IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WALTER BENTON DUNAGAN,

Respondent.
_____/

Case No. 91,753
[TFB Case No. 97-30,790 (07A)]

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

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

The appellee, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on March 31, 1998, shall be referred to as "T" followed by the volume number and cited page number (T Vol. ____ p. ____). Transcripts of all other hearings shall be referred to as "T" followed by the date of the hearing and cited page number.

The Report of Referee dated June 23, 1998, 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 Seventh Judicial Grievance Committee "A" voted to find probable cause in this matter on August 15, 1997, and the bar filed its complaint on November 5, 1997. The referee was appointed to hear this case on November 17, 1997. The final hearing was held on March 31, 1998. The referee served his report on June 23, 1998, recommending the respondent be found guilty of violating rules 4-1.7(a) for representing a client when the representation of that client will be directly adverse to the interests of another client; 4-1.7(b) for representing a client when the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests; 4-1.9(a) for representing another person in the same or substantially related matter as the representation of a former client where that person's interests are materially adverse to the interests of the former client and the former client has not consented after consultation; 4-1.9(b) for using information relating to the representation to the disadvantage of the former client; and 4-1.16(a) for failing to decline representation where representation will result in a violation of the Rules of

Professional Conduct or law. The referee recommended the respondent be suspended from the practice of law for a period of ninety-one days, with proof of rehabilitation required before reinstatement.

The respondent served a petition for review on July 21, 1998. The bar's board of governors considered this matter at its August, 1998, meeting and voted not to seek an appeal. The respondent served his initial brief on August 17, 1998.

STATEMENT OF THE FACTS

In July, 1992, the respondent represented William and Paula Leucht in the formation of their restaurant business. (ROR-A2; B-Ex. 1; T Vol. I p. 38). On July 8, 1992, the respondent prepared a Bill of Sale which purported to transfer certain assets of the business to the joint ownership of William and Paula Leucht. (ROR-A2; Attachment 2 to B-Ex. 1; T Vol. II p. 113). Paula Leucht wanted to ensure that her ownership interest in the business was secured because she had invested a considerable sum of money. (T Vol. I p.p. 13, 65-66). The respondent assured her that the Bill of Sale he prepared would secure her ownership position in the business. (T Vol. I p.p. 34-35). The respondent prepared the necessary paperwork for the fictitious name filing but omitted including Paula Leucht's name on the registration form. (ROR-A2; Attachment 1 to B-Ex. 1; T Vol. II p.p. 113-114, 147). From March, 1994, through December, 1995, the respondent represented the business and William and Paula Leucht in an eminent domain suit against the Florida Department of Transportation. (ROR-A2; T Vol. I p.p. 37, 62). In November, 1994, the respondent represented the business and William and Paula Leucht in partnership negotiations with Tamarie Althouse for the purpose of opening another restaurant in the

area. (ROR-A2; T Vol. I p.p. 33-34, 38).

On August 20, 1992, the respondent represented William Leucht and Paula Leucht in a commercial lease dispute with Bay-Walsh Properties (Florida), Inc., where Paula Leucht had been improperly joined as a party (ROR-A2; R-Ex. 1). The suit concerned a lease entered into by Mr. Leucht and his former wife during the operation of a prior restaurant business (ROR-A2; R-Ex. 1; T Vol. I p. 60). The respondent prepared and filed a responsive pleading or motion on behalf of Paula Leucht in the suit and was successful in having her dismissed as a party. (ROR-A2; R-Ex. 1; T Vol. II p.p. 108-109).

Sometime during 1995, the Leuchts began experiencing marital problems (T Vol. II p. 144) and Paula Leucht "caused a scene" at the restaurant Ms. Althouse managed (which was the second restaurant the Leuchts opened). (T Vol. II p. 127). Thereafter, the respondent mailed two letters, one to the Port Orange Police Department and another to the city attorney, (ROR-A2; B-Ex. 4; B-Ex. 5; T Vol. II p.p. 129-130) wherein he used information about Paula Leucht and her prior business arrangements to her disadvantage. (ROR-A2; B-Ex. 4; B-Ex. 5; T Vol. I p. 23, 40, 46-

47). The respondent possessed this knowledge and information because of his prior legal representation of Paula Leucht.

On February 26, 1996, the respondent completed a petition for dissolution of marriage on behalf of William Leucht against Paula Leucht which he filed with the clerk of the court on February 27, 1996. (ROR-A3; R-Ex. 4). On March 2, 1996, Paula Leucht was arrested and forcibly removed from the business for disorderly conduct and was further detained at the police station. (ROR-A3; B-Ex. 1; B-Ex. 3; T Vol. I p.p. 43, 46, 84). Ms. Leucht maintained that she was a co-owner of the restaurant and informed the police officers of this prior to, during, and after her arrest. (ROR-A3; B-Ex. 3; T Vol. I p.p. 40, 45-46).

In the divorce case, the court entered an order on May 2, 1996, holding that the Leuchts were to share equally in the net proceeds of the business. (ROR-A3; B-Ex. 2). The respondent did not withdraw from representing William Leucht in the divorce until October 21, 1996. (ROR-A3; B-Ex. 6; R-Ex. 4).

The referee found the evidence was clear that the respondent had represented both William and Paula Leucht in a number of

matters involving the restaurant business and that his representation of William Leucht in the divorce was an unethical conflict of interest. (ROR-A3-4). The respondent also used information he had gained by virtue of his prior representation of Paula Leucht to her disadvantage by writing the letters to the police department and the city attorney which contributed to her forcible removal from the restaurant and arrest. (ROR-A3-4). The referee found the respondent demonstrated a lack of understanding of "very basic ethical concepts" and noted the respondent's significant prior disciplinary history which included being disciplined for conflict of interest violations. (ROR-A5).

SUMMARY OF THE ARGUMENT

The respondent's basic argument appears to boil down to a contention that the referee erred in concluding that the respondent's representation of William Leucht in the divorce matter constituted a conflict of interest because the respondent had previously represented Paula Leucht concerning substantially related matters. Further, the respondent argues that if he did engage in misconduct, a 91 day suspension is not warranted. The respondent's representation of William Leucht by writing letters to city officials seeking Paula Leucht's arrest was a conflict of interest that occurred prior to Paula Leucht's hiring of a new attorney and she did not waive the conflict of interest nor did the respondent consult with her prior to writing said letters. The respondent's later representation of William Leucht in the divorce was an inherent conflict of interest that could not be waived. That counsel may elect not to seek a disqualification of an opposing attorney for strategic, or other, reasons is not dispositive of the ethical issues presented in a bar disciplinary proceeding. The letters the respondent wrote to the Leuchts on August 25, 1992, and August 19, 1992, (Attachments 1 and 2 to B-Ex. 1) clearly show that Paula Leucht was a client of the respondent with respect to the formation of the business and

clearly the business was a marital asset (T Vol. II p. 119), and, as such, was a material item in the divorce case. The respondent moved to withdraw only after Paula Leucht retained counsel to sue the respondent for malpractice. (R-Ex. 4 p. 8). The respondent's prior disciplinary history, which includes prior instances of engaging in conflicts of interest, warrants the imposition of a suspension requiring proof of rehabilitation.

ARGUMENT

POINT I

THE REFEREE'S LEGAL CONCLUSIONS THAT THE RESPONDENT ENGAGED IN AN IMPERMISSIBLE CONFLICT OF INTEREST WERE CORRECT.

Because Points A though D of the respondent's initial brief essentially argue the same issue, that the referee's legal conclusions were erroneous, the bar will address them under Point I of its argument here.

It is clear from the evidence that the respondent represented both Paula Leucht and William Leucht in the formation of their restaurant business and that the venture was entered into during the time the Leuchts were married (Attachments 1, and 2 to B-Ex. 1), thus making the business marital property. Fla. Stat. §61.075(5)(a)1 and 61.075(7). Therefore, the respondent possessed certain knowledge about this marital asset which was material to the parties' later divorce. The bar submits the conflict was so basic and fundamental that, from an ethical perspective, it mandated the respondent's withdrawal, regardless of whether opposing counsel was willing to agree not to seek the respondent's disqualification. Paula Leucht's first attorney in the divorce case, David B. Beck, could not have knowingly waived the conflict on Ms. Leucht's behalf, from an ethical perspective,

because it was too intrinsic to be waived. Further, the conflict commenced when the respondent wrote B-Ex. 4 and B-Ex. 5 to the city attorney and the police department. This was prior to the divorce being filed and thus prior to Mr. Beck's representation of Ms. Leucht. Paula Leucht never consented to the respondent writing these letters. Where a conflict of interest is a fundamental violation of the Rules Regulating The Florida Bar, even a client's consent, after full disclosure, will not relieve the attorney of his ethical duties or shield him from disciplinary actions. The Florida Bar v. Feige, 596 So. 2d 433, 435 (Fla. 1992). In fact, a reading of the letters the respondent wrote to the police department and city attorney (B-Ex. 4 and B-Ex. 5) just prior to filing the petition for dissolution of marriage for William Leucht clearly shows that the respondent was contesting the legality of the very document he had drafted. In each letter, the respondent stated "It is the case that at one time in the past a Bill of Sale was considered to put the business in the name of William and Paula Leucht. Such an instrument and the legal consequences thereof were duly considered, and it was determined with deliberation that William Leucht would remain the sole owner." It has been held that a lawyer represents conflicting interests "when it becomes his

duty, on behalf of one client, to contend for that which his duty to another client would require him to oppose." The Florida Bar v. Moore, 194 So. 2d 264, 269 (Fla. 1966). This court stated that the rule against engaging in such conflicts of interests is quite rigid because it was designed to prevent the dishonest lawyer from engaging in fraudulent conduct and to prevent the honest attorney from putting himself in a position where he might be called upon to choose between conflicting duties, or be led to try and reconcile the conflicting interests, rather than fully advocating the rights of a client. A lawyer should not even seek a consent from a client to represent conflicting interests where a disinterested lawyer, observing the situation, would conclude that the client should not agree to the representation. In re Captran Creditors Trust, 104 Bankr. 442 (M.D. Fla. 1989). The respondent drafted the Bill of Sale for the restaurant business. The ownership of the business was a central issue in the divorce. (T Vol. I p. 89). Paula Leucht testified that Mr. Beck never clearly advised her of her rights and possible prejudice in the respondent representing Mr. Leucht in the divorce. (T Vol. I p.p. 50-51, 88-89). The comment to rule 4-1.9 states that a waiver from a former client to a lawyer's representation of a new client with conflicting interests is effective only if the lawyer

makes a disclosure of the circumstances, including the lawyer's *intended* role on behalf of the new client, to the former client. Clearly, the respondent did not do this here. He wrote the two letters to the police department and the city attorney disputing the legality of the Bill of Sale and then undertook the representation of Mr. Leucht in the divorce without ever advising Paula Leucht of his *intended* role. The use of the term "intended" in the comment to the rule indicates that the lawyer must make the disclosure prior to undertaking the new representation, not after the fact. A lawyer should also document the disclosure and the former client's endorsement of the disclosure and the continuing representation of the new client. Khoury v. Estate of Kashey, 533 So. 2d 908 (Fla. 3d DCA 1988). Clearly the respondent did not do this here and, instead, seemingly relied on Paula Leucht's new attorney to fulfill the respondent's ethical obligations for him.

Although a referee's findings of fact are presumed to be correct and are not reviewable by this court unless they can be shown to be clearly erroneous or unsupported by the record, The Florida Bar v. Pellegrini, 23 Fla. L. Weekly S357 (Fla. June 18, 1998), the referee's legal conclusions are subjected to closer

scrutiny. The Florida Bar v. Grosso, 647 So.2d 840, 841 (Fla. 1994). The bar submits that the record supports the referee's legal conclusions that the respondent should have obtained Paula Leucht's consent to his representation of William Leucht in the divorce, that Paula Leucht never waived or consented to the respondent's representation of William Leucht in the divorce where there were conflicting interests, and that the respondent revealed confidential information relating to his prior representation of Paula Leucht to the police department and the city attorney. Although the respondent makes much of the fact that he could not have directly communicated with Paula Leucht to obtain her consent to his representation of William Leucht in the divorce, in fact, he could have spoken to her prior to her retaining counsel, especially in light of the fact she testified that she did call his office, prior to calling any other attorney (T Vol. I p. 90). The ethical duty to obtain a former client's consent rests solely with the attorney who is seeking to represent conflicting interests, not with an attorney later hired by the former client. See the comment to rule 4-1.7 which states that it is the lawyer who is seeking to undertake the conflicting representation who bears the primary responsibility for resolving the conflict issue.

The referee found no merit to the respondent's argument, presented for the first time at the final hearing, that his intent in writing the letters to the city attorney and the police department (B-Ex. 4 and B-Ex. 5) was to prevent the commission of a crime or physical injury. (ROR-A4). Clearly, the respondent revealed confidential information concerning the Bill of Sale that was detrimental to Paula Leucht because he questioned the legality of the Bill of Sale he prepared for her. Further, the respondent's reliance on rule 4-1.6 as justification for having written the letters conflicts with his own argument that Paula Leucht was never a client. (T Vol. II p.p. 149, 156). The rule provides that disclosure of confidential information may be made only to prevent a *client* from committing a crime or to prevent death or substantial bodily injury. The respondent admitted in his testimony that his discussion in the letters of the Bill of Sale "could be construed as a revelation of something that's confidential." (T Vol. II p. 133).

POINT II

THE REFEREE'S RECOMMENDED DISCIPLINE OF A 91 DAY SUSPENSION IS CORRECT IN LIGHT OF THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY.

The bar submits the case law, the Florida Standards For Imposing Lawyer Sanctions and the respondent's prior disciplinary history for engaging in conflicts of interest support the referee's recommendation that the respondent be suspended from the practice of law for a period of ninety-one days.

In The Florida Bar Wilson, 23 Fla. L. Weekly S227 (Fla. April 16, 1998), the attorney was suspended for a period of one year after undertaking the representation of the wife in a dissolution of marriage action after having represented both the wife and the husband in other matters over the past years. The couple first contacted the lawyer after the wife won the lottery and wanted to share her winnings equally with her husband. The lawyer prepared and filed a petition for declaratory judgment against the lottery department on the couple's behalf. The referee specifically found the attorney had represented the husband in the declaratory judgment action. Thereafter, he represented the couple in several other matters including the purchase of a home, contacting the mortgage company when they

experienced problems in meeting their monthly payments, and he represented the husband on criminal charges and the wife on domestic violence charges. At some point, the husband consulted with the attorney about obtaining a divorce and the attorney advised the husband he could not handle the case because of his past representation of the wife. After the husband obtained counsel and initiated divorce proceedings, the attorney entered his appearance as counsel for the wife. Opposing counsel eventually moved to have the attorney disqualified and, after the court entered its order approving the disqualification, the attorney continued to be involved in the case by filing several motions, including one seeking recusal of the judge. The referee found there was a clear conflict of interest but that the husband suffered no prejudice. In aggravation, the attorney had a prior disciplinary history.

In The Florida Bar v. Joy, 679 So. 2d 1165 (Fla. 1996), a lawyer was suspended for ninety-one days for representing clients with conflicting interests. Initially, he represented a father and son (I. Cantor and J. Cantor) in various personal and business matters over a period of years. Later, the Cantors became shareholders with another of the lawyer's clients, Cohen,

in a corporation that purchased and managed commercial real estate. Later, the lawyer became suspicious of the Cantors and discussed with Cohen his concerns that the Cantors might misappropriate funds from the corporation. The attorney received insurance settlement funds on behalf of the corporation and placed them into his trust account. When the Cantors and Cohen could not agree on how to best protect the funds from creditors, the lawyer removed the money and deposited it into an account in his wife's name without first advising the Cantors and Cohen. He then misrepresented to one of the corporate creditors that the funds had been disbursed. In addition, Cohen wished to protect his interest in the corporation from the Cantors and assigned his stock to the accused attorney without advising the Cantors. The referee found, and this court agreed, that the lawyer was representing a minority shareholder in a corporation at the same time as he was representing the corporation and attempted to secure the minority shareholder's interest in the insurance settlement funds rather than deliver all of the proceeds to the corporation as was required. In so doing, he violated his duties as escrow agent and made misrepresentations to the creditor who also had a potential interest in the funds. In mitigation, the lawyer had no prior disciplinary history, unlike the respondent.

The Florida Standards For Imposing Lawyer Sanctions also support a suspension requiring proof of rehabilitation. Standard 4.22 calls for a suspension when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client. Standard 4.32 calls for a suspension 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. The respondent never advised Paula Leucht that his representation of William Leucht could conflict with her own interests and he utilized information he gained through representing her to her disadvantage in writing B-Ex. 4 and B-Ex. 5 to the city attorney and the police department regarding the ownership of the business.

In aggravation, the respondent has a very significant prior disciplinary history [Standard 9.22(a)].

In 1986, the respondent received a private reprimand administered without a board appearance for trust account record keeping violations. The Florida Bar v. Dunagan, TFB Case No.

07A86C54.

In 1987, the respondent received a public reprimand and six months probation for entering into a business transaction with a client. The Florida Bar v. Dunagan, 509 So. 2d 291 (Fla. 1987). The respondent represented a client in selling or renting her real property. Although the respondent intended for the warranty deed to be held in trust, he never prepared any trust documents. He directed the client to execute the warranty deed and a power of attorney. Thereafter, the respondent failed to account to the client for collected rents. He later purchased the property from the client for a small sum of money plus payment of existing liens and in consideration for cash advances he had made to the client. He did not advise the client to seek independent counsel prior to entering into the transaction.

In The Florida Bar v. Dunagan, 565 So. 2d 1327 (Fla. 1990), the respondent was suspended for a period of sixty days for again engaging in a conflict of interest situation with clients. He represented a married couple over a long period of time in various matters. The clients became concerned about the respondent's bills. They were delinquent on paying their account

and the respondent had begun charging them interest, without their prior knowledge or consent, in such a manner that he was charging interest on each month's total rather than on each month's principal balance. This resulted in the respondent charging a usurious amount of interest. Due to increasing financial problems, the client decided to take out a loan. The respondent prepared one loan closing document and obtained some of the pay off figures for the clients. He also included the amount he was owed for past due attorney's fees on the loan closing statement without their prior knowledge or consent. The clients discovered the inclusion of the attorney's fees only at the closing and reluctantly elected to proceed with the closing only to avoid incurring the closing expenses. The respondent represented the clients at the loan closing where he intended to received payment from the loan proceeds for the debt the clients owed him.

Also in aggravation, the respondent has considerable experience as a lawyer, having been admitted to the bar in 1970, [Standard 9.22(c)]; and Ms. Leucht was particularly vulnerable because she considered the respondent to be her attorney and relied on his advice (T Vol. I p.p. 38, 88, 90) until after she

called the respondent's office after the petition for dissolution of marriage had been filed and she learned for the first time that he was representing William Leucht [Standard 9.22(h)]. In making his recommendation, the referee did consider the respondent's mitigating factors (T of May 7, 1998, p. 5) of personal or emotional problems [Standard 9.23(c)], physical or mental disability or impairment [Standard 9.23(h)], character or reputation for providing pro bono services [Standard 9.23 (g)], and the fact that Ms. Leucht suffered no prejudice from the respondent's actions. The bar submits the referee was correct in his conclusion that these mitigating factors do not overcome the cumulative nature of the respondent's misconduct.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will accept the referee's findings of fact and recommendations and enter an order suspending the respondent for 91 days and thereafter until he proves rehabilitation and direct that he pay the bar's costs now totaling $2,327.89.

Respectfully submitted,

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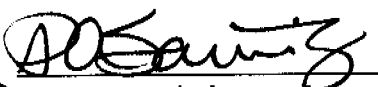
By: 
Jan K. Wichrowski
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Brief and Appendix have been sent by regular U.S. Mail to Sid J. White, Clerk, 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 Michael L. Ramos, counsel for respondent, 3000 North Atlantic Avenue, Daytona Beach, FL 32118; 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 4th day of September, 1998.

Respectfully submitted,

Jan K. Wichrowski
Bar Counsel

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COMPLIANCE WITH RULE 9.210(a)(2)

The undersigned hereby certifies that the foregoing brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 12 point Courier New, a font that is not proportionately spaced.

for Jan K. Wichrowski
Bar Counsel
ATTORNEY NO. 381586

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 91,753
[TFB Case No. 97-30,790(07A)]

v.

WALTER BENTON DUNAGAN,

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 March 31, 1998. 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 - Jan K. Wichrowski

For The Respondent - Michael L. Ramos

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:

1. The respondent, Walter Benton Dunagan, was and still is, a member of The Florida Bar, (approximately 28 years) subject to the jurisdiction of the Supreme Court of Florida and the Rules Regulating The Florida Bar.

2. The respondent resided and practiced law in Volusia County, Florida, at all times material.

3. In or around July, 1992, the respondent represented William and Paula Leucht in the formation of their restaurant, "Biscuits 'N' Gravy & More" (hereinafter referred to as "B&G"), which later opened in Port Orange, Florida. In the fictitious name filing for the restaurant, the respondent inadvertently omitted the inclusion of Paula Leucht's name on the registration form.

4. On or about July 8, 1992, the respondent prepared a Bill of Sale which purported to transfer certain assets of B&G to the joint ownership of William and Paula Leucht.

5. On or about August 20, 1992, the respondent represented B&G in a commercial lease dispute with Bay-Walsh Properties (Florida), Inc., d/b/a Nova Village Market Partnership (hereinafter referred to as "Bay-Walsh"). The respondent filed a responsive pleading or motion on behalf of Paula Leucht in the lawsuit between B&G and Bay-Walsh. Paula Leucht was thereafter dropped from the suit, it being shown that she was an improper party.

6. The commercial lease was signed by William Leucht and his former wife, Maria Leucht. William and Maria Leucht were divorced pursuant to a final judgment dated October 24, 1989. William Leucht married Paula Leucht on or about September 8, 1990.

7. In or around November, 1994, the respondent represented B&G and William and Paula Leucht in partnership negotiations with Tamarie Althouse to open another B&G restaurant in Daytona Beach, Florida. William and Paula Leucht signed partnership documents, although Ms. Althouse did not sign the documents. The Daytona Beach B&G eventually became operational.

8. In or around March, 1994 through December, 1995, the respondent represented B&G and William and Paula Leucht in an eminent domain suit against the Florida Department of Transportation (DOT). The suit papers show only William Leucht d/b/a Biscuits 'N Gravy & More as a named respondent. Paula Leucht testified, however, that the respondent (Dunagan) represented her interests in the matter as well. The respondent disputed representing Paula Leucht's interest in the eminent domain suit, but did acknowledge during testimony of having made one telephone call to Paula Leucht regarding the matter.

9. On or about February 23, 1996, the respondent sent a letter to the Port Orange Police Department wherein he used information about Paula Leucht and her prior B&G business arrangements to her disadvantage.

10. In or about February 26, 1996, the respondent filed a petition for dissolution of marriage on behalf of William Leucht against Paula Leucht. The suit was filed in the Seventh Judicial Circuit Court for Volusia County, Florida, under case no. 96-30686, division 36, and assigned to Judge Briese.

11. On or about March 2, 1996, Paula Leucht was arrested and forcibly removed from the Port Orange B&G restaurant by the Port Orange Police for disorderly conduct and was further detained at the police station. Ms. Leucht asserted that she co-owned the restaurant and informed law enforcement authorities of this prior to, during and after her arrest.

12. Judge Briese entered an order dated May 2, 1996, wherein he held that William and Paula Leucht were to share equally in the net proceeds from the Port Orange and Daytona Beach B&G restaurants.

13. On or about October 31, 1996, the respondent filed a motion to withdraw from the representation of William Leucht in the marital dissolution action.

14. The respondent jointly represented William and Paula Leucht during the formation of B&G, in defense of a commercial lease suit by Bay-Walsh, in an eminent domain matter with DOT, and in partnership negotiations with Tamaria Althouse for the Daytona Beach B&G restaurant.

15. The respondent failed to consult with William and Paula Leucht about the conflict of interest and other implications of the respondent's common representation in the B&G matter, the Bay-Walsh suit, the eminent domain suit, and the Port Orange B&G partnership negotiations.

16. The respondent represented William Leucht against Paula Leucht in their marital dissolution suit. In such proceeding, the respondent possessed and used information about Paula Leucht not within the domain of general public knowledge to her disadvantage when use of such information was not permissible under Rule 4-1.6.

17. The respondent's representation of William Leucht against Paula Leucht in the marital dissolution proceeding constituted an unethical conflict of interest.

18. The respondent failed to decline representation of William Leucht in the marital dissolution suit when he knew or should have known that such representation would result in a violation of the Rules of Professional Conduct as an unethical conflict between the interests of William Leucht and his former client Paula Leucht.

19. It is apparent to this referee that there was in fact an attorney client relationship between the respondent and Paula Leucht. The respondent counseled both Paula Leucht and her husband as to legal matters in regard to the ownership of the restaurant. This is, at the very least, evident from Bar Exhibit 1, attachment letter dated August 25, 1992, in which the respondent directs correspondence regarding legal matters to both Paula and William Leucht her husband, beginning the letter, "Dear Clients."

20. Given that there was in fact an attorney client relationship, it is clear that it was reasonable for Paula Leucht to believe that the respondent was in fact her attorney up until the point when she found out that he was representing her husband against her in the dissolution of marriage action.

21. It is clear that no disclosure of the conflict or waiver of same took place, given the uncontested fact that no testimony was provided that the respondent ever consulted with Paula Leucht as to the circumstances which led him to represent William Leucht in the divorce, and to what her position was vis-a-vis his representing William Leucht.

22. It is further clear that the respondent used information he had gained during the representation of Paula and William Leucht against Paula Leucht. This is evidenced by the letters the respondent directed to the Port Orange Police Department and to the city attorney, Bar Exhibits 4 and 5.

23. Although the respondent claimed at final hearing that he had written the letters above, Bar Exhibits 4 and 5, because of his duty to reveal confidential information he deemed necessary to prevent a death or substantial bodily harm to another under rule 4-1.6(b)(2), I find that this is not supported by credible evidence. The respondent first mentioned this defense at the final hearing despite the fact he had previously been asked to explain his conduct to bar counsel, the grievance committee, and in a formal answer to the bar's Complaint. Additionally, during the hearing, the respondent testified "I really did not even consider her [Ms. Leucht] a client". The respondent appears to have taken the position that first, Ms. Leucht was not his client and therefore, no violation took place, but, if the Referee finds otherwise, then, it becomes his position that the letter disclosure was to prevent a death or substantial bodily harm to another. The facts clearly show Paula Leucht was indeed the respondent's client. The evidence further supports that the respondent's letters to the Port Orange Police Department and to the City Attorney at least to some degree, contributed to Ms. Leucht being forcibly removed and being placed under arrest from a business she co-owned. The facts do not provide credible evidence supporting the theory that great public harm was likely if the respondent did not write these letters.

24. The respondent's position throughout these proceedings demonstrates a lack of recognition of very basic ethical concepts, such as his belief that it was not his duty to make a conflict disclosure to Paula Leucht. Such a basic concept is outlined in the Rules Regulating The Florida Bar, Rule 4-1.3, in the commentary, "If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty: As to the complaint, I make the following recommendations as to guilt or innocence: Based on the evidence presented, I find the respondent, Walter Benton Dunagan, by a clear and convincing standard, Guilty as charged.

IV. Rule Violations Found:

4-1.7(a) for representing a client when the representation of that client will be directly adverse to the interests of another client; 4-1.7(b) for representing a client when the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest; 4-1.9(a) for representing another person in the same or substantially related matter as the representation of a former client where that person's interests are materially adverse to the interests of the former client and the former client has not consented after consultation; 4-1.9(b) for using information relating to the representation to the disadvantage of the former client; and 4-1.16(a) for failing to decline representation where representation will result in a violation of the Rules of Professional Conduct or law.

V. Personal History and Past Disciplinary Record: After the finding of guilt 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.

Age: 61
Date admitted to bar: November 23, 1970
Prior disciplinary convictions and disciplinary measures imposed therein:

1. The Florida Bar v. Dunagan, TFB Case No. 86-16,853(07A) - Private reprimand for technical trust accounting violations.

2. The Florida Bar v. Dunagan, 509 So. 2d 291 (Fla. 1987) - Public reprimand and a six month period of probation for entering into business transaction with client wherein they had conflicting interests.

3. The Florida Bar v. Dunagan, 565 So. 2d 1327 (Fla. 1990) - Sixty day suspension for charging clients a usurious rate of interest on an outstanding fee balance and representing the clients in a matter wherein his personal interests conflicted with those of the clients.

The respondent presented, and the Referee considered, the following as to mitigation:

Mr. Dunagan received no property or benefit out of any conflict, nor was there a loss of property by Paula Leucht attributable to any conflict. The question of prejudice to Paula Leucht was specifically asked by the respondent of The Florida Bar in Interrogatory 6 of the Interrogatories propounded on the 10th day of November, 1997, and no prejudices to the complainant were listed. Also presented and considered by the Referee was mitigation that the respondent had provided legal services to the indigent for which he had been recognized; that during the time frame of this incident and for a period of approximately 6 years, the respondent testified he had been taking Valium for stress and Elavil to prevent depression; that his marriage of 29 years failed and ended in divorce in 1997.

I conclude that the facts of this case and the past disciplinary record of the respondent far outweigh the mitigating evidence presented.

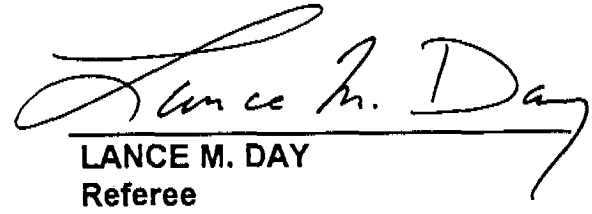
VI. Recommendation as to Disciplinary Measures to Be Applied: Respondent, pursuant to Rule 3-5.1(e), Rules of Discipline, shall be suspended for a period of 91 days and thereafter until rehabilitation is demonstrated. [1]

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. Bar Counsel Travel Costs		$ 45.51
B.	Referee Level Costs:		
	1. Transcript Costs		$ 1250.24
	2. Bar Counsel Travel Costs		$ 116.09
C.	Administrative Costs		$ 750.00
D.	Miscellaneous Costs:		
	1. Investigator Costs	$ 148.50	
	2. Copy Costs	$ 17.55	
	TOTAL ITEMIZED COSTS:		$ 2327.89

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, 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 23rd day of JUNE, 1998.



LANCE M. DAY
Referee

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[1] This case suggests a need to amend the Rules regulating The Florida Bar to require **written notification** by the attorney to the client regarding a potential conflict and a **written consent/waiver** of said conflict by the client **before** the attorney proceeds further.

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

Jan Wichrowski, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314

Michael L. Ramos, Counsel for Respondent, 378 South Atlantic Avenue, Aliki Plaza, Ormond Beach, Florida 32176

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