0+7

3/6

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellee, v. EDWARD KLEIN, Respondent-Appellant.	SC95011 The Florida Bar File Nos. 97-51,273(17G) and 97-51,484(17G)

THE FLORIDA BAR'S ANSWER BRIEF

KEVIN P. TYNAN, #710822
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

JOHN ANTHONY BOGGS, #253847
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5839

JOHN F. HARKNESS, JR., #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5839

TABLE OF CONTENTS

TABLE OF CONTENTS - Cont.

PAGE(S)

TABLE OF CASES AND CITATIONS

CASES PAGE(S)

RULES REGULATING THE FLORIDA BAR

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar". Edward Klein, Appellant, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Lastly, the symbol "TFB" followed by a letter and number will designate the bar's trial exhibits.

CERTIFICATION AS TO FONT SIZE AND STYLE

Pursuant to this court's Administrative Order In Re: Brief Filed in the Supreme Court of Florida, undersigned counsel for the bar hereby certifies that this Brief is produced in a font that is 14 point proportionately spaced Times New Roman type.

STATEMENT OF CASE AND FACTS

The respondent's statement of the case and facts is incomplete and not supported by the record. Accordingly, the bar feels compelled to set forth the correct statement of the case and facts.

On March 4, 1999, The Florida Bar filed a seventeen count complaint against the respondent, Edward Klein. Issue was joined and the case was tried over three days (October 6, 7 and 15, 1999). More than a hundred exhibits were entered into the record and considered by the referee, along with the testimony of eight witnesses. The referee issued his report on November 4, 1999, which report found the respondent guilty of all charges that were tried[1] and recommended that he be disbarred. The referee also executed a second distinct order, dated November 4, 1999, recommending that the respondent be placed on emergency suspension pending the outcome of his appeal. Post trial and post the filing of the report of referee, the respondent served four post trial pleadings, with all the requested relief being denied by the referee by orders dated November 18, 1999 and December 29, 1999. The respondent filed his petition for review on December 24, 1999, which petition sought review of the report of referee and the order denying the respondent's motion for rehearing.

---

[1] The bar withdrew Count VI.

The factual backdrop for this complaint arises from a homeowners association's attempt to amend their deed restrictions, post a change in the law, to restore the deed provisions concerning age restrictions in this mostly retiree community. Prior to 1988, the deed restrictions for the Westwood Community Two Association, Inc. ("Westwood"), a community of 214 single family homes located in Tamarac, Florida, provided that children under the age of 16 were not permitted to be permanent residents of the community. RR 1-2. At all times referenced below, unless indicated otherwise, the respondent was a resident of Westwood, served on the Board of Directors for Westwood, acted as an officer of Westwood at various times, and was the lawyer for Westwood.

Count I of the bar's complaint concerns the attempted amendment to the Westwood deed restrictions. In July of 1992, the Westwood homeowners, at a special meeting of the HOA, decided to resurrect the age limitation deed restrictions for Westwood. The respondent, as attorney for Westwood, drafted and caused to be recorded a July 23, 1992 Amendment to the By-Laws of Westwood. This new amendment to the By-Laws, and not the Deed Restrictions, purported to enact a ban on permanent residents under the age of eighteen and further required that at least one household member be over the age of fifty five. TFB A3. Subsequently two members of the community, John Lewis and Peter Martin, initiated federal and state court

actions against Westwood to hold these new age restrictions invalid. RR 2. These lawsuits were successful and Westwood was enjoined from enforcing these age restrictions as a result of an order in federal district court dated September 26, 1995 (TFB C10) and a state court order dated October 12, 1995 (TFB D15). The litigation revealed, and the referee so found, that the respondent failed to follow the correct methods for amending the deed restrictions and therefore provided his client, Westwood, with incompetent representation.

Counts II and III related to the respondent's representation of the Estate of Fay Bresnick. The decedent was the respondent's next door neighbor and he was retained by the decedent's two sons who resided out of state. RR 3. The Bresnick home was listed for sale by the estate and an offer to purchase same was made by Paula and Thomas Gajewski, who were both under the age of 55 and had a son who was 17. RR 3. The referee found that the respondent not only acted as attorney for the Estate, but also acted as the attorney for Westwood and as a member of the board of directors of Westwood. These conflicting roles came to a head when, the respondent insisted on the addition of certain clauses in the real estate contract that prevented the sale from going forward. RR 3. Further, it was the testimony of Gajewski's lawyer, Richard Percic, Esquire, that the respondent threatened to sue the Gajewskis and prevent them from purchasing the home merely because they did not meet the "new" age restrictions

set forth in the amendment to the By-Laws. The referee found that these actions were contrary to the wishes of the estate's beneficiaries and done without their consent. RR 3. The referee also specifically found that the respondent "allowed his own personal interests and those of Westwood's to override the interest of his client, the Estate of Fay Bresnick." RR 3. Accordingly, the referee found the respondent guilty of a conflict of interest as charged in Count II and of failing to abide by his client's wishes as alleged in Count III of the bar's complaint.

The respondent was found guilty of Count IV of the bar's complaint. The misconduct is very straight forward. The Lewis and Martin state court proceeding was filed on April 12, 1994. RR 4. The respondent, as lawyer for Westwood, filed a new action in state court on May 8, 1994, against Lewis, Martin, and Schneider, a board member, who had provided some assistance to Lewis and Martin. RR 4. The matter at issue (enforcement of the age restrictions) was identical to the issue raised by the Lewis and Martin action. RR 4. TFB D27; F31. The respondent did not follow the local administrative order about revealing common cases and instead engaged in forum shopping by securing a different judge than that assigned to the Lewis and Martin suit. RR 4.

We next turn to misconduct arising from the respondent's representation of Westwood in the Lewis and Martin state court litigation. The referee, in Count V

found the respondent guilty of having filed a frivolous motion to stay, when at the time he filed such motion there was nothing to stay as there was no final order entered at that time. RR 5. Count VI, also concerned allegations about the state court action, but this charge was withdrawn by the bar.

During the course of the Lewis and Martin state court action and in August 1996, the respondent was ordered to produce certain bank records for Westwood. RR 5. However, the respondent did not comply with this order on several occasions. RR 5. It took the threat of a contempt citation from the trial judge to cause the production of these bank records. RR 5. As such, the referee found the respondent guilty of failing to follow the judge's orders to produce the bank records and further found the rule violations plead in Count VII of the bar's complaint. RR 5.

Counts VIII through XIII concern the Lewis and Martin litigation and the respondent's ill fated decision to file suit against Mark and Linda Menzano to enforce the age restrictions which Westwood was enjoined from enforcing (TFB D15). RR 6. In Count VIII, the respondent is found guilty of filing the Menzano lawsuit (TFB G33) in direct contravention of the state court injunction (TFB D15). The respondent was held in contempt by the state court judge for filing the Menzano lawsuit. RR 6. Further, the referee found that the respondent's defense based upon the federal court's order of clarification (TFB 11) was unfounded and without merit. RR 6. During the

hearing to hold the respondent in contempt, several witnesses testified, inclusive of other board members and the respondent. RR 6. It was determined by the state court judge that the respondent did not have his client's permission prior to filing the Menzano lawsuit. RR 6. The referee confirmed this finding after hearing from multiple witnesses on this issue and found the respondent guilty of Count IX. RR 6. The referee also found the respondent guilty of making a material misrepresentation in the Menzano complaint. RR 7. In particular the referee found that the respondent made the following statement in the Menzano complaint:

> In a decision involving this community having a very similar Declaration of Restriction and containing the same Article 6 language as exists in the instant case herein, Article 6 of the original recorded Declaration has been upheld as still being effective. See John L. Lewis and Peter C. Martin v. Westwood Community Two Association, Inc., Case No. 95-6318-CIV-UNGARO-BENAGES; copies of said decision and Order of Clarification dated 10/25/95 within said proceedings are attached hereto and made a part hereof as Exhibits B and C respectively. RR 7.

The referee's comments in finding the respondent guilty of Count X is very informative. He states:

> Klein knew the age restrictions were invalid. Klein's complaint is misleading, at the very least. Klein throughout the proceeding attempted to justify and argue his defense that all of his actions were based upon the Order of Clarification. The referee rejects this defense as not being

supported by the evidence in this case and the plain reading of Judge Ungaro-Benages Order. RR 7.

In Count XI, the referee found the respondent guilty of a conflict of interest in that he had many roles and relationships in the Menzano lawsuit. RR 7-8. First, he was a homeowner who was interested in imposing age restrictions. Second, he was an officer and/or member of the board of directors of Westwood who had a fiduciary obligation to the residents not to violate the injunction. Lastly, he was the attorney and legal advisor to Westwood and had a further obligation as an officer of the court not to violate court orders. RR 7-8.

On March 24, 1997, Dan Powers, a member of the Westwood board, testified in the state court hearing, held to determine if the respondent should be held in contempt for filing the Menzano lawsuit. RR 8. At that hearing Powers testified that the Westwood board had not authorized the filing of the Menzano lawsuit prior to the filing of same and that he only learned about the Menzano lawsuit after it had been filed. RR 8. Notwithstanding knowledge of this prior testimony, the respondent, during the course of the bar's investigation of the instant grievance, had Powers execute an affidavit (TFB L76) which related completely different and opposite testimony. RR 8. After Powers executed the affidavit, the respondent submitted same to the bar in an attempt to mislead the bar into believing that the board provided prior authorization

for the Menzano lawsuit. RR 8. The respondent, in Count XII, was found guilty of securing a fraudulent affidavit and engaging in misrepresentation.

Count XIII follows the respondent's lie about his authority to file the Menzano lawsuit to the Fourth District Court of Appeals and the respondent's attempt to have his contempt citation for filing the Menzano lawsuit overturned. In an appellate brief (TFB E29), the respondent claimed that the Westwood board had approved the Menzano lawsuit prior to its filing. RR 8. The referee found that it "was impossible" for Westwood to have authorized the lawsuit "when they had no knowledge of the contemplated action prior to the action being taken." RR 8. Accordingly, the referee found the respondent guilty of making a misrepresentation to the appellate court.

The referee's comments about Count XIV are very informational. The referee found:

> At page 5 of Klein's brief in the Edward Klein, Esq. v. Westwood Community Two Association, Inc., John L. Lewis and Peter C. Martin appeal (case number 97-1411), he states as follows: "The federal court order states that it is legal for Westwood Community Two Association, Inc. to prohibit children under the age of 16 from permanently residing in the community." At the time Klein made the statement above, he knew that Judge Ungaro's order of September 26, 1995 in the Lewis and Martin federal lawsuit (case number 91-2772-Civ-Ungaro-Benages) clearly found that the age restrictions set forth in the Westwood Declaration of Restrictions were null and void and further said order "permanently enjoined (Westwood) from

> enforcing" same. At the time that Klein made the statement, he knew that Judge Ungaro's order of October 25, 1995 which clarified her prior order but did not allow the enforcement of the age restrictions. Further, at the time that Klein made the statement, he knew that he had stated in his brief of the appeal of both of the aforementioned orders that Section 6 of the Westwood Declaration of Restrictions was abolished by operation of law and was of no force and effect. Klein's position that Section 6 was void as a matter of law is set forth in great detail at pages 10 through 15 of the brief he filed on behalf of the Westwood in the appeal of the aforementioned orders. RR 9.

Having been charged with contempt in the state court matter, the respondent moves back to federal court. On February 11, 1997, the respondent filed a Verified Motion for Attorneys Fees and Costs on behalf of Westwood claiming that Westwood was the prevailing party. TFB C13. The referee, in Count XV, found this to be a frivolous motion because it "was untimely in that it was filed more than a year after the date that Westwood lost this proceeding and the dispositive orders relating thereto." RR 9.

In Count XVI, the respondent is found guilty of the some of the more serious charges present in this case. After the adverse ruling in the Lewis and Martin state and federal court actions, the respondent, in November 1995, caused Westwood to file a petition in bankruptcy. RR 10. Next, on November 29, 1995, the respondent formed a successor corporation, Westwood Community Two, Inc. (dropping "Association").

RR 10; TFB B5. A week later, the respondent drafted an assignment (TFB A4) of each and every asset of Westwood to Westwood Community Two, Inc. and had the document executed by the prior treasurer of Westwood and then recorded. RR 10. This was all done in contravention of the bankruptcy code and was done without the knowledge and consent of the bankruptcy trustee. RR 10. This fraudulent assignment was discovered and became an issue in the bankruptcy proceeding. RR 10. Shortly thereafter Westwood petitioned to dismiss the bankruptcy and the first bankruptcy case was dismissed on March 18, 1996. RR 10.

About a year later, the respondent, on his own initiative filed a new bankruptcy petition for Westwood. The referee found that this was done to avoid the claims of Lewis, Martin, Gajewski and others. RR 10. This bankruptcy case evolved into an adversary case with a complaint being filed against the respondent and Westwood Community Two, Inc., to avoid the fraudulent transfer of assets. RR 10; TFB I41. This adversary proceeding was over litigated by the respondent and culminated in Judge Hyman's 1.2 million dollar award against Westwood in the bankruptcy action, the cost of which must be borne by the residents of Westwood. RR 10-11; TFB I41.

The last Count of the bar's complaint sounds in conflict of interest. The referee in finding the respondent guilty summed up this charge as follows:

> For more than four (4) years Klein has advised the Board of Westwood that they have a legal right to impose age restrictions. This legal advise has resulted in several lawsuits, all of which ended in adverse judgments to Westwood. These judgments, in turn, prompted Klein to fraudulently bankrupt the association which led to the bankruptcy trustee taking control of the association and at one point even padlocking the clubhouse and pool. Klein continued a four year campaign (which continues today) to improperly attempt to enforce invalid age limitations in his community. Kleins four (4) year campaign was against the wishes of Westwood, and he put his interests above the interest of his client. Westwood has lost each and every action and had to pay court costs, attorney's fees and damages, and even bankrupt Westwood. RR 11.

The referee after considering all of the foregoing and the aggravating factors present in this case has recommended that the respondent be disbarred. RR 11-14. The respondent is appealing the referee's factual findings, his determination of guilt as to the rule violations and his disbarment recommendation.

SUMMARY OF ARGUMENT

The respondent in this case was engaged in a struggle to enforce invalid age restrictions in his community. While trying to achieve this goal, he committed a litany of ethical breaches, inclusive of engaging in conflicts of interest, making misrepresentations to the courts and the bar, disobeying court orders, committing bankruptcy fraud and retaliating, by filing frivolous lawsuits or criminal charges, against anyone who stood in his way. This egregious misconduct warrants disbarment.

The referee felt so strongly about the respondent's unethical actions that he recommended that the respondent be placed on emergency suspension pending the outcome of this appeal. This court accepted this extraordinary remedy.

At issue in this appeal, is the respondent's attempt to convince this court that either (a) the referee misunderstood his position or (b) the bar failed to meet its burden of proof on particular issues. In reality, the respondent's initial brief contains nothing more than the same failed factual arguments that he raised before the referee, as well as the various courts that resolved the litigation underlying this complaint. It is the respondent's burden in this appeal to show that the referee's findings of fact and guilt were clearly erroneous and lacking in evidentiary support. He has failed to meet this high burden. Accordingly, the referee's findings of fact and guilt should be accepted. Likewise, this court should approve the referee's recommendation that the respondent be disbarred.

ARGUMENT

I. DISBARMENT IS THE APPROPRIATE SANCTION FOR A LAWYER WHO, AMONG OTHER THINGS, ABUSES THE JUDICIAL SYSTEM, COMMITS FRAUD UPON THE COURT, VIOLATES COURT ORDERS AND ENGAGES IN CONFLICTS OF INTEREST TO ADVANCE HIS OWN PERSONAL AGENDA TO THE DETRIMENT OF HIS CLIENTS.

The referee, by his statement below, has encapsulated the great damage done by the respondent, not only to the courts and to his clients, but also to members of his community:

> This is a case of the enormous magnitude, that affects not only the numerous parties that were directly impacted by the serious misconduct of a Florida lawyer, but the public at large, has been the victim of this serious misconduct by a Florida lawyer. It is clear that the likelihood of the problems imposed on the Community by this misconduct will be long term. Undoubtedly, for many of the residents and the members of the twenty (20) Homeowners Associations at Westwood, there will be a permanent scar. The actions Klein have taken not only have saddled this Community with large monetary judgment, but the threats and tactics used included Civil and Criminal actions that caused harm to everyone who opposed Klein. RR 11.

The respondent takes issue with the referee's findings of fact and guilt and has filed this appeal. In fact it is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that

these findings are "clearly erroneous and lacking in evidentiary support". The Florida Bar v. Canto, 668 So.2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). The respondent makes nary a reference to the record below and instead relitigates the same factual issues that he lost before the referee and before the judges who considered the litigation underlying this action.

A. The misconceptions raised by the respondent.

The linchpin of the respondent's defense is his claim that an order of clarification (TFB C11) allowed Westwood to ignore the federal court injunction (TFB C10) and the state court injunction (TFB D15) against enforcing the age restrictions in his community. This is a fallacious argument raised by the respondent. He lost this argument before the referee. He argued this before other judges and each of them rejected the argument. See TFB D22; Q89; O86.

On September 26, 1995, Federal District Court Judge Ungaro-Banages entered an order invalidating all of the Westwood age restrictions. TFB C10. As he has everywhere, the respondent filed a motion for rehearing and for clarification. Judge Ungaro-Banages granted the motion for clarification to the extent that she clarified that: (1) Westwood was enjoined from enforcing the 1992 amendment to paragraph 6 of the Westwood deed restrictions (TFB A3), and (2) The original paragraph 6 of the deed restrictions was left untouched by her ruling.

The respondent relies upon the language in the order which reads: "Article 6 and the original version of Paragraph 6 of the Declaration of Restrictions are still effective." The original version of paragraph 6 prevented minors under the age of 16 from living in the community. The amendment to the by-laws raised the age to 18 but required at least one titled resident to be over the age of 55.

The respondent argues that the supremacy clause allowed him to use the order of clarification to ignore the state court injunction. Putting aside the fact that the restrictions in Article six were void because of the Federal Fair Housing Act,[2] all we need do is examine the order of clarification to see that the respondent is factually wrong in his interpretation. Judge Ungaro-Benages in a later lawsuit filed by the respondent in March of 1998, filed on behalf of his allies (Winter, Robbins and Ravitch) against his then former client Westwood, Judge Ungaro-Benages, in dismissing that lawsuit, commented upon her order of clarification as follows:

> On October 25, 1995, this Court issued an Order of Clarification in Case No. 94-6318-CIV-UNGARO-BENAGES (*John L. Lewis et al. v. Westwood Community Two Association, Inc.)*. Clarifying its Order granting summary judgment for plaintiffs dated September 26, 1995, the undersigned ordered that "Defendant Westwood is

---

[2] If not why did Westwood create the amendment to get around the Act? Also see Westwood Community Two Assoc., Inc. v. Lewis and Martin, 687 So.2d 296 (Fla. 1997); TFB C12.

> permanently enjoined from enforcing the July 23, 1992 amendment to paragraph 6 of its Declaration of Restrictions. Article 6 and the original version of Paragraph 6 of the Declaration of Restrictions are still effective." Plaintiff requests that the Court enforce the second sentence finding that Article 6 is still effective by ordering Defendant to enforce it.
>
> The undersigned finds that . . . (a)lthough the Court may have jurisdiction to enforce a permanent injunction that it issued, the second sentence referenced above granted no affirmative relief and did not reflect a determination that Article 6 is lawful. Thus, the order provides nothing for the Court to enforce. Plaintiffs are asking the Court to order Defendant to enforce Article 6. Had the Court originally issued permanent injunctive relief requiring Defendant to enforce Article 6, Plaintiff's action to enforce that injunction would be properly before the Court. However, the Court's prior order simply declared Article 6 effective, it did not order Defendant to do anything nor did the Court determine its validity. Therefore, the Court cannot now, in this action, order Defendant to do something that it never ordered in the first place. TFB O86.

At an earlier time in the underlying litigation the respondent acknowledged that "Section 6 of Westwood's Declaration of Restrictions was abolished by operation of law" because of the Fair Housing Act. See TFB C14, May 1996 Initial Brief of Appellant served by the respondent when he was appealing Judge Ungaro-Benages'

summary judgment order. This is just one example from the record[3] to support the respondent's view that the original deed restrictions were invalid and if they were not invalid there would have been no need to seek an amendment. It is disingenuous of the respondent to argue today that the original deed restrictions are or were still valid at the time of the relevant misconduct in this case.

Having cleared up the misconception over the order of clarification we next turn to the other fallacy created by the respondent, with that fallacy being the respondent's claim that he has not caused harm to anyone. On the contrary there are 1.2 million[4] reasons why he has caused, and was continuing to cause, great public harm. The referee specifically found that not only did the respondent's misconduct affect Lewis, Martin, Gajewski and Menzano, but they affected his clients (the Bresnicks and Westwood), but also may have "permanently scarred" his community of retirees. RR 11.

---

[3] For example see the initial brief at p.15. ("Respondent further testified that it was his belief when Congress passed the 1988 Fair Housing Act. Its intent was to supersede all recorded deed restrictions in homeowners associations.")

[4] The total damage amount awarded to Lewis, Martin and Menzano in the bankruptcy proceeding directly attributable to the respondent's campaign to enforce invalid age restrictions. See TFB I48.

B. Count I.

In count I the respondent is charged with a lack of competence in amending the Westwood deed restrictions. Simply stated, the deed restrictions the respondent sought to amend contained a two-pronged provision that needed to be followed when making amendments to the deed restrictions. TFB A2 at para 16. First the amendment needed to be approved by the developer, which admittedly may have been impossible as the homes were built in the 1970's. Secondly, the amendment needed the "consent of each institutional lender" holding a mortgage on any home in Westwood. The respondent chose to do neither and instead opted to draft a by-law change. TFB A3.

The referee found that the failure to follow the amendment procedures evidenced a lack of competence. There is full support for this finding in the record in that the failure to properly amend the deed restrictions (along with the Federal Fair Housing Act) was at the core of the decisions to invalidate the new age restrictions. TFB C10; D15. The respondent focuses his defense on R. Regulating Fla. Bar 4-3.1 which allows for good faith arguments for a modification of existing law. This misses the mark as he simply failed to follow the proper amendment procedures in the deed restrictions.

C. Counts II and III.

These two counts of misconduct concern the attempted purchase, by Gajewski of the Estate of Bresnick's house located next door to the respondent's home. The respondent's brief contains a little more than a page of factual argument on why the referee should not have found him guilty of a conflict of interest for his multiple representation of the Estate, Westwood and his own interests (Count II) and failing to abide by his client's instructions on the objectives of the representation (Count III).

With scant reference to the record, other than to list the same exhibits that the referee did in his report regarding the Gajewski matter, the respondent focuses on the fact that he did not prepare the contract for sale and that he was absolved of wrongdoing by the Broward County Human Rights Commission. The respondent is probably referring to the U.S. Department of Housing and Urban Development's closure of Gajewski's complaint on September 25, 1996 (TFB J70). However, the document that the respondent conveniently forgets to discuss is the State of Florida Commission on Human Relations Split Determination of Reasonable Cause and No Reasonable Cause (TFB R102) which specifically found Gajewski's complaint to have merit as it related to Westwood and the respondent attempting to enforce invalid age restrictions. In any event the referee heard respondent's testimony, the testimony of Gajewski and her lawyer, Percic, as well as considered over 20 exhibits concerning

the attempted Bresnick to Gajewski sale, which sale was thwarted by the respondent's inclusion, into the sales contract, of terms and conditions that were meant to prevent a sale of the home to Gajewski.

While the respondent, in his brief and during the trial, attempted to hide behind the Realtor and distance himself from the additional offensive contract provisions, Richard Percic, Esquire's trial testimony was most compelling in showing the respondent's true actions in blocking this sale. TT156-161. Of particular interest are Percic's comments that the respondent informed him that he was the seller's attorney and Westwood's attorney[5] and that he would sue the Gajewskis if they attempted to complete the purchase of his client's home notwithstanding that Westwood had a weak legal position regarding these age restrictions. There is a sound basis in the record for the findings of guilt as to both counts of misconduct.

D. Count IV.

This count sounds in forum shopping by the respondent who filed a new lawsuit against Lewis and Martin, but added a third nominal defendant Schneider, another member of the Westwood community. RR 4. Westwood's new lawsuit was filed less

---

[5] Percic further knew that the respondent was serving on the Westwood Board and resided next to Bresnick home. TT 158 and 161.

than a month after Westwood had been sued by Lewis and Martin. The second case was before Judge Leroy Moe. Judge Moe found that:

> . . . None of the three counts alleged in this lawsuit stated a cause of action independent and separate from anything else alleged in the case. The motion (to dismiss) is granted without prejudice to raise the same matters either as an affirmative defense or as a counterclaim in the original lawsuit . . . . F31, p.4, l.19-p.5, l.1.

During that same hearing, the respondent justified his actions by saying that he filed the second action because the other state court case "was not moving". TFB F31, p.12, l.14-15. Of course the first suit had been pending for less than 30 days at the time that the respondent felt it was not moving. Judge Moe awarded fees and costs against Westwood because he believed that the respondent had engaged in improper forum shopping. TFB 31, p.13. The referee agreed and found the respondent guilty. RR 4.

E. Count V.

At issue in Count V is a motion to stay filed by the respondent in the Lewis and Martin state court proceeding. TFB D17. A fair reading of this motion is that Westwood was attempting to stay the injunctive portion of the order granting partial summary judgment. TFB D17, para. 1-2. The respondent contends he was attempting to stay a cost award of approximately $2,000.00. However, the referee found, after

considering the respondent's testimony, that this was not the case and found the motion to stay frivolous. The respondent's brief only contains a statement that he had introduced the cost judgment at trial, but provided no further argument or reference to show that the referee's findings are "clearly erroneous and lacking in evidentiary support"and therefore his appeal of this finding must fail. Canto; Porter.

F. Count VII.

The misconduct in Count VII is rooted in a discovery dispute over the production of bank records sought by Lewis and Martin in the state court proceeding to prove the fraudulent transfer of assets from Westwood to Westwood Community Two, Inc. RR 5. There was protracted litigation over the production of these records and it took the trial judge to state during a hearing on the production issue:

> Mr. Klein, let me tell you something, you are skating on thin ice in this case, because I can't believe you and whoever this Board is are disobeying the order, I cannot believe that you won't provide those months documents.
>
> Now I am telling you, sir, I don't care how old you are, these orders of this court are going to be obeyed. (TFB D25, p.11, l.6-13.) . . . . .

The respondent's defense is that he was not the treasurer and that he could not produce what he did not have. However, an examination of the hearing on this issue (TFB D25) does not indicate this defense being raised. Rather, the respondent being

ordered to produce the remaining crucial documents within 5 days (TFB D20) he responds "Judge, I'll produce the records, it's no problem."

The respondent, while he correctly explains the holding of The Florida Bar v. Cramer, 643 So.2d 1069 (Fla. 1994) [Bar must prove intent in misrepresentation cases.], Cramer is not applicable to the instant act of misconduct. Further, the respondent's reliance on Ravitch's deposition is likewise misplaced. While Ravitch, Westwood's then treasurer, testified that she had been asked by the respondent for the records and had requested them from the bank, Judge Moriarity correctly pointed out:

> Sir, you're the attorney for the corporation and officer for the corporation, if you don't know where the bank accounts are, you better resign. (TFB D25, p.12, l.15-17.)

G. Count VIII.

The respondent does not contest the facts of this count (the filing of a lawsuit in violation of an injunction against enforcing deed restrictions). Rather, he makes two legal arguments on why he believes he was allowed to ignore the state court injunction. Firstly, he contends that the "...validity of the Order of Clarification must be decided by the courts, not by The Florida Bar." Respondent's initial brief at 21. The respondent presents no authority for his astounding theory, perhaps because there is no authority to support his proposition. The respondent made the same argument to the referee via a motion to strike and this was denied by order dated August 12, 1999.

That said, however, the referee and this court must interpret, as it does every day of the week, the orders of other courts as it relates to this fact pattern. As is explained in great detail above, the order of clarification did not provide the respondent or Westwood with any authority to enforce its invalid age restrictions. TFB O86. Nor does the supremacy clause apply, because there is no conflict between the Lewis and Martin federal court orders and state court orders. RR 6.

The next legal argument presented by the respondent is that he had a good faith belief that his actions were appropriate and refers to R. Regulating Fla. Bar 4-1.2(d) [A lawyer shall not counsel a client to engage in criminal or fraudulent conduct, but may explore the limitations of the law with the client.] and the comments to R. Regulating Fla. Bar 4-8.4, which discusses a lawyer's ability to make a good faith challenge to the application of the law. In order to find shelter in a "good faith" defense, there ought to be some colorable claim that the respondent could rely upon. The order of clarification just does not supply that shelter. At the time of the order of clarification, the respondent knew that the under 16 age restriction was invalid as a matter of law and argued in an appellate brief that it was invalid. (TFB C14). As the referee noted, ". . . the order of clarification . . . did not provide Klein with any authority to file the Menzano lawsuit." RR 6. As such, after taking note of the fact that the respondent had been held in civil contempt for filing the Menzano lawsuit, the

referee found the respondent guilty of having committed conduct prejudicial to the administration of justice and of having knowingly violated a court order.

The respondent contends, and the bar agrees, that the referee was not bound by the findings and judgments of other tribunals. The Florida Bar v. Garland, 651 So. 2d 1182 (Fla. 1995); The Florida Bar v. Swickle, 589 So.2d 901 (Fla. 1991). The referee, after analyzing these other judicial findings and orders, along with having had the opportunity to take testimony from the relevant parties, entered a reasoned ruling that was in accord with the prior judicial rulings. Merely because the referee agreed with Judge Moriarity (and others) that the respondent knowingly disobeyed a court order does not mean that he felt bound by those prior orders.

H. Count IX.

In Count IX, the respondent is charged with filing the Menzano lawsuit without the prior express permission of his client. This story forms the predicate for Counts XII and XIII, which allege that the respondent misrepresented that he had such authority to the bar and the appellate court. The referee had the opportunity to hear the respondent's testimony, as well as the testimony of Dan Powers, the then acting presiding officer of the Westwood board, and Betty Ravitch, the board member who acted as secretary.

The most troubling aspect of this scenario is the lack of board minutes and the purposeful inability to define when the board meeting was held to instruct the respondent to file suit against Menzano. Ravitch testified that she, as a custom and practice, always took minutes and they were ratified at the next meeting. TT 180, 190-192. However, there are no minutes for this meeting. TT 189-190. The last available minutes are from December 1996 and January 1997. TFB B6-B9. As there were no minutes, the question of authorization boils down to which witness you are going to believe. An issue of credibility is best left for a referee. The Florida Bar v. Thomas, 582 So.2d 1177 (Fla. 1991); The Florida Bar v. Carricarte, 733 So.2d 975 (Fla. 1999). The referee, after hearing from the witnesses, decided that there was no formal meeting at which a vote was taken to file suit against Menzano. This reasoned decision was likewise found by Judge Moriarity when he found the respondent in contempt, he likewise found that the respondent acted without board authority.

Dan Powers testified that the board did not authorize the suit prior to its filing. There is testimony from the respondent and his board allies that the vote was done at a regular board meeting, which was normally held on the second Monday of the month. TT 195. We know from a perusal of the December and January minutes (TFB B6-B9) that this task was not accomplished at those meetings. This leaves February as the likely month for the meeting (if it was held), as the Menzano suit was filed on

March 21, 1997. TFB G33. The second Monday of February 1997 was February 10, 1997. While Ravitch gave completely conflicting reasons for why the board held the February board meeting at Dan Powers' home (TT 187-189), she insisted that it was at a regular board meeting. TT 171-173. One difficulty for the respondent, based upon the testimony of his own witness, is that the respondent sent his demand letter to Menzano a full week prior to this supposed February 10, 1997 board meeting. It is the respondent's position that he had authority to file the Menzano suit at the time he sent the demand letter, but this does not fit with the story told by his own witness.

The referee, after wading through the conflicting testimony, found the respondent's version of events to be lacking. In finding the respondent in contempt, Judge Moriarty ruled that the respondent did not have the Westwood Board's prior permission to file the Menzano lawsuit. TFB D22. The referee's comment on this point is interesting. The referee stated that ". . . it was impossible for his client to have authorized an action (i.e. the filing of a lawsuit) when they had no knowledge of the contemplated actions prior to the action being taken." RR 8.

I. Count X.

The respondent drafted and served a complaint upon the Menzanos. This complaint makes the following statements:

a. paragraph six (6) of the Menzano complaint states that "Article 6 . . . Has been a covenant of this community in the public records since the original recording of the declaration."

b. paragraph seven (7) of the Menzano complaint, states:

> In a decision involving this community having a very similar Declaration of Restriction and containing the same Article 6 language as exists in the instant case herein, Article 6 of the original recorded Declaration has been upheld as still being effective. See John L. Lewis and Peter C. Martin v. Westwood Community Two Association, Inc., Case No. 95-6318-CIV-UNGARO-BENAGES; copies of said decision and Order of Clarification dated 10/25/95 within said proceedings are attached hereto and made a part hereof as Exhibits B and C respectively. TFB G33.

In both quoted passages there is no disclosure made that the Westwood HOA age limitations were invalid by operation of law or were unenforceable by virtue of federal and state court rulings. The referee in finding the respondent guilty of filing a frivolous lawsuit and engaging in misrepresentation noted that:

> Klein knew the age restrictions were invalid. Klein's complaint is misleading, a the very least. Klein throughout the proceeding attempted to justify and argue his defense that all his actions were based on the Order of Clarification. The referee rejects this defense as not being supported by the evidence and the plain reading of Judge Ungaro-Benages Order. RR 7.

The respondent's only comment on this guilty finding was that the referee was wrong because the Order of Clarification "has not been rejected by any court of competent jurisdiction." Initial brief at 26. Putting aside the fact that the referee was a court of competent jurisdiction, all one need do is examine the later order of Judge Ungaro-Benages wherein she discussed that the respondent's interpretation of her order of clarification was incorrect. TFB O86. Also see pages 14-17 above.

J. Count XI.

The respondent's argument on Count XI is difficult to follow. He correctly copies a portion of the report of referee which sets forth the various roles he played during the Menzano litigation. The second supposed quote does not come from the referee's report. Rather, it is a passage from page 7 of his own pleading entitled Findings of Fact and Conclusions of Law. Next the respondent makes a conclusory statement that he had no conflict of interest, presumably because he did not represent Menzano. However, that is not the conflict that is being discussed. It is the conflict between the respondent's representation of Westwood, his fiduciary obligations to the association as he was a board member, and his own personal interests in keeping age restrictions. The respondent sets forth no explanation on why the referee's finding is incorrect and therefore his findings should not be disturbed.

K. Count XII.

At Count XII, the referee found respondent guilty of knowingly submitting a false affidavit to the bar. RR 8. The referee reaches this conclusion because on March 24, 1997, during the hearing on whether Klein should be held in contempt for filing the Menzano lawsuit, Powers, the then acting presiding officer of the Westwood board, testified that the Westwood board did not authorize the respondent to file the Menzano lawsuit, prior to its filing. RR 8. In fact, the respondent orchestrated a rehearing of his contempt order and had Powers testify before Judge Moriarty for a second time, wherein he stated that the board of directors did not authorize the Menzano lawsuit before it was filed. TFB D24, p.7-15. This transcript also reveals that the respondent had also deposed Powers on this precise issue. TFB D24, p.7-8. Perhaps the most compelling aspect of Powers' testimony at trial was that he did not personally hear of the Menzano lawsuit until after it had been filed. RR 8.

Notwithstanding all of the foregoing, the respondent secured an affidavit from Powers, as well as four other friendly board members, who opined in their affidavits that they had authorized the filing of the Menzano lawsuit. TFB 1.76 - 1.81. All of these affidavits state that the Menzano lawsuit was done with their approval.[6] What is

[6] All but Powers state that the Westwood board approved the suit. Powers states that a majority of the homeowners voted to enforce the deed restriction.

missing however, is a date for such approval and the reason there is no date is because it never happened prior to the lawsuit being filed. See brief at pages 27-28 above.

The respondent contends that the bar did not prove that he intentionally provided a false affidavit to the bar. The referee disagreed and also noted that part of his decision was based upon the fact that there were no minutes of this supposed meeting.

L. Count XIII.

The lack of authorization to file the Menzano lawsuit is also at the core of this count of misconduct. In February of 1997, the respondent appealed his contempt finding and at page one of the initial brief dated April 28, 1997, prepared and filed by the respondent in the contempt appeal, the respondent states:

> On or about February 21, 1997, Edward Klein filed an action against Mark and Linda Menzano in the circuit court of Broward County pursuant to the instructions of the Board of Westwood Community Two, Inc., his client . . . TFB E29.

The referee found this to be a misrepresentation of fact to a tribunal. RR 9. All the respondent contends is that the referee was "mistaken" on this point. Initial Brief at 28. This is hardly a demonstration that these findings are "clearly erroneous and lacking in evidentiary support". Canto.

M. Count XIV.

This is yet another misrepresentation count. The referee found:

> At page 5 of Klein's brief in the Edward Klein, Esq. v. Westwood Community Two Association, Inc., John L. Lewis and Peter C. Martin appeal (case number 97-1411), he states as follows: "The federal court order states that it is legal for Westwood Community Two Association, Inc. to prohibit children under the age of 16 from permanently residing in the community." At the time Klein made the statement above, he knew that Judge Ungaro's order of September 26, 1995 in the Lewis and Martin federal lawsuit (case number 91-2772-Civ-Ungaro-Benages) clearly found that the age restrictions set forth in the Westwood Declaration of Restrictions were null and void and further said order "permanently enjoined (Westwood) from enforcing" same. At the time that Klein made the statement, he knew that Judge Ungaro's order of October 25, 1995 which clarified her prior order but did not allow the enforcement of the age restrictions. Further, at the time that Klein made the statement, he knew that he had stated in his brief of the appeal of both of the aforementioned orders that Section 6 of the Westwood Declaration of Restrictions was abolished by operation of law and was of no force and effect. Klein's position that Section 6 was void as a matter of law is set forth in great detail at pages 10 through 15 of the brief he filed on behalf of the Westwood in the appeal of the aforementioned orders. In truth and fact, Klein had not informed his client, the Board of Directors of Westwood, prior to the filing of the Menzano lawsuit, that he was going to file such lawsuit. Therefore, it was impossible for his client to have authorized an action (i.e. the filing of a lawsuit) when they had no knowledge of the contemplated action prior to the action being taken. RR 9.

The respondent makes a claim that it was improper for the bar and the referee to interpret his interpretation of the order of clarification and that the validity of the deed restrictions must be resolved in the courts. However, they were resolved in the courts (TFB C10; C12; D15; E28; O86) and on each occassion they were found to be invalid. The respondent also attempts to distance himself from his prior statements (his prior appellate brief TFB C14) wherein he plainly stated that the under 16 age restriction was inlaid by operation of law due to the Federal Fair Housing Act. However, this is an admission, at or about the time that is relevant in this case, that he was fully aware that the under 16 provision was invalid.

N. Count XV.

The respondent's argument concerning this particular charge reads, in toto:

> The count is for an alleged violation of a Federal rule of procedure in a United States District Court case on a motion for attorney fees and costs.
>
> The Federal Court Order in this case stated that the District Court is free to entertain a motion for attorney's fees even while the case is on appeal.
>
> The Florida Bar is without jurisdiction to complain about Federal Procedure in a Federal case. Initial Brief at 29-30.

Once again the respondent makes a bold pronouncement on the jurisdiction to pursue him for something that happened in federal court, but provides no case law to

support his contention. If this were true R. Regulating Fla. Bar 3-4.3 [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice . . . whether committed within or outside the state of Florida . . . may constitute cause for discipline.] would have no meaning. Also see The Florida Bar v. Cohen, 583 So.2d 313 (Fla. 1991) [Disbarment ordered for violation of Maine felony arson statute.]; The Florida Bar v. Nunes, 679 So.2d 744 (Fla. 1996) [Attorney suspended for acts solely related to immigration matter.].

The referee found the respondent guilty of filing a frivolous motion for attorneys fees. RR 9. The referee based his ruling on two distinct grounds. Firstly, the motion was untimely filed in that was filed more than a year after the dispositive order and the federal rules place a thirty day window to make such a motion. RR 9. Secondly and more importantly, the respondent's client was not the prevailing client because summary judgment had been entered against them. RR 10. The respondent has provided no sound argument to overturn the referee's finding of guilt.

O. Count XVI.

We now turn to the most serious findings by the referee. The referee found that the respondent engaged in bankruptcy fraud by (1) fraudulently creating an alter ego corporation (Westwood Community Two, Inc.) to avoid the claims of Lewis, Martin, Gajewski and later Menzano and by (2) fraudulently transferring all of the assets of

the bankrupt corporation (Westwood) to this alter ego. RR 10-11. While the respondent insists that the referee and the bar are mistaken, the facts are very straight forward and explained in good detail in the statement of the case (above) and in the report of referee. RR 10-11. Simply stated, Westwood attempted to avoid the ramifications of the Lewis and Martin lawsuits by taking itself into bankruptcy. The Lewis and Martin decisions were entered in September and October of 1995. TFB C10; D15. The voluntary petition for bankruptcy was filed on November 22, 1995. TFB H34. The record does reveal that the petition was filed by a bankruptcy lawyer and not the respondent. TFB H36. However, the respondent's "handwriting" is all over the decision to file the bankruptcy and activity related to the action. RR 10; TFB A4; H37[7]-H39. The record shows that the bankruptcy was filed on November 22, 1995, and that by December 5, 1995, the respondent had formed Westwood Community Two, Inc. (TFB B5), and the next day caused all of Westwood's assets to be transferred to Westwood Community Two, Inc. TFB A4. Also see the treasurer, Ruth Fleischer's, deposition testimony. TFB R101.

Contrary to the respondent's protestations, the Assignment transferred the "ability to levy assessments... (and) ... to collect monies" as well as all of Westwood's

---

[7] The respondent is listed on the service list for the order dismissing the first bankruptcy.

"obligations to operate and maintain" the community clubhouse. TFB A4. The ability to levy assessments and to collect same is the life blood and major asset of any home owners association. The clubhouse surely had to be one of the major assets of this community also. Thus the respondent's argument that he did not participate in transferring any assets to Westwood Community Two, Inc. is disingenuous. Additionally, the trustee believed this an important enough issue that he successfully completed an adversary proceeding wherein it was established that the transfer of these assets was fraudulent. TFB I41; I42.

P. Count XVII.

The last count of the bar's complaint sounds in conflict of interest. While the referee finds the respondent guilty of the conflict, his discussion is more focused on the harm caused by this conflict. RR 11. Prior to discussing the grievous harm caused by the respondent, it is important to once again address the various roles for the respondent in this matter. First, he was a homeowner who was interested in keeping age restrictions in his neighborhood. Second, he served on the Westwood board of directors and at times acted as an officer of Westwood. Third, during the second bankruptcy proceeding he acted as "the person responsible" for Westwood and further represented that he was the sole remaining officer of Westwood. Fourth, he acted as Westwood's attorney. Fifth, he also was the lawyer for Westwood Community Two,

Inc. Sixth, testimony adduced at trial related that the respondent also represented various former board members, as well as himself, in an action filed by the Attorney General's office. TFB Q89. One or more of these roles conflicted with each other at various times. For example he orchestrated the creation of Westwood Community Two, Inc., and the assignment of all of Westwood's assets to the successor corporation, without consideration and while it was in bankruptcy. Another conflict was ongoing at the time of the trial - the conflict between his personal interests and those of the other board members that he represented in the Attorney General's litigation. Lastly, and more importantly, it is the respondent's personal desire to maintain age restrictions in his community that pervades all of his decisions.

The referee found the following harm caused by the respondent's conflicts and actions, which harm started with the incompetent amendment of the deed restrictions and went through the various lawsuits and actions referenced in the report of referee:

> For more than four (4) years Klein has advised the Board of Westwood that they have a legal right to impose age restrictions. This legal advise has resulted in several lawsuits, all of which ended in adverse judgments to Westwood. These judgments, in turn, prompted Klein to fraudulently bankrupt the association which led to the bankruptcy trustee taking control of the association and at one point even padlocking the clubhouse and pool. Klein continued a four year campaign (which continues today) to improperly attempt to enforce invalid age limitations in his community. Kleins four (4) year campaign was against the

> wishes of Westwood, and he put his interests above the interest of his client. Westwood has lost each and every action and had to pay court costs, attorney's fees and damages, and even bankrupt Westwood. RR 11.

The best the respondent can argue in this regard was that he was not a member of the board of directors for the last two years and thus had no control over any decisions. The respondent's argument forgets to make mention of his active participation in the bankruptcy case and his role as "the person responsible" for the affairs of Westwood.

Lastly, the respondent takes issue with the referee's findings regarding the harm caused in the bankruptcy proceeding and also contends that the case is still being litigated before the bankruptcy court. However, the record in this case shows a 1.2 million dollar judgment being entered against Westwood and by respondent's own admission no appeals have been filed, the time to appeal has now run and in his own words the bankruptcy case "has been concluded." Initial Brief p.14.

Q. Sanction.

The respondent's brief fails to submit any argument on sanction and as such this court should assume that the referee's sanction recommendation is proper. In an abundance of caution, the bar will highlight the reasons why the disbarment recommendation should be accepted.

This is a case of serious misconduct by a Florida lawyer. At the root of this case are egregious conflicts of interest. There are misrepresentations to the court, there is misuse of the court system and there are violations of court orders. This type of misconduct requires stern sanction by the court.

In discussing an appropriate discipline, it is important to examine the applicable Florida Standards for Imposing Lawyer Sanctions (hereinafter Standards). The referee found that the following Standards apply in this matter (RR 12):

Standard 4.61	Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury.
Standard 4.62	Suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
Standard 6.11(a)	Disbarment is appropriate when a lawyer with the intent to deceive the court, knowingly makes a false statement or submits a false document.
Standard 6.12	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 6.21	Disbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

Standard 6.22 Suspension is appropriate when a lawyer knowingly violates 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.

Accordingly, the debate that must be resolved is whether this is a long term suspension case or a disbarment case. The Florida Bar concedes that in many cases in which an attorney has perpetrated a fraud on the court, a long term suspension has appropriately resulted. See The Florida Bar v. Norvell, 685 So.2d 1296 (Fla. 1996) [91 day suspension for making false statements of material fact to a tribunal among other misconduct]; The Florida Bar v. Rood, 622 So.2d 974 (Fla. 1993) [two year suspension ordered where respondent on two occasions, in two separate matters, misrepresented facts to courts, in one case by omission and in the other, by a false affidavit - one year suspension ordered for knowingly and intentionally encouraging clients to execute false documents, exacerbating wrongfulness of such action by filing the false documents with the probate court, and perpetrating fraud on probate judge by misrepresenting status of case and one year suspension ordered, consecutive to suspension in other matter, for knowingly assisting in fraudulent conveyance of real property]; The Florida Bar v. Feige, 596 So.2d 433 (Fla. 1992) [two year suspension for assisting client with a fraudulent act, failing to reveal fraud to affected person, and

accepting employment where attorney's judgment will be affected by his personal interest and where he will be a witness in pending litigation].

In the instant case, respondent's misconduct is far more egregious than that set forth above. Indeed, his misconduct is more like that of the respondent in The Florida Bar v. Kaufman, 684 So.2d 806 (Fla. 1996), wherein Kaufman had a large civil judgment entered against him. He thereafter attempted to thwart collection of the judgment by testifying falsely about his assets and their whereabouts, and by transferring assets to another account and dissipating his assets. The Supreme Court of Florida disbarred Kaufman for his grave misconduct. Respondent's actions in bringing the homeowner's association into bankruptcy twice and the fraudulent transfer of assets are strikingly similar to Kaufman. Also see The Florida Bar v. Hmielewski, 702 So.2d 218 (Fla. 1997) [Making multiple misrepresentations regarding location of medical records required a three year suspension.].

The conflict aspect of this case standing alone warrants the imposition of at least a long term suspension. In The Florida Bar v. Reed, 644 So.2d 1355 (Fla. 1994), the lawyer wore multiple hats in a real estate transaction, inclusive of lawyer for buyer and seller, Realtor for the buyer, landlord, and eventual title holder of the property. This lawyer received a six month suspension. The lawyer was able to demonstrate that the violations (the conflict) was unintentional and not intended for self enrichment. In

this case the violations were clearly intentional. In another case a lawyer was suspended for two years for, among other things, representing his own interest in a lawsuit as well as his clients. See Feige. That said, however, the fact pattern in this case is more like that found in The Florida Bar v. Della-Donna, 583 So.2d 307 (Fla. 1989). This was a massive conflict case. The court stated that:

> an attorney might, as it were, wear different hats at different times does not mean that professional ethics can be "checked at the door or that unethical or unprofessional conduct by a member of the legal profession can be tolerated."

While the backdrop for Della-Donna is in the estate milieu, the similarities of conflict of interest and frivolous litigation to advance the lawyer's personal agenda, and not the clients, is persuasive.

In determining the proper discipline in this case, the court must consider the law as well as the myriad of aggravating factors present in this case. The referee found the following aggravating factors: (All references are to Standard 9.22, Florida Standards for Imposing Lawyer Sanctions):

9.22(b) dishonest or selfish motive;

9.22(c) a pattern of misconduct;

9.22(g) refusal to acknowledge wrongful nature of conduct;

9.22(h) vulnerability of victim (the victimized community consists primarily of retired senior citizens);

9.22(i) substantial experience in the practice of law (admitted in 1987);

9.22(j) indifference to making restitution (The respondent's continued campaign in the bankruptcy court continues to add fees and cost that the homeowners must eventually pay).

While the referee did not mention any mitigation, one factor is present in this case: - 9.32(a) [absence of a prior disciplinary record].

Lastly it is important to note that any recommended sanction must take into account the cumulative nature of the respondent's misconduct. The Supreme Court of Florida has held that:

> the Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct.

The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982). Also see The Florida Bar v. Mitchell, 385 So.2d 96 (Fla. 1980); The Florida Bar v. Williams, 604 So.2d 447 (Fla. 1992).

An initial inclination could be to give deference to the respondent's advanced age and long tenure at the bar without a disciplinary record by recommending a long

term suspension. However, what elevates this case to a disbarment case is the respondent's abuse of his position as a lawyer by retaliating against those that stood in his way. For example the respondent:

a) filed a criminal complaints against Lewis. TFB R95-R96;

b) filed a criminal complaints against Menzano. TFB R90;

c) filed a defamation action against Menzano for filing his bar grievance. TFB M82;

d) set a deposition on December 24, 1998 in the defamation case against Menzano. TFB M83;

e) filed a meritless grievance against opposing counsel. TFB R91;

f) threatened defamation actions against two other residents who filed bar grievances. TFB R93-R94; and

g) filed suit against two former board members who disagreed with his position. TFB N85[8].

Respondent has continually engaged in actions which are harmful to the courts and to the public at large. For this reason and because he has displayed "an attitude or course of conduct wholly inconsistent with approved professional standards",

---

[8] Yet another example was his ad hominem attacks on both bar counsel during his closing argument and during the hearing on his motion for rehearing.

respondent must be disbarred. The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) quoting The Florida Bar v. Murrell, 74 So.2d 221, 223 (Fla. 1954).

CONCLUSION

Based on the case law and the Standards, the appropriate sanction for the grievous misconduct committed by the respondent is disbarment. Disbarment would meet the criteria underlying all bar sanctions: fairness to both the public and the accused; sufficient harshness to punish the violation and encourage reformation; and severity appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

WHEREFORE, The Florida Bar respectfully requests this court to enter an order disbarring the respondent, Edward Klein.

Respectfully submitted,

KEVIN P. TYNAN, #710822
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, #835
Fort Lauderdale, FL 33309
(954) 772-2245

JOEL M. KLAITS, #108359
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, #835
Fort Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief of The Florida Bar has been furnished via regular U.S. mail to Edward Klein, respondent, at 9803 N.W. 67 Ct., Tamarac, FL 33321-3317, on this 18th day of February, 2000.

KEVIN P. TYNAN