

10-27

IN THE SUPREME COURT OF FLORIDA

SEP 28 1987

THE FLORIDA BAR,

Complainant

CLERK OF THE SUPREME COURT
Case No. 65,469
Deputy Clerk

vs.

WILLIAM M. HOLLAND, JR.

BRIEF OF RESPONDENT

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POINTS INVOLVED

FIRST POINT INVOLVED

DOES INCONSISTENT, CONTRADICTORY AND CONFUSED TESTIMONY OF THE ONLY ADVERSE WITNESS AS TO ALL OF THE RELEVANT ISSUES OF FACT CONSTITUTE CLEAR AND CONVINCING EVIDENCE UPON WHICH CAN BE BASED VALID FINDINGS OF FACT BY THE REFEREE?
(FINDINGS OF FACT "B", "C" and "E")

SECOND POINT INVOLVED

CAN A REFEREE MAKE FINDINGS OF FACT WHEN THERE IS NO COMPETENT EVIDENCE BEFORE HIM TO SUPPORT THEM?

THIRD POINT INVOLVED

UNDER THE PECULIAR FACTS OF THIS CASE, IS NOT THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FROM THE PRACTICE OF LAW FOR A PERIOD OF SIX (6) MONTHS AND THEREAFTER UNTIL HE SHALL PROVE HIS REHABILITATION, AN UNDULY HARSH SANCTION?

SUMMARY OF ARGUMENT

FIRST POINT INVOLVED
(Referee's Finding of Fact B, C and E)

The only witness to testify adversely to the Respondent relative to the Findings of Fact B, C and E was Mrs. Maciejewski. These Findings of Fact, therefore, must of necessity be based thereon. In order to get the full impact of Mrs. Maciejewski's testimony it is necessary that one read it carefully and in its entirety. It is so replete with inconsistencies, contradictions, evasions and confusion that after reading the same one should not be convinced as to what actually occurred relative to the matters set out in the Findings of Fact. As a result thereof it cannot be said that said testimony constitutes clear and convincing evidence of anything.

SECOND POINT INVOLVED
(Referee's Finding of Fact D)

The only evidence in the entire record as to whether Respondent's fee was clearly excessive consists of:

1. Two orders entered by Judge Griffin in the case of Maciejewski against Maciejewski, on Motions to fix the fee payable by Mr. Maciejewski to Mrs. Maciejewski's counsel.

These Orders provide that in effect \$4,500.00 was a reasonable fee for Respondent's services to Mrs. Maciejewski of which \$3,000.00 should be paid by Mr. Maciejewski and \$1,500.00 by Mrs. Maciejewski. Judge Griffin was without any jurisdiction to determine the reasonable fee due from Mrs. Maciejewski to the Respondent notwithstanding which he did so. He declined to adjudicate the liability of Mrs. Maciejewski to Respondent for her fees based upon any contractual relationship between her and Respondent. The opinion of Judge Griffin, which was not a determination because of lack of jurisdiction should not have been considered by the referee. The Respondent had no opportunity to cross examine him relative to his basis for reaching said opinion.

2. The only other adverse witness relative to fees was F. Scott Taylor. He had not reviewed the Court file, was not familiar with the work actually done by Mr. Holland or the time expended. Without knowledge as to the contents of the file or the time expended by Mr. Holland he opined that he expended more time than necessary without even estimating the overage.

As a result of the foregoing there was no clear and convincing evidence before the referee to the effect that the fee was clearly excessive.

THIRD POINT INVOLVED

(Referee's Finding of Fact D)

It is not Respondent's contention that if he is guilty of the conduct set out in Findings of Fact B, C and E that the recommended discipline is excessively harsh. It is his position that if this Court concludes that he is not guilty of the conduct set out in said Findings of Fact but finds that he is guilty of some minor infraction of the Code of Professional Responsibility suspension for 6 months and until Respondent proves rehabilitation is excessive.

It is further his position that if the Court finds he is not guilty of the conduct set out in the Findings of Facts B, C and E but is guilty of the conduct set out in Findings of Fact D, under all the facts and circumstances of this case he should not be disciplined as recommended.

PRELIMINARY STATEMENT

Respondent is not at all certain that the Record before the Court is in exactly the same condition as the Record in counsel's possession. Counsel has two volumes of the Transcript of the Hearing. The first volume, Page 1 through 26, contains the direct examination of Mrs. Maciejewski. The second volume contains the cross-examination and re-direct examination of said witness, as well as the testimony of J. Scott Taylor and the direct and cross-examination of Seymour Honig, and it is numbered 1 through 123. All references to the Transcript in this Brief will be I-Tr., being the first volume, and II-Tr., being the second. In the event the Court has all of this in one volume, the correct references to II-Tr., can be obtained by using the number assigned in this Brief and adding "26" to it.

STATEMENT OF THE CASE

This matter is before the Court on Respondent's Petition for Review of a Referee's Report in a disciplinary matter.

The Florida Bar filed its Complaint, the Respondent answered and the case was tried before a Referee.

At the conclusion of the trial, the Referee made his Report which contained Findings of Fact and recommending that the Respondent be found guilty and that he be suspended from the practice of law for six (6) months and thereafter, until he proved his rehabilitation.

Respondent timely filed his Petition for Review.

STATEMENT OF THE FACTS

There are only two basic issues of law on this Appeal. The first issue is whether there is clear and convincing evidence to support the Findings of Fact of the Referee and the resulting Recommendations that the Respondent be found guilty. The pertinent facts relative to the Referee's Finding of Fact B, C and E consist of the testimony of the only witness, Mrs. Maciejewski, upon which the Findings of Fact can be based.

The Finding of Fact designated B in the Referee's Report reads as follows:

"The evidence was clear and convincing that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in that he actively misrepresented the nature and meaning of documents he directed Mrs. Maciejewski to sign by failing to disclose and explain the contents of the documents and by actively concealing the true meaning of the documents he directed her to sign."

Unfortunately, the Referee failed to specify the documents to which he referred in said Finding so that it is necessary to analyze the testimony of Mrs. Maciejewski relative to each of the documents which she signed.

PROFESSIONAL SERVICES EMPLOYMENT
CONTRACT (Exhibit 1):

This document is dated September 22, 1981, and was admittedly signed by Mrs. Maciejewski. The matter involved was

a proceeding for the dissolution of Mrs. Maciejewski's marriage. The contract provided, in substance: 1) that the Respondent was employed and his fee would be based upon hourly rates of \$100 per hour for office work and \$125 per hour for Court appearances and work performed outside of the office; 2) the client would execute such promissory notes and mortgages on any real property in which she had an interest to secure the payment of the fees in the event any unpaid bill exceeded \$150; 3) the client would pay the Respondent a \$250 non-refundable retainer fee and that all costs and expenses would be billed to the client, net; 4) the Respondent would reimburse the client for any amounts received from her husband towards fees and costs.

On direct examination, Mrs. Maciejewski testified as follows:

On the evening of September 23, 1981, she called Mr. Holland's office and made an appointment to see him for the first time the following morning, September 24th. On the morning of September 24th, she met with Mr. Holland and employed him to represent her in the divorce action. This was the first time that she ever met with Mr. Holland (1-Tr.4).

She had no recollection of seeing the Professional Services Employment Contract, Exhibit 1, until a fee hearing was held (Sept. 1982). (1-Tr.4) Although the signature on said contract was hers, the date

September 22, was obviously incorrect because she did not see him until September 24 (1-Tr.5).

She explained to Holland that she "did not have anything--I only had what I had in my pockets and what might have been given me." She asked him about payment and he said, "don't worry about payment now. We will see that it is your husband that will be making the payments in this case." He did not ask for a retainer fee of any amount and there was no conversation about an hourly rate of pay (1-TR.5).

At sometime subsequent to the first meeting with Mr. Holland on September 24, he told her that he required a retainer fee of \$250 and she "came with the checkbook and I wrote it out of my -- our account that my husband and I shared at that time."
(1-Tr.6,7)

On cross-examination, Mrs. Maciejewski was shown a document containing information, peculiar to her, reflecting the assets of the parties and the values thereof, together with other information. This document was likewise admittedly signed by Mrs. Maciejewski and is dated September 22, 1981, the same date as the Employment Contract. Admittedly, the information contained in said document was given by Mrs. Maciejewski (11-Tr.7,8). Again, Mrs. Maciejewski testified

that the date could not be correct because she did not see Mr. Holland until September 24.

An examination of this document (Respondent's Exhibit 2) reflects that the information contained therein was necessary to enable Respondent to file a Petition for Dissolution and he had to have it prior to the filing thereof.

Mrs. Maciejewski was shown a check signed by her drawn on her joint account with her husband payable to Respondent in the amount of \$250 dated September 23. Admittedly, she wrote the check, signed it and gave it to Mr. Holland. She was asked the following questions and gave the following answers relative thereto:

Q. Did you give him that check on September 23?

A. It says I did.

Q. Well, did you?

A. I really don't recall. When I went there it was the morning of the 24th. Do you realize when I went there I just went through a terrible ordeal. If I miswrote that, I could have. I know I was very upset.

Q. Mrs. Maciejewski, do you know if you gave him a check on the 23rd or 24th?

A. I gave him a check.

Q. Do you know whether it was the 23rd or 24th?

A. I recall it being the 24th. This check does say the 23rd.

Q. Are you saying that it was not the 23rd.

A. No, I am not saying that. Right now I feel like -- I recall going there on the morning of the 24th.
(II-Tr.11,12)

Admittedly, subsequent to the first meeting with Mr. Holland, Mrs. Maciejewski gave him a check for \$250. If the date of the check as filled out by Mrs. Maciejewski was in fact September 23rd, it is apparent that her first conference with Mr. Holland was on September 22nd, the date of the employment contract and the date on the Information Sheet.

STATEMENTS: Exhibits 2, 3 and 4

These statements itemized the costs and out-of-pocket expenses of the litigation as well as the various services rendered by the Respondent and his charges therefor. At the end of each statement was a declaration signed by Mrs. Maciejewski to the general effect that Respondent had rendered the services set out and that she was satisfied with them.

Relative to these statements, Mrs. Maciejewski, on direct examination, testified substantially as follows:

On several occasions, Respondent had her sign papers saying that she was satisfied with what he was doing so as to expedite the divorce proceedings. He would lay the documents in front of her and she would have to sign them. (1-Tr.7) She trusted Respondent and signed them. He did not go over the items with her, nor did he explain the time involved in the activities. (1-Tr.10) She did not think that the dollar amounts on the Exhibits were actually there when she signed them but were added on later. (1-Tr.11)

On cross-examination, in reference to Bar's Exhibit 2, Mrs. Maciejewski testified as follows:

BY MR. EARLE:

Q. Now I am going to show you Respondent's Exhibit or the Bar's Exhibit 2.

A. Uh huh.

Q. Have you seen that before?

A. I remember seeing papers like this because he would write down what was happening and seems like this is something I have seen.

Q. And you signed it, didn't you?

A. Yes, I did, but when I saw it these figures were not present.

Q. We'll get to that in a moment.

A. I signed it.

Q. Is that one of the documents that he shuffled around and said sign it?

A. Yes, there were many of them.

Q. Never mind many of them. Is this one of them?
(I-Tr.15)

A. Yes, it is.

Q. He came in and said, trust me, sign it, and you signed it?

A. Yes.

Q. You didn't study it, did you?

A. No, Sir.

Q. Are you sure you didn't study it, Mrs. Maciejewski?

A. I am very sure. He told me to go home and relax. I was under emotional and mental --(II-Tr.16)

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Q. It is your testimony you didn't study it?

A. No, I did not have the time. He put it down and let me glance -- the most important page is the part that says, was I satisfied with his services. (II-Tr.16)

Q. Did he ever go over these items with you, these items on Exhibit 2?

A. No, Sir, never did.

Q. Did he ever explain them to you or give you a chance to ask questions about them?

A, The only thing he said was these papers always need to be signed to continue the divorce, if I wanted to get the divorce I had to sign these papers. He stressed how important that was. (II-Tr.16)

Q. Now going back to the Grievance Committee meeting, do you remember that when you testified before the Grievance Committee?

A. Yes, Sir.

Q. Was this question asked you:

"Q. O.K. Now each time you signed these documents referring to the bills -- did you not sign -- first you went through and you would take each bill, wouldn't you, and go through it either in the vacant office that was within my office or out in the waiting room? Didn't you go through those first before signing those?"

Do you remember being asked that question?

A. O.K., but --

Q. Wait a minute, and didn't you answer

"A. Yeah, you asked me to read it. That was what you had done."

Q. Do you remember that?

A. That is right.

Q. Then you were asked:

"Q. O.K. And each time there was any, so far as a disbursement, money paid out or money paid in, you would sit down and I would explain any questions that you had. Isn't that correct?"

And you answered,

"A. The first time I remember that very clear."
(II-Tr.17)

Q. Did you answer that way?

A. O.K., but the first time maybe but -- because there was nothing on there.

Q. Mrs. Maciejewski, I was asking you about the first time.

A. I don't recall that.

Q. You don't recall answering those questions that way?

A. That first --

Q. Well, we'll go on.

"Q. All right but wasn't that done on each one of these before it was signed?"

"A. Not the disbursement part. I remember going to the second page. I remember very clearly where you listed what you had actually done."

Q. Remember the question, remember the answer, isn't that right?

A. Uh huh.

Q. You were asked the next question:

"Q. All right. For instance on Bar Exhibit 2 which is the same as the document I just showed you, it has the date on there and the Clerk and so much money I paid to the Clerk. Any time that you had any questions about any of those disbursements, that was explained to you, wasn't it? (II-Tr.18)

"A. Yes, you asked if I understood that. I remember that."

Q. Do you remember that answer?

A. I know what you are talking about. May I see a copy of that again? On the front page there is documents. This business (indicating), this is what I was talking about here. This.

Q. That is all you studied?

A. Well, I didn't study it. I would look like this (indicating). I can see telephone calls and things. I did not understand all of it. This was not here. This is what I am talking about right now. (II-Tr.19)

Q. Now you were asked this question:

"Q. Now, and in addition, each thing that was listed on there under services rendered after you had gone over thoroughly, I would sit down in my office and if you had any questions or whatever, it would be explained, wouldn't it?

A. You asked me to read it and if I understood, and most of this is very clear, I mean, you have it written out, there was really no --

A. Right.

Q. No ma'am, under the services rendered.

A. That is what I am talking about" (II-Tr.19)

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:
:

Q. Do you remember the question that I just read being asked and do you remember your answer to it?

A. Yes.

Q. And the next question

"Q. And you read each word of each statement, didn't you?

"A. I believe I did of these, yes."

Q. Do you remember that?

A. Yes.

Q. Now is that true or is that false?

A. It is true that I read this for services rendered. This was not on here (indicating). (II-Tr.20)

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Q. He (respondent) did suggest if you had any questions, ask him, didn't he?

A. I do not recall him saying that but he may have. I testified before he did.

Q. Yes, Ma'am. And which was correct, then or now?

A. I imagine then because its closer to the time.IITr22

PROMISSORY NOTE & MORTGAGE:
(Bar's Composite Exhibit #7)

Bar's Exhibit No. 7 is a promissory note and a mortgage securing it encumbering Mrs. Maciejewski's residence. The instruments are dated May 19, 1982. The Respondent is the Payee and Mortgagee, respectively, in said instruments.

Admittedly, Mrs. Maciejewski executed the note and the mortgage but she had no recollection of the occasion when the note and mortgage were signed. (II-Tr.33) She further testified that there was never any discussion of her having to pay anything. There was no discussion on any mortgage liens or any notes to be paid because I was not going to be responsible for the payment of these fees (I-Tr.14). Nobody explained to her that "once I signed it, there would be a lien and I would have to make payments. There was no one explaining any of that to me." (I-Tr.16) There was no discussion about Mrs. Maciejewski paying any part of that fee. (I-Tr.25)

Mrs. Maciejewski further testified that she saw the document which constituted the promissory note but she did not read it. (I-Tr.24,29) However, she also testified that when she saw the document, the interest rate was 18% and was in the principal amount of \$10,000. She asked him and she commented that the 18% seemed high to which his response was, "I will lower it to 12%." (I-Tr.16) The Respondent then took the document, went back in the room and had it re-typed (II-Tr.55)

Her testimony was that she signed the note and she had no reason to panic or to be worried or upset about this payment because it would be lowered or adjusted or maybe not even used.

After the "fee hearing" in August 1982, she asked Mr. Holland if he was going to change the note. (I-Tr.20)

Mrs. Maciejewski, on cross-examination, admitted that the Respondent told her that the Judge would determine what would be a fair fee and who would be paying it. He explained to her that "there is a chance you will be paying a small amount of that, you know, something I could handle, but as far as owing him money something like this (indicating), there was no discussion of this at all." (II-Tr.26, 27)

As to the mortgage, Mrs. Maciejewski testified as follows:

She never saw either the first or second pages of the mortgage in Mr. Holland's office; yet, admittedly, she signed as the Mortgagor on the second page (I-Tr.15). She did not know it was a mortgage but thought it was an instrument getting her husband's name off the title to the property.

An examination of Exhibit No. 7 reflects that in bold letters immediately under her signature is the word, "MORTGAGE".

The promissory note was payable in equal monthly installments of \$150., the first of which was payable on the 15th day of June, 1982. Mrs. Maciejewski timely made said \$150 payment (II-Tr.37), although she testified that said payment "was to cover some costs (fees), letters and things." (II-Tr.37) Other than the \$250 retainer fee and the \$150 payment made in June 1982, Respondent made no demand on Mrs. Maciejewski for the payment of any monies prior to the Hearing held for the purpose of fixing Respondent's fees to be assessed

against Mr. Maciejewski. (II-Tr.56). The Hearing was had for the purpose of fixing Respondent's fees assessable against Mr. Maciejewski in August 1982, and the Order Fixing Fees was entered September 2, 1982. At the Hearing for the purpose of fixing fees, Mrs. Maciejewski expressed her opinion to the Court that she was happy with the results of the divorce case but that Respondent's fees were "way out of line." (II-Tr.36)

The Court entered an Order which provided that a reasonable fee for Respondent's services was \$4,500 of which, Mr. Maciejewski should pay \$3,000.

On September 15, 1982, Mrs. Maciejewski employed Scott Taylor to represent her relative to the fee matter and, on the same day, discharged Respondent as her attorney. (II-Tr.58)

The mortgage was recorded the same day that the Respondent was discharged as attorney for Mrs. Maciejewski.

By bill dated November 24, 1982, (Bar's Exhibit #6), Mr. Holland voluntarily reduced his statement from \$11,925 to \$7,920 (I-Tr.23).

Mr. Holland never brought an action on the promissory note or to foreclose the mortgage (I-Tr.24).

Respondent further reduced Mrs. Maciejewski's bill, having received \$3,000 from Mr. Maciejewski, to \$3,000. (I-Tr.24)

FIRST POINT INVOLVED

DOES INCONSISTENT, CONTRADICTORY AND CONFUSED
TESTIMONY OF THE ONLY WITNESS AS TO ALL OF THE
RELEVANT ISSUES OF FACT CONSTITUTE CLEAR AND
CONVINCING EVIDENCE UPON WHICH CAN BE BASED
VALID FINDINGS OF FACT BY THE REFEREE?
(FINDINGS OF FACT "B", "C" AND E)

A R G U M E N T

At the outset, it must be recognized that Mrs. Maciejewski's testimony constitutes the only evidence upon which Findings of Fact "B", "C" and "E" can be based. There are no other witnesses who testified adversely to the Respondent relative to these issues.

Bar's Exhibit "1", the Professional Services Employment Contract, is chronologically the first document which Mrs. Maciejewski signed. It provides that:

1. Respondent would receive \$100 an hour for office work and \$125 an hour for work outside the office;
2. Client would execute promissory notes and mortgages securing the same to secure the payment of fees to Respondent;
3. Client would pay Respondent a \$250 non-refundable retainer fee and would be billed for all costs and expenses;
4. Respondent would reimburse client for any amounts received from her husband towards fees and costs.

Thus, this document, if valid, is the basis of practically all of the documents involved in this matter, as well as the alleged misconduct of the Respondent.

Mrs. Maciejewski testified that when she went to Mr. Holland's office the first time to employ him, she explained that she had no money except what was in her pockets and what might have been given her and discussed payment of his fees with him. He told her, "Don't worry about your payment now. We will see that it is your husband that will be making the payments in this case." He did not ask for a retainer fee of any amount and there was no conversation about an hourly rate of pay. This testimony is directly contradictory to the Professional Services Employment Contract (Exhibit 1) which requires a retainer fee of \$250, payment of fees at an hourly rate, her responsibility for the payment of the fees with the understanding that he would reimburse her for any fees he received from her husband.

A careful reading of all of Mrs. Maciejewski's testimony relative to the Employment Contract will reflect that it was her position that there was no Employment Contract signed at the time of the initial conference and that, in some manner, at a later date, she unknowingly signed the document. To demonstrate this, she testified that the contract was dated September 22nd, when, in fact, she never saw the Respondent until September 24th and that, therefore, it was apparent that, in some manner, this document was fraudulently procured by the Respondent. Admittedly, she gave Respondent a check payable to Respondent and drawn on a joint bank account with her husband in the amount of \$250 as a retainer fee and she testified, in effect, that he required the \$250 before he would file the

action. The check is in her handwriting and dated September 23. Admittedly, she gave the check to Respondent the day after her first visit. Her explanation for the check was simply that she was in such an emotional state that she might have misdated it. The evidence reflects tht the check was credited to Respondent's account on September 24.

Respondent's Exhibit #2 is a questionnaire which reflects the salient facts necessary to enable Respondent to file a Petition for Dissolution. Most of the information contained on it was known only to Mrs. Maciejewski. Admittedly, she signed it and it is dated September 22, 1981. Her explanation for this date is that it simply is not the correct date.

The fact that she gave the Respondent a \$250 retainer fee refutes her testimony that Respondent did not ask for a retainer fee as provided in the Employment Contract. It also refutes her testimony to the effect that she told Respondent that she had no money except what was in her pockets. It likewise refutes her testimony that Respondent told her, "Don't worry about your payment now. We will see that it is your husband that will be making the payments in this case." The fact that she paid Respondent a retainer fee of \$250 by a check dated by her September 23, 1981, casts serious doubt on her testimony relative to her first conference with Respondent and the Information Sheet (Respondent's Exhibit #2) dated September 22 supports Respondent's position that, in fact, Mrs. Maciejewski did see Respondent on September 22nd. It cannot be said that there was clear and convincing evidence that she did

not execute the Professional Services Employment Contract on the date set out therein.

As to Bar's Exhibits 2, 3 and 4, the various statements, Mrs. Maciejewski testified that Respondent laid these documents in front of her, she trusted Respondent and signed them. He did not go over the documents with her, nor did he explain the time involved and the activities described therein. She did not study these Exhibits, she did not have the time. He put these Exhibits down and let her glance at them and he never went over them with her and did not give her a chance to ask questions about them.

As to these Exhibits, Mrs. Maciejewski also testified that the Respondent asked her to read them. She read the statements and after she had gone over them carefully, Respondent would sit down in his office and ask her if she had any questions about them and if she had any questions, he would explain them.

One can only conclude from the foregoing that her testimony relative to these documents is contradictory and inconsistent and certainly cannot constitute clear and convincing evidence that the Respondent simply shoved the documents in front of Mrs. Maciejewski and told her to sign them and she did so after only glancing at them.

The promissory note and mortgage were admittedly executed by Mrs. Maciejewski. She testified that there was no discussion between her and Respondent about any mortgage liens or any notes to be paid or about her paying anything for that matter. Her testimony infers that, in some manner, the

Respondent surreptitiously secured her signature on these documents and she did not realize what she was signing. She further testified that she had no recollection of the occasion when the note and mortgage were signed.

Mrs. Maciejewski, on cross-examination, admitted that the Respondent told her that the Judge would determine what would be a fair fee and who would be paying it and he explained there is a chance you will be paying a small amount of that, you know, something I could handle. She saw the promissory note but she did not read it. Yet, on the other hand, she testified that when she saw it, the interest rate was 18% and she commented that the 18% seemed high, at which point he told her that he would reduce it to 12% and had it re-typed with the new interest rate. The note called for monthly payments of \$150 each, the first of which would be due on June 15, 1982, but she had no reason to panic or be worried or be upset "about this payment" because it would be lowered or adjusted or maybe not even used, depending upon the outcome of the fee hearing. Incidentally, she made the \$150 payment due on June 15.

As to the mortgage, she testified tht she never saw either the first or second pages of the mortgage in Mr. Holland's office, although, admittedly, she signed the mortgage on the second page thereof. She did not know it was a mortgage but thought it was an "instrument getting her husband's name off the title to the property." She testified that she knew what a mortgage was and an examination of the mortgage actually executed by her reflects that immediately under her signature

in the middle of the page in big, bold print is the word "MORTGAGE". It is not reasonable to believe that she signed this document without noticing the word, "MORTGAGE".

It is not the writer's purpose to accuse Mrs. Maciejewski of lying. The inconsistencies and contradictions in her testimony, assuming her to be an intelligent individual, are so glaring that it is difficult to believe that she lied deliberately. I suggest that her testimony to the effect that she had no recollection of the occasion when the note and mortgage was signed is applicable to all of the documents which she executed. With the passage of several years, I suggest that she had no specific recollection of any of these documents and that she reconstructed what she believed were the circumstances surrounding her execution of them leading up to her signing the same, which reconstruction was tainted by her obvious anger toward the Respondent. I suggest that when she saw the ultimate bill rendered by the Respondent based upon the employment contract and became fearful of what his services might cost her, she became distraught. When she appeared at the Hearing where Respondent was attempting to recover his fees from her ex-husband, she stopped looking to Respondent for advice. It was the purpose of the Hearing to fix the fee assessable against her ex-husband, which it was to her advantage to have fixed as high as possible so that as much as possible would be credited against the fee which she had incurred. She did not understand this and she voluntarily advised the Court that Respondent's fee was out of line and too

high. She then went to other counsel, Scott Taylor, relative to the fee problem and he advised her to discharge Respondent as her attorney and she did so. From then on, the situation between Mrs. Maciejewski and Respondent deteriorated and undoubtedly her anger increased. It was in this state of mind with no actual recollection of the various events but with ever growing anger, she testified before the Grievance Committee and the Referee concerning her reconstruction of the events.

The testimony of Mrs. Maciejewski is the only adverse testimony relative to the Findings of Fact "B", "C" and "E". Respondent respectfully submits that this testimony, because of its various inconsistencies and contradictions and its confused nature does not constitute clear and convincing evidence to support the Referee's Findings of Fact "B", "C" and "E".

SECOND POINT INVOLVED

CAN A REFEREE MAKE FINDINGS OF FACT WHEN
THERE IS NO COMPETENT EVIDENCE BEFORE HIM
TO SUPPORT THEM?

A R G U M E N T

The Referee's Finding of Fact "D" is as follows:

"D. The evidence was clear and convincing that the Respondent charged Mrs. Maciejewski a clearly excessive fee and that he purported to expend hours of labor which were far in excess of those normally necessary for legal matters such as the Maciejewski dissolution of marriage. Further, the fee was so excessive as to be unconscionable."

The only evidence which could possibly support this Finding of Fact consisted of:

1. The Order of Judge Griffin entered on November 10, 1982, at a Hearing on a Motion for Rehearing and Clarification and on Respondent/Wife's Supplemental Motion for Clarification As to Fees entered in the divorce case between Mr. and Mrs. Maciejewski;

2. The testimony of J. Scott Taylor before the Referee.

Judge Griffin in Hillsborough County was the Judge assigned to the Maciejewski dissolution of marriage case. A Hearing was held before him in August 1982, for the purpose of determining the fees payable by Mr. Maciejewski to the attorney for Mrs. Maciejewski. On September 2, 1982, Judge Griffin entered an Order which provided, in effect, that a reasonable fee for Mr.

Holland's services to Mrs. Maciejewski was \$4,500., of which Mr. Maciejewski should pay \$3,000 and Mrs. Maciejewski should pay \$1,500. Subsequently, a Hearing was had before Judge Griffin on the Motion for Rehearing and Clarification and on Respondent/Wife's Supplemental Motion for Clarification As to Fees and, as a result, he entered an Order affirming his prior Order of September 2nd but stating expressly that he was not adjudicating any of the rights of Mr. Holland against Mrs. Maciejewski based upon any fee contract between them.

It is Respondent's position that neither of said Orders constituted competent evidence before the Referee as to a reasonable fee payable by Mrs. Maciejewski to Mr. Holland based upon the Professional Services Employment Contract. The reason for this position is simply that Judge Griffin was without jurisdiction in the divorce case to determine a reasonable fee payable by Mrs. Maciejewski to her own attorney. The Courts in this State have consistently held that in an action for dissolution of marriage, the Court's authority to award attorneys' fees is in reference to determining the amount of attorneys' fees, if any, payable by one party to the other (or the other's attorney), and that in such action, the Court has no power or jurisdiction to determine the fees due from a party to his or her own attorney, absent a claim of a charging lien. Harold v. Hunt, 327 So.2d 240 (Fla. App. 4th, 1976); Chaachou v. Chaachou, 122 So.2d 24 (Fla. App. 3d, 1960); Cristiani v. Cristiani, 114 So. 2d 726, Fla. App. 2d, 1959).

At its best, the Order of Judge Griffin constituted only his opinion as to a total reasonable fee payable by both Mr. and Mrs. Maciejewski and the Respondent, having no ability to cross-examine Judge Griffin relative thereto, it should not have been considered by the Referee. It is impossible from the Order itself to determine what factors entered into Judge Griffin's decision.

The testimony of J. Scott Taylor cannot be the basis for the Referee's Finding of Fact above quoted. On direct examination, he testified that he was employed by Mrs. Maciejewski for the purpose of settling or resolving a dispute that she had with Mr. Holland concerning his fee. (II-Tr.68)

Q. What did you do?

A. I contacted Mr. Holland in the hopes we could dissolve the dispute. We could not and I filed a Motion for Clarification before Judge Griffin to see if I could get a clear picture of the controlling medium for her fee.

In other words, was Judge Griffin going to set the fee or Mr. Holland going to set the fee.
So I set a Motion for Clarification.

Q. Did you have a hearing on that Motion?

A. Yes, I did.

Q. Did the Judge issue another Order?

A. He ruled that his previous Order was a reasonable fee, \$4500. He said any contractual disputes between Mrs. Maciejewski and Mr. Holland were not before him and he would not rule on them.

This testimony accurately reflects the purpose of the Motion for Clarification and the tenor of Judge Griffin's Order entered thereon. The purpose of the Motion was simply to have Judge Griffin re-affirm his Order of September 2nd (II-Tr.68,69)

The foregoing testimony of Mr. Taylor becomes important. On cross-examination, he was asked:

Q. Mr. Taylor, you are familiar with the Court file in Maciejewski v. Maciejewski, aren't you?

A. The divorce case? No, Sir, I never spent any time going through that.

Q. Well, you went through that part of it necessary to represent Mrs. Maciejewski for a Motion for Clarification, didn't you?

A. Yes, Sir. (II-Tr.75)

The only portion of the divorce file necessary for Taylor to represent Mrs. Maciejewski on the Motion for Clarification was simply the Order of September 2nd. Taylor was totally unfamiliar with the aspects of the case because he never went through the Court file. Further, he testified that he never disputed Holland's statements that he had put in the time that he said he did. (II-Tr.76) Although he was not familiar with the file and the work performed by Mr. Holland, it was his view that Holland had spent more time doing to work than was necessary. For obvious reasons, he did not even estimate the amount of excess time.

Of even greater importance, an examination of all of Mr. Taylor's testimony will reflect that at no time did he testify

that Mr. Holland's fee was clearly excessive. He could not have so testified truthfully. DR-2-106(b) of the Code of Professional Responsibility sets out the guides for determining the reasonableness of a fee. Some of these guides are as follows:

1. The time and labor required;
2. The novelty and difficulty of the question involved;
3. The skill requisite to perform the services properly;
4. The amount involved and the results obtained.

Taylor did not know the amount of time and labor required but, even if he did know, he did not question that Respondent had spent the time reflected by the file. Not having reviewed the Court file and, therefore, being unfamiliar with the nature of the litigation, he had no way to know the novelty and difficulty of the questions involved and he likewise had no way to evaluate the skill requisite to perform the services properly. Not having reviewed the file, Taylor had no way to evaluate the amount involved and the results obtained. Further, not having any knowledge as to the foregoing, he was completely unable to evaluate the fee customarily charged in the locality for similar legal services.

In brief, it is Respondent's position that there was no competent evidence upon which the Referee could base his Finding of Fact that Respondent charged a clearly excessive fee which was so excessive as to be unconscionable and that he purported to spend hours of labor which were far in excess of those normally necessary for legal matters such as the Maciejewski dissolution of marriage.

It should be pointed out that Respondent offered the testimony of Seymour Honig, a practicing lawyer in Tampa, who testified that he had carefully examined the file and was familiar therewith and that he had evaluated the time expended by the Respondent and based thereon, it was his opinion that Respondent's fee was reasonable.

THIRD POINT INVOLVED

UNDER THE PECULIAR FACTS OF THIS CASE, IS NOT THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FROM THE PRACTICE OF LAW FOR A PERIOD OF SIX (6) MONTHS AND THEREAFTER UNTIL HE SHALL PROVE HIS REHABILITATION, AN UNDULY HARSH SANCTION?

A R G U M E N T

The purpose of lawyer discipline is not punishment. The cases universally hold that the purposes are to protect the bench, the Bar and the public and to deter other lawyers from similar misconduct. The purposes are better stated in the Florida Standards For Imposing Lawyer Santions as follows:

"The purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge or are unlikely to discharge their professional duties to clients, the public, the legal system and the legal profession properly."

If this Court believes that the Bar proved by clear and convincing evidence that Respondent was guilty of the conduct set out in the Referee's Findings of Fact "B", "C" and "E", the Referee's recommended sanctions are applicable, unquestionably. Respondent, however, submits that although a careful reading of the testimony of Mrs. Maciejewski may reflect that, in some minor way, Respondent may have violated the Code of Professional Responsibility, it will not reflect that the Findings of Fact "B", "C" and "E" are so supported. It is in this context that Respondent suggests that suspension for six (6) months and until rehabilitation has been proved is unduly

harsh for such minor transgressions of the Code of Professional Responsibility as the Court may find.

If the Court finds that there is clear and convincing evidence that the Respondent charged Mrs. Maciejewski a clearly excessive and "unconscienable" fee, the Court should take into consideration the following facts:

1. He voluntarily reduced said fee by \$4,000 to approximately \$7,000;

2. He ultimately settled the matter for \$6,400 (\$3,000 from Mr. Maciejewski and \$3,400 from Mrs. Maciejewski);

3. Although the note and mortgage were signed May 19, 1982, he did not record the mortgage until September 14, 1982, the day that Mrs. Maciejewski discharged him as her lawyer;

4. He took no action whatsoever to collect the note or to foreclose on the mortgage.

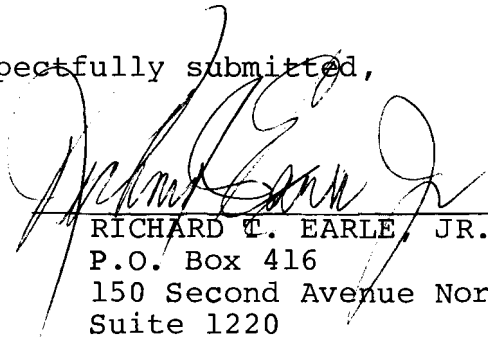
Respondent submits that a careful review of the entire Record relative to the controversy over fees in this matter will not reflect that a six (6) month suspension is either necessary or desirable for the protection of the bench, the Bar and the public.

C O N C L U S I O N

Respondent submits that the Record in this case does not contain clear and convincing evidence that the Respondent engaged in the conduct set out in the Referee's Findings of Fact "B", "C", "D" and "E" and said Findings of Fact should be set aside and the Respondent found Not Guilty.

On the other hand, if the Court finds from a reading of the entire Record that Respondent is guilty of some relatively minor breach of the Code of Professional Responsibility or, if the Court finds that his fee was only slightly excessive, the discipline recommended by the Referee is unduly harsh.

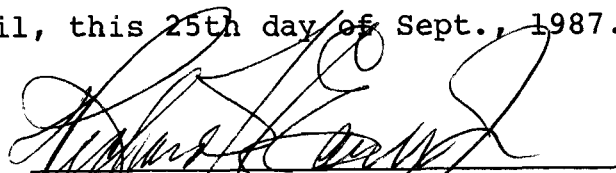
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy hereof has been furnished to John Berry, Esq., Bar Counsel, The Florida Bar, Tallahassee, FL 32301, and to DAVID RISTOFF, ESQ., Staff Counsel, The Florida Bar, Suite C-49, Marriott Hotel, Tampa International Airport, Tampa, FL 33607, by U.S. Mail, this 25th day of Sept., 1987.



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