IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 86,027
[TFB Case Nos. 95-30,134(5B) & 94-31,482(05B)]

v.

MICHAEL CARR NORVELL,

Respondent.
_____/

THE FLORIDA BAR'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

James W. Keeter
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 771252

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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 November 29, 1995, and November 30, 1995, shall be referred to as "T. V." followed by the cited volume and page number. The disposition hearing held on February 8, 1996, shall be referred to as "T. II" followed the cited page number.

The Report of Referee dated March 13, 1996, will be referred to as "ROR," followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____).

The bar's exhibits will be referred to as B-Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as R-Ex. _____, followed by the exhibit number.

STATEMENT OF THE CASE

The Fifth Judicial Circuit Grievance Committee "B" voted to find probable cause in this matter on February 9, 1995. The bar filed its complaint on July 10, 1995. This court entered an order on July 17, 1995, directing the chief judge of the Eighth Judicial Circuit to appoint a referee to hear this matter. The referee was appointed on July 24, 1995. The final hearing was held on November 29, 1995, and November 30, 1995. Thereafter, on February 8, 1996, the referee held a hearing on the discipline to be recommended.

The March 13, 1996, Report of Referee recommended the respondent be found guilty of violating Rules Regulating The Florida Bar 4-1.8(i) for acquiring a proprietary interest in a cause of an action or subject matter of litigation the lawyer is conducting for a client; 4-1.16 for failing to withdraw from the representation of a client if the continued representation will result in a violation of the Rules of Professional Conduct or law; 4-3.3(a) for knowingly making a false statement of fact or law to a tribunal; 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 of violating rules 4-1.4(b) for failing to explain a matter to the extent reasonably necessary for the client to make informed decisions regarding the representation; 4-1.7(b) for representing a client where the lawyer's exercise of professional judgment may be materially limited by his responsibility to another client or to a third person or by his own interests; and 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 a client.

The board of governors considered the referee's recommendations at its May, 1996, meeting and voted to seek review of the referee's legal conclusions and recommendation as to discipline. The board determined that a more appropriate level of discipline would be a one year period of suspension given the referee's factual determinations and the respondent's prior disciplinary history.

The bar served its Petition for Review on May 30, 1996. This Initial Brief is in support of the bar's petition.

STATEMENT OF THE FACTS

The following facts, unless otherwise noted, are taken from the Report of Referee, appended hereto.

The respondent, Michael C. Norvell, and his wife executed a contract in July, 1991, with The Arbors of Lake Harris, Inc. ("The Arbors") for the construction of their home. The principals of The Arbors were Forrest Berg and Douglas Dillard. The architect of the Norvells' home was Jamie Senatore. At the time the respondent entered into the contract with The Arbors, he was not a member of The Florida Bar; rather, the respondent was reinstated as a member of the bar on May 26, 1992.

In the latter part of 1991, a dispute arose between the respondent and Messrs. Berg and Dillard concerning timely and proper payments to subcontractors that The Arbors, the general contractor, had hired to work on the respondent's home. On December 3, 1991, the respondent paid $2,500.00 to attorney Robert Q. Williams to represent him in this contract dispute. Messrs. Berg and Dillard retained attorney Edward Clement. The

respondent sought to cancel the construction contract with The Arbors and to hire Mr. Senatore as the general contractor. On or about January 6, 1992, the respondent settled his dispute with The Arbors and was able to rescind the construction contract. He thereupon hired Mr. Senatore to complete construction. At some point in early 1992, a dispute arose between the respondent and Mr. Senatore concerning the timely completion of the respondent's home.

In April, 1992, Mr. Senatore filed suit against Messrs. Berg and Dillard and The Arbors concerning their refusal to sell shares in The Arbors back to Mr. Senatore under a share repurchase agreement previously executed by the lawsuit parties (hereinafter referred to as the "Senatore lawsuit"). Attorney Robert Williams represented Mr. Senatore in the Senatore lawsuit. The defendants in that suit retained attorney Royce Pipkins to represent them. On May 12, 1992, the respondent's wife, Tina, paid Mr. Williams $1,000.00 to be applied to Mr. Senatore's legal fees. Tina Norvell testified that Mr. Senatore requested this payment to be made in lieu of payment to Mr. Senatore for work he had performed on the respondent's home. Mrs. Norvell further

testified that there were many other occasions where, at Mr. Senatore's request, she had written checks directly to others who had worked on her home rather than paying Mr. Senatore directly.

Mr. Berg testified that, at some point in the summer of 1992, he approached the respondent with his "hat in his hand" and asked the respondent if he would help The Arbors increase lot sales. By this time the respondent resided in his new home at The Arbors and could directly observe conditions in the subdivision. The respondent agreed to assist Mr. Berg by talking with Mr. Senatore about the Senatore lawsuit. Subsequently, the respondent acted as an informal mediator and discussed with Mr. Senatore the adverse effects of the Senatore lawsuit on subdivision lot sales.

In July, 1992, a principal payment of $100,000.00 was due to Citizens National Bank (CNB), the primary lender for The Arbors. The Arbors could not make this payment. Messrs. Berg and Dillard were also individually liable for the CNB debt, but could not make the payment and thereby prevent default. Mr. Dillard testified that he and Mr. Berg anticipated satisfying the

$100,000.00 payment from lot sales proceeds, but pending lot closings did not occur. Mr. Berg contacted one of the CNB directors, Thomas Grizzard (who also was a licensed real estate broker in Leesburg, Florida) to formulate a marketing plan that would stimulate more lot sales and thus generate income to make the CNB debt payments. On September 1, 1992, Mr. Grizzard signed a one year exclusive listing agreement with The Arbors. Mr. Grizzard's subdivision marketing plan included a reduction of lot prices to attract more buyers. During the term of Mr. Grizzard's exclusive listing agreement, the respondent procured contracts for lot sales in The Arbors.

In September, 1992, CNB filed a foreclosure suit against The Arbors and sought money damages from Messrs. Berg and Dillard and their wives under their personal guaranties. On or about November 30, 1992, The Arbors' attorney, Royce Pipkins, filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court, Middle District of Florida, before The Honorable C. Timothy Corcoran, III. The bankruptcy progressed slowly from the initial filing through June, 1993, at which time the respondent entered an appearance in the bankruptcy court on behalf of The

Arbors. On June 15, 1993, Judge Corcoran ordered the respondent to be substituted for Mr. Pipkins as The Arbors' counsel of record. However, on August 17, 1993, Judge Corcoran determined that the respondent had not filed an application for employment nor had The Arbors filed the required affidavit for employment of the respondent as counsel. Judge Corcoran was displeased with these filing oversights and ordered the respondent to file the required application and affidavit that same day, August 17, 1993.

The respondent's August 17, 1993, affidavit for employment filed with the bankruptcy court stated in paragraph 2 that the respondent had "no connection with the debtor." In paragraph 3 of the affidavit, the respondent stated that he was a "disinterested person," as such term is defined in the Bankruptcy Code. Similarly, The Arbors' application for employment (provided by Mr. Berg on behalf of The Arbors) stated that the respondent had "no connection with the [bankrupt debtor]" and that the respondent "does not hold or represent an interest that would be adverse to the interest of the [bankrupt debtor's] estate in a Chapter 11 case." However, the respondent's August

20, 1993, letter to Mr. Dillard (B-Ex. 12) revealed that the respondent discussed his prospective ownership interest in The Arbors and its assets within 3 days after he submitted his August 17, 1993, affidavit to Judge Corcoran.

The referee found that the respondent's August 20, 1993, letter to Mr. Dillard resulted from their discussion about the respondent's prospective ownership interest in The Arbors. The respondent did not reveal this prospective ownership interest in the August 17, 1993, affidavit filed with the bankruptcy court.

On September 15, 1993, the respondent appeared before Judge Corcoran on the "problem calendar." Consequently, on that date Judge Corcoran denied the respondent's application for employment. The respondent testified at the disciplinary final hearing that when he learned of Judge Corcoran's denial of his employment application, he did not further pursue appointment. The respondent also did not take affirmative steps to inform Judge Corcoran about his prospective ownership of The Arbors.

On October 1, 1993, the respondent and Messrs. Berg and Dillard executed an Assignment and Assumption Agreement whereby the respondent would acquire a 100% ownership interest in The Arbors. The effective date of the agreement was September 27, 1993. On October 4, 1993, the respondent and attorney Richard Hennings filed a joint motion for substitution of counsel whereby Mr. Hennings sought appointment as counsel in The Arbors' bankruptcy. In paragraph 13.c of the joint motion, the respondent revealed his prospective ownership interest in The Arbors to the bankruptcy court for the first time. The Assignment and Assumption Agreement provided, inter alia, that the respondent (or other counsel compensated by the respondent) would represent The Arbors in the Chapter 11 proceeding. The agreement also provided that the respondent would be given a proxy agreement whereby he would be entitled to vote all shares of stock in The Arbors.

SUMMARY OF THE ARGUMENT

The bar submits the referee reached an incorrect legal conclusion that the respondent was not guilty of violating rules 4-1.4(b) and 4-1.7(b) because the evidence and testimony showed the respondent failed to provide his clients with necessary information and he represented many conflicting interests. Additionally, the referee's recommendation of a 90 day suspension is erroneous and unjustified given the respondent's prior disciplinary history, the fact he made misrepresentations to the bankruptcy court, his selfish motives and the pattern of misconduct occurring over a period of years.

The respondent failed to adequately communicate with his client, Mr. Berg. He did not advise Mr. Berg that he had paid legal fees to Mr. Senatore's lawyer and that the funds were used to pay Mr. William's legal fee for representing Mr. Senatore in a lawsuit against Mr. Berg. The respondent failed to communicate to his clients, Messrs. Berg and Dillard, that the Assignment and Assumption Agreement precluded his further representation of The Arbors in the bankruptcy suit. He also failed to inform Messrs.

Berg and Dillard that The Arbors bankruptcy could be further delayed by the need for new counsel.

The respondent had many conflicting interests in representing The Arbors, Mr. Berg and Mr. Dillard in the various legal matters. As a homeowner in the subdivision, he could not protect his own investment interests and also provide independent legal advice. The respondent paid a portion of Mr. Senatore's legal bill in the Senatore lawsuit yet later represented The Arbors, Mr. Berg and Mr. Dillard in defense of the Senatore lawsuit.

The respondent made material misrepresentations to the bankruptcy court. He failed to disclose his prospective ownership interest in The Arbors at the time he sought appointment as the Arbors' bankruptcy counsel. The respondent's misrepresentations to the bankruptcy court warrant a suspension of more than 90 days. Upon consideration of the respondent's misconduct in this matter and his prior disciplinary history, he should be suspended for one year.

ARGUMENT

POINT I

THE REFEREE'S CONCLUSION THAT THE RESPONDENT WAS NOT GUILTY OF VIOLATING RULES 4-1.4(b) AND 4-1.7(b) WAS CLEARLY ERRONEOUS.

The bar does not challenge the referee's findings of fact but rather, his legal conclusions drawn from those facts. A referee's findings of fact are presumed to be correct and will not be revisited by this court unless it can be shown they are clearly erroneous or without support in the record. The Florida Bar v. Benchimol, 21 Fla. L. Weekly S226, S227 (Fla. May 23, 1996). However, a referee's legal conclusions and recommendations are subject to closer scrutiny because this court has the ultimate responsibility for rendering the appropriate judgment. The Florida Bar re Grusmark, 662 So. 2d 1235, 1236 (Fla. 1995).

The referee's legal conclusion that the respondent was not guilty of violating rules 4-1.4(b) and 4-1.7(b) was clearly erroneous given the findings of fact and the evidence. The respondent violated rule 4-1.4(b) when, during the summer of

1992, he failed to disclose to Mr. Berg that he had paid $1,000.00 in legal fees to Jamie Senatore's lawyer, Robert Williams. This payment was for legal services rendered by Mr. Williams in Mr. Senatore's lawsuit against Mr. Berg (RR-A p. 2; T. V. I p. 34; T. V. III p.p. 455-456). The respondent's failure to disclose this information occurred in the summer of 1992 when Mr. Berg sought the respondent's assistance to negotiate a settlement of the Senatore lawsuit (RR-A p. 2; T. V. III p.p. 455-456).

Although the respondent paid Mr. Williams at Mr. Senatore's direction because the respondent owed this money to Mr. Senatore (RR-A p. 2, T. V. III p.p. 338-339), the respondent's fee payment and his later role as an informal mediator between Messrs. Berg and Senatore created the appearance of an improper conflict of interest. The fee payment should have been disclosed to Mr. Berg to allow his informed decision about whether the respondent should act as an informal mediator.

When he requested the respondent's help, Mr. Berg did not know whether the respondent was obligated to further fund the

Senatore lawsuit. According to Mr. Berg, he was not satisfied with his current attorney and he wanted to hire the respondent (T. V. I p.p. 181-182). The respondent entered a notice of appearance as Mr. Berg's attorney in the Senatore lawsuit in October, 1993 (T. V. II p. 211; B-Ex. 21).

The respondent also failed to disclose to Mr. Berg and Mr. Dillard the conflict of interest between his duties under the Assignment and Assumption Agreement (hereinafter referred to as the "agreement") and his bankruptcy representation of The Arbors. On August 17, 1993, the respondent filed an affidavit and sought a bankruptcy court order approving his employment as the attorney for The Arbors (B-Ex. 17). At this time he and Mr. Berg also first discussed the respondent's interest in purchasing Mr. Berg's and Mr. Dillard's ownership of The Arbors (T. V. III p.p. 385, 469). Therefore, the agreement (B-Ex. 13) was effectively under negotiation while the respondent sought to represent The Arbors (B-Ex. 11; B-Ex. 12; R-Ex. 4; T. V. III p. 382).

The respondent should have advised Mr. Berg and Mr. Dillard that the agreement required his disqualification from The Arbors'

bankruptcy. The respondent's deficient bankruptcy counsel application delayed The Arbors' bankruptcy representation and could have impeded lot sales and the timely satisfaction of the CNB debt. If Mr. Berg and Mr. Dillard had been timely advised of the respondent's conflict of interest arising from the agreement and his representation of The Arbors, they could have earlier selected Mr. Hennings as bankruptcy counsel.

In 1994, the respondent also handled lot closings while The Arbors was in bankruptcy. He was paid for writing the title insurance policies (T. V. III p. 400). The respondent and the Dillards and the Bergs entered into the agreement in October, 1993 (RR-A p. 5; T. V. III p. 381). Although the respondent discussed with Mr. Hennings (who then represented The Arbors) whether it was proper to handle the lot closings, the respondent did not discuss his receipt of title insurance policy fees with either Mr. Berg or Mr. Dillard, although his fees for the title insurance were paid by The Arbors on at least one lot closing (T. V. III p. 468).

The respondent violated the conflict of interest

prohibitions of rule 4-1.7(b). There was substantial evidence that the respondent's pecuniary interests (i.e. his ownership of the only home in the subdivision) created an irreconcilable conflict of interest with The Arbors and its principals. For example, the respondent wanted larger homes to protect his house investment, but The Arbors' marketing plan called for smaller homes to increase sales and thereby generate revenue to reduce the CNB debt. While the respondent may have intended no harm to the Bergs, Dillards, Mr. Senatore or The Arbors, he wanted to ensure that his home investment was protected. This self-interest caused his initial involvement with The Arbors.

The respondent assumed conflicting roles in this matter. He was a homeowner in the development (RR-A p. 1). He had a civil dispute with The Arbors and its principals (RR-A p. 2). The Arbors and its principals later became the respondent's clients as defendants in the Senatore lawsuit (T. V. III p. 413). The respondent later sued Mr. Senatore in a dispute concerning the construction of the respondent's home (RR-A p. 2). In September, 1993, the respondent began giving legal advice to The Arbors and the principals in the CNB foreclosure suit (T. V. III p. 415; T.

V. IV p. 500). In June, 1993, he sought representation of The Arbors in the bankruptcy suit (RR-A p.p. 3-4; T. V. III p.p. 468-469). In August, 1993, he negotiated with the principals to purchase their interests in The Arbors while he was still involved as The Arbors' attorney (RR-A p. 4; T. V. III p.p. 385, 469). Although the issues involved in these various actions were different, the respondent possessed financial and other information about the corporation, the principals and the architect (T. V. III p.p. 460-461).

The respondent never disclosed to either Mr. Berg or Mr. Dillard the payment he had made to Mr. Williams on behalf of Mr. Senatore (T. V. III p.p. 455-456). According to the respondent, he did not disclose this information to Mr. Berg at the time Mr. Berg first approached him in the summer of 1992 about acting as an informal mediator because it "wasn't any of his business" (T. V. III p. 455). The respondent undertook representation of clients in the Senatore lawsuit where he previously had paid the opposing counsel's fee. He also had extensive dealings with both lawsuit parties before and after the suit was filed.

The respondent represented Mr. Berg, Mr. Dillard and The Arbors in at least three legal actions: the Senatore lawsuit; the CNB foreclosure; and the bankruptcy. The respondent's self-interest conflicted with these representations. His self-interest as a property owner in the subdivision and his ownership rights in The Arbors under the agreement (which allowed him to control the subdivision's development) conflicted with his role as attorney for The Arbors. The bar submits these interests constituted an unethical conflict.

The respondent represented the Bergs and Dillards, who were personally liable for The Arbors' CNB debt (RR-A p. 3; T. V. I p.p. 81-83, 168), while he also represented The Arbors. The respondent wanted larger, more expensive homes to sustain the value of his home in The Arbors. Yet The Arbors needed to reduce home sizes and lot prices to pay the $100,000.00 mortgage principal reduction payment due in July, 1992, and to avoid CNB's foreclosure and other legal action against the Bergs and Dillards (T. I p.p. 95, 170). Therefore, after the CNB loan defaulted in July, 1992, the Bergs and Dillards were doubly motivated to sell lots. However their lawyer, the respondent, possessed a self-

interest in the sale of larger homes, a sales process in opposition to their need for reduced lot prices and home sizes.

The respondent had other conflicts of interest arising from his status as a homeowner and as attorney for The Arbors and its principals. He attempted to find lot buyers as early as November 30, 1992 (T. V. III p. 464). He closed some of these sales, for which he was paid (T. V. III p.p. 401, 466-468). In September, 1992, the respondent procured the buyers (the Williams) for lot number 13, handled the closing as the buyers' attorney, and wrote the title insurance policy, for which he was paid (T. V. III p.p. 466-468; B-Ex. 22). In other words, the respondent represented both the buyers (the Williams) and the seller (The Arbors)in the same real estate transaction.

Only a few days after executing the agreement, the respondent appeared on a notice of hearing in the Senatore lawsuit as a co-counsel (B-Ex. 5). On October 21, 1993, he moved to be substituted as counsel of record (B-Ex. 21). The respondent did not want Mr. Senatore to prevail with the Senatore lawsuit and thereby acquire any ownership interest in The Arbors (T. V.

III p. 424). Mr. Dillard wanted the Senatore lawsuit settled so that lot sales could resume as quickly as possible (T. V. I p.p. 107, 129). The respondent wanted compensation for his representation of The Arbors and its principals in the various legal matters, including the Senatore lawsuit. He advised Mr. Dillard that he either wanted to receive an hourly fee or be given complete control over The Arbors (T. V. I p. 111; B-Ex. 12). Mr. Dillard testified he liked the idea of transferring ownership of The Arbors to the respondent because he would be relieved of personal liability for the CNB debt and because the Senatore lawsuit still had not been resolved and lot sales were at a standstill (T. V. I p. 113). Mr. Berg testified he did not care whether transferring ownership of the Arbors was ethical or even if the respondent had a conflict of interest. Mr. Berg was only concerned with recovering his investment and with lot sales (T. V. II p. 229).

Another instance of the respondent's conflict of interest occurred in a settlement meeting on December 7, 1993, between Messrs. Berg and Dillard and Mr. Senatore, at which time the respondent's interests in the agreement conflicted with his

clients' interests (T. V. II p.p. 219-220; T. V. III p.p. 421-424, 484-486). During this meeting, Mr. Dillard offered Mr. Senatore stock in The Arbors, a proposal the respondent did not like because he did not wish to have Mr. Senatore involved in The Arbors (T. V. III p.p. 421-422, 424).

POINT II

THE REFEREE'S RECOMMENDED DISCIPLINE OF A NINETY DAY SUSPENSION WAS ERRONEOUS AND UNJUSTIFIED GIVEN THE FACTS OF THE CASE AND THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY.

The referee found the respondent guilty of making misrepresentations to the bankruptcy court. Coupled with the respondent's prior disciplinary history of engaging in felonious conduct, the referee recommended a 90 day suspension requiring proof of rehabilitation.

An attorney's misrepresentations to a court constitute serious misconduct. In The Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993), a lawyer was suspended for one year for making fraudulent representations to the bankruptcy court, entering into improper business transactions with clients, neglecting a legal matter and incompetently representing a client. In one matter, he was retained to handle a bankruptcy filing for a client and her husband. The lawyer never met with or spoke to the husband, yet he filed a bankruptcy petition on their behalf. The lawyer also filed a certification with the court indicating he had advised both the client and her husband of their rights regarding

the petition and of the available relief. In fact, he never spoke to the husband. When the court discovered the fraud, it sanctioned the lawyer. In a second matter, the lawyer was retained by two individuals to file a bankruptcy petition to forestall a foreclosure sale. However, due to an error by his office, the petition was filed after the foreclosure sale occurred. The attorney advised the clients that he could remedy the problem by purchasing the home. He never advised them of their conflicting interests and their need to seek the advice of independent counsel. After buying the property, the lawyer continued representing the clients in the bankruptcy case and failed to disclose to the court that he had purchased the property. Upon discovering what had occurred, the court sanctioned the attorney. The court stated the attorney-client conflict between the lawyer and the clients was clear because after the foreclosure sale occurred, there was no reason to continue with the bankruptcy proceedings other than to further enrich the lawyer. The court further found that the lawyer was not candid in his testimony and pleadings.

In The Florida Bar v. Abrams, 402 So. 2d 1150 (Fla. 1981), a

lawyer was suspended for one year. He misrepresented to the court his representation of a witness and his representation of clients with conflicting interests. The attorney represented three criminal defendants. During the course of the representation, he interviewed three prosecution witnesses who had been promised immunity in exchange for their testimony against the defendants. Two of the witnesses retained the attorney as counsel. At the trial of the three defendants, the lawyer stated to the court that the third witness had sought the attorney's representation. This was not true. The state later sought to prosecute the other two witnesses. The lawyer sought withdrawal from their cases only shortly before the trial and failed to appear at the trial. In disciplining the attorney, this court stated that "a series of acts of misconduct which in aggregate constitutes a serious breach of ethics warrant sterner sanctions." Id at 1153.

A lawyer suffered a one year suspension in The Florida Bar v. Smith, 195 So. 2d 852 (Fla. 1967), after making misrepresentations to a court. He represented a woman in a divorce but failed to ensure entry of the final judgment. He

never told the client that the dissolution of marriage was incomplete. He then married the client. Consequently, the client was an unknowing bigamist. They later divorced and, during those proceedings, the lawyer concealed the woman's pregnancy.

Acquiring a proprietary interest in a client's case is also a serious offense. In The Florida Bar v. Niles, 644 So. 2d 504 (Fla. 1994), an attorney was suspended for one year after he arranged for a television show interview with his client, a death row inmate with a pending appeal. The client unwittingly made damaging statements in the interview. The client was not aware her lawyer received payment in exchange for setting up the interview. The lawyer did not advise the court that he received this payment, although he had been appointed as a special public defender to handle the case and was compensated for his services. He also lied to prison officials and led them to believe he was arranging for his client's testimony in another case to be videotaped. Otherwise, prison officials would not have allowed the interview with the client at that time.

A lawyer generally may not represent conflicting interests regardless of how well-meaning his or her motives might be or however slight the conflict in the interests might be. The Florida Bar v. Della-Donna, 583 So. 2d 307, 310 (Fla. 1991).

> The rule in this respect is rigid, because it is designed not only to prevent the dishonest practitioner from fraudulent conduct but also to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather then to enforce to their full extent the rights of the interest which he should alone represent. Della-Donna, supra.

The Florida Standards for Imposing Lawyer Sanctions also support the imposition of a suspension in this case. Standard 4.32, Failure to Avoid Conflicts of Interest, states that a suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Standard 6.12, False Statements, Fraud, and Misrepresentation, states that a suspension is appropriate when a lawyer 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. Standard 6.22, Abuse of the Legal Process, provides that a suspension is appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

In aggravation, the respondent has a prior disciplinary history, [Standard 9.22(a)]. He was suspended for a period of three years due to his conviction for conspiracy to possess and distribute marijuana. He was allowed to resign in lieu of discipline in The Florida Bar v. Norvell, 456 So. 2d 454 (Fla. 1984).

Also in aggravation, the respondent is experienced in the practice of law [Standard 9.22(i)]. He had a selfish motive [Standard 9.22(b)] because he wanted to protect the value of his own home. This case involves multiple offenses [Standard 9.22(d)]) with a pattern of misconduct [Standard 9.22(c)].

The bar submits a one year suspension would meet the

purposes of lawyer discipline as outlined most recently in Benchimol, supra. A one year suspension would protect the public. Upon petitioning for reinstatement, the respondent would need to demonstrate that he understands the ethical demands of law practice. This discipline would also have a deterrent effect on others who may be inclined to engage in similar behavior.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, conclusions of law and recommendation of a 90 day suspension and instead impose a suspension of one year and payment of costs now totaling $4,209.30.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
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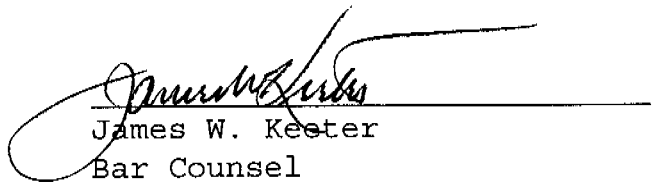
AND

James W. Keeter
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 771252

By: 
James W. Keeter
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to counsel for respondent, John A. Weiss, 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, FL 32308; 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 28th day of June, 1996.

Respectfully submitted,

James W. Keeter
Bar Counsel

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Tallahassee, Florida 32399-2300
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880 North Orange Avenue
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Complainant,

Case No. 86,027
[TFB Case Nos. 94-31,482(5B); 95-30,114(5B)]

v.

MICHAEL CARR NORVELL,

Respondent.
_____/

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 November 29, 1995, and November 30, 1995. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: James W. Keeter

For The Respondent: John A. Weiss

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 commented on below, I find:

The respondent, Michael C. Norvell, and his wife executed a contract in July, 1991, with The Arbors of Lake Harris, Inc. ("The Arbors") for the construction of their home. The principals of The Arbors were Forrest Berg and Douglas Dillard. The architect of their home was Jamie Senatore.

At the time the respondent entered into the contract with The Arbors he was not a member of The Florida Bar; rather, the respondent was reinstated as a member of the bar on May 26, 1992.

In the latter part of 1991, a dispute arose between the respondent and Messrs. Berg and Dillard concerning timely and proper payments to subcontractors that The Arbors, the general contractor, had hired to work on the respondent's home. On or about December 3, 1991, the respondent paid $2,500 to attorney Robert Q. Williams to represent him in this contract dispute; Messrs. Berg and Dillard retained attorney Edward Clement. The respondent sought to cancel the construction contract with The Arbors and to hire Mr. Senatore as the general contractor. On or about January 6, 1992, the respondent settled his dispute with The Arbors and was able to rescind the construction contract. He thereupon hired Mr. Senatore to complete construction. At some point in early 1992 a dispute arose between the respondent and Mr. Senatore concerning the timely completion of the respondent's home.

In or about April, 1992, Mr. Senatore filed suit against Messrs. Berg and Dillard and The Arbors concerning their refusal to sell shares in The Arbors back to Mr. Senatore under a share repurchase agreement previously executed by the lawsuit parties. Attorney Robert Williams represented Mr. Senatore in the lawsuit. The defendants in that suit retained attorney Royce Pipkins to represent them. On or about May 12, 1992, the respondent's wife, Tina, paid Mr. Williams $1,000 on behalf of Mr. Senatore. Tina Norvell testified that Mr. Senatore requested this payment to be made in lieu of payment to Mr. Senatore for work he had performed on the respondent's home. Mrs. Norvell further testified that there were many other occasions where she had written checks directly to others who had worked on her home rather than paying Mr. Senatore directly.

Mr. Berg testified that, at some point in the summer of 1992, he approached the respondent with his "hat in his hand" and asked the respondent if he would assist The Arbors in some way to increase lot sales. By this time the

respondent was residing in his new home and was able to directly observe conditions in the subdivision. The respondent agreed to assist Mr. Berg in talking with Mr. Senatore about the lawsuit Mr. Senatore had filed against Messrs. Berg and Dillard and The Arbors. Subsequently, the respondent acted as an informal mediator and discussed with Mr. Senatore the adverse effect that Mr. Senatore's lawsuit was having on lot sales in the subdivision.

In or about July, 1992, a principal payment of $100,000 was required to be paid to Citizens National Bank (CNB), the primary lender for The Arbors. The Arbors was unable to make this payment. Messrs. Berg and Dillard were individually liable for payment of this amount, but were also unable to make the payment and the loan defaulted. Mr. Dillard testified that he and Mr. Berg had anticipated making the $100,000 payment out of lot sale proceeds, but that pending lot closings did not occur. One of the CNB directors, Thomas Grizzard (who is a licensed realtor in Leesburg, Florida) was contacted by Mr. Berg to formulate a marketing plan that would result in greater lot sales and payment of the debt to CNB. On September 1, 1992, Mr. Grizzard was given a 1-year exclusive listing agreement for The Arbors. Mr. Grizzard's marketing plan included a reduction in unit prices in order to make the subdivision attractive to more potential buyers. During the term of Mr. Grizzard's exclusive listing agreement, the respondent was involved in procuring contracts for the sale of lots in The Arbors.

In September, 1992, CNB filed a foreclosure suit against The Arbors and, in that suit, sought personal judgments against Messrs. Berg and Dillard, who had provided guaranties for The Arbors' debt. On or about November 30, 1992, The Arbors' attorney, Royce Pipkins, filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court, Middle District of Florida. The Honorable C. Timothy Corcoran, III presided over The Arbor's bankruptcy case. The bankruptcy progressed slowly during the period from initial filing through June, 1993, at which time the respondent entered an appearance in the bankruptcy court on behalf of The Arbors. Judge Corcoran entered an order dated

June 15, 1993, which allowed the respondent to be substituted for Mr. Pipkins as counsel of record for The Arbors. However, on or about August 17, 1993, Judge Corcoran entered an order which determined that the respondent had not filed an application for employment nor had The Arbors filed the required affidavit for employment of the respondent as counsel. The respondent testified that Judge Corcoran was not pleased about these filing oversights and, therefore, ordered the respondent to file the required application and affidavit that same day, August 17, 1993.

The respondent's affidavit for employment dated August 17, 1993, stated in paragraph 2 that the respondent had "no connection with the debtor." In paragraph 3 of the affidavit the respondent stated that he was a "disinterested person," as such term is defined in the Bankruptcy Code. Similarly, the application for employment, provided by Mr. Berg on behalf of The Arbors, stated that the respondent has "no connection with the [bankrupt debtor]" and that the respondent "does not hold or represent an interest that would be adverse to the interest of the [bankrupt debtor's] estate in a Chapter 11 case." However, it is noted that a letter from the respondent to Mr. Dillard dated August 20, 1993, (entered into evidence as the bar's exhibit 12) indicates that the respondent discussed the prospect of his ownership in The Arbors and its assets within 3 days after he submitted his affidavit to Judge Corcoran which stated that he had "no connection with the debtor" and was a "disinterested person."

It is clear and convincing to this referee that, in order to draft the letter of August 20, 1993, to Mr. Dillard, the respondent had discussed with Mr. Dillard the respondent's prospective ownership interest in the bankrupt debtor. It is further clear and convincing that the respondent failed to mention this prospective ownership interest in the August 17, 1993, affidavit that he filed with Judge Corcoran. Such failure constituted an act contrary to honesty and justice and was a knowing false statement of material facts.

On or about September 15, 1993, the respondent was required to appear before Judge Corcoran on the "problem calendar."

Judge Corcoran entered an order of that date which denied the respondent's application for employment. The respondent testified at the final hearing in this matter that, when he learned of Judge Corcoran's denial of his employment application, he did not further pursue appointment; however, it is also clear from the respondent's testimony that he did not take affirmative steps to inform Judge Corcoran about his prospective ownership of The Arbors.

On or about October 1, 1993, the respondent and Messrs. Berg and Dillard executed an Assignment and Assumption Agreement, whereby the respondent would acquire a 100% ownership interest in The Arbors. The effective date of the agreement was September 27, 1993. On or about October 4, 1993, the respondent and attorney Richard Hennings filed a joint motion for substitution of counsel, whereby Mr. Hennings sought his substitution for the respondent as counsel in The Arbors' bankruptcy. In paragraph 13.c. of the joint motion the respondent revealed to the bankruptcy court his prospective ownership interest in The Arbors. The Assignment and Assumption Agreement provided, inter alia, that the respondent (or other counsel compensated by the respondent) would represent The Arbors in the Chapter 11 proceeding. The agreement also provided that the respondent would be given a proxy agreement whereby he would be entitled to vote all shares of stock in The Arbors.

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty and Rule Violations Found: As to each ethical violation alleged in the bar's complaint I make the following recommendations as to guilt or innocence:

Rule 4-1.4(b) - recommend not guilty;
Rule 4-1.7(b) - recommend not guilty;
Rule 4-1.8(a) - recommend not guilty;
Rule 4-1.8(i) - recommend guilty; the respondent entered into the Assignment and Assumption Agreement with Messrs. Berg and Dillard to acquire a proprietary interest in The Arbors; the assets of The Arbors were assets of the bankruptcy estate and, accordingly, were the subject matter of the bankruptcy litigation in which the respondent

repeatedly sought, albeit unsuccessfully, to represent The Arbors;

Rule 4-1.16 - recommend guilty; the respondent should have withdrawn his application for employment filed with the bankruptcy court when he commenced negotiations for ownership of The Arbors; the respondent should have known that continued representation of The Arbors, while he was an owner of The Arbors, would result in violations of the conflict of interest prohibitions set forth in the Rules of Professional Conduct;

Rule 4-3.3(a) - recommend guilty; the respondent's August 17, 1993, affidavit to the bankruptcy court failed to disclose and materially misstated the respondent's prospective interest in The Arbors, as such interest was set forth in the respondent's August 20, 1993, letter to Mr. Dillard;

Rule 4-8.4(c) - recommend guilty; the respondent's misrepresentations to Judge Corcoran were conduct involving dishonesty, fraud, deceit, or misrepresentation;

Rule 4-8.4(d) - recommend guilty; the respondent's conduct in attempting to represent The Arbors in the bankruptcy matter was conduct in connection with the practice of law that was prejudicial to the administration of justice; such conduct subverts the administration of justice and undermines the public's confidence in our system of justice.

IV. Recommendation as to Disciplinary Measures to Be Applied:

I recommend that the respondent be suspended for a period of ninety (90) days, that he be required to retake the ethics portion of the bar exam, and that he be required to pay the bar's costs in prosecuting this matter.

In making this recommendation I have considered in aggravation the following factors:

(i) the respondent's prior disciplinary history of resignation after suspension upon conviction of federal drug charges (see Standard 9.22(a));

(ii) multiple offenses (see Standard 9.22(d)).

I have also considered in mitigation the following factors:

(i) full and free disclosure to the disciplinary board (see Standard 9.33(e));

(ii) remorse (see Standard 9.33(l));

(iii) absence of harm to the respondent's clients;

(iv) remoteness of prior offenses (see Standard 9.33(m)).

V. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended 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: 50
Date admitted to bar: November 19, 1976
Date readmitted to bar: May 26, 1992
Prior disciplinary convictions and disciplinary measures imposed therein: Suspension, Case No. 83-03,423, by Order of the Supreme Court of Florida dated March 23, 1983; resignation in lieu of discipline, Case No. 84-05,185, by Order of the Supreme Court of Florida dated September 6, 1984.

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	$0
	2. Bar Counsel Travel Costs	$0
B.	Referee Level Costs	
	1. Transcript Costs	$2,289.02
	2. Bar Counsel Travel Costs	$181.76

C.	Administrative Costs	$750.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	$988.52
	2. Witness Fees	$[TBA]
	TOTAL ITEMIZED COSTS:	$4,209.30

It is apparent that other costs have or may be incurred; particularly, witness expenses attributable to Douglas Dillard for his attendance at the final hearing on November 29, 30, 1995, will be incurred by the bar. Mr. Dillard's expenses are not currently determinable, but will be submitted in an Affidavit of Costs to be submitted by the bar to the Supreme Court of Florida. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 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 13 day of March, 1996.

Frederick D. Smith

Frederick D. Smith, Referee

Original to Supreme Court with Referee's original file.
Copies of this Report of Referee only to:

James W. Keeter, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801

John A. Weiss, Counsel for Respondent, 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, FL 32308

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