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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN LOBBAN MAYNARD,

Respondent.
_____/

Case No. 83,918
[TFB Nos. 93-30,761 (09C)
and 93-31,279 (09C)]

THE FLORIDA BAR'S INITIAL 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 transcript of the final hearing held on March 10, 1995, and March 24, 1995, shall be referred to as "T", followed by the transcript volume and the cited page number(s).

The Report of Referee dated April 6, 1995, will be referred to as "ROR", followed by the referenced page number(s).

The bar's exhibits from the final hearing will be referred to as "Bar Ex.", followed by the exhibit number.

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "C" voted to find probable cause on April 4, 1994, in Case No. 93-30,761 (09C) and Case No. 93-31,279 (09C). In Supreme Court Case No. 83,198, which consists of the aforementioned cases, the bar filed its complaint on June 30, 1994. After two continuances (both at the respondent's request), the final hearing was held on March 20, 1995, and continued thereafter to March 24, 1995. The referee issued his report on April 6, 1995. Thereafter, the referee entered an order clarifying his report on April 18, 1995, and entered an order correcting errors to the report on May 1, 1995.

The referee recommended the respondent be suspended for ninety-one days and pay the bar's costs for violating the following Rules Regulating The Florida Bar: As to Count I, Disciplinary Rule 5-104(A) of the Code of Professional Responsibility for entering into a business transaction with a client wherein they have differing interests and where the client expects the lawyer to exercise his professional judgment for the protection of the client; and the following Rules of Professional Conduct: 4-1.4(a) for failing to keep a client reasonably

informed about the status of a matter and promptly complying with reasonable requests for information; 4-1.4(b) for failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; 4-1.7(a) for representing a client where that representation will be directly adverse to the interests of another client; 4-1.7(b) for representing a client where the lawyer's exercise of independent professional judgment in the representation may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest; 4-1.7(c) for representing multiple clients in a single matter without explaining the implications of the common representation and the advantages and risks involved; 4-1.8(a) for entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interests adverse to a client; 4-1.8(b) for using information relating to the representation of a client to the disadvantage of the client; 4-1.15(a) for commingling; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, misrepresentation; and Rules Regulating Trust Accounts 5-1.1 for using trust funds for purposes other than those for which they were entrusted to the

lawyer; and 5-1.2 for failing to follow the minimum required trust accounting procedures and maintain the minimum required trust accounting records. The referee recommended the respondent be found not guilty of the allegations in Count II. As to Count III, Rules of Professional Conduct: 4-1.3 for failing to act with reasonable diligence and promptness in representing a client; 4-1.4(a) for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; 4-1.4(b) for failing to explain a matter to the extent reasonable necessary to permit the client to make informed decisions regarding the representation; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and 4-8.4(d) for engaging in conduct that is prejudicial to the administration of justice. The referee recommended the respondent be found not guilty as to the allegations in Count IV. As to Count V, Rules of Professional Conduct: 4-1.4(a) for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; 4-1.4(b) for failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;

4-1.8(a) for entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interests adverse to a client; 4-1.8(b) for using information relating to the representation of a client to the disadvantage of the client; 4-2.1 for failing to exercise independent professional judgment and render candid advice in representing a client; and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The Board of Governors of The Florida Bar considered this case at its meeting which ended on May 26, 1995. The board voted to appeal the referee's recommendation as to discipline and to seek disbarment of the respondent; require that respondent pay restitution to Randy Strausberg and Matthew Seibel for losses incurred as a result of respondent's conduct or, in the event Strausberg and/or Seibel should make successful claims to The Florida Bar Clients' Security Fund, make reimbursement to the fund for payments made by it in connection with the respondent's conduct; and pay the costs of these disciplinary proceedings. The bar served its petition for review on June 2, 1995.

STATEMENT OF THE FACTS

The following facts are taken from the report of referee, unless otherwise noted.

Count I

Respondent met Randy Strausberg in 1982 and thereafter they became close friends. Over the years, respondent handled several legal matters for Strausberg. In early 1984, Strausberg hired the respondent to set up an irrevocable trust for his children with the respondent acting as trustee. One of the purposes of the trust was to create a fund for the educational needs and bar mitzvahs of his children. The children's trust is hereinafter referred to as the "Trust."

Strausberg knew he could not dictate which investments the trustee should consider, however, he believed that Respondent would consider his recommendations. Towards that end, Strausberg had numerous discussions with respondent regarding what he considered to be good investments and he expected

respondent to make prudent investments for the Trust. In a letter dated November 10, 1984, he outlined to respondent what he considered to be good investments.

In January, 1984, Strausberg delivered $43,000 to respondent as trustee and on January 25, 1984, respondent loaned the money to Eric J. Parker and took back a mortgage, hereinafter referred to as the "Parker Mortgage," for the Trust. Respondent failed to list the $43,000 initial cash contribution in any accounting for the Trust. In August, 1984, Strausberg transferred a mortgage, (hereinafter referred to as the "Chang Mortgage"), valued at $9,000 to the Trust which was to have brought to the Trust monthly payments of $133.18.

On February 11, 1985, respondent received a payment of $19,493.33 on the Parker Mortgage. In a June, 1985, letter, he advised Strausberg he would open a separate money market account for the Trust with a deposit of $20,537.63 (which included the February, 1985, Parker Mortgage payment of $19,493.33 and payments on the Chang Mortgage). However, he did not account for those funds until August, 1985, when he opened a separate money

market account for the Trust. Respondent did not indicate how many payments on the Chang Mortgage were included in the deposit and there is no method to determine such as respondent's records for the Trust are incomplete. Respondent agreed to send Strausberg monthly statements from that separate account, however, he failed to do so.

In February, 1987, respondent received the final payment of $16,053.33 on the Parker Mortgage. He did not deposit said funds into the money market account. Rather, it appears he put them with funds held in his general law office trust account.

Respondent kept a ledger for the Trust funds held in the money market account and a client ledger for Trust funds held in his general law office trust account. The entries in these two ledgers can not be reconciled. Further, respondent has been unable to account for all funds taken from the Trust.

Respondent was responsible for the preparation and filing of annual income tax returns for Trust. However, he did not timely file tax returns for the years ending 1985 and 1986 and despite

Internal Revenue notices advising of delinquent fiduciary tax returns, he did not file tax returns for the years ending 1989, 1990 and 1991.

Respondent loaned himself $15,000 from the Trust, without providing any collateral, and in a subsequent accounting identified the loan as the "Mayfield Loan". Although unable to provide a copy of the promissory note, respondent claims he executed one to himself as trustee. It is impossible to determine from the Trust records whether the loan was paid back, however, respondent testified that it was repaid with interest.

In 1987, respondent made a personal loan of $13,156.50 to Bernard Weinstein from the Trust, without requiring a promissory note or security for the loan. He also used the Trust fund to make loans to his friends and to pay off his personal debt to the Crowders in the amount of $15,606. Respondent, during the referee hearing, observed that loans to "friends" was the purpose of the Trust and that it was unlikely that loans would be made to persons other than friends.

In December, 1985, respondent loaned $16,500 from the Trust to his personal secretary and her friend, without first obtaining a credit check or having them provide any type of financial statement. He took back a second mortgage, hereinafter referred to as the "Alter/Mansfield Mortgage," without obtaining any type of appraisal on the property. Subsequently the Alter/Mansfield Mortgage went into default. Even though he knew as early as June, 1988, that the Alter/ Mansfield Mortgage was over five months in arrears, respondent did not bring a foreclosure action or take any other action to collect on the note. In March, 1989, the first mortgage holder obtained a final judgment and a certificate of sale. Respondent did not notify Strausberg that the first mortgage had been foreclosed "out from under" the Alter/Mansfield Mortgage. In his accountings to Strausberg, respondent continued to list the Alter/Mansfield Mortgage as an asset of the Trust, well after the property had been lost and the mortgage and note became valueless.

Respondent represented in a July 13, 1986, letter of accounting to Strausberg that the Alter/Mansfield Mortgage could be withdrawn after six month's notice. Under the terms of the

loan, however, the six month's notice of withdrawal proviso was inapplicable until after December 12, 1988.

In May, 1984, respondent agreed with one James Hart that the latter would purchase a condominium known as "the Springs," from one Timothy Meyers for $110,000 with $4,000 down. Respondent, who represented Meyers, was to hold the deed, apparently in escrow, until Hart paid Meyers for his equity in the property. Hart was also to pay the first mortgage due Florida Federal Savings and Loan Association in the principal amount of $82,000. A second mortgage in favor of Barnett Bank encumbered the property in the sum of $100,000. In March, 1986, respondent dispersed $19,300 from the Trust to Meyers and obtained a mortgage, but no note, from Meyers for payment, ostensibly representing Meyers' equity in the property. Respondent did not obtain an appraisal on the property nor did he obtain the outstanding balance of the mortgage to Florida Federal to determine the equity in the property. He knew at the time the payment was made that the combined outstanding balance of the Barnett Bank mortgage and the Florida Federal mortgage exceeded the value of the property. This payment was Hart's

responsibility under the May, 1984, agreement with Meyers. Respondent treated the payment as a loan to Hart (who was his former client) and treated the mortgage as security for the Meyers payment in his Trust records, even though at the time of the dispersement he did not have a promissory note from Hart. In his July 16, 1986, accounting, respondent indicated that the Trust had a mortgage in the amount of $21,000 on the Springs.

The Florida Federal mortgage had a due on sale clause and the Barnett Bank mortgage on the Springs had a nontransferable clause. The respondent did not obtain the consent of either mortgage holder for the transfer of the property from Meyers to Hart. Further, he did not record the mortgage taken back from Meyers, ostensibly to avoid "triggering" the "due on sale" clause.

Respondent loaned Hart additional monies from the Trust, including a $14,146.18 payment on August 13, 1987, to reinstate the Florida Federal mortgage. These monies were paid directly by respondent to Florida Federal for payments due on Meyers' first mortgage. The $14,146.18 payment from the Trust was from monies

respondent still held in his general law office trust account, not from the money market account. Over one year from the $19,300 payment to Meyers, respondent obtained a promissory note from Hart for $41,618.75 with a 12 percent interest rate. Respondent knew at the time he loaned the Trust's funds to Hart that Hart was having difficulty making the obligated payments to Florida Federal. Further, respondent had received numerous notices that the assessments and maintenance fees of the Springs property were not being paid.

In 1987, Florida Federal filed a foreclosure action on the Springs naming Meyers as a defendant. Respondent accepted service for Meyers and filed a notice of appearance as counsel for Meyers. He failed to inform Strausberg of the foreclosure action and failed to explain that more monies from the Trust were going to pay the Meyers loan to Florida Federal with no increase in the collateral. For example, respondent's 1987 accounting of the Trust assets showed the Hart Mortgage as having a value of $44,146.18, which reflected an increase of $23,146.18 over the July amount of $21,000.00 and his 1989 accounting showed the mortgage as having a value of $56,326.70, which reflected an

increase of $12,180.52 over the 1987 accounting. Respondent misrepresented to Strausberg the financial state of the Trust. In his July, 1989, accounting, respondent stated there was $17,677.66 cash in the Trust. The money market account bank statement, however, showed a beginning balance on June 30, 1989, of $4,699.98 and an ending balance on July 31, 1989, as $4,723.46, with no deposits or withdrawals. The client ledger for the Trust for the year 1989, did not indicate a cash balance of $17,677.66 at any time.

Although knowing that the cash in the Trust had been depleted, the Alter/Mansfield mortgage was rendered valueless and that the loan to Hart was in default, respondent, in the July, 1989, accounting, promised Strausberg that he would liquidate the trust assets and invest them in zero coupon bonds. He later wrote Hart a letter, indicating that Hart owed him a debt which at the end of the month totaled $123,312.57. In August, 1991, respondent sold the Springs property for Meyers, without an appraisal, at a price that did not benefit the Trust.

Count III

In or about the middle of 1990, Strausberg retained respondent to write demand letters to one Gary Monieson regarding an unpaid loan. He told respondent he wanted to claim a bad debt reduction on his personal income tax return. Strausberg requested respondent send the information directly to his accountant so that he might claim the deduction on his 1990 income tax return.

Strausberg had difficulty contacting respondent in 1991 and stated that respondent told him he had sent the information when in fact he had not done so. Respondent did not forward the information to the accountant until April 10, 1992. At that time, Strausberg had already filed his 1990 tax return and did not wish to amend it, lest it trigger an audit by the Internal Revenue Service. Strausberg was unable to use the deduction for any subsequent tax year. Respondent's failure to seasonably provide the information to the accountant resulted in substantial tax benefits being lost by Strausberg.

Count V

In 1989, Dr. Matthew Seibel hired respondent to serve as co-counsel in probating his great aunt's estate. Respondent had handled several legal matters for Seibel over the years and they had become close personal friends. Indeed, respondent, Seibel and Strausberg and their families often traveled, visited and socialized together.

In April, 1989, respondent asked Seibel to loan him $35,000 for personal reasons and Seibel agreed. Respondent did not put the terms of the loan in writing, neither did he advise Seibel to seek the advice of independent legal counsel nor did respondent give him the opportunity to do so. He did not request Seibel consent to the loan in writing nor did Seibel so consent. The discussions between the respondent and Seibel regarding the terms of the loan spanned approximately one and one half minutes and took place in a car. As security for the loan, respondent assigned to Seibel a mortgage he was holding. At the time of this loan, Seibel considered respondent to be his friend and attorney and trusted the respondent to act in his best interests.

In the fall of 1990, prior to the repayment of the $35,000 loan, respondent indicated to Seibel that he needed to purchase certain property and asked Seibel for another loan. Seibel, not having that much ready cash, obtained a bank loan and then loaned the respondent $33,911.50. Respondent provided no security or collateral for the loan. Respondent advised Seibel he would get all of his money back plus interest or dividends. The discussion regarding the terms of the $33,911.50 loan, like the other one, took less than a minute and one-half. Respondent told Seibel what he needed the money for and Seibel relied on his representations.

Respondent did not put the terms of the loan in writing, did not give Seibel the opportunity to seek the advice of independent legal counsel and did not request that Seibel consent to the loan in writing nor was Seibel's consent ever reduced to writing.

Respondent used the $33,911.50 to purchase property in the name of one of his companies which Seibel later learned was solely owned by respondent. Seibel later sought repayment of the loan, however, his repeated requests for payment were futile.

Respondent has filed for bankruptcy and listed this loan as one of his debts to be discharged.

In 1991, respondent approached Seibel about a real estate venture investment involving a rental property referred to as the Oak Lane property. Respondent owned the Oak Lane property and conveyed it to Seibel by deed dated Feb. 20, 1991. At the time of the conveyance, the property was encumbered by a first mortgage.

After the property was purchased by Seibel, he refinanced it. Seibel claims he refinanced the mortgage because respondent represented that the original mortgagee was calling its loan. Over a short period of time, Seibel paid respondent over $12,500 towards repairs and renovations to the property. Respondent claims to have paid in the same amount and that such funds were expended for repairs and maintenance to the Oak Lane property.

In the fall of 1992, Seibel received a notice from the mortgagee that the mortgage was in arrears. Respondent represented that it was merely a bank error and that he

(Respondent) would take care of the matter. Thereafter, respondent falsely represented that he had indeed taken care of the matter. At that time, Seibel actually viewed the property and he judged it to be in very poor condition and that it did not appear to have had any renovation work as indicated by respondent. In 1992, Seibel requested an accounting of the real estate venture from respondent, however, respondent failed to respond to the request.

Seibel sold the Oak Lane property in an attempt to recoup some of his losses. Although vehemently denied by respondent, Seibel believed respondent inflated the value of the property in order to induce him to enter into the venture.

SUMMARY OF THE ARGUMENT

The respondent previously received a two month suspension in The Florida Bar v. Maynard, 372 So. 2d 74 (Fla. 1979). A client of respondent complained that respondent had failed to use funds provided to pay off a judgment as instructed. An investigation commenced and a grievance proceeding was held. Respondent was asked whether a document which had been presented into evidence was a true copy of his master trust account journal. Respondent replied that it was. Thereafter, it was learned that respondent had instructed his bookkeeper to alter entries in the master trust account journal and a second grievance proceeding was commenced with probable cause being found. The referee found that respondent under oath, knowingly and intentionally provided a false answer to the grievance committee regarding whether a page from his trust journal, which had been presented into evidence in the proceedings, was a true copy. The referee noted that the false statement to the grievance committee was supported by other false statements which respondent had made to the committee, evidencing a purpose to conceal the true nature of his firm's trust account. In Maynard, the court adopted the

referee's recommendation that respondent be found guilty of engaging in conduct representing dishonesty, fraud, deceit or misrepresentation, engaging in conduct prejudicial to the administration of justice and engaging in conduct that adversely reflects on his fitness to practice law. That case, like the matter herein, demonstrates respondent's dishonesty and his disregard of his responsibility as a member of The Florida Bar to maintain a standard of conduct that exemplifies the legal profession.

This case presents a pattern of conduct where respondent cultivated a close personal and professional relationship with his clients and then used their trust to exploit them for his personal benefit without regard to their interests. Without hesitation, respondent entered into business transactions with his clients, disregarded and violated his fiduciary duty as trustee, used client funds for his own purposes, made misrepresentations to clients to conceal his activities and conduct, failed to keep clients informed about matters and comply with reasonable requests for information and entered into situations with clients strife with conflicts of interest between

clients and between himself and his clients. Although the referee did not specifically find that respondent acted with a "bad motive," it is clear that he acted without regard to his clients' interests. Respondent further failed to properly maintain his trust account records with respect to the complainant, Randy Strausberg. He has refused to acknowledge his wrongdoing and throughout the proceedings was less than forthcoming and cooperative.

Respondent established himself in the lives of Strausberg and Seibel to the extent that they had extreme confidence in him and blindly trusted him with their affairs and their money. They truly demonstrated a level of blind trust that, as discussed in The Florida Bar v. Dancu, 490 So. 2d 40 (Fla. 1980), is unparalled in very few other economic relationships. In the present case, respondent deprived his clients of substantial funds, which have not been recouped, and behaved in such a manner that he should receive discipline harsher than a 91 day suspension and should be required to pay them restitution.

Given the nature of the charges, the number of violations,

the pattern of misconduct, respondent's disciplinary history and his lack of remorse, a disbarment or a long period of suspension and restitution is appropriate.

ARGUMENT

DISBARMENT OR LONG TERM SUSPENSION IS APPROPRIATE GIVEN THE NATURE AND NUMBER OF DISCIPLINARY VIOLATIONS, WHICH INCLUDED MISUSE OF CLIENT FUNDS AND TRUST ACCOUNT IRREGULARITIES, PRIOR DISCIPLINARY HISTORY, PATTERN OF MISCONDUCT AND LACK OF REMORSE.

The bar does not take issue with the referee's findings of fact or recommendations as to guilt. It does, however, contest his recommendation as to discipline. The main concern is the length of time respondent should be suspended. Given the number of violations, pattern of misconduct, the nature of the charges, respondent's prior disciplinary history and his lack of remorse, the bar submits that a suspension in excess of 91 days would be more appropriate and further submits that disbarment is warranted.

> Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standard of ethical conduct... Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above the minimum standards. But in the last analysis, it is the desire for the respect and

> confidence of members of his profession and of the society which he serves that should provide to a lawyer the incentive of the highest possible degree of ethical conduct. (From the preamble of the Code of Professional Responsibility, Sept. 1985).

Respondent's conscience does not rise to even a minimum level of ethical conduct and his actions show a clear disrespect for the rights of others.

Respondent, who has practiced law since 1971, is a very articulate and personable man who established a professional relationship with Randy Strausberg and Matthew Seibel and thereafter became good friends with them to the extent that he and Strausberg took vacation trips together and he, Strausberg and Seibel had dinner in each others' homes. When asked whether Strausberg trusted his legal abilities, respondent proudly stated it was more accurate to say that Strausberg loved him dearly, (T. Vol. III p.249). The bar submits that he cultivated the trust and friendship of Strausberg such that Strausberg was comfortable and made it a practice to discuss most of his legal matters with respondent even if respondent was not actively representing him in the matter. (T. Vol.I p.67-69). Further, it was not unusual

for Strausberg to frequently spend hours in respondent's office talking. (T. Vol.IV pg. 396). Their relationship was such that over the years, Strausberg paid respondent over six figures in legal fees and a bonus of $20,000 for doing nothing (T. Vol.III pp.248-249) and he had respondent rent and watch over his home while he was out of the state for an extended period. (T. Vol.I p.68). The friendship and respect was such that Strausberg wanted respondent as trustee for his children's trust. The matter of service as trustee as put by respondent was "something a godfather might do." (T. Vol.IV p.398). Yet, respondent acted with complete indifference to his duty as trustee. He failed to preserve the assets of the Trust and to make prudent investments. His deliberate and oftentimes callous conduct resulted in the Trust's assets being depleted.

A lawyer is the shepard of his client funds which are entrusted to the lawyer's care. See the dissenting opinion of Justice Ehrlich in The Florida Bar v. McShirley, 573 So. 2d 807, 810 (Fla. 1991). It is essential to the practice of law that the public have confidence that the attorney to whom a client's life, and property are entrusted will not breach his fiduciary duties.

The attorney is in a special position of trust and has a duty to maintain the safety and integrity of trust account records. See The Florida Bar v. Rosen, 608 So. 2d 794 (Fla. 1992). In Rosen, the supreme court held that a felony conviction, past discipline of suspension, misappropriation of client funds and failure to maintain trust records warranted a two year suspension. The court herein, as in *Rosen*, should deal severely with respondent because this is cumulative misconduct.

In The Florida Bar v. Wolf, 605 So. 2d 461 (Fla. 1992), an attorney was suspended for 24 months after mishandling and misappropriating estate funds while serving as personal representative and for misusing and overdrawing her trust accounts. Wolf submitted a final accounting which did not reflect a true recitation of all funds received and paid out while the attorney was the personal representative. In the case at bar, respondent submitted an accounting to Strausberg which he knew, or should have had reason to know, did not accurately reflect nature and the value of the assets in the Trust. (ROR, pp.4-5). Respondent, however, appears to believe he had no duty to make an accounting to "any human alive" with respect to the

Trust because he had complete control over it. (T. Vol.IV p.402). Therefore, why should it matter if the accountings were inaccurate and misleading?

This case is even more egregious than Wolf, because, unlike Wolf, supra, respondent has not made restitution to Strausberg or the beneficiaries of the Trust (or Seibel) and has, in fact, sought to discharge his debts to the Trust by filing for bankruptcy. The court found that Wolf's actions involved dishonesty, fraud, deceit and misrepresentation. She wrote a number of checks for purposes having nothing to do with the estate or the client matter. The referee found a pattern of misconduct in the handling of client funds which he considered an aggravating factor. The facts here clearly show that respondent made a personal loan of $15,000 from the Trust to himself and a personal loan of $13,156.50 to his accountant, Weinster, without requiring any collateral or security, a personal loan of $2,228.50 to his friend, Michael Kelly (T. Vol.III p.364, and Bar Ex. 2) a personal loan, to his former client and friend, James Hart, and a personal loan of $15,000, to his personal secretary and her friend and that he paid off his personal loan of $15,606

to the Crowders from the Trust. Respondent would have the court believe that several of these loans were repaid by a complicated scheme of payments he made from his own funds to Florida Federal Savings and Loan Association. (T. Vol.III pp.284-285 and T. Vol.IV pp.413-415) His own records do not show that these loans were ever repaid and because of the poor quality of his record keeping with respect to the Trust, it is impossible to determine the actual loss. Respondent would have the court believe that these losses were merely the result of investments which went "bad." The bar would submit that respondent made these loans without regard for the purposes of the Trust, without considering whether they were prudent investments with adequate security and a reasonable rate of return and without regard to Strausberg's recommendations of safe investments. The bar would submit that respondent considered the Trust to be a "treasure chest" from which he could make loans to whomever he chose for whatever reason there might be.

Respondent should be disbarred or, at the very minimum, suspended for a period longer than 91 days for lending funds to himself, his clients and friends. It is deplorable that he used

funds belonging to another to pay off his own personal debt. The court in The Florida Bar v. Wagner, 497 So. 2d 238 (Fla. 1986), suspended an attorney for 18 months followed by three years probation and required the attorney to pay restitution to his former clients. The record herein, like that in Wagner, showed numerous questionable loans and payments made from the Trust. Wagner loaned monies from the trust to one of his clients, knowing that this client was in precarious financial difficulty. Herein, respondent made mortgage payments from the Trust to Florida Federal at a time when he knew Hart was having financial difficulties.

The respondent may argue that his actions were the result of some impairment. Even if respondent claims his actions were the result of some sort of mental disability or substance impairment, his misconduct still warrants disbarment or a long term suspension. In The Florida Bar v. Hartman, 519 So. 2d 606 (Fla. 1988), the attorney was suspended for two years and placed under a two year probation due to his unintentional misuse of client funds which occurred during a short period of emotional instability and substance addiction. The attorney was under

contract with HRS and received cost advances for blood tests for putative fathers. In several instances, he failed to place these funds into a trust account, disburse funds to pay for blood tests or forward the money to HRS. In a real estate matter he failed to properly handle the proceeds of a sale. He deposited the funds into his trust account but did not distribute them to the client. In another case, the client gave him funds to pay certain debts incurred by the client. He failed to satisfy the debts as agreed and instead kept some of the funds without providing an accounting. The court upheld the referee's recommendation of guilt for failing to maintain trust records, commingling, failing to preserve the identity of client funds, failing to maintain complete records of client funds, and engaging in conduct reflecting adversely on his fitness to practice law. Respondent, during the final hearing, appeared to argue he lacked bad motive in his conduct with respect to the Trust. However, assuming one believes respondent had no bad motive, even considering the lack of intent, a harsher discipline is appropriate herein as in Hartman, supra, where such lack of intent was looked at merely as a mitigating circumstance. The bar submits that the extreme sanction of disbarment should be

imposed because rehabilitation of the respondent is highly improbable as he has accepted no responsibility for his conduct and he has a past disciplinary history of dishonesty.

Respondent was also found guilty of improperly entering into business transactions with his client, Seibel. Respondent is likely to argue that a short suspension is warranted. See The Florida Bar v. Black, 602 So. 2d 1298 (Fla. 1992), wherein the attorney was suspended for 60 days and placed on probation for a 2 year period for obtaining an unsecured loan from his client. However, herein there is a pattern of conduct as respondent took for himself two loans from Seibel, two loans for himself from the Trust and entered into a real estate venture with Seibel. In addition, unlike Black, supra, the clients herein suffered losses. Respondent seized upon the opportunity to obtain personal loans in substantial amounts from his closest and dearest friends and clients. Further, in the Oak Lane venture, Seibel purchased property from respondent and assumed and later paid off the respondent's mortgage on said property without receiving any financial benefit. (T. Vol.II pp.197-198 and T. Vol.IV p.446) The bar has established respondent's selfish

motive and the vulnerability of his clients, not because of their lack of sophistication, but because of their misplaced confidence in the integrity, ability and character of respondent and their belief that he would look out for their interests. In The Florida Bar v. Crabtree, 595 So. 2d 935 (Fla. 1992), the referee found Crabtree guilty of engaging in conduct involving dishonesty, fraud, deceit and misrepresentation; entering into a business transaction with a client without full disclosure and consent of the client; and representing two clients at the same time, which could have adverse interests, without their knowledge or consent. Therein, the Supreme Court held that attorney misconduct in representing two different people in the same transaction without informing one of his representation of the other, taking fees and interest in transactions without fully explaining his part and share in the transactions and writing phoney letters designed to mislead anyone looking into the transaction combined with a prior private reprimand for similar misconduct warrants disbarment. Further, harsh discipline in this case is warranted because of the seriousness of the transgressions and the need to deter others who may be susceptible to engaging in this type of misconduct due to the

ease and accessability of the funds from their clients who happen to be close friends. As noted in Black, supra, "lawyers must be extremely careful in their personal dealings with clients. Lawyers act in a special fiduciary capacity with their clients and must avoid using that relationship for personal gain." [At p.1298]. Herein, it was more expedient for respondent to use his friends' resources as a funding source instead of using the conventional method of obtaining a bank loan.

By their very nature, business dealings with clients are fraught with conflict of interest problems. Notwithstanding a lawyer's good intentions, human nature makes such conflict virtually inevitable. When a lawyer deals with a client in a business transaction, the lawyer must be scrupulous in disclosing the exact nature of the transaction and in obtaining the client's consent in writing. The Florida Bar v. Kramer, 593 So. 2d 1040, 1041 (Fla. 1992). The rules define the prerequisites for business deals between a client and attorney and the bar submits that respondent's actions clearly indicate his disdain for these rules. His numerous business transactions with clients without regard to whether the terms of the transactions were fair and

reasonable to the clients (for example, no interest or collateral in the Seibel $35,000 loan and no collateral and no defined interest rate in the Seibel $33,911.50 loan), his abuse of their trust and failure to comply with the safeguards require harsh treatment. The prerequisites to protect the client must be taken regardless of whether the client attempts to brush them aside as respondent states Seibel did. (ROR, pp.8-9)

The bar argues that respondent's misconduct with respect to the Meyers/Hart transaction clearly requires strict discipline as there can be no better example of the dangers of multiple representations. Depending upon which point in time the matter is viewed, respondent represented Meyers, Hart, both Meyers and Hart, and Meyers, Hart and the Trust. Initially, he facilitated the purchase and sale of the Springs, acted as an escrow agent, and as Meyers' attorney in the transaction. (ROR, p.4) Almost two years later when Meyers wanted his equity payment under the agreement, respondent gave $19,300 from the Trust to Meyers and took back a mortgage. Since this payment was Hart's responsibility, it can be argued that respondent was acting to protect Hart's interests. Also, he was protecting his own

interests since the legal fees of the transaction attributed to Hart, were included in the loan amount. (T. Vol.III pp. 328-329). How could this "loan" have benefitted the Trust, as respondent would have one believe, when he did not take such reasonable steps as determining the equity in the property and independently verifying Hart's financial soundness, obtaining a promissory note from Hart and recording the mortgage. (ROR, pp.4-5). Respondent put the financial and legal welfare of Meyers and Hart ahead of the Trust. Under the circumstances in this case, it is difficult to even imagine how any reasonable person could believe he/she was acting in a prudent manner. In The Florida Bar v. Micks, 628 So. 2d 1104 (Fla. 1993), the court held that an 18 month suspension was warranted, with the requirement of restitution, due to the attorney's misrepresentation, entering into business transactions with a client who has differing interests, and failing to seek the lawful objectives of a client in connection with a foreclosure action, and for other offenses. Respondent should be disciplined harshly for representing both Meyers and Hart despite possible conflict of interest; for entering into business transactions with clients having different interests therein where the exercise of his professional judgment

on behalf of the clients would be or reasonably may be affected by his own financial, business, or property or personal interests; for failing to disclose the conflict of interest; failing to use client funds for their intended purpose, and for failing to provide an accounting of client funds. Such conduct reflects adversely on his fitness to practice law. This pattern of misconduct makes it clear that this was not an isolated lapse of judgment on respondent's part.

Respondent's position appears to be that even if he was derelict or acted wrongly with respect to his duties as trustee, such dereliction and malfeasance are not within the purview of The Florida Bar. Such is not the case. The matter herein is similar to The Florida Bar v. House, 303 So. 2d 15 (Fla. 1974), wherein House agreed to establish a trust for his mother-in-law and her mother. House deposited these funds, which were in excess of $100,000, into a separate trust account and thereafter used these monies to pay a mortgage on his house and to satisfy certain obligations to another bank. House also transferred funds from the trust to his own office account and to a corporation solely owned by him. Based upon these facts and

others within the case, the Supreme Court determined that the professional conduct of House was less than what is expected in the professional field of a practicing attorney and found him guilty of violating the Code of Professional Responsibility, Rules Governing Conduct of Attorneys and the Integration Rules of The Florida Bar.

The Florida Supreme Court in House, supra, acknowledged that it was a reasonable and natural conclusion that the principles of justice and fair play be applied to the dereliction of professional duty owed even to a family legal matter. It is the bar's position that the respondent owed a professional duty to Strausberg and to the beneficiaries of the Trust. He should have exercised the judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the management of their own affairs, considering the probable income and the probable safety of their capital. See Florida Statutes Section 518.11. As Strausberg testified at the referee hearing, a reasonable person would assure himself that the person he was lending money to would be able to repay it, and if the person could not repay it, you would be intimately

knowledgeable about the value of the property so that you feel there is more than adequate value in the property to cover your mortgage. (T. Vol.I pp.89-90).

In the case herein, respondent had a duty to inform and account to the beneficiaries of the Trust. In that the beneficiaries herein were children, the respondent's duty would be to their parent, Strausberg. See Florida Statutes Sections 737.302 and 737.303. Respondent was not expected to have 20-20 hindsight. He should, however, have exercised proper care and diligence in his handling of the childrens' Trust. Further, he should have acted in good faith, that is, honestly and with the finest and undivided loyalty to the Trust. This is especially true where the reasons for employing respondent to act as trustee was based on his integrity, not necessarily his financial skills. However, the record clearly shows that respondent did not act prudently, nor did he act in good faith.

Respondent's failure to seasonably file income tax returns for the Trust, his lack of honesty and the misrepresentations he made concerning the assets of the Trust are deplorable. The

facts clearly indicate respondent's mixed interest as trustee and attorney. Further, like the attorney in The Florida Bar v. Bennett, 276 So. 2d 481 (Fla. 1973), respondent should not be allowed to cast off the mantle he enjoys as a member of the profession and merely act with simple business acumen and not be held responsible under the high standards of the profession. "'An attorney is an attorney is an attorney,' much as the military officer remains 'an officer and a gentleman' at all times." Bennett, supra, at page 482. In Bennett, the referee found that the attorney was acting not only as a joint owner and investor, but also as a trustee for the other investors. Further, the referee stated in his finding in Bennett that the fact that he was an attorney should have made Bennett more aware of the obligations he owed to others on whose behalf he was acting. The supreme court upheld the recommendations of guilt by the referee based upon the attorney's failure to pay taxes for which his principals had sent the money and for his misrepresentations made to his principals. The court found in Bennett that the attorney's actions, which were committed during the course of his fiduciary capacity, were contrary to honesty and justice. The bar's position that the discipline recommended

by the referee herein is insufficient is supported by Bennett, supra. In Bennett, the Court suspended the attorney for one year with the requirement of showing rehabilitation prior to reinstatement. Like Bennett, respondent placed himself in such a position that Strausberg looked to him as an attorney who would be informed on the matter and relied upon him. Respondent was expected to remain above suspicion and to be on guard and act accordingly to avoid tarnishing the professional image or damaging the public which may rely upon an attorney's professional standing.

The bar's position that long term suspension or disbarment would be more appropriate as discipline is also supported by The Florida Bar v. Weed, 559 So. 2d 1094 (Fla 1990). The court in Weed ordered a three year suspension for an attorney whose actions included neglect of legal matters (dealing with one client's attempt to recover for damages in an auto accident, not filing an appeal in conjunction with the client's son's vandalism convictions), assisting in illegal conduct and failing to file tax returns.

The discipline ordered should protect the public from unethical conduct. It must be fair to a respondent yet be sufficient to punish the breach and encourage reformation and rehabilitation and it must be severe enough to deter others who might be prone to become involved in like violations. The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). The court in The Florida Bar v. Marcus, 616 So. 2d 975 (Fla. 1993), found a three year suspension to be appropriate where the attorney misappropriated client funds, rather than the presumptive sanction of disbarment, in light of the mitigating factors of cocaine addition, successful rehabilitation, delay, and early and full restitution. The misappropriation of a client's funds "is one of the most serious offenses a lawyer can commit and absent sufficient mitigating factors, compels the extreme sanction of disbarment." The Florida Bar v. Tunsil, 503 So. 2d 1230, 1231 (Fla. 1986) as quoted in Marcus, supra.

In The Florida Bar v. Mattingly, 342 So. 2d 508 (Fla. 1977), the attorney admitted to owing one of his clients $117,900 from funds placed in his trust account. He claimed his misleading statements to his client were due to confusion, not evil intent,

that the irregularities in his trust account were due to an unsatisfactory bookkeeping system and that his conduct in improperly handling the trust funds was not due to any willful or evil intent to defraud anyone. Mattingly was disbarred but not prevented from reapplying for admission to the bar. However, the bar argues that this case for review is more akin to The Florida Bar v. Zyne, 266 So. 2d 668 (Fla. 1972), wherein the attorney was permanently disbarred for commingling funds of a client, depositing a client's check in his own checking account and letting the statute of limitations run in a negligence claim. In addition, Zyne had a past suspension of six months. The referee recommended permanent disbarment stating that the "conduct of the respondent is grossly out of character for a lawyer. Personal observation and the entire record in the case on him convince me that he is quite incapable of ever developing the moral character necessary to one whose business is handling the money, secrets and affairs of others." Zyne, supra, at page 669. Like Zyne, respondent should be disbared in light of his repeated and completely unprofessional actions and his serious defalcations and damage done to clients and the profession.

In some respects this case is similar to The Florida Bar v. McShirley, 573 So. 2d 807 (Fla. 1991). Therein the attorney was charged with conversion of funds from his trust account for personal use. He converted funds to make personal real estate transactions, to support a little league program and to pay his law office operating expenses. The bar charged him with a number of trust account violations, commingling, conduct involving dishonesty, fraud, deceit and misrepresentation and conduct adversely reflecting on his fitness to practice law. The bar sought disbarment but the court ordered a three year suspension. The court, however, noted it was a close case as McShirley had knowingly converted client funds for his personal use over a period of several years. McShirley is dissimilar to the case at bar as respondent has not replaced the converted funds, there is a prior disciplinary history and he has not exhibited genuine remorse. Further, his cavalier attitude is antithetical to his responsibilities and fidelity to a client. The bar contends that Justice Ehrlich's dissent in McShirley, which holds that a lawyer who is so lacking in character or so deficient in judgment as to misappropriate a client's money should be disbarred, is relevant to the respondent's conduct in this case.

In The Florida Bar v. Lobel, 526 So. 2d 65 (Fla. 1988), the Supreme Court held that the attorney's use of a client's funds to satisfy personal obligations and failure to reimburse the client constituted misconduct and warranted disbarment. Settlements of property and support claims in a divorce action totaling in excess of $33,000 were placed with Lobel. He was to deduct his agreed upon fee of $5,000 and distribute the remainder to the client. He disbursed $1,000 to her and told her he took the remainder to satisfy some of his personal debts. He signed a promissory note in the amount of $25,000. He later gave her several checks in small amounts which were dishonored. He was found guilty of conduct involving dishonesty, fraud, deceit or misrepresentation; conduct reflecting adversely on his fitness to practice law; engaging in an improper business transaction with a client; failing to preserve funds of clients, and trust fund misuse. He was disbarred and ordered to make restitution before his application for readmission would be considered.

Respondent's action in keeping the Trust monies in his general law office trust account after having promised to put it in a seperate account, in providing inaccurate and misleading

accountings regarding the Trust, in promising to closely watch the investments in the Trust (T. Vol.I p.93), but failing to do so (T. Vol.III p.278) in keeping poor records for the Trust, in attempting to discharge in bankruptcy his obligations to Strausberg and Seibel, in transacting business with clients without regard to their best interests, indicate an attorney who has no respect for his responsibilities and duties as a member of The Florida Bar. He has demonstrated that he is unworthy of the public's trust and he should not be allowed to taint the reputation of his fellow attorneys.

It is evident from the evidence in this case, the totality of respondent's violations and the relevant case law discussed herein, that a suspension of the respondent in excess of 91 days is warranted. However, the bar contends the respondent's disbarment is necessary and required under the circumstances.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will approve the referee's findings of fact and recommendation of guilt but review the referee's recommendation as to discipline and, instead, order a suspension in excess of 91 days or disbarment; restitution to Randy Strausberg and Matthew Seibel for the losses they incurred as a result of respondent's misconduct (or reimbursement to The Florida Bar Clients' Security Fund should Mr. Strausberg and/or Dr. Seibel make successful claims to the fund); and payment of the bar's costs in prosecuting this case which total $6,730.80.

Respectfully submitted,

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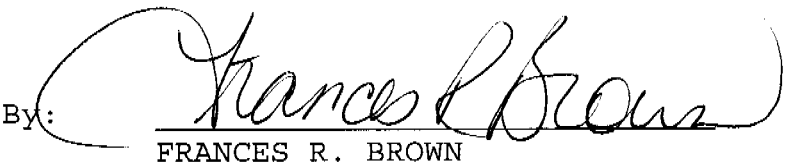
By: 
FRANCES R. BROWN
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing initial brief and appendix have been furnished by First Class mail to The Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by certified mail No. P 912 210 132, return receipt requested, to Gavin D. Lee, counsel for respondent, at 230 Lookout Place, Suite 200, Maitland, Florida, 32751-4494; and a copy of the foregoing has been furnished by First Class mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 3rd day of July, 1995.

FRANCES R. BROWN
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN LOBBAN MAYNARD,

Respondent.
_____/

Case No. 83,918
[TFB Nos. 93-30,761 (09C)
and 93-31,279 (09C)]

APPENDIX TO COMPLAINANT'S INITIAL BRIEF

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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 Regulating The Florida Bar, a hearing was held on March 10, 1995, with its continued conclusion on March 24, 1995. The pleadings, notices, motions, orders, transcripts and exhibits are forwarded herewith and constitute the record of this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Frances R. Brown
For The Respondent - Gavin D. Lee

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, some portions which may be commented on below, I find:

COUNT I

1. Respondent and Randy Strausberg have known each other since 1992. They became very close personal friends, eating dinner at each other homes, taking vacations trips together and the like. Over the years Respondent handled several legal matters for Strausberg.

2. In 1984, Strausberg hired Respondent to set up an Irrevocable Trust for his two children. Respondent was requested to act as Trustee. While no Trust instrument is known to exist, nevertheless, the parties acknowledged that a Trust was created.

3. Strausberg desired the childrens' Trust be created to remove assets from his personal estate and to establish a fund which could be used for the education of his children and their

bar mitzvahs.

4. Strausberg knew he could not dictate which investments the Trustee should consider, however, believed that Respondent would consider his recommendations. Strausberg had numerous discussions with Respondent concerning what he considered to be good investments and expected Respondent to make prudent investments for the childrens' Trust. He provided Respondent with a letter of November 10, 1994, outlining what he considered to be good investments.

5. Respondent agreed to keep Strausberg advised of the status of the assets in the Trust, however, failed to do so.

6. In January of 1984, Strausberg funded the subject Trust by delivering Forty Three Thousand Dollars ($43,000.00) to Respondent, as Trustee. On the 25th of January, 1984, Respondent, as Trustee, loaned from the Trust the sum of Forty Three Thousand Dollars ($43,000.00) to Eric J. Parker, and as Trustee, took back a mortgage. (hereinafter the "Parker Mortgage") Respondent did not list the initial contribution in any accounting for the Trust. He later testified that he had placed the funds in his general law office Trust Account.

7. On August 31, 1984, Strausberg transferred a mortgage valued at Nine Thousand Dollars ($9,000.00) to the Trust. That mortgage (hereinafter the "Chang Mortgage") was to have brought to the Trust monthly payments of One Hundred Thirty Three Dollars and Eighteen Cents ($133.18).

8. Respondent received a payment of Nineteen Thousand Four Hundred Ninety Three Dollars and Thirty Three Cents ($19,433.19) on the Parker Mortgage on February 11, 1985. He did not account for those funds, however, until August, 1985, when he opened a separate money market account for the Trust.

9. In a letter of June 17, 1985, Respondent advised Strausberg that he would open a separate money market account entitled "John L. Maynard, as Trustee", for the Strausberg children, in the amount of Twenty Thousand Five Hundred Thirty Seven Dollars and Sixty Three Cents ($20,537.63). That amount included the February 11, 1985 Parker Mortgage payment of Nineteen Thousand Four Hundred Ninety Three dollars and Thirty Three Cents ($19,433.19) and payments received on the Chang Mortgage. Respondent did not indicate how many payments on the Chang Mortgage were included in the funds to be deposited and there is no method to determine such as the Trust records Respondent produced are incomplete. Respondent agreed to send Strausberg monthly statements from that separate account, however, failed to do so.

10. Respondent failed to deposit the Twenty Thousand Five Hundred Thirty Seven Dollars and Sixty Three Cents ($20,537.63)

into a separate fund until August 26, 1985, when Respondent deposited the funds in an interest bearing, "money market" account.

11. In February, 1987 Respondent received Sixteen Thousand Fifty Three Dollars and Thirty Three Cents ($16,053.33.) from Eric J. Parker, representing the final payment on the Parker Mortgage. Respondent failed to deposit those funds into the money market account. Rather, it appears that he placed them in his general law office Trust account.

12. Respondent kept a ledger for the funds held in the money market account and a ledger for funds held in his general law office Trust account. The entries in these ledgers cannot be reconciled.

13. Respondent admitted that he, as Trustee, was responsible for the preparation and filing of annual income tax returns for the subject Trust.

14. Respondent did not seasonably file tax returns for the years ending 1985 and 1986. He did not file a tax return for the Trust for the year ending in 1984, however, Respondent asserts that there was no income that year to report.

15. Despite Internal Revenue notices sent him advising of the delinquent fiduciary returns, Respondent did not file tax returns for the years ending 1989, 1990 and 1991. Respondent urges, however, that such returns had been prepared, albeit late, by the Accountant, Bernard Weinstein.

16. Respondent loaned himself Fifteen Thousand Dollars ($15,000.00) from the childrens' Trust, and in a subsequent accounting identified the loan as "the Mayfield loan". Respondent stated that he provided a promissory note to the Trust, however, could not provide a copy of the note. Moreover, Respondent conceded that he did not require collateral for the loan. It is impossible to determine from the records whether or not the loan was paid back, however, Respondent testified that it was repaid with interest.

17. In 1987 the Respondent made a personal loan to Mr. Weinstein in the amount of Thirteen Thousand One Hundred Fifty Six Dollars and Fifty Cents ($13,156.50) from the childrens' Trust. He did not require a promissory note or security for the loan. Respondent testified such loans, to be repaid at interest, were one of the basic functions of the Trustee, and that the subject loan was repaid.

18. Respondent used the Trust fund to make loans to friends and to pay off his personal debt to the Crowders in the amount of Fifteen Thousand Six Hundred Six dollars ($15,606.00). It was observed that loans to "friends" were the purpose of the Trust and

that it is unlikely such loans would be made to other than friends.

19. On December 12, 1985, Respondent loaned Sixteen Thousand Five Hundred Dollars ($16,500.00) from the Trust to his secretary, Ann Marie Alter, and her friend, Patricia Mansfield, to purchase their real property. Respondent did not obtain a credit check nor did Alter or Mansfield provide any type of financial statement. Respondent took back a second mortgage (hereinafter the Alter/Mansfield Mortgage), without obtaining any type of appraisal.

20. Alter and Mansfield subsequently defaulted on the mortgage. Respondent did not bring a foreclosure action or take any other action to collect on the note. Indeed, Respondent knew as early as June, 1988 that the mortgage was five (5) months behind. Despite Respondents' efforts, he was unable to locate either mortgagor.

21. In March, 1989 the first mortgage holder obtained a Final Judgment of Foreclosure and a Certificate of Sale thereon was issued on June 5, 1989. Respondent did not notify Strausberg that the first mortgage had been foreclosed "out from under" the Alter/Mansfield Mortgage.

22. Respondent listed the Alter/Mansfield Mortgage as an asset of the Trust in his accounting to Strausberg well after the property had been lost and the mortgage and note become valueless.

23. Respondent represented the terms of the loan to Alter and Mansfield in his July 13th letter of accounting, saying that the loan could be withdrawn after six month's notice. Under the terms of the loan, however, the six month's notice of withdrawal proviso was inapplicable until after December 12, 1988.

24. In May, 1984 Respondent agreed with one James Hart that the latter would purchase a condominium known as "the Springs" from one Timothy Meyers for One Hundred Ten Thousand Dollars ($110,000.00), with Four Thousand Dollars ($4,000.00) down. Respondent, who represented Meyers, was to hold the Deed, apparently in Escrow, until Hart paid Meyers for his equity in the property. Hart was also to pay the first mortgage due Florida Federal Savings and Loan Association in the principal amount of Eighty Two Thousand Dollars ($82,000.00). A second mortgage in favor of Barnett Bank encumbered the property in the sum of One Hundred Thousand Dollars ($100,000.00).

25. In March, 1986 Respondent disbursed Nineteen Thousand Three Hundred Dollars ($19,300.00) from the childrens' Trust to Meyers and obtained a mortgage, but no note from Meyers for the payment ostensibly representing Meyers equity in the property. The payment was actually Hart's responsibility under the May, 1984 agreement with Meyers. In his Trust records, Respondent treats this payment as a loan to Hart.

26. Prior to making the abovedescribed payment, Respondent did not obtain an appraisal nor did he seek to obtain the outstanding balance of the mortgage due Florida Federal to determine equity in the property - if any. Respondent intended to use the mortgage as security for the Hart loan even though at that time there was no written promissory note from Hart.

27. The Florida Federal mortgage had a due on sale clause and the Barnett Bank mortgage included a nontransferable clause. Neither mortgage holder consented to the transfer of the property from Meyers to Hart, though Respondent testified he had reason to believe he would receive such consent.

28. In a letter of July 13, 1986 to Strausberg, Respondent listed a second mortgage for Twenty One Thousand Dollars ($21,000.00) on the Springs. Respondent failed to record that mortgage which he had taken back from Meyers, ostensibly to avoid "triggering" the "due on sale" clause.

29. In a 1987 accounting, Respondent referred to the mortgage from Meyers as the "Hart" mortgage. It was listed at a value of Forty Four Thousand One Hundred Forty Six Dollars and Eighteen Cents ($44,146.18) which reflected an increase of Twenty Three Thousand One Hundred Forty Six Dollars and Eighteen Cents ($23,146.18) over the July 13, 1986 accounting.

30. Respondent knew at the time of the loan from the Trust to Hart that the combined outstanding balance of the Barnett Bank mortgage and the Florida Federal mortgage exceeded the value of the property. Respondent insists, however, that he had personal knowledge that the second mortgage was paid, simply not satisfied of record yet.

31. After March, 1986, Respondent loaned Hart additional monies from the Trust. These monies were paid directly by Respondent to Florida Federal as payments due on Meyers first mortgage.

32. Respondent knew at the time he loaned the Trust funds to Hart that Hart was having difficulty making payments to Florida Federal, which payments were his obligation under the agreement with Meyers. Hart was a former client of Respondent.

33. In 1987, Florida Federal filed a foreclosure action on the Springs property, naming Meyers as a defendant.

34. Respondent accepted service for Meyers in that action and filed a notice of appearance as counsel for Meyers.

35. On August 13, 1987, Respondent delivered a check for Fourteen Thousand - One Hundred Forty Six Dollars and Eighteen Cents ($14,146.18) to Florida Federal to reinstate the Meyers loan.

Those monies were from the childrens' Trust, paid from Respondent's general law office Trust account, not from the money market account.

36. On September 17, 1987, over a year from the Nineteen Thousand Three Hundred Dollars ($19,300.00) payment to Meyers, Respondent, as Trustee, obtained a promissory note from Hart for Forty One Thousand Six Hundred Eighteen Dollars and Seventy-Five Cents ($41,618.75), at 12 percent per annum. Although two versions of the note were executed by Hart, Respondent maintained that the operable note included a demand provision and a provision that Hart make the first mortgage payments to Florida Federal.

37. Respondent failed to inform Strausberg of the foreclosure action initiated by Florida Federal in 1987 and failed to explain that more monies from the Trust were going to pay the Meyers loan to Florida Federal with no increase in the collateral for the Hart loan.

38. The year end account on the Hart mortgage in 1987 showed Forty Four Thousand One Hundred Forty Six Dollars and Eighteen Cents ($44,146.18), reflecting an increase of Thirteen Thousand One Hundred Forty Six Dollars and Eighteen Cents ($13,146.18).

39. Respondent received numerous notices, including a Claim of Lien, putting him on notice that the assessment and maintenance fees of the Springs property were not being paid.

40. In a letter to Strausberg of July, 1989, Respondent listed the Hart mortgage value at Fifty Six Thousand Three Hundred Twenty Six Dollars and Seventy Cents ($56,326.70), an increase of Twelve Thousand One Hundred Eighty Dollars and Fifty Two Cents ($12,180.52) over the 1987 accounting. He also stated there was Seventeen Thousand Six Hundred Seventy Seven Dollars and Sixty Six Cents ($17,677.66) cash in the Trust. The money market account statement, however, showed a beginning balance on June 30, 1989 of Four Thousand Six Hundred Ninety Nine Dollars and Ninety Eight Cents ($4,699.98) and an ending balance on July 31, 1989 as Four Thousand Seven Hundred Twenty Three Dollars and Forty Six Cents ($4,723.46), with no deposits or withdrawals. The client ledger for the Trust for the year 1989 did not indicate a balance of Seventeen Thousand Six Hundred Seventy Seven Dollars and Sixty Six Cents ($17,677.66) at any time.

41. In the 1989 accounting Respondent promised to liquidate the Trust assets and invest in a zero coupon bonds. Respondent knew that the cash in the Trust had been depleted, the Alter/Mansfield Mortgage rendered valueless and that the loan to Hart was in default.

42. Respondent wrote Hart a letter dated May 22, 1991, indicating that Hart owed him a debt which at the end of the month

totaled One Hundred Twenty Three Thousand Three Hundred Twelve Dollars and Fifty Seven Cents ($123,312.57).

43. In August, 1981, Respondent sold the Springs property for Meyers, without an appraisal, at a price at which the Trust obtained no benefit from the sale.

44. Respondent has been unable to account for all funds withdrawn from the childrens' Trust.

COUNT II

45. Strausberg retained Respondent in 1989 to pursue the repayment of a debut from Peter Witonsky.

46. Respondent was to take such action as necessary to collect monies from Witonsky, including filing a lawsuit if need be.

47. There is a conflict in the evidence as to whether Respondent ever told Strausberg he had filed suit and obtained a Judgment against Witonsky. The record is clear, however, that suit was not filed.

48. Strausberg claims he had difficulty contacting Respondent after 1989. It is clear, however, that he had the telephone numbers at Respondent's law office, including his private line, his home and his cellular phone.

49. Strausberg sent a letter to Respondent on April 18, 1991, complaining of Respondent's inaccessibility, indicating that he needed to talk to Respondent about the Witonsky matter.

50. By letter of September 27, 1991, Respondent apologized to Strausberg for his prolonged silence, indicating that his time had been monopolized by one case.

COUNT III

51. In mid 1990, Strausberg retained Respondent to write letters of demand to one Gary Monieson, concerning an unpaid loan. He told Respondent he wanted to claim a bad debt reduction on his personal income tax.

52. Strausberg requested that Respondent send the information directly to his accountant, that he might claim the deduction on his 1990 tax return.

53. Strausberg had difficulty contacting the Respondent in 1991 and stated that Respondent told him he had sent the

information when he had in fact not done so.

54. Respondent did not forward the information to the accountant until April 10, 1992, at that time, Strausberg had already filed his tax return and did not wish to amend it, lest it trigger an audit by the Internal Revenue Service. Strausberg was unable to use the deduction for any subsequent tax years.

55. Respondent's failure to seasonably provide the information to the accountant resulted in substantial tax benefits being lost by Strausberg.

COUNT IV

56. In 1989, Strausberg retained the Respondent to confront "Pools By Max" and obtain repair of allegedly substandard work or return to Strausberg the monies paid for construction of a pool. If "Pools By Max" failed to correct its alleged deficiencies or refund Strausberg's money, Respondent was instructed to file suit.

57. A letter of February 7, 1981, Respondent demanded that "Pools By Max" correct their alleged deficiencies or return Strausberg's money. It was not until October, 1991, however, that Respondent caused a complaint to be prepared. Suit was not filed until February, 1992.

58. Thereafter, Respondent took no action to conclude the suit despite of Strausberg's instructions to do so. Respondent explains that his alleged failure to do so was based upon instructions from Strausberg's wife, presumably conveying Strausberg's message.

COUNT V

59. In 1989, Dr. Matthew Seibel hired Respondent to serve as co-counsel in probating his great-aunt's estate. Respondent had handled several legal matters from Seibel over the years and they had become close personal friends. Indeed, Respondent, Siebel and Strausberg and their families often travelled, visited and socialized together.

60. In April, 1989, Respondent asked Seibel to loan him Thirty Five Thousand Dollars ($35,000.00) for personal reasons. Seibel loaned him the money. Respondent did not put the terms of the loan in writing, neither did he advise Seibel to seek independent counsel or give him the opportunity to do so. Respondent did not request Seibel to consent to the loan in writing nor did Seibel so consent. Respondent argues that Siebel consented in writing by signing the check. The discussion between Respondent and Siebel concerning the loan fanned approximately one and one-half minutes, and took place in a car.

61. As security for the loan, Respondent assigned to Siebel a mortgage he was holding from one Waisman.

62. At the time of this loan Siebel considered Respondent to be his friend and attorney and he trusted Respondent to act in his best interest.

63. In the fall of 1990, Respondent indicated to Siebel that he needed to purchase certain property. Respondent asked Siebel for another loan prior to repayment of the Thirty Five Thousand Dollar ($35,000.00) loan. That loan, however, was repaid.

64. Siebel, not having much ready cash, obtained a bank loan and then loaned Respondent Thirty Three Thousand Nine Hundred Eleven Dollars and Fifty Cents ($33,911.50). Siebel testified that Respondent advised he would get all of his money back plus interest or dividends. The discussion concerning the terms of the Thirty Three Thousand Nine Hundred Eleven Dollars and Fifty Cents ($33,911.50) loan, like the other one, took less than a minute and a half. Respondent told Siebel what he needed the money for and Siebel relied upon his representations.

65. Respondent did not put the terms of the loan in writing, did not give Siebel the opportunity to seek advice of independent counsel and did not request Siebel to consent to the loan in writing nor was Siebel's consent ever reduced to writing. Respondent asserts that he began telling Siebel of his right to independent legal advice but was "brushed aside" and told, in effect, that such would be unnecessary.

66. Respondent used the Thirty Three Thousand Nine Hundred Eleven Dollars and Fifty Cents ($33,911.50) to purchase property in the name of one of his companies, which Siebel claims he later learned was solely owned by Respondent.

67. The testimony is unclear as to whether or not at the time of the loan Respondent provided Siebel with a promissory note. It is uncontroverted, however, that at some point Respondent did provide Siebel with a note for the Thirty Three Thousand Nine Hundred Eleven Dollars and Fifty Cents ($33,911.50).

68. Siebel sought repayment of the loan, however, his repeated requests for payment were futile. Respondent filed in Bankruptcy and scheduled this loan as one of the debts to be discharged.

69. In 1991, Respondent approached Siebel about a real estate venture involving investment in rental property known as the "Oak Lane Property". Testimony is unclear as to whether Respondent and Siebel were to purchase the property as partners and also as to whether Respondent disclosed to Siebel that the subject property was being purchased from Respondent. It is clear, however, the

Respondent owned the Oak Lane property and that he conveyed that property to Siebel by Deed dated February 20, 1991. At the time of the conveyance, the subject property was incumbered by a first mortgage.

70. Siebel believed the Respondent inflated the value of the property in order to induce him to enter into the venture, which Respondent vehemently denies.

71. After the property was purchased by Siebel, he refinanced it. Siebel claims he refinanced the mortgage because Respondent represented that the original mortgagee was calling its loan.

72. Over a period of time Siebel paid Respondent an access of Twelve Thousand Five Hundred Dollars ($12,500.00) toward repairs and renovations to the Oak Lane property. Respondent claims to have paid in the same amount, and that such funds were then expended for repairs and maintenance to the Oak Lane property.

73. In 1992, Siebel requested an accounting of the real estate venture from Respondent, however, Respondent failed to respond to the request.

74. In the fall of 1992, Siebel received a notice from the mortgagee that the mortgage was in arrears. Respondent represented that it was a bank error and that he (Respondent) would take care of the matter. Thereafter, Respondent falsely represented that he had in deed taken care of the matter, however, he had done nothing.

75. At the time Siebel actually viewed the Oak Lane property he judged it to be in very poor condition and that it did not appear to have had any renovations such as indicated by Respondent. Respondent asserts, however, that Siebel admitted that he was unfamiliar with the nature of rental properties or the standards of maintenance, and that his background and circumstances were attuned to more refined residences.

76. Siebel sold the Oak Lane property in an attempt to recoup some of his losses. Respondent maintained that Siebel panicked in selling the property and that if he had held on to it he would have realized a profit.

III. Recommendations as to whether or not Respondent should be found guilty: As to each Count of the Complaint, I make the following recommendations as to guilt or innocence:

COUNT I - I recommend the Respondent be found guilty and specifically that he be found guilty of violating the following disciplinary rules of the Code of Professional Responsibility:

5-104(A) for entering into a business transaction with a client wherein they have differing interest and where the client expects

the lawyer to exercise his professional judgment for the protection of the client; and the following Rules regulating The Florida Bar:

4-1.4(a) for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information;

4-1.4(b) for failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representations;

4-1.7(a) for representing a client where that representation will be directly adverse to the interest of another client;

4-1.7(b) for representing a client where the lawyer's exercise of independent professional judgment in the representation may be materially limited by the lawyer's responsibility to another client or to a third person or by the lawyer's own interest;
4-1.7(c) for representing multiple clients in a single matter without explaining the implications of the common representation and the advantages and risks involved;

4-1.8(a) for entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to the client;

4-1.8(b) for using information relating to the representation of client to the disadvantage of the client;

4-1.15(a) for co-mingling;

4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, misrepresentation;

5-1.1 for using Trust funds for purposes other than those for which they were entrusted to him;

5-1.2 for failing to follow the minimum Trust Accounting Procedures and maintain the minimum required Trust Accounting Records.

COUNT II - I recommend the Respondent be found not guilty. While the evidence is fraught with suspicious circumstances, The Bar has failed to prove its case by clear and convincing evidence.

COUNT III - I recommend the Respondent be found guilty, and specifically that he be found guilty of violating the following Rules Regulating The Florida Bar:

4-1.3 for failing to act with reasonable diligence and promptness in representing a client;

4-1.4(a) for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information;

4-1.4(b) for failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;

4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

4-8.4(d) for engaging in conduct prejudicial to the administration of justice.

COUNT IV - I recommend the Respondent be found not guilty. There is a dearth of clear and convincing evidence.

COUNT V - I recommend the Respondent be found guilty, and specifically that he be found guilty of violating the following Rules Regulating The Florida Bar:

4-1.4(b) for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information;

4-1.4(c) for failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representations;

4-1.8(a) for entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interests adverse to client;

4-1.8(b) for using information relating to the representation of a client to the disadvantage of the client;

4-2.1 for failing to exercise independent professional judgment and render candid advice in representing a client;

4-8.4(c) for engaging in conduct involving dishonesty, deceit or misrepresentation.

IV. Rule Violations Found:

Disciplinary Rules of the Code of Professional Responsibility:

5-104(A)

Rules Regulating The Florida Bar:

4-1.4(a); 4-1.4(b); 4-1.7(a); 4-1.7(b); 4-1.7(c); 4-1.8(a);

4-1.8(b); 4-1.15(a); 4-8.4(c); 5-1.1; and 5-1.2.

COUNT II - Rules Regulating The Florida Bar: None

COUNT III - Rules Regulating The Florida Bar:

4-1.3; 4-1.4(a); 4-1.4(b); 4-8.4(c); and 4-8.4(d)

COUNT IV - Rules Regulating The Florida Bar: None

COUNT V - Rules Regulating The Florida Bar:

3-4.3; 4-1.4(b); 4-1.4(c); 4-1.8(a); 4-1.8(d); 4-1.15(a); 4-2.1; and 4-8.4(c).

V. Recommendation as to Disciplinary Measures to Be Applied:

Suspension for ninety (90) days and thereafter until Respondent demonstrates proof of rehabilitation.

VI. Personal History and Past Disciplinary Records:

After finding of guilty on Counts I, III and V and prior to recommending discipline pursuant to Rule 3-7.6(k) (1) (D), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 49
Date Admitted to Bar: March 5, 1971
Prior disciplinary convictions and disciplinary measures imposed therein: The Florida Bar v. Maynard, 372 So.2d 74 (Fla. App. 1979) - Two months period of suspension for Trust Account Record keeping violations.

VII. Statement of costs and manner in which costs should be taxed:

I find the following costs were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
1.	Transcript Costs	$ 954.25
2.	Bar Counsel Travel Costs	$ -0-
B.	Referee Level Costs	
1.	Transcript Costs	$ 2,493.90
2.	Bar Counsel Travel Costs	$ 80.90

C.	Administrative Costs	$ 750.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	$ 418.00
	2. Witness Fees	$ Not yet available
	3. Copy costs	$ 2,033.75
	TOTAL ITEMIZED COSTS:	$ 6,730.80

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning thirty (30) days after the Judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

DATED this 6th day of April, 1995.

ROBERT E. PYLE
REFEREE

Original to Supreme Court with Referee's original file;

Copies of Report of Referee only to:

Frances R. Brown, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801

Gavin D. Lee, Esq., Counsel for Respondent, 230 Lookout Place, Suite 200, Maitland, FL 32751-4494

John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

JOHN LOBBAN MAYNARD,

Respondent.

CASE NO.: 83, 918
[TFB Case Nos. 93-30, 761 (09C)
and 93-31,279 (09C)]

ORDER ON MOTION FOR CLARIFICATION

THIS CAUSE is before the Referee on The Florida Bar's Motion for Clarification of the recommendation embraced in paragraph V of the Report of Referee dated April 6, 1995, herein. The subject Motion points up a scrivener's error and is well taken. It is thereupon

ORDERED that the recommendation in paragraph V of the aforedescribed Report of Referee is corrected to read:

"Suspension for ninety-one (91) days and thereafter until Respondent demonstrates proof of rehabilitation".

DONE AND ORDERED this 18 day of APRIL, 1995, in Chambers, at Sebring, Highlands County, Florida.

ROBERT E. PYLE
REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Order was furnished by First Class mail to Hon. Sid J. White, Clerk of the Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1925, and copies furnished by First Class mail to Frances R. Brown, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801, Gavin D. Lee, 230 Lookout Place, Suite 200, Maitland, FL 32751-4494, and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 18th day of APRIL, 1995.

ROBERT E. PYLE
REFEREE

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

JOHN LOBBAN MAYNARD,

Respondent.

CASE NO.: 83,918
[TFB NOS. 93-30,761 (09C) and 93-31,279 (09C)]

ORDER CORRECTING ERRORS
IN REPORT OF REFEREE

It having been made to appear that certain errors are embraced in Section III of the Report of Referee in this cause, it is of the Court's own Motion,

ORDERED that Section III, Count V (page 12) is corrected to substitute "4-1.4(a)" and "4-1.4(b)" respectively for and in lieu of "4-1.4(b)" and "4-1.4(c)". It is further

ORDERED that on page 13, Section III, Count V, reference to Rules 3-4.3 and 4-1.15(a) is deleted and rule "4-1.8(b)" is substituted for and in lieu of "4-1.8(d).

DONE AND ORDERED this 1st day of MAY, 1995, in Chambers, at Sebring, Highlands County, Florida.

ROBERT E. PYLE
REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Order was furnished by First Class mail to Hon. Sid J. White, Clerk of the Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1925, and copies furnished by First Class mail to Frances R. Brown, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801, Gavin D. Lee, 230 Lookout Place, Suite 200, Maitland, FL 32751-4494, and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 1st day of May, 1995.

ROBERT E. PYLE
REFEREE