IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

COSTELL WALTON, JR.,

Respondent.
_____/

Supreme Court Case
No. SC 05-774

The Florida Bar File
No. 2004-51,708(17A)

RESPONDENT'S INITIAL BRIEF

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Costell Walton, Jr., 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. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF CASE AND FACTS

The Respondent, Costell Walton, Jr., successfully represented his clients, Tisa Burney and Catherine Badgett, in a law suit against Louis Asbate, who is the individual that filed the Bar grievance in this case. RR2. Asbate was sued to secure the refund of a real estate deposit that Burney and Badgett had given to Asbate in order to purchase a home that was being sold by Asbate. RR2-3. There was significant animus between the buyer and seller during the real estate transaction and this flowed over into the litigation, with neither party really trusting or liking the other party. TT45 and TT158. The testimony from both lawyers in the litigation was that their relationship remained cordial and professional. TT103-104; 159

On February 12, 2004, the trial court entered a judgment in favor of the Respondent's clients, with the judgment awarding them the return of their $3,000.00 deposit and $250.00 for the costs associated with filing the lawsuit, with interest on the judgment to accrue at seven percent (7%) per annum. RR3. The judgment specifically reserved jurisdiction on the issue of attorneys' fees and further costs that could be assessed against Asbate. The instant action concerns the satisfaction of this judgment.

During the course of the litigation over the escrow deposit, the parties agreed to the deposit of the disputed $3,000.00 into the court registry for eventual payout

to the prevailing party. RR3. As these funds were in the court registry at the conclusion of the case, the only funds necessary to satisfy the judgment were (a) the $250.00 for the cost award and (b) interest from the date of the judgment forward to the date of final payment of judgment.[1] RR3.

Asbate, upon the advice of his legal counsel, Kevin Hagen, decided that it would be in his best interest to not pay the remaining portions of the judgment until such time as the potential liability for the payment of the Respondent's client's legal fees had diminished. RR3. It is undisputed in the record that Asbate did not request any estoppel or payoff information from the Respondent or his client, but instead made his own calculation on the interest that should be owed on the judgment and forwarded to his lawyer a check made payable to his lawyer's trust account in the amount of $254.08. Asbate admitted under cross examination that his interest calculation did not allow for additional interest to cover the time frame between Asbate's delivery of a check to Hagen and the turnaround time necessary for Hagen to get clear funds in his trust account and then for Hagen to deliver his

[1] Unless there was a further award of fees and costs and there was no such order in this case.

trust account check to the Respondent.[2] TT134-135. Asbate's lawyer made the same admission. TT37.

The Referee noted that on May 11, 2004, Hagen forwarded his trust account check in the amount of $254.08 to the Respondent along with a request that the Respondent provide a recorded satisfaction of judgment. RR3. Hagen's trust account check was received by the Respondent on May 12, 2004. TT196. The Respondent testified that upon his receipt of the check he examined the cover letter from Hagen and the interest calculation that was used and immediately discovered that the interest calculation was wrong making the tendered check less than full payment of his client's judgment. TT192-198. The Respondent further testified that he took no further action at that time because he believed that Asbate was playing a game or continuing in his contentious ways. TT198.

The Referee pointed out that on June 28, 2004 (47 days after the Respondent received Hagen's trust check[3]) Asbate filed a complaint to The Florida Bar alleging the Respondent had failed to provide a satisfaction of judgment. RR4. The Referee also discussed that it was the Respondent's position, at the time of the

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[2] In fact his calculation allowed for interest through May 7, 2004 and the ultimate check was not received by the Respondent until May 12, 2004, a difference of five days.

[3] Please note that Fla. Stat. §701.04(1) allows a 60 day period to provide a satisfaction of judgment after a judgment has been fully paid and that Fla. Stat. §701.05 only allows for a thirty day period after a written demand and full payment having been tendered.

filing of the grievance, that he owed no obligation to Asbate. RR4. The Respondent made such statement because from the time that he received Hagen's check through the time frame of the filing of the Bar grievance, the judgment was not fully satisfied. Further, the judgment was not fully satisfied until mid November, 2004, when additional funds were provided to the Respondent and a check was delivered made payable to his clients in the correct amount. TT40.

The Respondent drafted a satisfaction of judgment and his client's executed same on or about September 30, 2004, which was forwarded to Asbate's lawyer by letter dated December 14, 2004. TT92-93; 175-176; 199-200. However, the Report of Referee finds that the Respondent sent the satisfaction on January 21, 2005. RR4. The Referee correctly finds that when the satisfaction was forwarded to Hagen, it was unrecorded and that Asbate completed the recordation. RR4-5. While the Referee failed to comment on the reimbursement of the recording fees, Asbate admitted that the Respondent later reimbursed Asbate for the twenty seven dollar fee. TT142.

The Referee took issue with the Respondent's decision to file a Motion for Clarification and/or Determination of When Judgment was Satisfied in the underlying litigation on September 6, 2005. RR5. This motion was heard on October 6, 2005 and the full transcript of such hearing is in evidence. RR5; also see Resp. Ex. 1. Interestingly, the trial Judge, the Honorable Martin Dishowitz,

found that the judgment had not been fully satisfied upon the presentation of the $254.08 check albeit he believed the payment was only fourteen cents short. TT188-190.

The Referee's report finds the Respondent guilty of three substantive rule violations[4] and three procedural or catch all rule violations.[5] After having found the Respondent guilty, the Referee made the following sanction recommendation:

> A. A ninety-one day suspension from the practice of law, which suspension would require proof of rehabilitation;
>
> B. Payment of Asbate's legal fees and costs (if any) caused by the Respondent's "failure to timely prepare and record the satisfaction of judgment";
>
> C. Payment of the Bar's costs and
>
> D.Completion of a Law Office Management Assistance Service (LOMAS) evaluation.

The Respondent in this appeal seeks review of the Referee's findings of guilt and her sanction recommendation.

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[4] R. Regulating Fla. Bar 4-1.1 [A lawyer shall provide competent representation to a client.]; R. Regulating Fla. Bar 4-1.3 [A lawyer shall act with reasonable diligence in representing a client.]; 4-8.4(d) [A lawyer shall not engage in conduct prejudicial to the administration of justice.].

[5] R. Regulating Fla. Bar 3.4.2 [Violation of the Rules of Professional Conduct is cause for discipline.]; R. Regulating Fla. Bar 3-4.3 [The commission of any act contrary to honesty and justice is cause for discipline.]; 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.].

SUMMARY OF THE ARGUMENT

The Respondent in this case enforces his client's rights to receive full and complete satisfaction of a judgment that they held. The statutory provisions relied upon by the Bar and the Referee in seeking to discipline the Respondent place certain obligations upon the judgment holder and not the judgment holder's counsel. Notwithstanding this fact, the Bar successfully convinced a Referee that notwithstanding a lack of full payment of a judgment, with the Bar's own witnesses admitting that the initial tendered payment was short several days of interest, that the Respondent ought to be found primarily liable under these statutory provisions for failing to give a satisfaction of judgment where no legal obligation existed to do so at that time.

Not only are the Referee and the Bar wrong on the facts of this case, they are wrong on the sanction that is recommended and the underlying analysis to reach the sanction recommendation set forth in the Report of Referee. The primary violations found by the Referee sound in failure to provide competent and diligent representation to a client. Firstly, the complainant herein is not the Respondent's client and secondly these types of cases are routinely resolved at the public reprimand level. While the Respondent understands that his prior disciplinary record, even though he has not been disciplined for almost thirteen years, warrants some enhancement that enhancement should not be to a ninety-one day suspension.

ARGUMENT

I. WHETHER A LAWYER VIOLATES THE RULES OF PROFESSIONAL RESPONSIBILITY BY NOT PROVIDING A SATISFACTION OF JUDGMENT UNTIL FULL AND TOTAL PAYMENT IS TENDERED.

At issue in this appeal is whether a lawyer should be suspended from the practice of law when that lawyer does not provide a recorded satisfaction of judgment to an individual who has made less than full and total payment of a judgment. The Referee has found the Respondent guilty of having committed certain ethical violations notwithstanding (1) that the first payment sent to the lawyer was not full payment of the judgment in that it had an improper amount of interest and (2) that the lawyer did ultimately provide a fully executed satisfaction of judgment, prior to the expiration of the 60 day period of time allowed by Fla. Stat. §701.04(1).

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). It is the Respondent's position that the Referee's findings of guilt are clearly erroneous and that as to the ultimate issue (an obligation to provide a satisfaction prior to full payment) is lacking in evidentiary support.

Prior to discussing the facts of this case it is important to review the various statutory requirements concerning the satisfaction of a judgment. Two of these statutes are referenced in the Referee's Report and the third is mentioned as part of the Respondent's explanation of why the Respondent forwarded an executed satisfaction to opposing counsel, but did not directly cause same to be recorded prior to transmitting same.

Fla. Stat. § 701.04(1) explains in relevant part that: "(w)ithin 60 days of the date of receipt of full payment" of a judgment the judgment holder "shall send or cause to be sent" a recorded satisfaction to the person who has made such payment.[6] This subsection also states that the judgment holder has an obligation to provide an estoppel letter indicating the amount owed on the judgment and a per diem rate of interest upon the request of the debtor. This statutory provision does not require the debtor to make a demand for the satisfaction.

The second statutory provision is slightly different. Fla. Stat. § 701.05 states that any judgment holder who accepts full payment of the judgment and "who shall fail for 30 days after written demand made by the person paying the same, to

[6] If we use the date of receipt of the first tendered payment as May 12, 2004, the bar complaint filed by Asbate by letter dated June 28, 2004 was clearly made prior to the expiration of this 60 day period. See TFB Ex. 2.

cancel and satisfy of record" said judgment is guilty of a misdemeanor.[7] The difference in this statutory provision is that there must be a written demand for a satisfaction after full payment and if both criteria are met then the judgment holder has 30 days to provide the satisfaction.

The last statutory provision, Fla. Stat. §55.141, is not mentioned in the Report of Referee, but the Respondent testified that he believed he was following this statute, as well as the custom and practice in Broward County concerning the satisfaction of judgments. Fla. Stat. §55.141 places the burden on the Clerk of the Court to record a satisfaction of judgment, provided by the judgment holder, when monies to pay the judgment are/or were on deposit in the court registry.

For each of the statutory provisions to apply there must be full payment.[8] It is therefore important to discern when the judgment at issue in this case was fully paid and satisfied.

The judgment in this case was rendered on February 12, 2004 and established that the Respondent's had prevailed on the claim for the $3,000.00 escrow deposit, as well as reimbursement for $250.00 in court costs plus seven

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[7] Please note that this particular statutory provision was repealed in July 2005. However, this provision was in effect at the time of the initial payment (but not full payment), and at the time that full payment was made.

[8] If the amount of the tendered payment "does not include the interest to which a creditor is entitled, the tender is nugatory." Dade County v. American Re-Insurance Company, 467 So. 2d 414,420 (Fla. 3rd DCA 1985) citing to Morton v. Ansin, 129 So. 2d 182 (Fla. 3rd DCA 1961)

percent interest on the amount of the total judgment. RR3. Previously the $3,000.00 had been deposited into the court registry and the parties are in agreement that interest should not be calculated on the funds in the court registry. Thus, interest was only to be calculated on the cost award.

Asbate testified that he did not seek any estoppel information from the Respondent or his clients,[9] but instead made his own interest calculation. After making his own calculation, he forwarded his personal check made payable to his lawyer's trust account in the amount of $254.08. See TFB Ex. 2. Asbate asserts that he mailed this check to Hagen, his lawyer, on May 5, 2004, and that in turn Hagen mailed same to the Respondent on May 10, 2004. See TFB Ex. 2. The Report of Referee notes that Hagen sent his trust account check to the Respondent in the amount of $254.08 on May 11, 2004. RR3. The Report is silent on the date that the Respondent received said check. However, the testimony at trial was that Hagen "issued his check" on May 11, 2004, along with his cover letter of May 10, 2004, (TT35) and that the Respondent received said check shortly thereafter. TT196.

The Report of Referee is also silent on the fact that the check that was delivered to the Respondent in May 2004 was insufficient to fully satisfy the judgment. Asbate admitted under cross examination that his interest calculation

[9] See Fla. Stat. § 701.04(1).

did not allow sufficient per diem interest to allow for the delivery of the check from his lawyer to the Respondent. TT134-135. Further, his own lawyer testified that the interest calculation that was used for the May 2004 tender of payment was short four days of interest. TT80. Without this additional interest there was no full payment of the judgment as required to trigger any of the statutory references above. The exact amount of such shortage is immaterial because the $254.08 was not full payment. That said, it is evident that the Respondent should have extended a professional courtesy to his colleague, Hagen, and advised him that the interest calculation was wrong. However, the failure to extend a professional courtesy should not be equated to a violation of the Rules of Professional Conduct.

At this juncture it is also important to discuss the proceedings held before the Honorable Martin Dishowitz, upon the Motion for Clarification and/or Determination of When the Judgment was Satisfied, which motion was filed by the Respondent. While not charged in its complaint, the bar contended that this proceeding was frivolous and not relevant to the determination of any issue in this case. The Respondent disagreed and successfully introduced the transcript of this hearing. See Resp. Ex. 1. The Bar would prefer not to discuss this motion and the judge's ruling thereon because it was not helpful to their proposition that the judgment was satisfied upon payment of the $254.08. In fact, the uncontroverted

testimony was that Judge Dishowitz found that the $254.08 was ***not*** full payment of the judgment. TT194-195.

Ultimately the Respondent and Hagen discussed the fact that the initial tendered payment did not include all of the interest that was due on the judgment. TT40. Further, Hagen was advised that his trust account check remained uncashed and in fact was returned to him after that discussion. TT 197-198. On or about October 25, 2004, Hagen resent the previous check for $254.08 and as Hagen recalled $.27 in change to make up the difference in the interest calculation. TT38-39. This check and change was returned to Hagen by letter dated November 4, 2004 and shortly thereafter Hagen forwarded a new trust account check made payable directly to the Respondent's clients in the amount of $254.35. TT39. It was at this time that the judgment was fully satisfied and the Respondent was obligated to provide a satisfaction of judgment.[10] Unfortunately, the record does not recite the exact date that the check made payable to the Respondent's client was forwarded or received by the Respondent. For purposes of this Brief, the Respondent will use mid November as the reference point for full satisfaction of the judgment. The testimony in this case reveals that the Respondent forwarded an unrecorded satisfaction to Hagen by letter dated December 14, 2004. TT92-93;

[10] One could argue that until the monies were received from the Court registry that the judgment was not fully satisfied. However, the Respondent even prior to the receipt of the additional twenty seven cents had drafted a satisfaction and forwarded same to his client's for execution.

175-176; 199-200. December 14, 2004 is well within the 60 day period allowed by Fla. Stat. §701.04 and appears to be within the 30 day time frame allowed by Fla. Stat. §701.05.

While the Respondent timely forwarded a satisfaction of judgment to Hagen, it was not recorded at that time. There are two points to make in this regards. Firstly, Asbate testified that when he received the satisfaction of judgment from his lawyer, he personally recorded same at his expense. The Respondent upon being advised of this fact sent a reimbursement check to Hagen in the amount of $27.00 to cover the recording fee. Secondly, and more importantly the Respondent provided a full explanation on why he forwarded the satisfaction in an unrecorded form. It was the Respondent's testimony that he secured an executed satisfaction from his clients and then sent it to Hagen to make sure he had no objection to the form of the satisfaction and if there was no objection then he expected Hagen to forward same to the Clerk of the Court for filing and recordation at no cost. TT199-200. Please note that Fla. Stat. 55.141(2) provides that a satisfaction of judgment may be recorded in this fashion. While the Referee and this Court may, in hindsight, find that the Respondent should have directly forwarded the satisfaction on for recording, the Respondent's actions in forwarding an executed satisfaction to Asbate's attorney were made in good faith and in an effort to promptly resolve the satisfaction issue. The Respondent explained that there was

some difficulty in securing the return of a completely executed satisfaction due to the fact that one of his clients had moved out of state. TT93. Due to the animosity expressed by Asbate during the underlying case, it is expected that had the Respondent forwarded the satisfaction on for recording (either through the Clerk of Court or the County) that Asbate would be complaining about the additional time that it took to secure a recorded satisfaction.

The Referee, because of her incorrect viewpoint on the date that the judgment was in fact satisfied has found the Respondent guilty of several rule violations. As such it is important to review these particular rules and discuss why the Referee should not have found a violation of guilt.

The first substantive violation is R. Regulating Fla. Bar 4-1.1 which requires a finding that the Respondent failed to "provide competent representation to a client." The Rule defines competent representation as requiring "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Unfortunately, the Referee does not explain the rationale for her finding of this violation. The Respondent's testimony evidences that he understood the necessity of providing a satisfaction and secured same. Further, he understood that the satisfaction needed to be recorded and believed that upon his furnishing of an executed satisfaction and approval of the form of such satisfaction that opposing counsel would have done exactly as the Respondent would and that

is forward the satisfaction to the Clerk of the Court for inclusion in the court file and recordation by the Clerk. Opposing counsel chose a different path and sent the satisfaction (still unrecorded) to his client. Opposing counsel's decision to follow a different path should not equate to a finding that the Respondent provided less than competent representation to his own client.

The second substantive violation found by the Referee was R. Regulating Fla. Bar 4-1.3 which requires a lawyer to "act with reasonable diligence and promptness in representing a client." It appears that the Referee's finding in this regard is based upon her mistaken premise that the judgment was satisfied in May of 2004 and that no satisfaction was forwarded until some eight months later. While the Respondent would agree that an eight month delay in satisfying a judgment could be considered a violation of R. Regulating Fla. Bar 4-1.3, there was no eight month delay. In fact, the Respondent acted within the statutory time frames after full payment was received in a check made payable to his clients.

The last substantive violation was R. Regulating Fla. Bar 4-8.4(d) which generally requires that a lawyer shall not engage in conduct prejudicial to the administration of justice.[11] Again, it is believed that the Referee found this

[11] The rule does provide some examples of the type of misconduct the rule protects against. However, these examples do not apply to the alleged failure to timely provide a satisfaction of judgment.

violation because of her belief that the Respondent took nine months to issue a satisfaction, which of course is not accurate.

The Referee found three other violations which are procedural rules and/or general catch all violations. They are:

1) R. Regulating Fla. Bar 3-4.2 which avers that a violation of the Rules of Professional Conduct is cause for discipline;
2) R. Regulating Fla. Bar 3-4.4 that states in relevant part that the commission, by a lawyer, of any act that is unlawful or contrary to honesty and justice is cause for discipline;
3) R. Regulating Fla. Bar 4-8.4(a) which provides that a lawyer should not violate the Rules of Professional Conduct.

The first two rules basically stand for the proposition that a lawyer may be sanctioned if they violated the Rules of Professional Conduct and does not ordinarily establish a separate substantive violation. However, it must be admitted that often times these rules show up in Supreme Court orders but not by themselves as the only violations in the case. This is the same outcome as a violation of R. Regulating Fla. Bar 4-8.4(a) which ordinarily does not stand by itself as a violation as there must be a violation of some other provision of the code to secure a violation of this subsection. In football terminology, the use of these

three rule violations is nothing more than "piling on" and adds nothing to the case except to make it appear to be a more significant case than it is.

It is the Respondent's position that he should be found not guilty of the Rule violations set forth in the Report of Referee. The Referee's Report finds that the Respondent had certain statutory obligations and failed to meet them and that the Respondent's alleged delay in personally securing and recording a satisfaction of judgment results in certain violations of the Rules of Professional Conduct. However, a careful reading of each of these statutory provisions, indicates that the responsibility to provide a recorded satisfaction is that of the judgment holder, in this case the Respondent's clients and not the Respondent.

D. WHETHER A NINETY ONE DAY SUSPENSION FROM THE PRACTICE OF LAW IS AN APPROPRIATE SANCTION FOR PROVIDING AN UNTIMELY SATISFACTION OF JUDGMENT.

The Referee in this case is recommending that the Respondent be suspended from the practice of law for failing to timely provide a recorded satisfaction of judgment. Her recommendation also included payment of Asbate's legal fees and costs (if any) caused by the Respondent's "failure to timely prepare and record the satisfaction of judgment;" payment of the Bar's costs and completion of a Law Office Management Assistance Service (LOMAS) evaluation.

This Court has consistently held that it has broad discretion when reviewing a sanction recommendation because the responsibility for an appropriate sanction

ultimately rests with the Supreme Court. The Florida Bar v. Thomas, 698 So. 2d 530 (Fla. 1997). The Supreme Court in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. The sanction proposed by the Referee does not meet these standards.

The Referee's stated purpose in reaching her sanction recommendation is two fold. She starts her analysis by stating that "(n)eglecting a client matter is generally punished by a suspension of less than 90-days" and cites to two cases which will be discussed in some detail below. This is an incorrect analysis of the law on this subject. The Florida Bar v. Price, 569 So. 2d 1261, 1263 (Fla. 1990) notes that: "(d)ecisions of this Court have established that "(p)ublic reprimand is an appropriate discipline for isolated instances of neglect or lapses of judgment." (Citations omitted). In Price, the attorney was publicly reprimanded for failing to consult with his clients about dismissing a bankruptcy case, actually dismissing the case and then failing to tell the client about such dismissal.

Similarly, an attorney was publicly reprimanded for neglect of a client matter by missing a statute of limitations and for failing to advise his client of

same. The Florida Bar v. Whitaker, 596 So. 2d 672, 674 (Fla. 1992). The Court went on to state that: "Our case law demonstrates that public reprimand is more appropriate in cases such as this which involve neglect of client matters." (Citations and footnote omitted). It is also important to note that a public reprimand is not precluded if the accused lawyer neglected more than one client matter. See for example The Florida Bar v. Barcus, 697 So. 2d 71 (Fla. 1997). In Barcus, the lawyer neglected several distinct cases for related clients and this Court reduced the referee's recommended thirty day suspension to a public reprimand. In making this change the Court relied upon The Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as "Standard ___"). While the Court discussed Standard 4.42 to explain why suspension is not appropriate due to the lack of intent and ultimate harm to the client, the better Standard for this case is Standard 4.43 which comments that: "Public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client."

The Referee cites to The Florida Bar v. Morse, 784 So. 2d 414 (Fla. 2001), to support her baseline proposition of a ninety day suspension. However, Morse, was only suspended for ten (10) days and he completely neglected the probating of a client's estate for more than a year. In fact the Court referred to the extent of the neglect in that case to a "knowing" failure to diligently represent the client. Id., at

416. The other case cite by the Referee is likewise dissimilar. A lawyer also received a ten (10) day suspension in The Florida Bar v. Golden, 502 So. 2d 891 (Fla. 1987). The facts of Golden are similar to that of Morse in that there was significant neglect of a probate matter. Interestingly, in both of these cases the Court reduced Referee sanction recommendations of thirty day suspensions to ten days. These cases hardly stand for the proposition that the sanction analysis for neglect of a legal matter (even when coupled with the other violations cited herein) should start at a ninety day suspension. Rather, the public reprimands set forth in Price and its progeny are the better baseline for the proper sanction in this case.

The Referee next considers the mitigation and aggravation present in this case. She fails to find any mitigation but instead finds three aggravating factors and candidly two of these factors are applicable, but the third is not. The Referee finds, without explanation or justification, that there was a "dishonest or selfish motive." However, it is difficult to understand this analysis in light of the fact that there was no benefit in any kind to the Respondent in refusing to provide a satisfaction of judgment until full payment was tendered for his clients.

The difficulty in this case is the value to assign the Respondent's prior disciplinary record. This appears to be similar to the situation faced by the Court in imposing a proper sanction on a different lawyer. The Florida Bar v. Maier, 784 So. 2d 411 (Fla. 2001). In Maier, the Court suspended the lawyer for sixty days

when that lawyer neglected a client matter, failed to properly communicate with the client and also failed to respond to the Bar notwithstanding a more extensive disciplinary record. Maier had a thirty-day suspension and two admonishments for similar misconduct. The Court in Maier stated that: ". . . we do not believe that a public reprimand is sufficient in light of the fact that Maier's violations in the instant case involve the same type of misconduct that were the subject of her three previous disciplinary actions." The operative term from the Morrison decision, as discussed in Maier, is that the "Court considers the respondent's previous history and increases the discipline where appropriate." Florida Bar v. Morrison, 669 So.2d 1040, 1042 (Fla.1996)

The Court has not always increased a disciplinary sanction when there is a prior record. For example an attorney has received a three year suspension and then after being reinstated received a public reprimand. The Florida Bar v. Chosid 500 So. 2d 150 (Fla. 1987); The Florida Bar v. Chosid, 869 So. 2d 541 (Fla. 2004) [table opinion]. It is also important to note that this Court has also given lesser value to older disciplinary orders. See for example The Florida Bar v. Nunes, 734 So. 2d 393 (Fla. 1999); Fla. Standard for Imposing Lawyer Sanctions, Standard 9.22 [Minor misconducts older than seven years not considered as aggravating under certain circumstances.]. Accordingly the Referee's enhancement to a ninety one day suspension is not warranted due to the age of the prior disciplinary

sanctions which occurred over a four year period between 1989 and 1993, with the last case being resolved almost thirteen years ago. The Respondent has learned from his last suspension and has had no disciplinary action initiated against him for thirteen years. It therefore appears that the Referee has given too much weight to his prior sanctions.

Prior to concluding the discussion on sanction the Referee's requirement of the payment of "restitution" to Asbate for the "costs and legal fees" he may have incurred in seeking a satisfaction of judgment. This "restitution" looks very similar to "a substitute for what should be addressed in private civil actions against attorneys" and which this Court has held was an impermissible sanction recommendation. The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989). It is respectfully contended that this provision of the Referee's Report is vague and ambiguous and that if Asbate has a remedy for any damages he has incurred it is in a civil action against the judgment holder.

CONCLUSION

The Respondent in this case refused to secure a satisfaction of judgment from his clients, the judgment holders, when full and complete payment was not tendered. Until such full payment was made he had no obligation to the debtor. When the debtor made a correct payment, a satisfaction was furnished to the debtor within the statutory time frames. A failure to provide a recorded satisfaction of

judgment under the mistaken belief that the opposing counsel would forward the satisfaction on the Clerk of Court's office for inclusion in the public record after approval of the form of the satisfaction should not form the basis for guilt of the rule violations alleged by the Bar. If the Court disagrees and finds that some form of sanction should be imposed, it should be no more than the ten day suspensions ordered in the two cases relied upon by the Referee.

WHEREFORE the Respondent, Costell Walton, Jr., respectfully requests that the Court reverse the Referee's findings of guilt and sanction and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 71082

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this ____ day of March, 2005 to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale,

FL 33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by McAfee.

By: _____
KEVIN P. TYNAN, ESQ.