under The Rules Regulating The Florida Bar. However, Rule 4-1.4 does require that Respondent explain matters to his client to the extent necessary for the client to make an informed decision. Since Respondent failed to meet or speak with Mr. Jerrels prior to filing the bankruptcy petition, he is guilty of violating this Rule.

The Referee's finding is as follows: Respondent did not fulfill his duties and responsibilities to Michael Jerrels in the areas of sufficiently meeting with a client to explain the parameters of a bankruptcy action, together with the potential benefits and detriments. (RR at p. 5).

This Finding of Fact made by the Referee relates to the same subject matter and parties which are contained in that the count of the complaint filed by The Florida Bar. The Referee further found that Respondent did not fulfill his responsibility to the client and to the bankruptcy court to ascertain whether or not the purported signature of Michael Jerrels on certain bankruptcy papers were authentic. (RR at p. 5).

II. THE PORTION OF THE REPORT OF THE REFEREE CONCERNING THE MALMENS IS NOT ERRONEOUS AND IS SUPPORTED BY THE EVIDENCE ADDUCED AT HEARING BECAUSE THE REFEREE DID NOT CONSIDER INADMISSIBLE EVIDENCE OR MATTERS OUTSIDE THE RECORD. THERE WAS CLEAR AND CONVINCING PROOF THAT RESPONDENT VIOLATED THE ETHICAL RULES BY ENTERING INTO A CONTRACT FOR SALE WITH THE MALMENS WITHOUT FULL DISCLOSURE AND AN OPPORTUNITY TO SEEK INDEPENDENT COUNSEL.

The record does not support Respondent's claim that the Referee considered inadmissible evidence to support his conclusion that Respondent violated the ethical rules. The admission by

Respondent that he failed to carry malpractice insurance was during the disciplinary hearing, which took place after the Referee had ruled that the Respondent was guilty of violating the Rules Regulating The Florida Bar.

Respondent further challenges the Referee's findings that: 1) Respondent did not act diligently in his handling of the Malmen matter; 2) Respondent violated the Rules by entering into a contract with the Malmens to purchase their residence, and 3) that Respondent knowingly made a false statement of material fact or law to the bankruptcy court. As this Court has previously held, "A Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support." The Florida Bar v. Stalnaker, 485 So. 2d 815, 816 (Fla. 1986).

A. The referee did not consider inadmissible evidence and evidence of Respondent's lack of malpractice insurance considered by the Referee in discipline proceedings did not result in the Referee improperly concluding that ethical rule violations occurred.

The Referee made factual findings based on the record before him. Although the Referee considered as evidence information included in the bankruptcy court orders, those orders were relevant as to the nature of the proceedings in which the alleged violations occurred, and for the purpose of formulating a conclusion as to guilt of the Respondent.

Because Bar Disciplinary proceedings are quasi-judicial, rather than civil or criminal, the Referee is not bound by the technical rules of evidence. The Florida Bar v. Rendina, 583 So. 2d 314 (Fla. 1991). Referees are authorized to consider any evidence,

such as the trial transcripts or judgements from a civil proceeding, that they deem relevant in resolving the factual question. The Florida Bar v. E. C. Rood, No. 78,742, (Fla. June 24, 1993). Additionally, the Referee considered the bankruptcy court orders in light of the Respondent's own testimony and the truthfulness thereof. The Respondent implied at the Final Hearing that Judge Baynes, Bankruptcy Court Judge, allowed him to redeem the property without objection. (TR, p. 206). After that point, the Referee conducted inquiry of the Respondent based on the court order which evidenced a scenario totally contrary to that which the Respondent was presenting the court. (TR, p. 209, 211). In The Florida Bar v. Greer, 541 So. 2d 1149 p. 1142 (Fla. 1989), this Court recognized Referee's unique position as trier of fact:

> While there are some inconsistencies in the version of events as presented by Greer and the version of events presented by the witnesses, the Referee is in a better position to make determinations concerning a witness's credibility because he is privileged to observe the witness's demeanor while we are forced to review the cool transcript of proceedings.

In the instant case, the Referee recognized that the Respondent was expressing an opinion of the bankruptcy proceeding in the Malmen matter contrary to what was expressed in the bankruptcy court order. Since one of the alleged violations dealt with candor towards a tribunal, the bankruptcy court orders were definitely relevant and also admissible.

During closing argument the Court conducted inquiry with Respondent's counsel as to alternative methods for resolving the Malmen matter. This occurred as a result of Counsel's argument

that Respondent's actions were motivated by an interest to benefit his clients. Subsequently, the Court conducted inquiry in an attempt to further ascertain Respondent's choice or methods to rectify an admitted malpractice situation. (TR, p. 41). At no point did the Referee make a ruling which indicated that his findings of violations by the Respondent were based upon the existence or lack thereof of malpractice insurance. In fact, there was no evidence presented to support Respondent's lack of malpractice insurance until after the Referee found Respondent guilty of violating the Rules.

B. The Referee did not err in concluding that Respondent violated ethical rules in the Malmen matter because there was clear and convincing evidence that Respondent failed in his duty to act with reasonable diligence and promptness, improperly entered into a business transaction with his clients, and misled the court.

The evidence at trial clearly established that there was not an exercise of due diligence in the filing of the Malmens' bankruptcy petition. The Malmens were aware of the August 12th date that was set to sell the property and therefore, signed the voluntary petition on August 8, 1991. In fact, when they initially consulted with Respondent in May, the foreclosure suit had already been filed. (TR, p. 165). When the Malmens signed the voluntary petition on August 8th, there was sufficient time to prevent the home from being sold through foreclosure. However, the petition was filed late and the Malmen's house was sold.

The Respondent failed to comply with Rule 4-1.8(a) in that he did not fully disclose the conflict of interest in this real estate

transaction, and give them an opportunity to seek counsel until after the contract for sale had been signed. (TR, p. 151). Even after the contract for sale was entered into and the warranty deed was executed, Respondent verbally mentioned separate counsel with the Malmens, never executing a written document as required by the Rule.

The Respondent provided financial assistance to the Malmens in two instances. First, he deposited his own funds in the Court Registry for the purpose of redeeming the property and second, he gave the Malmens $5,000 with which to leave the state prior to dismissal of the bankruptcy proceedings. (TR, p. 202, 150).

The Respondent argues that although the contract for sale had been executed, the warranty deed had been executed, and the deed was in his possession, the transfer had not occurred. Undeniably, the Malmens had left the state with no intentions of returning, the deed was in Respondent's possession, and the Respondent had invested approximately $110,000 through the court deposit and payment to the Malmens. Yet, Respondent continues to assert that title had not been transferred even though he offered no evidence of a written clause in the contract or by separate instrument reserving the right of either party to cancel the contract.

The Referee did not solely rely on the findings of the bankruptcy court in determining that Respondent made numerous misrepresentations to the Bankruptcy Court. The documentary evidence attached to the record fully supports Respondent's guilt of this violation. The numerous pleadings that were filed by the

Respondent after the title transferred clearly established his intentional misrepresentations made to the Court. (TFB Exh. 9, 13, 14, 20).

Respondent alleges that the transaction was fair to all concerned. However, this conclusion is not supported in the record. Although the purchase price was listed in the contract as $135,000 the actual purchase price was much less. This purchase price included a $22,000 indebtedness to credit card companies which was to be paid by Respondent. (TR, p. 146).

In fact, the Respondent negotiated with the credit card companies without advising them that he had assumed responsibilities for these debts. As a result, the claims were settled at an amount significantly less than $22,000, thereby reducing the of $135,000 purchase price listed in the contract. (TR, p. 224). The detrimental effect of a negative credit report as a result of settling claims at a lesser amount was never discussed with the Malmens. (TR, p. 176).

III. THE RECOMMENDED DISCIPLINE OF A PUBLIC REPRIMAND AND ONE YEAR SUSPENSION FROM THE PRACTICE OF LAW IS NOT EXCESSIVE UNDER THE CIRCUMSTANCES AND SHOULD BE UPHELD.

The Referee found that the Respondent was guilty of violating Rules 4-1.2(a), 4-1.4(b), and 4-3.1 as to the matter involving Michael and Cecelia Jerrels. The Referee also found that Respondent violated Rules 4-1.3, 4-1.8(a), 4-1.8(e) and 4-3.3. (RR at p. 5). In spite of these numerous violations, Respondent argues that a public reprimand and a one year suspension is too severe of a punishment to be imposed. To the contrary, the serious nature of each violation fully supports the recommended discipline. As this Court held in The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993)

> The integrity of the individual lawyer is the heart and soul of an advisary system. In the ultimate analysis our system depends on the integrity, honesty, moral soundness and uprightness of a lawyer. Lawyers who commit serious transgressions forfeit their privilege of being officers of the Court.

In Winderman, the Respondent undertook representation of multiple clients. He failed to communicate with his clients and ultimately missed a filing deadline of May 26, 1990. Through separate letters dated May 24, 1990, Winderman advised his clients that he was withdrawing from their case. On June 19, 1990, he filed a Motion to Withdraw, falsely asserting that his clients requested that he do so. This Court suspended Winderman from the practice of law for one year.

In the case at bar, the Respondent's actions in the Malmen matter were a total sham on the bankruptcy court. These actions were not consistent with the purpose of the bankruptcy proceeding

and effectively stripped the bankruptcy court of its power. (TR, p. 70). Respondent relies heavily on The Florida Bar v. McLawhorn, 535 So. 2d 602 (Fla. 1988), to support his position that the recommended discipline is too severe. However, that case is distinguishable based on its facts. First, McLawhorn advised the court about the misrepresentation prior to proceeding with the hearing. Second, McLawhorn did not continuously file pleadings in furtherance of the misrepresentation. Id.

In the instant case, Respondent failed to advise the Court of the misrepresentation until confronted with opposition by another party. (TFB Exh. 20). Second, Respondent initiated the action in the bankruptcy court to facilitate his own interest, providing no benefit to the clients since the Malmens' interests were protected after the execution of the warranty deed. Finally, Respondent continuously filed false or misleading documents with the court in the form of Motion to Approve Sale, Notice of Intent to Sell and Request for Emergency Hearing. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct was found to be grounds for disbarment in The Florida Bar v. Manspeaker, 428 So. 2d 241 (Fla. 1983).

Respondent further argues that his clients were not harmed by his representation and he acted in their best interest at all times. The Florida Standards for Imposing Lawyer Sanctions recognizes not only actual harm to the client but potential harm as well. The potential harm that could have occurred and did occur in both the Jerrels and Malmen case is clear. Mr. Jerrels testified

that he has suffered financially resulting from the expense of trying to correct his credit record. Mrs. Malmen testified that the whole experience caused her emotional stress.

In The Florida Bar v. Kickliter, 559 So. 2d 1123 (1990), the respondent was representing a client on his death bed. The client advised the attorney that he wished to change his will in favor of the grand- children as opposed to in favor of the son. The same day that the client advised the attorney of his wishes the attorney went to his office and prepared the will accurately reflecting the wishes of his dying client. Unfortunately, the client died before he was able to sign the new will. The attorney, with no apparent fraudulent motive signed the will on behalf of the client expressing the client's wishes as they were expressed to him and had two witnesses notarize the signature. The Court ruled that the attorney should be disbarred.

The Court expressed that there was fraud at the inception when the attorney fraudulently signed the document, but the Court also noted that on several occasions throughout the attorney had an opportunity to correct the fraud on the court and chose not to do so. Id.

Finally, the Respondent argues that he should not be disciplined because Mrs. Jerrels signed the Petition for Bankruptcy instead of Mr. Jerrels. The Respondent was not charged nor disciplined for the act of Mrs. Jerrels. The Respondent violated the rules and should be disciplined because he fraudulently certified that he explained the bankruptcy procedures and

ramifications to both Mr. and Mrs. Jerrels. If Respondent had performed his duty to Mr. Jerrels and then Mrs. Jerrels signed the petition there would have been no violation. The signature of the clients also serves as a protection to the attorney because it acknowledges that the Respondent performed his duty of communication. Respondent violated the Rules and should be disciplined because he failed to communicate with Mr. Jerrels and filed a petition on behalf of Mr. Jerrels even though he had no good faith basis for doing so. For this behavior the Respondent should be disciplined as recommended by the Referee.

The Florida Standards for Imposing Lawyer Sanctions, Section 6.11 reads:

> Disbarment is appropriate when a lawyer: (a) with the intent to deceive the Court, knowingly makes a false statement or submits a false document or (b) improperly withholds material information, and causes a significant or potentially significant adverse effect on a legal proceeding .....absent aggravating or mitigating circumstances.

The Referee considered the absence of a prior disciplinary record of the Respondent when he made his recommendation of discipline. Additionally, Respondent was relatively new to the practice of law. In light of the lack of prior disciplinary record of the Respondent and his recent entry to the practice of law, The Bar did not petition for review of the recommended one year suspension.

CONCLUSION

The recommended discipline of a public reprimand and one year suspension is totally and fully supported by the record. The Referee made findings of fact as to the violations charged and expressed those findings in the form of issues to be resolved. Upon review, Respondent had the burden to demonstrate that this Report of Referee is erroneous, unlawful, or unjustified. Rule 3-7.7(c)5, R. Regulating Fla. Bar. Respondent has failed to meet this burden. In light of the serious nature of the violations, previously decided cases, together with The Florida Standards for Imposing Lawyer Sanctions, the recommendation for a public reprimand and a one year suspension is an appropriate discipline and should be upheld.

WHEREFORE, The Florida Bar respectfully requests that this Court deny the Petition for Review, and affirm the Referee's Findings of Fact, and Recommendation of a public reprimand and a one (1) year suspension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail, on July 2, 1993, to Mr. Joseph F. McDermott, 445 Corey Avenue, St. Petersburg, Florida 33706-1901, and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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