IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Case No. SC96,980
TFB No.99-10,468(20A)
Complainant,

vs.

JAMES EDMUND BAKER

Respondent.
_____/

ANSWER BRIEF
OF
THE FLORIDA BAR

STEPHEN CHRISTOPHER WHALEN
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813)875-9821
Florida Bar No. 651941

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, JAMES EDMUND BAKER, will be referred to as "Respondent".

"Tr." will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC96,980 held on May 5, 2000.

The Report of Referee dated May 26, 2000 will be referred to as "RR".

"TFB Ex." will refer to exhibits presented by The Florida Bar at the final hearing before the Referee in Supreme Court Case No. SC96,980.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE

The Statement of the Facts in the Respondent's Initial Brief is incomplete and incorrect. The Bar makes the following statement as to the proceedings in this case.

The Respondent, James Edmund Baker, and his wife, Ellen Baker, owned a home in Miami, Florida as tenants by the entirety. (Tr. page 18, lines 6-7; page 57, lines 3-5). The Bakers' marital residence was in New York. (Tr. page 19, line 1). On or about April 1997, Respondent relocated to Fort Myers, Florida to accept employment as a staff attorney with the Lee County School Board. (Tr. page 18, lines 19-21; page 19, lines 4-6). Mrs. Baker remained in New York and, on April 9, 1997, moved out of the marital home and obtained a restraining order against the Respondent. (Tr. page 56, lines 9-25).

On or about April 1997, the home in Miami became subject to a foreclosure action. Mrs. Baker became aware of the foreclosure action because she was picking up mail from the former marital residence and received a letter from the mortgage company. (Tr. page 58, lines 4-8). Mrs. Baker discussed with her husband the fact that the house was the subject of foreclosure and, about the first or second week in May, Respondent informed her he was going to put the home up for sale by owner. (Tr. page 58, lines 15-21). At the time, Respondent's parents were residing in the home. (Tr. page 20, lines 21-22; page 58, lines 17-18).

In early July of 1997, Respondent located a buyer for the Miami home, (Tr.

page 21, line 11-14), however, he did not inform his wife (Tr. page 58, lines 22-24). On July 3, 1997, Respondent executed a Contract for Sale and Purchase for the sale of the home to an individual named Soraime Palomino. (Tr. page 22, line 25; page 23, line 1; page 24, lines 12-14). The Contract provided for a closing date of July 25, 1997. (TFB Ex. 5; Tr. page 29, lines 10-11). Respondent hired an attorney, Larry Parks, to represent him in the matter of the sale of the home and to prepare the closing documents. (Tr. page 24, lines 15-21). Mr. Parks prepared and mailed the closing documents to Respondent to obtain the necessary signatures. (Tr. page 25, lines 8-11). On or about July 10, 1997, without his wife's knowledge or consent, Respondent signed her name on all of the closing documents. (Tr. page 26, lines 1-19; page 63, lines 8-22). The closing documents consisted of a Warranty Deed (TFB Ex. 1), a Power of Attorney (TFB Ex. 2), a Bill of Sale (TFB Ex. 3), and a FIRPTA Affidavit (TFB Ex. 4).

Respondent then gave the documents to his secretary, Marnell Keller, who was a Notary Public and asked her to notarize his signature and that of his wife. (Tr. page 88, lines 9-20; Tr page 36, line 21-23, page 91, lines 2-5). Ms. Keller proceeded to notarize the closing documents without ever actually witnessing Mrs. Baker's signature. (Tr. page 92, lines 18-24).

In the process of notarizing the Warranty Deed, Ms. Keller noticed that Mrs. Baker's signature had not been witnessed. Respondent asked her to talk to two other School Board employees, Gladys Ortega and Becky Allison, and ask them to witness

Mrs. Baker's signature. Ms. Keller watched the two employees sign the documents while Respondent stayed in his office. (Tr. page 91, lines 6-10).

Respondent never told his secretary that he had signed his wife's name to the documents and she had no reason to believe that Mrs. Baker had not signed them. (Tr. page 91, lines 17-19; Tr. page 93, lines 21-24). Ms. Keller did not notice any similarity in the signatures at the time she notarized them, nor did she have any reason to think that she should compare the signatures Respondent gave to her for notarization. (Tr. page 103, lines 10-24).

Respondent sent the documents by overnight mail to Mr. Parks (Tr. page 36, line 13-15) and the closing on the house took place on or about July 14, 1997. (Tr. page 43, lines 20-22). Respondent never informed Mr. Parks that he had signed his wife's name on the closing documents, nor did he ever inform the buyer or anyone representing the buyer that he had signed his wife's name. (Tr. page 38, lines 2-16). Mr. Parks was not aware that the Power of Attorney given to him in the name of Ellen Baker had never been signed by her. (Tr. page 6, lines 10-22).

While Respondent was in Ft. Myers signing his wife's name to the legal documents necessary to effectuate the sale of their jointly owned property, Mrs. Baker remained in New York, unaware of the fact that a buyer had been found for the home, a contract executed, and a closing was about to take place. (Tr. page 58, lines 22-25; page 59, lines 1-3). In fact, Mrs. Baker did not learn that the home had been sold until March of 1998. (Tr. page 64, lines 16-21; page 66, lines 3-8).

On July 16, 1997, two days after the closing, Mrs. Baker received a call from the Respondent informing her that he was sending her by express mail a package containing papers for the sale of the Miami house. He would not tell her the sales price or whether an attorney was involved with the sale. (Tr. page 60, lines 15-25, page 61, lines 1-3). On July 17, 1997, Mrs. Baker received an overnight package from her husband containing a set of blank closing documents for the sale of the Miami home. The documents did not contain the name of the attorney who had prepared them. (Tr. page 59, lines 13-22). With the documents was a note from the Respondent dated July 16, 1997, addressed to "Dear Ellen" and asking her to sign the enclosed paperwork and return it "pronto." The letter stated that Respondent hoped the closing could take place by "the end of the month," and "keep your fingers crossed that the prospective buyer doesn't bail out." (TFB Ex. 8).

Mrs. Baker called her husband on July 17th and again on July 21st to find out the details of the proposed sale. (Tr. page 61, lines 12-15). He refused to tell her the name of the buyer, the name of the attorney handling the sale, the sales price, or any other terms of the sale. (Tr. page 62, lines 1-25). Mrs. Baker was completely unaware that the home had been sold several days before. (Tr. page 63, lines 1-4). At no time during their telephone conversation on July 17th, or at any time during the month of July 1997, did Respondent ever ask Mrs. Baker for permission to sign her name to any documents, nor did she ever authorize him to do so. (Tr. page 63, lines 8-22).

After the closing, Respondent received a check in the amount of approximately

$29,000 from the proceeds of the sale. (Tr. page 39, lines 13-15). The check was made payable to both Respondent and his wife. Respondent endorsed the check by signing his own name and his wife's name. (Tr. page 50, lines 14-20). On July 15, 1997, Respondent deposited $20,000 from these proceeds into his personal checking account at the Suncoast Schools Federal Credit Union. (Tr. page 41, lines 12-14). This account was his sole account and Mrs. Baker had no access to it. (Tr. page 40, lines 18-20). Respondent did not provide his wife with an accounting of how he disbursed the proceeds from the sale of the home. (Tr. page 49, lines 20-23; Tr. page 64, lines 4-6). She was not aware that he had even received a check from the closing on the sale, and never authorized him to sign her name on any check made payable to her from the sale of the home. (Tr. page 64, lines 11-15).

SUMMARY OF ARGUMENT

Respondent's right to due process of law was not violated by the lack of a separate hearing on discipline. Respondent was given ample opportunity to explain the circumstances of his alleged offense and to present mitigating evidence at the Final Hearing, however, Respondent chose not to take advantage of the opportunity afforded to him.

The record in this case clearly supports the Referee's findings of fact and recommendations of guilt, and they should be upheld. The evidence shows that the Respondent signed his wife's name on legal documents in order to sell jointly owned property without her knowledge or consent. In so doing, he committed forgery, an offense prosecutable as a felony. He then presented the forged documents to his secretary, a notary public, and requested her to unlawfully notarize them. Respondent perpetuated the fraud and deceit by allowing another attorney to close a real estate sale using illegal documents. Respondent signed his wife's name on the proceeds check from the sale without her knowledge or consent, and deposited the funds into a personal account to which she had no access.

The Referee recommended that the Respondent be disbarred from the practice of law for five years. Disbarment is the appropriate sanction for Respondent's multiple acts of fraud, forgery and deceit, and the Referee's recommendation should be approved by this Court.

ARGUMENT

I. RESPONDENT HAD NO DUE PROCESS RIGHT TO A SEPARATE HEARING ON DISCIPLINE AND HE HAD AMPLE OPPORTUNITY TO EXPLAIN THE CIRCUMSTANCES OF THE ALLEGED OFFENSE AND TO OFFER MITIGATING EVIDENCE AT THE FINAL HEARING ON MAY 5, 2000.

Respondent argues that his due process rights were violated by the Referee's failure to provide him the opportunity to explain the circumstances of the alleged offense and to offer evidence in mitigation of any discipline imposed. Respondent maintains that the Referee should have held a separate hearing on discipline, thus affording the Respondent time to prepare and present evidence of mitigation. The record in this case shows that Respondent was provided ample opportunity to present his side of the case, including any mitigating factors. Moreover, the decisions of this Court do not require bifurcated disciplinary hearings to satisfy the requirements of due process of the law.

A. RESPONDENT HAD AMPLE OPPORTUNITY TO EXPLAIN THE CIRCUMSTANCES OF THE ALLEGED OFFENSE AND TO OFFER MITIGATING EVIDENCE AT THE FINAL HEARING.

At the Final Hearing on May 5, 2000, after the Bar rested its case in chief, the Court asked Respondent's counsel if he had any witnesses to call. Respondent's counsel responded by asking for a lunch recess. Following the

recess, Respondent's counsel declined to present any evidence or witnesses and rested the defense's case, stating:

> Because this case, the way it was presented to the Court with us being able to introduce our documents into evidence, Your Honor, and because of the testimony that was brought out by Mr. Baker, I think you have heard our case, Judge.
> And we have into evidence all the exhibits we wanted to introduce into evidence. And so based on that, Your Honor, we'd like to rest our case.

(Tr. page 105, line 15-22).

The Referee then indicated he would proceed to closing arguments. After some discussion of whether the Referee would require written proposed findings, which decision was tabled until after closing arguments, Bar counsel asked if the Referee wanted to hear argument regarding the Bar's position on discipline. The Referee replied in the affirmative, stating:

> So yes, I would say not only tell me what you believe the evidence has shown, the clear and convincing evidence has shown, but, Judge, here is what the Florida Bar thinks you ought to do and why. And conversely, the same thing with Mr. Baker. Am I asking for something you weren't expecting?

(Tr. page 110, line 9-14).

At this point, Respondent's counsel made no response and did not request a separate hearing. In fact, it was Bar counsel who reminded the Referee that the proceedings could be bifurcated for purposes of conducting a mitigation hearing. (Tr. page 110, lines 15-18). Again, Respondent's counsel did not object or indicate that Respondent needed more time to prepare or present additional evidence before

proceeding to closing arguments. Respondent never requested a separate hearing, but now argues that his due process rights were violated by the Referee's failure to hold bifurcated hearings.

At the conclusion of closing arguments, when the Referee asked counsel for both parties what they wanted to do about proposed factual findings, Respondent's counsel declined the opportunity to submit written findings to the court:

> MR. POWELL: If you don't need it, Judge, we just ask that you just do it.
> THE COURT: That's fine.
> MR. POWELL: It would save us a tremendous amount of time and trouble.
> THE COURT: No. Some people like to do it, because, like I say, it gives them another chance to throw their position on the Court. That's all.

(Tr. page 130, lines 11-25; page 131, line 1).

The record clearly shows that, contrary to the Respondent's assertions, he was not prevented from presenting mitigating evidence, and, in fact, declined the opportunity to do so when it was afforded to him. Respondent even declined "another chance" to present his position to the Referee in the form of proposed written findings.

A similar situation occurred in The Florida Bar v. Weed, 559 So. 2d 1094 (Fla. 1990). Weed argued that the referee erred in not permitting him to present mitigating evidence. At the hearing, the referee had requested each side to file a memorandum regarding aggravation or mitigation of discipline. Weed chose not to submit a memorandum. This Court found no error in the referee's refusal to allow

Weed to present mitigating evidence after the referee made his findings, stating that "Weed chose not to take advantage of an opportunity afforded to him." Id. at 1096.

The absence of any request by Respondent and his counsel to bifurcate the proceedings or otherwise present testimony in mitigation when afforded the opportunity to do so clearly constituted a waiver to present such evidence. Furthermore, neither Respondent nor his counsel made a request to the Referee or this Court for a hearing to present mitigating evidence at any time prior to this Court's November 2, 2000 Order approving the Report of Referee.

B. RESPONDENT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE LACK OF A SEPARATE HEARING ON DISCIPLINE.

The cases cited by Respondent in his Initial Brief do not support his contention that his due process rights were violated by the manner in which the Referee conducted the Final Hearing on May 5, 2000. Respondent's reliance on this case is misplaced. In The Florida Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999), the due process issue before this Court was a challenge to the requirement of a mental health evaluation as part of the discipline imposed on the basis that the attorney was not afforded notice that his mental state was in question. In Carricarte, the only aspect of discipline challenged by the respondent was the requirement that he submit to an evaluation by Florida Lawyer's Assistance, Inc. (F.L.A.). Id. at 978. The Court found that the respondent "was aware that his

mental state was in question and that he had an opportunity to offer evidence on this issue and simply failed to do so." Id. At 979. The Court held there was no due process violation where the respondent had "an opportunity to present any evidence he felt was appropriate" and "he presented no evidence to refute the Bar's recommendation." Id.

Similarly, in The Florida Bar v. Centurion, 2000 WL 551035 (Fla.), 25 Fla. L. Weekly S344 (Fla. May 4, 2000), Centurion argued that his due process rights were violated by the requirement that he undergo a mental health evaluation by Florida Lawyers' Assistance. He claimed he had no notice that the Bar was seeking discipline in addition to a suspension. The referee recommended conditions of reinstatement, which included a mental health evaluation, the completion of ten ethics credits, and passing the Ethics portion of the Bar exam. The Court approved the referee's recommended discipline, with the exception of the mental health evaluation, concluding that Centurion did not have sufficient notice to allow him to offer testimony in mitigation of this penalty. The facts of the case were not such that Centurion would be aware that his mental health was in question.

In the instant case, Respondent's mental state was never in issue. He appears to be arguing his due process rights were violated because he had no notice that the Bar would be seeking the sanction of disbarment. Given the serious nature of Respondent's misconduct, including fraud, criminal acts of forgery, and

multiple misrepresentations, Respondent was clearly on notice that he was subject to severe discipline. Moreover, Respondent cannot claim that he was unaware that the Bar was seeking disbarment. In closing argument at the Final Hearing, counsel presented the Bar's case for disbarment. Respondent was given an opportunity to respond, and could have requested an opportunity to present additional evidence at a future hearing. Respondent chose not to do so and cannot now argue a due process violation.

Respondent has no due process right to advance notice of the specific disciplinary sanction sought by the Bar. Due process in Bar disciplinary proceedings requires that attorneys must know the charges they face before proceedings commence. The Florida Bar v. Vernell, 721 So. 2d 705 (Fla. 1998). The Respondent in this case was served with a complaint clearly specifying the charges against him and the misconduct alleged. He had full knowledge of the specific rule violations charged. Moreover, the nature of the proceedings themselves were sufficient to put Respondent on notice of the possibility of the sanction of disbarment. He cannot now argue a deprivation of due process.

Respondent also cites The Florida Bar v. Daniel, 626 So. 2d 178 (Fla. 1993) in support of his due process argument. In that case, Daniel argued he was deprived of due process because he was not given the opportunity to challenge or refute the costs assessed against him. This Court found his argument "totally without merit." Id. At 182. Daniel appeared at a hearing at which costs and

discipline were to be assessed, however, he voluntarily excused himself from the hearing. Id. After Daniel left, Bar counsel made a brief argument as to appropriate discipline and submitted a memorandum addressing discipline and costs. The Court held that "Daniel clearly was afforded an opportunity to be heard; the fact that he voluntarily chose not to take advantage of that opportunity does not offend due process." Id. at 183.

Respondent argues that he had no choice in the matter of being heard on the subject of discipline. He implies that the Referee deliberately deprived him of the opportunity to present mitigating evidence. The record shows that this is simply not true. Like the attorney in Daniel, Respondent was afforded an opportunity to be heard and voluntarily chose not to take advantage of it. Although Respondent and his counsel did not leave the hearing, no objection was raised regarding the Referee's decision to proceed with closing argument. When the transcript of the hearing is reviewed, it appears that Respondent and his counsel did not intend to present mitigating evidence. In fact, Respondent's counsel advised the Referee that a "tremendous amount of time and trouble" would be saved if he were not required to submit a written argument (Tr. page 130, lines 22-23).

Considering the fact that Respondent did not present any witnesses in his defense and the absence of any request or attempt to present mitigating evidence, it is not unreasonable to conclude that for strategic and tactical reasons, he chose not to offer mitigating evidence. With the benefit of hindsight, Respondent now

argues that he had "no choice" in the matter of presenting mitigating evidence and therefore, he was deprived of his constitutional right to be heard. Respondent's claim that his due process rights were violated is without merit.

II. THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY THE CLEAR AND CONVINCING EVIDENCE IN THE RECORD, AND SHOULD BE UPHELD.

The Respondent challenges the Referee's findings of fact as being erroneous and unsupported by the record. Respondent essentially disagrees with the Referee's findings of fact on the basis that they are contrary to his own testimony.

A Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). In order to successfully challenge the Referee's findings, Respondent must demonstrate "that there is no evidence in the record to support [the referee's] findings or that the record evidence clearly contradicts the conclusions." The Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996). Respondent has not met this burden.

This Court has stated that "the referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." The Florida Bar v. Fredericks, 731 So. 2d 1249, 1251 (Fla. 1999). It is clear in this

case that the Referee weighed the credibility of Respondent's testimony, and where the evidence was in conflict, chose to credit the documentary evidence and the testimony of other witnesses over the testimony of Respondent.

Respondent disputes the Referee's finding in Paragraph 1 of the Report of Referee that he moved to Florida in April of 1997. An examination of the record does not reveal the exact date of Respondent's relocation to Ft. Myers, Florida. The Bar maintains that, whether Respondent moved to Florida during April of 1997 or prior to April of 1997, does not change the nature of the misconduct which occurred in July of 1997.

Respondent claims as erroneous a number of the Referee's findings in Paragraph 2 of the Report of Referee, concerning the sale of the Miami home. It is not disputed that Mrs. Baker discussed with her husband the need to sell the Miami home which was the subject of a foreclosure action. Mrs. Baker was also aware that Respondent's father would be assisting in a "sale by owner." (Tr. page 58, lines 15-21). What Mrs. Baker did **not** know, however, was that the Respondent executed a Contract for Sale and Purchase with a specific buyer, a Soraime Palomino, on or about July 1, 1997. (Tr. page 58, lines 22-25; page 59, lines 1-3; TFB Ex. 5). It is irrelevant to the misconduct at issue whether or not Respondent's father assisted in locating a buyer; it was the Respondent who forged the closing documents, not his father. Respondent disputes the Referee's finding that he alone hired an attorney to represent him in the sale of the Miami home. Of course, the

attorney would have to know the property was jointly owned in order to prepare the closing documents. The key fact is that Mrs. Baker did not know that Respondent hired an attorney in Dade County to handle the sale, and in fact, did not even know about the sale. (Tr. page 58, lines 22-24; Tr. page 59, lines 21-22; Tr. page 69, lines 5-7).

Respondent disputes the Referee's finding in Paragraph 3 of the Report of Referee that Respondent's wife had no idea that the Dade County home was sold. It is not disputed that Mrs. Baker knew that her husband was attempting to sell the home, and may very well have supplied him with original documents in her possession pertaining to the ownership of the home. The fact that Mrs. Baker knew the house was on the market is not in dispute. What the Referee found was that she was unaware that Respondent had actually sold the home. The clear and convincing evidence in the record supports the Referee's finding that Mrs. Baker had no idea whatsoever that the Dade County home had been sold. (Tr. page 58, lines 22-24; Tr. page 64, lines 16-21; Tr. page 66, lines 3-8). Respondent makes much of a stack of original closing documents that Mrs. Baker brought to the Final Hearing. These documents only support the finding that Respondent attempted to deceive his wife as to the actual sale by sending her blank documents to sign the day **after** the closing. (Tr. page 68, lines 9-12; Tr. page 59, lines 8-22).

Respondent claims the Referee erred in finding, in Paragraph 4 of his Report that Respondent led his secretary to believe that his wife had merely forgotten to

have her signature notarized. The clear and convincing evidence in the record supports the Referee's conclusion. Respondent left the deed on Marnell Keller's desk. When Ms. Keller said to him that Ellen had not had this notarized, Respondent asked, "Can you please do that for me." (Tr. page 91, lines 2-5). Respondent never told Ms. Keller that he had signed his wife's name on the deed. Ms. Keller did not realize that she was notarizing a document signed by Respondent, and he said nothing to dispel her belief that she was notarizing Mrs. Baker's signature. She did not compare Mrs. Baker's signature with the Respondent's or notice any similarity between them. (Tr. page 91, lines 17-19; Tr. page 103, lines 10-24).

In Paragraph 7 of the Report of Referee, the Referee found that Mrs. Baker received a note from her husband with blank closing documents. Respondent argues that the Referee erred in admitting a copy of this letter. The letter was dated July 16, 1997 and accompanied a set of blank closing documents. (Tr. page 59, lines 8-25; p. 60, lines 1-2). It stated that Respondent had found a buyer for the property and requested Mrs. Baker to sign and return the documents as soon as possible. (TFB Ex. 8) The Referee admitted the letter on the basis that it went to Respondent's credibility. (Tr. Page 67, lines 15-19). Respondent had testified that he did not recognize the letter and, when questioned by Bar counsel about the circumstances of the package of documents received by Mrs. Baker, Respondent repeatedly testified that he could not recall what documents he sent or when he sent

them. (Tr. page 44, lines 1-13; Tr. page 47, lines 13-20; Tr. page 49, lines 4-19).

It is well-established that "[in] Bar discipline cases, hearsay is admissible and there is no right to confront witnesses face to face. The referee is not barred by technical rules of evidence." The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986). See also The Florida Bar v. Maynard, 672 So. 2d 530, 537 (Fla. 1996) (in disciplinary cases, hearsay evidence is admissible, particularly where its credibility is established); The Florida Bar v. Rendina, 583 So. 2d 314, 315 (Fla. 1991) (referee is not bound by technical rules of evidence and did not abuse his discretion regarding the admissibility of evidence). In this case, the authenticity of the July 16, 1997 letter was corroborated by the testimony of Mrs. Baker, who was present at the hearing and subjected to cross-examination by Respondent's counsel. The Referee credited the testimony of Mrs. Baker and did not err in admitting the July 16, 1997 letter into evidence.

The July 16, 1997 letter supports the Referee's finding that Mrs. Baker did not know about the sale and did not give her consent to the Respondent to sign her name. The undisputed evidence in the record shows that Respondent deposited a check from the proceeds of the sale on July 15, 1997. (Tr. page 41, lines 12-14). After the sale had closed, on July 16, 1997, Respondent called his wife and told her he was Federal Expressing some documents for her to sign "so that we could sell the house" and to return them in 24 hours. (Tr. page 60, lines 15-20). On July 17th, Mrs. Baker received a package containing a set of blank closing documents

and a letter dated July 16th in which Respondent wrote: "Dear Ellen, Enclosed is the paperwork we have to sign in order to close on the Miami house. Hopefully, we can do so by the end of the month. . . . Keep your fingers crossed that the prospective buyer doesn't bail out." (TFB Ex. 8) The closing on the sale of the home had already taken place several days before, yet Respondent misrepresented to his wife that he needed her to sign documents for a possible future closing. When Mrs. Baker called her husband on July 17th to ask him about the particulars of the sale, he would not tell her the name of the buyer, the sale price, or the name of the attorney handling the closing. (Tr. page 62, lines 1-25). The only conceivable explanation for Respondent's actions in sending blank documents to his wife on July 16, 1997, after the closing had already taken place, was a belated attempt to obtain her signature to legitimize the forgery he had already committed. When examined about the documents and letter at the Final Hearing, the Respondent repeatedly stated that he could not recall what exact documents he sent to his wife or what date he sent them out.

> Q. You didn't send copies of, for that matter, Exhibits 1 through 4 to your wife, did you, the copies of the signed exhibits?
> A. I don't recall.
> Q. Well, do you believe that you had made copies of the documents that you signed for her and sent them up to her?
> A. I sent something up to her, but I don't recall if those were the actual documents that I sent to her.

(Tr. page 42, lines 9-17)

> Q. After the closing of the sale, though, didn't you send--or did

You send copies of Exhibits 1 through 4 to your wife?
A. I sent documents relating to the sale of the home to my wife. I don't particularly recall after what has transpired since that time exactly what that was.

(Tr. page 43, lines 10-15)

Q. All right. So but you're saying you do believe you sent documents to your wife?
A. Yes.
Q. So would that have been after the closing took place?
A. Again, I don't recall the exact date I sent these out.

(Tr. page 44, lines 1-7).

Based on the record, Respondent's testimony regarding the package of blank documents and July 16, 1997 letter is simply not credible.

Respondent next argues that the Referee's findings concerning when Mrs. Baker learned that the house had been sold are erroneous. Again, Respondent cites to evidence in the record indicating that Mrs. Baker knew the home was on the market, that her father-in-law was assisting in the sale, and that a foreclosure was pending. These facts are not disputed by the Bar.

The Referee's finding in Paragraph 8 of the Report of Referee that Mrs. Baker did not know about the sale and did not give her consent to Respondent to sign her name is supported by clear and convincing evidence. The Referee acknowledged that the Bakers were involved in a bitter dissolution action, nevertheless, the Referee credited Mrs. Baker's testimony that she never gave the Respondent authority to sign her name to the closing documents, and indeed, did

not learn of the sale until months later. (Tr. page 63, lines 8-22; page 64, lines 16-21). The Referee also credited the testimony of Respondent's secretary Marnell Keller, who had no interest in the outcome of the dissolution action. Ms. Keller stated that Respondent never informed her that he had signed his wife's name on the closing documents. (Tr. page 91, lines 17-19).

Respondent makes much of Mrs. Baker's practice of using her father-in-law's credit cards, with his permission. The fact that Mrs. Baker may have signed for occasional purchases on her father-in-law's credit card with his permission is entirely irrelevant to the issue of whether she consented to Respondent signing her name to sworn documents in order to sell a jointly owned marital asset. The clear and convincing evidence in the record supports the Referee's finding that she did not authorize Respondent to sign for her. (Tr. page 63, lines 8-22).

Based on the foregoing evidence, the Referee recommended that Respondent be found guilty of violating Rule 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so; or do so through the acts of another); Rule 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); and Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The Referee's recommendation of guilt is clearly supported by the substantial evidence in the record. Respondent committed criminal acts of forgery

by signing his wife's name to legal documents without her consent. The documents included not only a Power of Attorney, a Warranty Deed, and a Bill of Sale, but also a FIRPTA Affidavit, which is a sworn affidavit made under penalty of perjury. (TFB Ex. 4). Respondent knowingly caused his secretary to notarize the forged documents, and further involved two other employees in witnessing forged documents. He perpetuated a fraud by causing the attorney in Dade County to close the sale of the home using forged documents. He engaged in misrepresentation by failing to disclose to the notary, his attorney, or the purchaser of the home, that the documents did not contain his wife's signature. He deceived his wife by selling the jointly owned home without her knowledge or consent. These actions on the part of the Respondent, which are well supported by substantial evidence in the record, clearly support the Referee's findings as to violations of the Rules of Professional Conduct.

A referee's findings of fact regarding guilt are presumed correct and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Pellegrini, 714 So. 2d 448, 451 (Fla. 1998). The role of this Court is not to reweigh the evidence and substitute its view of the credibility of the witnesses for that of the referee. Id. The Respondent has not met his burden of showing that the Referee's findings in this case are clearly erroneous.

III. THE REFEREE'S RECOMMENDATIONS AS TO DISCIPLINARY MEASURES ARE SUPPORTED BY CASE LAW AND THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND SHOULD BE APPROVED.

The Referee recommended that Respondent be disbarred from the practice of law for a period of five years. Respondent argues that this discipline is excessive and that he was not allowed to present any mitigating evidence prior to the Referee making his recommendation for disbarment. The Bar maintains that disbarment is the appropriate sanction for Respondent's misconduct and is supported by existing case law and the Florida Standards for Imposing Lawyer Sanctions.

While this Court has the ultimate responsibility to order a disciplinary sanction, a referee's recommendation of discipline is to be afforded deference unless the recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v. Niles, 644 So. 2d 504, 506-07 (Fla. 1994). "Therefore, the

referee's disciplinary recommendation is presumptively correct and will be followed unless clearly off the mark." The Florida Bar v. Vining, 707 So. 2d 670, 673 (Fla. 1998).

Given the egregious nature of Respondent's misconduct, disbarment is the appropriate sanction and the Referee's recommendation should be approved by this Court. The evidence shows that the Respondent signed his wife's name on legal documents in order to sell a jointly owned asset without her knowledge or consent. In so doing, he committed forgery, an offense prosecutable as a felony. He then presented the forged documents to his secretary, a notary public, and requested her to unlawfully notarize them. He further involved two other employees in his office by requesting them to witness the forged signature. Respondent perpetuated the fraud and deceit by allowing another attorney to close a real estate sale using the forged documents. After the closing, Respondent signed his wife's name on the proceeds check without her knowledge or consent, and deposited the funds into a personal account to which she had no access. The Referee recognized that the serious nature of Respondent's acts of forgery, fraud and deceit warranted the sanction of disbarment. The Referee's recommendation should be upheld.

Conduct similar to that of the Respondent has resulted in disbarment. This Court's analysis of the facts and applicable law in The Florida Bar v. Kickliter, 559 So. 2d 1123 (Fla. 1990) is particularly instructive for the instant case. Kickliter, an attorney, was asked to prepare a new will for a client, excluding the man's sons in

favor of his grandchildren. Kickliter prepared the new will according to his client's instructions, but the client died the next day, prior to seeing or signing the new will. After discussing the effect of the unsigned will with the client's granddaughters,

Kickliter forged the decedent's name on the will. He then had two of his employees witness the forged signature, and notarized the self-authenticating clause himself. He then submitted the forged will for probate. Id. At 1123. Kickliter's forgery was later discovered and he was charged with three third degree felonies. Subsequently, Kickliter pled guilty to the charges, adjudication was withheld and Kickliter received three years probation. Id.

The Referee in Kickliter recommended a three year suspension to run for the duration of Kickliter's probation. On appeal, this Court emphasized that Kickliter's act of forgery constituted serious misconduct, that Kickliter compounded his misconduct by having two of his employees witness the forgery, thereby compromising them as well, and that submitting the forged will for probate was egregious. Id. at 1124.

The Court noted that the referee found substantial mitigation, including absence of a dishonest or selfish motive, a cooperative attitude, good character and reputation, remorse, and the imposition of criminal penalties. Id. Nevertheless, the Court could not overlook the magnitude of Kickliter's misconduct and his failure to correct it, stating:

> He could have decided not to forge the signature. Having done so, however, he could have refrained from submitting the will to probate. Having submitted the will, he could have informed the court of the fraud. He took none of these actions, either to refrain from an improper action or to correct it. Instead, he committed a fraud on the court and allowed it to continue until exposed through criminal proceedings.

Id. at 1124. Notwithstanding Kickliter's absence of a dishonest motive and other mitigating factors, this Court found that there was no basis to warrant not applying the "general rule of strict discipline against attorneys who deliberately and knowingly perpetuate a fraud on the court," and disbarred him for five years. Id.

In the instant case, as in Kickliter, Respondent forged another person's signature on legal documents and compounded his misconduct by having his secretary notarize the forged signatures and two of his employees witness the forgeries. He continued the fraud by submitting the documents to an attorney for a real estate closing. Like Kickliter, Respondent failed to take advantage of numerous opportunities to correct his misconduct. Initially, he could have decided not to forge his wife's signature. Having done so, he could have refrained from involving innocent third parties. He could have refrained from submitting the unlawful documents to his attorney to close a real estate transaction. After the closing, he could have revealed his actions to his wife. Instead, he signed her name to the proceeds check from the sale and deposited it in a bank account to which she did not have access. She did not learn of the sale until months later.

Respondent argues that, unlike Kickliter, he did not prepare and file forged

documents with a court and did not perpetrate a fraud on any court or individual. Respondent clearly perpetrated a fraud on numerous parties, including his wife, his secretary, the two witnesses, his attorney, and the buyer of the property. The fact that the legal documents forged by the Respondent were used in a real estate closing rather than filed in a probate action is a distinction without a difference. Both cases involve forgeries of legally significant documents. Indeed, the documents forged by Respondent include a sworn affidavit. A FIRPTA Affidavit is a sworn statement relating to IRS regulations on the sale of real property, and contains the following language: "Under penalties of perjury, Transferors declare that this Affidavit has been examined and to the best of their knowledge and belief, all statements are true, correct and complete." The Affidavit also stated that the Transferors understand that "any false statement contained herein could be punished by fine, imprisonment, or both." (TFB Ex. 4) Respondent also forged a Power of Attorney, granting to a third party, attorney Larry Parks, full power and authority to act on her behalf to complete the sale. (TFB Ex. 2) Mr. Parks had no idea that Mrs. Baker had not actually signed the Power of Attorney giving him this authority. (Tr. page 6, lines 10-22).

Respondent argues that, unlike Kickliter, he was not afforded the opportunity to present any mitigating evidence to the Referee. Contrary to Respondent's assertion, the Referee in the instant case considered the fact that Respondent had no prior disciplinary history and specifically noted that factor in

his report. Although the Referee did not specifically list mitigating and aggravating factors, the Referee, in his findings of fact, noted that the Respondent and his wife were having domestic problems and were involved in a bitter dissolution action, including a custody battle. (Report of Referee, Paragraphs 1 & 8). Moreover, as discussed infra, Respondent had ample opportunity to present additional mitigating evidence at the final hearing, but chose not to do so. Respondent also overlooks the result in Kickliter. Despite "substantial" mitigation, this Court found in that case that Kickliter's misconduct warranted disbarment.

A similar result was reached in The Florida Bar v. Forbes, 596 So. 2d 1051 (Fla. 1992). Forbes was indicted for filing false information on a loan application for a condominium he was developing. He misrepresented the amount of the construction contract on which the bank relied in making its decision to approve the loan. Id. at 1051. Forbes pled guilty to knowingly making materially false statements in a document submitted to the bank so as to influence its actions in granting him a loan, which was a felony. Id. at 1052. In the Bar proceedings, the referee found him guilty of the same rules that Respondent was found to have violated in the instant case: Rule 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so; or do so through the acts of another); Rule 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); and Rule 4-8.4(c) (a lawyer shall not engage

in conduct involving dishonesty, fraud, deceit, or misrepresentation). The referee found that Forbes was remorseful for his actions and that he had no prior disciplinary record, and recommended that he be disbarred retroactive to the date of his felony suspension. Id. at 1052. On appeal, Forbes argued that his conduct merited a public reprimand, or no more than a 90-day suspension. The Court disagreed and approved the referee's recommendation of disbarment. Id. at 1053.

In The Florida Bar v. Salnik, 599 So. 2d 101 (Fla. 1992), an attorney with no history of prior discipline was disbarred for using a judge's stamp to commit a forgery. He represented a landlord in eviction proceedings and submitted a proposed final judgment to the court. The judge refused to sign the judgment because the court file did not reflect that both tenants had been served with the complaint. Salnik later went to the judge's office to discuss the matter, but she was not there. He applied the judge's rubber stamp to two of the final judgments and mailed one of them to the tenants. When his misconduct was discovered, Salnik lied in an attempt to cover up his guilt. Salnik was found guilty of violating Rule 3-4.3 (commission of an act which is unlawful or contrary to honesty and justice); Rule 4-8.4(b) (engaging in a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness); Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 4-8.4(d) (conduct that is prejudicial to the administration of justice). The referee recommended a 91-day suspension, considering Salnik's absence of a prior disciplinary record as a mitigating factor, as

well as his personal stress at the time of the conduct, his lack of experience in the practice of law, and overall good character. Id. at 102-103. The Court found disbarment a more appropriate punishment, stating: "We cannot overlook the magnitude of this misconduct and Salnik's failure to correct it. . . . Resorting to forgery when legal attempts to obtain relief are unsuccessful is completely contrary to the most basic ideals of the legal profession." Id. at 103.

In The Florida Bar v. Grief, 701 So. 2d 555 (Fla. 1997), an attorney with no history of prior discipline was disbarred for filing false immigration documents with the INS on behalf of illegal aliens. His misconduct led to conviction on felony charges of conspiracy to defraud the government for which he received three years' probation and a fine of $3,000. The referee found him guilty of violating Rule 3-4.3 (commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause of discipline); Rule 4-8.4 (b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Id. at 556. The referee considered mitigating factors, including Grief's absence of prior discipline, and recommended a three-year suspension. This Court, however, over-ruled the referee's recommendation and disbarred Grief.

In asking this Court to disapprove the discipline recommended by the

Referee and impose a lesser punishment, Respondent argues that his misconduct was a matter occurring "entirely within a personal context" and "occurred as a single event and was confined to the boundaries of his personal, marital" relationship. Respondent cites The Florida Bar v. Rose, 607 So. 2d 394 (Fla. 1992), in support of his argument that conduct involving personal matters does not warrant disbarment. In Rose, the attorney signed his ex-wife's name to stock certificates and client agreement forms, cashed in the stock, and then signed his wife's name on the checks from the sale, all without her authorization. The stock was held in an account in the name of his ex-wife as custodian for their minor children.

Respondent's reliance on Rose is misplaced. Respondent's misconduct cannot be characterized as a purely personal matter. On the contrary, Respondent not only deceived his wife when he sold a jointly owned home without her knowledge or consent, he also involved numerous other individuals in the fraud. He forged legal documents which then had to be witnessed, notarized, and recorded in order to effect the closing of the sale.

To accomplish this, Respondent had to involve three of his employees, Marnell Keller, Gladys Ortega and Becky Allison. Marnell Keller was asked to notarize Mrs. Baker's signature without having seen her sign the documents. Gladys Ortega and Becky Allison were asked to witness Mrs. Baker's signature without having seen her sign the documents. None of these women knew they

were witnessing forged documents. To complete the closing, Respondent then had to involve an attorney in Dade County, Larry Parks. Not realizing that Mrs. Baker had not signed the documents or authorized the sale, Mr. Parks used the illegal documents to close the sale and caused the Warranty Deed to be recorded in the public record. Finally, Soraime Palomino unknowingly purchased a home owned by someone who had not authorized its sale. Contrary to Respondent's claim that this was an isolated incident occurring within an entirely personal context, Respondent engaged in not one, but several acts of dishonesty, and compounded his misconduct by involving innocent third parties.

Respondent relies on The Florida Bar v. Kravitz, 694 So. 2d 725 (Fla. 1997), to support his argument that the Referee's recommended discipline is too harsh. In that case, Kravitz was found to have made several misrepresentations to the court. Kravitz was the joint owner of a restaurant, and represented the restaurant in a case in which another establishment sued for infringement of its trade name. In the course of litigation, Kravitz misrepresented to the court the name of the individual responsible for violating an injunction, misrepresented to one of his managers that the judge would have him arrested if he did not pay Kravitz $4,000 by a certain time, and misrepresented to the court opposing counsel's lack of opposition to the entry of orders vacating contempt orders previously entered against Kravitz. Id. at 726. This Court suspended Kravitz for 30 days, taking into consideration the Referee's recommendation of probation and the respondent's lack of prior

discipline. Id. at 728.

While recognizing the seriousness of the misrepresentations in Kravitz, the Bar maintains that Respondent's actions in this case are far more egregious. Respondent not only made multiple misrepresentations as did the attorney in Kravitz, but also engaged in a series of fraudulent acts, including the criminal offense of forgery. Respondent deceived his wife and sold a jointly owned home without her knowledge or consent. He accomplished this by forging her name on multiple legal documents, and never informed her of the sale. He involved others in the fraud by causing his secretary to unlawfully notarize the documents and two other employees to witness them. He allowed his attorney to close the sale with forged documents. When the proceeds check was issued after the closing, he endorsed his wife's name without her permission and deposited the funds into his personal account. He then attempted to cover his tracks by sending a set of blank documents to his wife for her to sign, including a letter stating that he hoped the closing would take place by "the end of the month." Respondent's misconduct more clearly falls within the boundaries of the Kickliter case, which resulted in disbarment.

This Court has repeatedly recognized that forgery is a serious offense, requiring the imposition of harsh punishment:

> Generally, the Court has imposed harsh punishment on lawyers who intentionally lie under oath, lie to the court, or present false or forged documents. Indeed, this Court has stated that no ethical violation is

> more damaging to the legal profession and process, and "[a]n officer of the court who knowingly and deliberately seeks to corrupt the legal process can logically expect to be excluded from that process."

The Florida Bar v. Klausner, 721 So. 2d 720 (Fla. 1998) (quoting The Florida Bar v. Rightmyer, 616 So. 2d 953, 955 (Fla. 1993). See also The Florida Bar v. Spann, 682 So. 2d 1070, 1074 (Fa. 1996) ("Authorizing the forging of a signature and the subsequent notarization of the signature, knowing it to be a forgery, constitute serious misconduct."); The Florida Bar v. Cramer, 678 So. 2d 1278, 1282 (Fla. 1996) (perpetrating fraud on financial institution by signing another's name on lease-purchase agreement for office equipment warrants disbarment).

The Florida Bar v. de la Puente, 658 So. 2d 65 (Fla. 1995), supports the presumption of disbarment for misconduct involving forgery. While the attorney in de la Puente received a ten-year disbarment for multiple misconduct, including misuse of client trust funds, forgery, misrepresentations, fabricating evidence in the bar proceeding, and telling a witness to lie, the Court noted that "several of these actions, when considered alone, create a presumption that disbarment is the appropriate remedy." Id. at 69. (citing The Florida Bar v. Kickliter, 559 So. 2d 1123 (Fla. 1990). Like the Respondent in the instant case, de la Puente argued that he did not "forge" any signatures because he signed the checks in his own handwriting and did not attempt to mimic the clients' signatures. The Court found this unpersuasive, concluding that de la Puente signed the individuals' names without their consent in order to negotiate the checks and have use of the funds.

Id. at 68-69.

The Florida Standards for Imposing Lawyer Sanctions provide additional support for disbarment in this case. Standard 5.11 states that disbarment is appropriate when:

> (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or
> . . . .
> (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Respondent's acts of forgery, deceit, and misrepresentation, place his conduct clearly within the parameters of Standard 5.11.

By reason of the foregoing, Respondent should be disbarred from the practice of law.

CONCLUSION

Respondent's right to due process of law was not violated in this case. Respondent was given ample opportunity to present mitigating evidence, but chose not to do so. Respondent's claim to have a due process right to a separate hearing on discipline is without merit.

Substantial evidence in the record supports the Referee's findings of fact and recommendations of guilt. The Referee found by clear and convincing evidence

that the Respondent committed forgery, fraud, and deception. The Referee's findings are not clearly erroneous and should be upheld by this Court.

Respondent has committed acts of forgery and deceit which strike at the heart of a lawyer's moral and ethical obligations. The individual acts of Respondent, as well as the overall pattern of his misconduct, clearly indicate that disbarment is the appropriate discipline. The Referee's recommendation of disbarment should be approved.

Dated this ____ day of February, 2001.

Respectfully submitted,

_____
STEPHEN CHRISTOPHER WHALEN
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813)875-9821
Florida Bar No. 651941