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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WILLIAM T. CHARNOCK,

Respondent.
_____/

Case No. 81,857
[TFB Case No. 93-30,100 (05B)]

ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The Report of Referee dated October 13, 1994, will be referred to as "RR."

The two volume transcript of the final hearing held on February 11, 1994, shall be referred to as "T. 2/11/94, Vol." followed by the appropriate volume number, in Roman numerals, and the appropriate page or pages. The transcript of the final hearing held on March 30, 1994, shall be referred to as "T. 3/30/94, Vol." followed by the appropriate volume number, in Roman numerals, and the appropriate page or pages.

Bar exhibits introduced into evidence at the final hearing shall be referred to as "B-Ex." Exhibits attached to the grievance committee transcript will be referred to in the numerical order in which they were received in the committee hearing and will be preceded by the designation "B-Ex. A."

Respondent's exhibits introduced into evidence at the final hearing shall be referred to as "R-Ex."

STATEMENT OF THE CASE

The Fifth Judicial Circuit Grievance Committee "B" voted to find probable cause in this matter on February 11, 1993. The bar filed its formal complaint on June 1, 1993. The referee was appointed on June 11, 1993. The evidentiary portion of the final hearing was held on February 11, 1994, and March 30, 1994. The hearing on arguments as to discipline was held on September 8, 1994. The referee issued his report on October 13, 1994, recommending the respondent be found guilty of violating rules 4-4.4 for using means that had no substantial purpose other than to embarrass, delay or burden a third person, 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and 4-8.4(d) for engaging conduct that was prejudicial to the administration of justice. He recommended the respondent be found not guilty of violating rules 4-1.3, 4-3.3(a), 4-3.4(b), 4-4.1, 4-5.3, 4-8.4(a) and 4-8.4(b). The referee recommended the respondent be suspended from the practice of law for 90 days.

After considering the report at its November, 1994, meeting, the Board of Governors of The Florida Bar voted not to seek an appeal of the referee's findings and recommendations. The respondent served his petition for review on November 21, 1994, wherein he sought this court's review of the referee's findings of fact and recommendations as to guilt and discipline. On December 19, 1994, he moved for an extension of time to file his

initial brief. The respondent was granted an extension until January 3, 1995. The respondent served his initial brief on January 3, 1995. The bar would note that its copy was not mailed by respondent's counsel until January 4, 1995.

STATEMENT OF THE FACTS

Respondent's statement of the facts in his initial brief contains irrelevant material without supporting citations to the record. The following facts, unless otherwise noted, are derived form the report of referee.

The respondent represented a Dutch consortium known as Pelycado Onroerend Goed, B.V. The respondent also maintained a power of attorney to act on behalf of the company and had the right to negotiate and enter into lease agreements for its real estate properties located in Hernando County, Florida. Pelycado purchased certain residential property that was located across the street from the respondent's residence. A mechanic's lien was filed against the property which became the subject of a foreclosure action. Neither the respondent nor his client had notice of the foreclosure action due to the plaintiff's attempt to use the long arm statute to effect service of process. A motion for summary judgment was granted without the knowledge of either the respondent or his client and on March 19, 1992, Gary Schraut purchased the property at a judicial sale. On March 30, 1992, a certificate of title was issued to him. Upon going to the property, Mr. Schraut found the residence was occupied by vacationers. They were told that they would need to leave after their vacation period ended.

The respondent accidentally learned of the legal action involving his client's property on March 31, 1992. After

advising his client, the respondent filed a motion to quash service of process, motion to set aside foreclosure sale and motion to deny purchase or possession on April 1, 1992. That same day, the court, sua sponte, entered its order to stay. On May 13, 1992, the court ordered the parties to mediation. After an impasse was reached, the court entered an order on July 13, 1992, denying the three motions filed by the respondent on behalf of his client. On July 15, 1992, the court entered an order approving and confirming the issuance of the writ of possession. The writ of possession was issued dated July 15, 1992.

In or around July, 1992, the respondent met Todd Shoen. Mr. Shoen worked for a friend of the respondent. Mr. Shoen's employer asked the respondent if he could assist him in locating housing for Mr. Shoen. The respondent offered to allow Mr. Shoen to stay at his own home until he could find suitable housing. Mr. Shoen accepted the respondent's offer.

On July 13, 1992, opposing counsel in the foreclosure action faxed to the respondent's office the court's order denying the respondent's motion to quash and set aside the foreclosure. As of July 15, 1992, the respondent was aware of the order's existence and that a lifting of the stay of the writ of possession would be forthcoming. On July 15, 1992, the respondent contacted his client and with its authorization retained another law firm to pursue an appeal. In discussions with the appellate attorneys, the respondent became aware of the provisions of Florida Rule of Civil Procedure 1.580. Although

the respondent testified that one of the appellate attorneys advised him to "put someone in possession of the property," the referee specifically found that this was not supported by the evidence. The referee found that the respondent contacted Mr. Shoen about renting the residence after he became aware of the provisions of Rule 1.580. They entered into an oral contract that would allow Mr. Shoen to occupy the home for two weeks at the rental sum of $300. The referee specifically found that the decision to put a tenant or someone in possession of the property was the respondent's decision.

The respondent instructed his secretary to prepare an affidavit for Mr. Shoen on July 15, 1992. Later that evening, the respondent, accompanied by one his secretaries, met with Mr. Shoen so he could execute the affidavit. The affidavit was necessary in order to implement Rule 1.580. The respondent did not review the affidavit prior to presenting it to Mr. Shoen and after introducing Mr. Shoen to his secretary, departed the area.

On July 16, 1992, a member of the respondent's staff delivered Mr. Shoen's affidavit to the sheriff of Hernando County. On that same date, Mr. Schraut, accompanied by a deputy sheriff, proceeded to the property with the writ of possession. Upon entering the home, Mr. Schraut determined that no one was occupying it. He then observed a man across the street and upon approaching learned that he was Todd Shoen. The referee found that Mr. Shoen and the respondent had entered into an oral rental agreement and the respondent did not engage in any conduct to

procure perjury or a false affidavit and that Mr. Shoen had constructive possession of the property. Mr. Shoen was in a position to enforce his right to possession.

The referee found that the respondent fabricated and created a tenant relationship which had no substantial purpose other than to delay the transfer of actual possession pursuant to the writ of possession. The respondent's conduct was deceitful and accomplished without notice to or the knowledge of the third party. In addition, the respondent attempted to shift the blame for his actions in procuring and putting Mr. Shoen in possession by testifying that another attorney told him to take this action. The referee specifically found that the respondent's testimony in this respect was not truthful.

SUMMARY OF THE ARGUMENT

The respondent seeks to attack the referee's findings, conclusions and recommendations as to guilt and discipline. The bar submits the referee's findings of fact are well supported by the evidence and testimony. That he chose not to believe the respondent does not make his findings incorrect. The referee acts as this court's fact finder and because he is in the best position to determine credibility through observing the demeanor of the witnesses, his findings come to this court clothed with a presumption of correctness.

Although a referee's legal conclusions are subject to broader review, the bar submits that in this case the referee's report shows he gave serious consideration to his conclusions. The evidentiary portion of the final hearing lasted two (2) days and the respondent was well represented by his two (2) attorneys. Additionally, the referee requested both parties provide him with written closing arguments. There is no evidence the referee's legal conclusions were hastily drawn or ill-advised. They were well reasoned and based upon all the testimony and evidence presented to him.

Because this court has the ultimate responsibility for imposing the appropriate level of discipline, a referee's recommendation as to discipline is subject to broader review than the findings. The particular facts presented by this case are unique. The misconduct, however, is not. The referee

specifically found the respondent's conduct was deceitful and prejudicial to the administration of justice. The respondent misused the legal system to try and gain an advantage for his client. The case law and standards indicate that a suspension is the appropriate level of discipline for an attorney who engages in deceitful conduct that is prejudicial to the administration of justice. What suffered the greatest damage as a result of the respondent's action was the image of the legal profession.

ARGUMENT I

THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

Merely as a point of clarification, the bar would note that page 13 of the respondent's initial brief contains a typographical error. The appellate attorneys in Tampa for whom the respondent sought advice were Vetter and Anderson rather than Best and Anderson.

The respondent challenges the referee's findings of fact and conclusions of law. Specifically, he challenges the referee's finding that he tried to excuse his conduct by testifying that it was Vetter and Anderson who told him to put someone in possession of the property in order to delay the enforcement of the writ of possession. The respondent also challenges the referee's legal conclusion that he misused Florida Rule of Civil Procedure 1.580 merely to delay the enforcement of the writ of possession.

In challenging a referee's findings of fact, a party carries a heavy burden because, in order to succeed, it must be shown there was no evidence in the record to support the referee's findings or the record evidence clearly contradicted the conclusions, The Florida Bar v. Rue, 643 So.2d 1080, 1082 (Fla. 1994). A referee's findings of fact carry a presumption of correctness and this court is precluded from reweighing the evidence and substituting its judgment for that of the referee, Rue, supra. This court's review of a referee's findings is not

in the nature of a trial de novo, The Florida Bar v. Niles, 644 So.2d 504,506 (Fla. 1994).

The referee had the benefit of observing the respondent's demeanor while testifying and of comparing it to the transcript of his prior testimony before the grievance committee (B-Ex A) and to the other evidence and testimony. The referee simply found the respondent's testimony concerning the advice given to him by the appellate attorneys, Vetter and Anderson, to be untruthful (RR. p. 6). It is the referee's duty to resolve the inevitable conflicts in the testimony and evidence, The Florida Bar v. Hayden, 583 So.2d 1016,1017 (Fla. 1991). The bar submits the evidence supports the referee's findings.

According to the respondent's own testimony, Charlotte Anderson, one of the appellate attorneys the respondent hired on behalf of his client, told him to "[g]et someone in possession of the property. Get someone to lease the premises,"(T. 2/11/94, Vol. II p. 200). The respondent qualified his answer by stating that he spoke to both Ms. Anderson and Ms. Vetter and was not certain which of the two made the statement. One of them called his office staff and gave them instructions concerning the preparations of a tenant's affidavit (T. 2/11/94, Vol. II, p.p. 200-204). According to the respondent, the idea of putting someone in possession of the property was that of the appellate attorneys and not his (T. 2/11/94, Vol. II, p. 201). He also testified it was the appellate attorneys who told his office staff to place a note on the door of the subject property

directing inquiries to the respondent and prohibiting entry (T. 2/11/94, Vol. II, p. 228). The respondent then stated he doubted any of his staff posted this note and theorized that Mr. Cario and Mr. Schraut were mistaken about what the note said and that they had it confused with the writ of possession (T. 2/11/94, Vol. II, p. 229). The respondent admitted only that it was his idea to lease the home to Mr. Shoen and prepare an affidavit for him (T. 3/30/94, Vol. II, p. 173).

Similarly, the respondent testified at the grievance committee hearing held on February 11, 1993, that the appellate attorneys told him to "put someone in possession" because the issuance of an order releasing the stay of the execution of the writ of possession was imminent (B-Ex. A p. 45).

Ms. Anderson stated in her affidavit that when she asked the respondent if the property was currently leased and occupied by tenants, he told her it was. Only then did she tell him that Florida Rule of Civil Procedure 1.580 appeared to be applicable to the situation. At no time did she tell him to seek a person to place in possession of the property if no one currently had possession of it (B-Ex. D). Clearly, the referee chose to believe Ms. Anderson's version of the events over the respondent's.

This court's scope of review of a referee's legal conclusions is somewhat broader than that of the findings of fact, The Florida Bar In re Inglis, 471 So. 2d 38 (Fla. 1985). The bar submits the referee's conclusion that the respondent's

conduct was deceitful and prejudicial to the administration of justice was correct and supported by the evidence. The referee found that the respondent was not entitled to procure a tenant and put him in possession of the property to invoke Florida Rule of Civil Procedure 1.580 once the respondent knew the stay of the issuance of the writ of possession had been lifted (RR. p. 6).

The testimony of Jefferey Cario and Sue Bess clearly established that on July 15, 1992, at approximately 9:30 a.m. the order directing the issuance of the writ of possession was transmitted by facsimile to the respondent's office as directed by the court (T. 2/11/94, Vol. II, p.p. 157-159, 164, 177; B-Ex. C). The respondent's secretary, Ruth Ann Applegate, testified that although she recalled the initial transmission from Mr. Cario's office being incomplete, she could not recall if it was resent (T. 3/30/94, Vol. I, p.p. 116-118). Her further testimony indicated the facsimile was successfully received in full because R-Ex. G appeared to have been a facsimile of the unsigned order (T. 3/30/94, Vol. I, p.p. 119-120). This is in contrast to the respondent's assertion that he did not receive Mr. Cario's facsimile but did receive the order on July 15, 1992 (T. 2/11/94, Vol. I, p.p. 192,197).

The respondent testified at some variance that he received the actual writ of possession on July 13, 1992 (T. 2/11/94, Vol. II, p. 193). But then stated he never received the writ but rather received an order on July 13, 1992, directing the writ be prepared (T. 2/11/94, Vol. II, p. 197). The order itself was

executed on July 13, 1992, and the certificate of service shows it was sent by the trial court to the respondent on that date. It directed Mr. Cario's firm to prepare an order issuing the writ of possession and disbursement. The writ was executed by the clerk on July 14, 1992. A copy of the proposed (i.e. unsigned) order vacating lis pendens and order of disbursement was sent by facsimile to the respondent on July 15, 1992. The order approving and confirming the issuance of the writ was executed on July 15, 1992. All of the above information was contained in the record on appeal for Pelycado Onroerend Goed, BV v. Rothenberg.

Mr. Shoen had been residing with the respondent since July 10, 1992 (T. 2/11/94, Vol. II, p.p. 204-205), but it was not until after the respondent knew the stay of the writ of possession had been lifted that he decided to lease the subject home to Mr. Shoen. Yet, the respondent's testimony indicated that he believed he had the authority to lease the property while the stay was in effect (T. 2/11/94, Vol. II, p.p. 211-212). The respondent knew that by having Mr. Shoen in possession of the property, he could delay the transfer of physical possession to Mr. Schraut because Mr. Schraut would need to initiate an eviction proceeding (T. 2/11/94, Vol. II, p. 245). The respondent believed that if possession could be delayed, his anticipated appeal stood a greater chance of succeeding (T. 3/30/94, Vol. II, p. 158). The respondent wanted to accomplish two (2) things by his actions: remove Mr. Shoen from his home and stay the execution of the writ of possession (T. 3/30/94, Vol.

II, p. 176). The bar submits the respondent's creation of the lease to Mr. Shoen was nothing more than a frustrative legal maneuver to stay execution of the writ of possession and obtain a court hearing pursuant to Florida Rule of Civil Procedure 1.580 so as to give the respondent time to file an appeal to have the foreclosure sale rescinded. Rule 1.580 provides that if any tenant is in residence and occupancy of the subject property, the tenant can retain possession by filing with the sheriff an affidavit stating the tenant's entitlement to possession and specifying the nature of the claim. Thereupon, the sheriff will desist from enforcing the writ until the party who caused the issuance of the writ applies to the court for an order directing the sheriff to complete his execution.

The respondent already had obtained one stay of the writ's execution but the trial court, after considerable litigation, found against his client. The bar submits the respondent's conduct was nothing more than an example of "sharp practice" where he knew the court would order the transfer of possession go forward. The respondent could have filed his notice of appeal without resorting to creating a tenant relationship after the stay of the writ had been dissolved. The difference is this would not have resulted in Mr. Schraut incurring additional expenses in initiating an eviction action and paying counsel to attend yet another hearing. The respondent had a right to disagree with the trial court and, ultimately, his client did prevail on appeal. It is the bar's position, however, that the

ends do not justify the means. The judicial system is founded on the principle that "disagreements with the application of law can be corrected by appeals, by collateral attacks, or by petition to the legislature for a change in the law. No attorney is ever privileged to arrogate to himself or herself the right to say with finality what the law is. That prerogative inheres in the courts. Without this principle, our legal system would fall into shambles." Dissenting opinion of Justice Barkett in The Florida Bar v. Wishart, 543 So. 2d 1250, 1253 (Fla. 1989).

The respondent misused rule 1.580. The referee found his actions were deceitful and accomplished without notice to or the knowledge of Mr. Schraut (RR. p.6). The respondent's conduct was prejudicial to the administration of justice (RR. p.6).

> The administration of justice is a service rendered by the State to the public and exacts of those who engage in it the highest degree of confidence and good faith... We practice law by grace, not by right. The privilege to practice law is in no sense proprietary. The State may grant it or refuse it, or it may withdraw it from those who abuse it... The administration of justice ... contemplates the righteous settlement of every controversy that arises affecting the life, liberty, or property of the individual ... The administration of justice is the business of the public. Members of the bar are stewards commissioned to perform that business. There stewardship will be successful in proportion to the manner in which they take the public into their confidence and perform it with a fidelity alike to the State, to client and to the profession ... [I]n the conduct of his profession, he will do nothing that will reproach the administration of justice. Lambdin v. State, 9 So. 2d 192, 193 (Fla. 1942).

Obstructing the administration of justice includes

activities which undermine the legitimacy of the judicial process, The Florida Bar v. McLawhorn, 505 So. 2d 1338, 1341 (Fla. 1987). The respondent knew before he entered into the oral lease with Mr. Shoen that the stay had been dissolved by the court and the writ would be issued as soon as possible. Rather than filing the notice of appeal, something for which a delay was not needed, he thrust Mr. Shoen, an innocent bystander, into the middle of an ongoing controversy that resulted in Mr. Shoen being interviewed by an investigator with the State Attorney's Office (B-Ex. A 3) and enduring considerable anxieties about a situation not of his own making (T. 3/30/94, Vol. I, p.p. 89-95).

A frivolous claim has been defined, in part, as being one that is readily recognizable on the face of the record as being so devoid of merit that there is little, if any, prospect whatsoever that it can succeed, Wiggins v. Southern Management Corp., 629 So. 2d 1022,1025 (Fla. 4th DCA 1993), quoting Whitten v. Progressive Casualty Insurance Co., 410 So. 2d 501 (Fla. 1982). The bar submits the respondent knew his claim that Mr. Shoen was entitled to protection under rule 1.580 would fail and he advanced this claim only for the purpose of forcing the court to hold an emergency hearing and delay Mr. Schraut's ability to enforce a validly issued writ of possession. Advancing non-meritorious claims warrants discipline. For example, in The Florida Bar v. Graves, 541 So. 2d 608 (Fla. 1989), an attorney was suspended for six months and placed on three years probation for engaging in numerous instances of misconduct, including

filing frivolous pleadings on behalf of a client in a foreclosure action and unreasonably delaying the sale.

ARGUMENT II

THE REFEREE'S RECOMMENDATION OF A 90 DAY SUSPENSION IS APPROPRIATE GIVEN THE FACTS OF THIS CASE.

This court's review of a referee's recommended discipline is broader than its review of the findings because this court has the ultimate responsibility to order the appropriate sanction, Rue, supra.

The bar submits the purposes of discipline would best be served by a suspension of at least 90 days. Those purposes are: protection of the public in a manner that is fair to society both in terms of protecting it from unethical conduct and not denying the services of a qualified lawyer; punishing the wayward attorney in a manner that is both sufficient to punish the ethical breach and encourage reform and rehabilitation; and deterring others from engaging in similar misconduct, The Florida v. Lord, 433 So. 2d 983, 986 (Fla. 1983). Also important is the creation and protection of a favorable image of the legal profession, The Florida Bar v. Larkin, 447 So. 2d 1340 (Fla. 1984). As this court stated in Petition of Wolf, 257 So. 2d 547, 548 (Fla. 1972), the rules "at every turn [place] emphasis upon the protection of the public and the image and integrity of The Florida Bar as a whole." The first purpose of discipline has been somewhat negated by the explosive growth in the bar's membership since 1983. The geographical roster for the Ocala area contained in the September, 1994, issue of The Florida Bar Journal (the directory issue) shows no shortage of lawyers

practicing in Ocala. The purpose set forth in Larkin, supra, is particularly important in the instant case. The respondent's argument throughout this matter implies that the lawyer's role is to do whatever it takes to promote the client's interests. The bar submits the public's perception of the facts of this case would most likely be that it is yet another example of an attorney using legal trickery merely to delay a matter at the expense of the other party. A lawyer should not be reduced to being a "hired gun." An attorney is an officer of the court who is sworn to uphold the orderly administration of justice. "There can be no temporizing with an offense the commission of which serves to destruct the judicial process," The Florida Bar v. Rayman, 238 So. 2d 594, 598 (Fla. 1970). As this court stated in Petition of Florida State Bar Association, 40 So. 2d 902,908 (Fla. 1949), "[A] lawyer's responsibility to the public rises above his responsibility to his client."

The respondent's case is somewhat unique in that there is no case law in Florida on point. That case law which is available and the Florida Standards for Imposing Lawyer Sanctions point toward a period of suspension as being the most appropriate level of discipline given the referee's findings that the respondent's conduct was deceitful and prejudicial to the administration of justice. The respondent's prior disciplinary history also acts as an aggravating factor to be considered in imposing the appropriate level of discipline.

In The Florida v. Johnson, 19 Fla. L. Weekly, S606 (Fla.

Nov. 17, 1994), an attorney was suspended for 60 days for engaging in deceitful conduct. The attorney represented his son-in-law in a number of corporate matters. At the request of his son-in-law, the attorney moved into a building he owned. It was understood between the parties that the attorney would reside there rent free. No lease was executed at the time he took possession. Thereafter, the son-in-law attempted to obtain a loan from a local bank. The lender required certain information and documents concerning tenant leases and tenant affidavits. The son-in-law requested the attorney to execute a lease and affidavit. The attorney complied. However, the lease the attorney executed was not enforceable because the building was owned by the son-in-law and his wife, but the lease was executed only by the son-in-law and did not conform with section 689.01 of the Florida Statutes. The attorney knew the lease was not enforceable as executed and he paid no money pursuant to it. Contrary to what he knew to be true, he then executed a notarized tenant affidavit that expressly indicated there was a valid lease including a monthly rental amount which he was obligated to pay and for which the first and last month's rent had been paid. The attorney knew the bank relied upon the tenant affidavit for the purpose of issuing a loan to his son-in-law. The attorney did advise his son-in-law to inform the bank that the lease was not enforceable but he did not himself advise the bank of the circumstances or ensure that his son-in-law did. The court found that although the attorney's affidavit did not cause any harm to

the bank, it was a misrepresentation which constituted a dishonest act.

In The Florida Bar v. Richardson, 591 So. 2d 908 (Fla. 1991), an attorney was suspended for 60 days after he brought a frivolous and malicious federal court claim. The attorney represented the personal representative of an estate. The probate judge determined that his fee was excessive and ordered him to make reimbursement. The attorney appealed the decision and argued that the judge lacked jurisdiction to order the refund because the payment had been rendered by the personal representative personally rather than from the estate. The District Court of Appeal found this argument to be without merit. After the matter was remanded to the probate court to recalculate the amount of the reimbursement, the attorney again attempted to appeal. This appeal was dismissed as being untimely. He next sought two writs of mandamus from the Supreme Court of Florida, one seeking to compel the District Court of Appeal to reinstate his second appeal and another seeking to vacate the latest judgment entered by the probate judge and to compel the probate court to withdraw jurisdiction. The supreme court denied both petitions. Thereafter, the attorney filed a complaint in the United States District Court for the District of Columbia, alleging that the reimbursement order violated his civil rights because of a lack of jurisdiction. He sought one million dollars in damages as well as injunctive relief. The federal court granted the defendants' motions to dismiss. In addition, the

court found that the complaint filed by the attorney was both frivolous and malicious and imposed sanctions against him under Rule 11 of the Federal Rules of Civil Procedure. The attorney's federal suit was clearly unwarranted on the grounds of judicial immunity, res judicata and lack of federal jurisdiction over the probate proceedings. In considering the disciplinary case, the supreme court stated that although neither it nor the bar wanted to stifle innovative claims by attorneys, the pursuit of imaginative claims was not without limit. The accused attorney's behavior was nothing more than an obsessive attempt to relitigate an issue that had failed decisively numerous times. Although the referee made no explicit finding of bad faith, the attorney's failure to meet the standard embodied in rule 4-3.1 of the Rules Regulating The Florida Bar called into question either the purpose of his lawsuit or his overall ability to practice. He was suspended for a period of sixty days, a lesser amount of time than that recommended by the referee, because the incident arose from the same set of facts that had resulted in the suspension he was currently serving for having charged the excessive fee. Therefore, the prior discipline was not an aggravating factor.

An attorney was suspended for 91 days in The Florida Bar v. Fischer, 549 So. 2d 1368 (Fla. 1989), for engaging in conduct that resulted in a fraud being perpetrated on the court. After receiving a speeding ticket, the attorney requested a civil infraction trial. On the morning of the trial, he requested his legal secretary to place a call to the highway patrol station and

leave a message that she was a clerk with the clerk's office and that the speeding ticket hearing had been cancelled and the trooper did not need to appear. He then left the office to attend the hearing. After the trooper failed to appear, the judge dismissed the ticket. Although there was considerable conflict in testimony as to whether or not the attorney actually told his secretary to take the action she did, the referee found there was clear and convincing evidence to find that he did tell her to pose as a clerk and tell the trooper the hearing the hearing had been cancelled. He knew that she had complied with his request and took no steps either directly or indirectly to advise the judge what had happened and the real reason why the trooper did not appear. He took no steps to correct the fraud on the court until after there was a finding of probable cause in the bar disciplinary case. Even though the attorney denied having told his legal secretary to place the call, at the final hearing he did admit he was aware that she had done something to cause the hearing to be cancelled and that he took no steps to rectify the matter until after the bar case proceeded to a finding of probable cause. The referee noted that even in the best light, this was a violation of the disciplinary rules. This court found that a 91 day suspension was warranted because the attorney's actions in perpetrating a fraud on the court evinced a total disregard for the judicial system he was sworn to uphold. This court stated that it could not "countenance manipulating the courts in this manner."

In The Florida Bar v. Moore, 194 So. 2d 264 (Fla. 1966), an attorney was suspended for a minimum of three (3) months with the suspension to continue thereafter until full restitution was made and costs paid for engaging in multiple acts of misconduct, including seeking legal opinions from other attorneys without disclosing all the necessary background information in order to obtain opinions that would bolster advice he had given to certain trustees. A legally separated husband and wife agreed to establish an inter vivos trust under which the wife, as life tenant, would receive annual income in lieu of demanding alimony and property in the event of a divorce between the parties. The trustees were the wife and two other individuals. Thereafter, the parties divorced and the wife remarried. She and her second husband retained the accused attorney to advise them as to her rights under the trust instrument and the contemporaneous property settlement agreement which her former husband had breached. The attorney believed that under the terms of the trust instrument, the trustees had the authority to recover the past due taxes from the former husband, either by direct suit or by charging the amount against the principal of the trust of which the former husband was then designated as a remainderman. He also believed the wife was entitled to share in the trustees' fees payable from the principal because she was a co-trustee. He prepared a memorandum stating his views and sent it to the other trustees for their consideration. They disagreed with his assessment of the situation and resigned. Thereafter, the wife's

second husband was selected as one of the successor trustees. The attorney continued representing the wife and also began to advise and represent the trustees in respect to the trust administration, including the transfer of trust assets. He failed to make the trustees aware that they owed a duty to the remainderman, the life tenant's first husband. The accused attorney sought opinions from other practicing lawyers concerning the trust and the transfer of assets. The trust originally had been created out of state and later the assets were transferred to Florida. The attorney failed to provide the lawyers he consulted with all of the necessary facts. He requested their opinions for the purpose of corroborating his own views in respect to the legality of a sale of the stock and an allocation of the proceeds to income. These attorneys later testified in the disciplinary proceeding that had they been provided with the information the attorney had withheld, their opinions would have been different. The attorney was found guilty of representing conflicting interests and engaging in conduct with other lawyers that could be characterized as dishonest. In addition, he charged the life tenant an excessive fee.

The Florida Standards for Imposing Lawyer Sanctions also support a suspension as being the appropriate discipline in this case given the facts and the aggravating factors. Under Standard 6.1, False Statements, Fraud, and Misrepresentation, Standard 6.12 calls for a suspension when a lawyers knows that false statements or documents are being submitted to the court or that

material information is improperly being withheld, and takes no remedial action. Under Standard 6.2, Abuse of the Legal Process, Standard 6.22 calls for a suspension when a lawyer knowingly violates a court order or a rule, and causes injury or potential injury to a client or a party or causes interference or potential interference with a legal proceeding. Additionally, there are certain aggravating factors which must be considered in this case. The respondent has a prior disciplinary history. The official records of The Florida Bar reflect that on November 6, 1992, he was the recipient of discipline in the form of an admonishment for minor misconduct by letter from the president of The Florida Bar (B-Ex. E). This was properly considered by the referee as being an aggravating factor pursuant to Standard 9.22(a). The standard states that prior disciplinary offenses may be considered aggravation provided that after seven or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct shall not be considered as an aggravating factor. Also in aggravation is the referee's finding that the respondent was not truthful in his testimony at least in respect to his attempt to shift the blame for his conduct to the appellate attorneys. Standard 9.22(f) provides that submission of false evidence, false statements, or other deceptive practices during the disciplinary process may be considered in aggravation. Standard 9.22(b) should also be considered. It provides that a dishonest or selfish motive is an aggravating factor.

The bar submits the only mitigating factors applicable would

be 9.32(f), inexperience in the practice of law, and 9.32(k), imposition of other penalties or sanctions. Although the respondent argues in his initial brief that the referee failed to take into consideration the mitigating factors, he did present those matters to the referee. He advised the referee that he had complied with all the terms of his pre-trial intervention agreement and the criminal case against him had been dismissed, (T. 2/11/94/, Vol. II, p. 235). Mr. Devito, a friend of the respondent, testified that he believed the respondent enjoyed a good reputation in the community for honesty, kindness and good character, (T. 3/30/94, Vol. I, p. 54). Ms. Fagan, the respondent's legal assistant, testified that in her opinion, the respondent enjoyed a good reputation in the community, he was respected by his legal peers and treated clients well, (T. 3/30/94, Vol. I, p.p. 71-72). Clearly, the referee considered and gave the appropriate weight to the mitigating testimony in making his recommendations as to the appropriate disciplinary measures being imposed. The bar submits that what should not be considered in mitigation is the fact that the respondent was compelled to attend a bar approved course in law office management and take three hours of continuing legal education in the ethics field. He did this only because he entered into an agreement with the state where successful completion of these terms would result in the criminal charges against him being dismissed. Further, although the respondent argues he was inexperienced with respect to utilizing Florida Rule of Civil

Procedure 1.580, this should not be used to mitigate his misconduct. As an attorney admitted to practice in Florida it is presumed the respondent is either familiar with the rules and laws, especially those that pertain to the field where he concentrates his practice, or he knows how to research those areas with which he is not familiar. Ignorance is no excuse. In fact, it could have constituted grounds for charging him with incompetently representing his clients. The respondent is not inexperienced with respect to handling foreclosure cases. In fact, he testified that he has handled approximately 100 such cases, (T. 2/11/94, Vol. II, p. 239).

CONCLUSION

Wherefore, The Florida Bar prays this honorable court will enter an appropriate order upholding the referee's findings and recommendation to guilt, impose a suspension of no less than 90 days and tax cost against the respondent now totalling $1,521.37.

Respectfully submitted,

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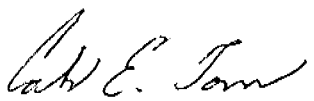
By: 

CARLOS E. TORRES
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing answer brief and appendix have been furnished by Airborne Express to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U. S. mail to James M. Brown, counsel for respondent, 211 South Main Street, Brooksville, Florida 34601; and a copy of the foregoing has been furnished by regular U. S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 27th day of January, 1995.

CARLOS E. TORRES
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WILLIAM T. CHARNOCK,

Respondent.
_____/

Case No. 81,857
[TFB Case No. 93-30,100 (05B)]

APPENDIX TO ANSWER BRIEF

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

VS.

WILLIAM T. CHARNOCK, III,

Respondent.

SUPREME COURT CASE NO. 81,857

(93-30,100 (05B)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

February 11, 1994, March 30, 1994 & September 8, 1994

The referee was appointed on June 11, 1993, and the trial was scheduled initially on October 25, 1993, which was within the 180 day time period. However, on October 21, 1993, the referee granted a continuance upon Motion of The Florida Bar with the concurrence of the Respondent, WILLIAM T. CHARNOCK, III. After extensive negotiations for a consent judgement agreement reached an impasse, the trial was scheduled for February 11, 1994 for a one day trial. Due to the length of the trial and the evidence to be presented, a continuance was required. On March 30, 1994 after another full day, the trial was concluded. Due to the nature of the evidence, the referee was requested to take judicial notice of Pelycado v. Rutherberg case which was on appeal with the Fifth District Court of Appeal. The record of that case was need before final arguments could be presented to said referee. After receipt of the record in Pelycado v. Rutherberg and the written arguments of counsel in support of their respective positions concerning the guilt or innocence of the respondent, this referee on August 12, 1994 determined that respondent was guilty of several violations of the Rules Regulating The Florida Bar and a final day would be needed for the opportunity of the parties to argue what discipline, if any, should be recommended. The final hearing as to discipline was scheduled for September 8, 1994.

The following attorneys appeared as counsel for the parties:

For The Florida Bar CARLOS E. TORRES
For The Respondent JAMES M. BROWN

II. **FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:** After considering all the pleadings and evidence before me, pertinent portions of which are commended upon below, I find:

As to COUNT I

During the time frame surrounding this complaint, respondent was a sole practitioner supported by a secretarial staff of five (5), as well as utilizing a "retired non-lawyer county court judge as an independent contractor law clerk" and an independent contractor paralegal. Since 1991 the respondent has represented a Dutch Consortium by the name of Pelycado Onroerend Goed B.V. Respondent not only represented the Dutch corporation as legal counsel, but also maintained a power of attorney to act on behalf of the company with specifically the right to negotiate and enter into lease agreements for their properties located in Hernando County. Respondent would on occasions enter into short-term lease agreements on behalf of the Dutch company as well as under said power of attorney pay certain assessed fees and maintenance costs, as well as generally oversee their properties in Hernando County. In fact the respondent's residence, which he owns, is located directly across the street from one of the properties owned by the Dutch corporation which happens also to be the property around which this controversy developed.

Subsequent to the purchase of the said property by Pelycado, a mechanic's lien was filed against said property alleging a construction debt owned to Castle Pools. Respondent in December 1990 under a client/lawyer relationship with Pelycado Onroerend Goed B.V., advised counsel for Castle Pools of his position that said lien was legally invalid. Some eight months later and without any further contact and unknown to respondent, a foreclosure action was commenced in the Circuit Court of Hernando County under Case No. 91-1551-CA-01. Respondent nor his clients had actual notice of the foreclosure action due to plaintiff's attempt to use the "Long Arm Statute," Chapter 48, Florida Statutes, to effect service of process. (The appellate court has since found that the plaintiffs failed to adhere to the requirements of said statute and has reversed the final judgment subsequently entered therein).

Ultimately, a motion for summary judgment was granted without knowledge of the respondent or his clients and on March 19, 1992, Gary Schraut purchased at the judicial sale the property located at 11023 Casa Grande Circle, Spring Hill. On March 30, 1992 a certificate of title was issued to Mr. Schraut and upon his going to the residence, he found the residence occupied by vacationers. The vacationers

in possession of said residence were instructed that they would need to leave after the vacation period ended.

On March 31, 1992 the respondent still being unaware of the legal action involving his client's property, was using a telephone in the judge's chambers when he observed pleadings with the Dutch corporation's name in the caption of the pleading. Being surprised that his client would be involved in litigation without his knowledge and being curious as to whether or not they might have hired other legal counsel, respondent later that day while at his office, accessed the clerk's computer system and became aware for the first time that his client's property was the subject of a foreclosure action.

After receiving confirmation from his clients that they knew nothing of the litigation and with their instructions from him to represent them, respondent on April 1, 1992 filed the Motion to Quash Service of Process, Motion to Set Aside Foreclosure Sale and Motion to Deny Purchase or Possession. On the same day, April 1, 1992 the Court sua sponte entered its Order to Stay. Subsequent thereto a number of pleadings and counter motions were submitted on behalf of the parties which ultimately resulted in the court entering the Order of May 13, 1992 appointing a mediator and referring the matter for mediation. After a notice of impasse was filed, the Court on July 13, 1992 entered the Order Denying Defendant's (Pelycado) Motion to Quash Service of Process, Motion to Set Aside Foreclosure Sale, and Motion to Deny Purchase or Possession. On July 15, 1992 the Court entered the Order Approving and Confirming the issuance of the Writ of Possession. The Writ of Possession was issued dated July 15, 1992.

For a better understanding of the events that followed the Order of July 15, 1992, one needs to address the relationship of respondent with Todd Shoen. Todd Shoen had on July 10, 1992 recently been hired by Henry DeVido, owner and operator of the Cooper Penny Pub as a bartender. Mr. DeVido was a friend of respondent and being aware of respondent's access to rental units, he asked respondent if he could assist in locating housing for Mr. Shoen. Mr. Charnock was unable to accommodate Mr. Shoen at the time but extended to Mr. Shoen the opportunity to stay with him in his personal residence until he (respondent) could find suitable housing for Mr. Shoen. Mr. Shoen was living at respondent's residence which as previously indicated was located across the street from the residence which was owned by Pelycado and the subject property of the foreclosure sale.

On July 13, 1992 the counsel for plaintiffs in the foreclosure action caused to be faxed to respondent's office the Order entered by the court denying respondent's Motion to Quash and Set Aside the foreclosure. Although there is considerable disagreement as to whether or not the fax was received in respondent's office, the fact remains that respondent on July 15, 1992 was in fact aware that the Order denying his relief was entered and he was aware that with the lifting of the stay a writ of possession would be forthcoming. Respondent on the July 15, 1992 contacted his client and with their authorization retained the firm of Vetter and Anderson to prosecute the appeal. In discussions with both Vetter and Anderson, respondent became aware of the provisions of Rule 1.580. It is the contention of respondent that one of the attorneys (the specific one being now unknown to respondent) advised him to "put someone in possession of the property."

That position is not supported by the evidence in this case. With the knowledge of the provisions of Rule 1.580, respondent contacted Todd Shoen about renting the residence in question. They in fact entered into an oral contract which would allow Mr. Shoen to occupy the residence for two weeks at the rental sum of $300.00. The decision to produce a tenant or put someone in possession was the decision of respondent. Respondent now seeks to shift the blame and responsibility to another attorney which is untrue. Respondent was scheduled to be before Judge Helplop in Brooksville at 1:30 p.m. on July 16, 1992, so he instructed his secretary to prepare the affidavit of Mr. Shoen. Later that evening, respondent accompanied by another of his secretaries, Tamara Jo Potts, proceeded to the Cooper Penny Pub for the purpose of securing the execution of the affidavit which would be required in order to implement Rule 1.580. Respondent did not review the affidavit prior to presenting it to Mr. Shoen and after introducing Mr. Todd Shoen to his secretary, departed the area for personal reasons. The Florida Bar's contention is that the notarization of the affidavit was in violation of Section 117.05, Florida Statutes, because Mrs. Potts did not personally know Mr. Shoen and that she relied on the respondent's identification of Mr. Shoen instead of a sworn written statement as required by law. Although the identification process was less than ideally desired, I find no unethical conduct on behalf of respondent in the execution of the affidavit of Todd Shoen.

On July 16, 1992 the July 15, 1992 affidavit of Todd Shoen was delivered to the Sheriff of Hernando County by a member of respondent's staff. On July 16, 1992 with the writ of possession, and accompanied by a deputy sheriff, Mr. Gary Schraut proceeded to the property in question and at about two or three o'clock walked through the residence noticing that no one was then occupying the villa. Mr.

Schraut then observed a man across the street and upon approaching learned that he was Todd Shoen, the individual who had signed the affidavit claiming the right to possession of the property covered by the writ of possession. Mr. Shoen refused to discuss his involvement with Mr. Schraut.

Mr. Schraut left and later that evening along with his attorney, Carlo, confronted Mr. Shoen at the Copper Penny. It is the testimony of Carlo as well as Mr. Schraut that Mr. Shoen admitted to them that he had not rented the house nor paid any money to Mr. Charnock and that he had agreed to sign the affidavit only to get free rent and board. This contention is somewhat supported by the testimony of Jane Phifer, the state attorney investigator, when she reported that Mr. Shoen told her that he simply needed a place to stay and he had agreed to stay in the house for two weeks for $300.00. He reported that it was an oral understanding and that he signed the affidavit presented by Mr. Charnock without reading it or inquiring about any details and simply signed it because he was told to do so. He also admitted to her that he did not have possession and was in fact still at respondent's residence. Jane Phifer testified that she did not believe Todd Shoen to be honest or a credible witness. In view of the fact that this referee only had benefit of the statements of Todd Shoen in hearsay form, I conclude that The Florida Bar has failed to show by clear and convincing evidence that Mr. Charnock's testimony that he did receive the sum of $300.00 cash in return for his agreement with Todd Shoen that he could rent the particular villa for two (2) weeks, was false. Therefore, an oral contract did exist between respondent's client and Todd Shoen which allowed him possession of the villa for a two week period. Said contract being entered into on July 15, 1992. A literal reading of the affidavit of Todd Shoen leads this referee to conclude that the affidavit was not a false affidavit nor did it contain perjured statements by Todd Shoen. Consequently, respondent did not engage in any conduct to procure perjury or a false affidavit.

Mr. Carlo, Mr. Schraut, and The Florida Bar's contention that the affidavit of Todd Shoen was false was largely based on the representation of Todd Shoen to them and others that he did not live in the villa and had not paid anything to respondent. Mr. Gary Carlo and Mr. Schraut's understanding that the affidavit contained false statements can be understood when they having read the affidavit in which Mr. Shoen claimed he had possession of the property and paid $300.00 and by their observation knew that the villa was in fact unoccupied on July 15 and 16, 1992. Respondent's position is that even though Mr. Shoen did not have actual possession he in fact had constructive possession under his contract with the owners, Pelycado Onroerend Goed, B.V. by and through their agent, the respondent. I find that

provisions of Rule 1.580 would allow a bona fide lessee under a valid contract who does not have actual possession to enforce his rights to possession.

The respondent argues that the "gravamen of the complaint was the allegation that respondent had improperly attempted to frustrate the assumption of actual possession of the subject property by a third party by inducing Todd Shoen to execute a false affidavit and by directing his secretary, Ms. Potts, to improperly notarize such affidavit." The Florida Bar also represents that "the thrust of the Florida Bar's Complaint against the respondent is that he was responsible for the improper preparation of an affidavit executed by Todd Shoen that contained information concerning Mr. Shoen's right of possession of the premises located at 11023 Casa Grande Circle, Spring Hill, Hernando County, Florida, and that the respondent and Mr. Shoen knew the affidavit's contents were false."

Both contentions center on the issue of whether or not the affidavit of Todd Shoen was false. However, I believe as previously stated, that the evidence supports a finding that said affidavit was not false and that Mr. Shoen had possession (obviously not actual but constructive) which would entitle him to the protection and rights under Rule 1.580. Consequently, the issue rather than whether the affidavit was false is whether respondent with the knowledge that his relief requested had been denied and that the stay for issuance of the writ of possession had been lifted, was entitled as an attorney to procure a tenant and put that tenant in possession of the subject property in order to invoke Rule 1.580 thereby frustrating the actual possession of the subject property passing to Mr. Schraut under the writ of possession.

I find that the procurement of a tenant, entering into the lease and directing and securing the affidavit of said tenant, all for the purpose of utilizing Rule 1.580 thereby delaying the transfer of actual possession pursuant to the writ of possession was unethical conduct. This maneuver by respondent in fabricating and setting up a tenant relationship had no substantial purpose other than to "embarrass, delay or burden a third person." This conduct was deceitful and accomplished without notice or knowledge of to the third party. It is also obvious to this referee that the conduct of respondent was prejudicial to the administration of justice.

In conclusion, the attempt by respondent to shift blame for his actions in procuring and putting Todd Shoen in possession by testifying that another attorney told him to put someone in possession was also unethical in that his testimony was not truthful.

III. **RECOMMENDATION AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY**: As to the complaint I make the following recommendations as to guilt or innocence:

I recommend that the Respondent be found **guilty** and specifically that he be found guilty of the following violations of the Rules of Discipline, to-wit: **Rule 3-4.3, "Misconduct and Minor Misconduct"**

I recommend that the Respondent be found **guilty** and specifically that he be found guilty of the following violations of Rules of Professional Conduct, to-wit: **Rules 4-4.4, 4-8.4(c), and 4-8.4(d).**

I recommend that the respondent be found **not guilty** and specifically that he be found **not guilty** of the following Rules of Professional Conduct, to-wit: **Rules 4-1.3, 4-3.3(a), 4-3.4(b), 4-4.1, 4-5.3, 4-8.4(a), 4-8.4(b).**

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

I recommend that the Respondent, **WILLIAM T. CHARNOCK, III,** be suspended from the practice of law for a period of Ninety (90) Days with automatic reinstatement at the end of period of suspension as provided in Rule 3-5.1(e), Rules of Discipline.

IV. **PERSONAL HISTORY AND PAST DISCIPLINARY RECORD**: After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(4), I considered the following personal history and prior disciplinary record of the respondent, to-wit:

Age: **29 years**
Date Admitted to Bar: **1988**
Prior disciplinary convictions and disciplinary measures imposed therein:
Admonishment for Minor Misconduct dated November 6, 1992
Other personal data: **None**

VI. **STATEMENT OF COSTS AND MANNER IN WHICH COST SHOULD BE TAXED**: I find the following costs were reasonable incurred by The Florida Bar.

Grievance Committee Level Costs:

Transcript Costs	**$ 360.00**
Bar Counsel Travel Costs	**$ 26.47**

Referee Level Costs:	
Transcript Costs	**$ 205.15**
Bar Counsel Travel Costs	**$ 106.25**
Administrative Costs	**$ 500.00**
Miscellaneous Costs	
Investigator Expenses	**$ 126.00**
Photo Copies	**$ 197.00**
TOTAL ITEMIZED COSTS:	**$1,521.37**

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent.

DATED this 13th day of October, 1994.

ELZIE S. SANDERS, REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Referee Report has been furnished SID J. WHITE, CLERK, SUPREME COURT OF FLORIDA, SUPREME COURT BUILDING, TALLAHASSEE, FL 32399-1927, and a copy this 13th day of October, 1994 to:

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