

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 70,829

[TFB Case No. 86-17,450 (09D)]  
and

v.

Case No. 71,144

[TFB Case No. 87-23,705 (09D)]

HERBERT R. SWOFFORD,

Respondent.

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REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, hearings were held on January 21, 1988. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits all of which are forwarded to The Supreme Court of Florida with this report, constitutes the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: John B. Root, Jr.

For The Respondent: In pro se

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

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[TFB Case No. 86-17,450 (09D)]

1. The Florida Bar filed the complaint in this case with a copy by certified mail to the respondent at his record Bar address on July 7, 1987. The certified receipt was returned to the Bar with the signature of John Bennett and the date "7-14-87". Respondent admitted that John Bennett was his stepson. Therefore, I find that the respondent was served the complaint in the proper manner and it was properly received on his behalf. (Personal inspection of postal receipts by Referee at trial; transcript Pp. 4-6, 10, 48.)

2. On July 28, 1987, The Florida Bar filed a Request For Admissions in this case. The respondent personally signed the postal receipt for certified mail on August 5, 1987 acknowledging receipt of the Request For Admissions. (Case record and verbal admission of the respondent.) The respondent failed to respond to the Request For Admissions which were therefore deemed to be admitted in their entirety pursuant to Fla.Civ.R.P. 1.370(a). (Case record)

3. In March or April, 1985, respondent was asked to assist in arranging a loan to Inter-Am Construction Corporation and certain officers of that corporation. The loan sought was for the amount of \$20,000.00. (Admission of respondent.)

4. The respondent and Quentin B. McCain, who was the husband of Jessie G. McCain, learned that she would loan the sum of \$20,000.00 to Inter-Am and its officers for 90 days at a stated rate of interest of 18% per annum. (Admission of respondent.)

5. Mr. McCain was not a registered mortgage broker in the state of Florida but he wanted a finder's fee of \$3600.00 and the respondent was to receive \$500.00 for closing costs and fee. (Admission and testimony of respondent.)

6. The respondent prepared the mortgage and mortgage note and other documents necessary for the transaction.

Mrs. McCain relied on respondent's advice in the matter. (Admission of respondent.)

7. On or about April 8, 1985, Inter-Am Construction Corporation and its officers executed and delivered a promissory note and a second mortgage securing payment on the note to Mrs. McCain. (Admission of respondent.)

8. The promissory note was for the sum of \$20,000.00 for 90 days at 18% per annum interest. The interest of \$900.00 was prepaid. Mr. McCain received his finder's fee of \$3600.00 and the respondent received \$500.00 fee and costs. (Admission of respondent; transcript p. 14.)

9. Although the amount of the note was \$20,000.00, Inter-Am Construction Corporation received only \$15,000.00. (Admission of respondent; transcript p. 14.)

10. In about August, 1985, the loan went into default and Mrs. McCain brought an action against Inter-Am Construction Corporation. Inter-Am Corporation filed a counterclaim alleging usury in about November, 1985. (Admission of respondent; testimony of witness; transcript p. 15.)

11. Mrs. McCain dismissed her complaint when it was discovered that the wrong parties had been sued. However, the counterclaim, alleging usury, was tried. (Admission of respondent.)

12. A judge in a circuit court of the 18th Judicial Circuit ruled, in an amended final judgment dated January 16, 1987, that the prepaid interest of \$900.00 plus the \$3600.00 finder's fees taken by her husband, with her knowledge, rendered the loan usurious pursuant to Florida Statute 687.03 (1983). (Admission of respondent; composite Bar Ex. 1.)

13. He further ruled that the usurious interest of \$4500.00 which was taken in advance from the loan should be doubled to \$9000.00 and forfeited by the plaintiff pursuant to Florida Statute 687.04 (1983). This judgment was not appealed. (Admission of respondent; testimony of witness; transcript p. 21; composite Bar Exhibit 1.)

14. In or about May, 1985, before the \$20,000.00 mortgage and loan went into default, respondent called Mrs. McCain to inquire as to whether or not she would be interested in making another loan to Inter-Am Construction Corporation. (Admission of respondent.)

15. She apparently was, because arrangements were completed with her for another 90 day loan to Inter-Am Construction Corporation. (Admission of respondent; testimony of witness; transcript p. 18.)

16. On or about June 11, 1985, a promissory note providing for the repayment of \$41,800.00, a second mortgage, and other security documents securing payment of the note, and prepared by the respondent, were

executed and delivered. (Admission of respondent; testimony of witness.)

17. The terms of this loan provided for interest at the rate of 18% per annum, a \$2000.00 discount of the note, and \$1000.00 to the respondent for fees and costs. The promissory note obligated repayment of \$41,800.00 in 90 days and the Inter-Am Construction Company received the sum of \$38000.00. (Admission of respondent, testimony of witness; transcript p. 18.)

18. On or about May 27, 1986, an amended complaint was filed by Mrs. McCain in the 9th Judicial Circuit alleging that the second loan was in default and naming Inter-Am Construction Corporation and others as defendants. (Admission of respondent; testimony of witness.)

19. The matter was tried before a jury, and at the end of the plaintiff's case, the defendant moved for a directed verdict in their favor. (Admission of respondent; testimony from witness; transcript p. 18.)

20. On February 17, 1987 the court entered a directed verdict for Inter-Am and the other defendants and found that the \$2000.00 "discount" was interest in addition to the other \$1800.00 interest required by the note. The court further found that it was an intentional and deliberate act on the part of Mrs. McCain to charge interest at more than the legal rate. (Admission of

respondent; testimony of witness; transcript p. 18; composite Bar Exhibit 2.)

21. The court computed the interest to be at the rate of 39.99% per annum. The court ruled that the \$41,800.00 note and mortgage made by Inter-Am Construction Corporation and others in favor of Mrs. McCain, was not an enforceable debt in the courts of Florida. (Admission of respondent; composite Bar Exhibit 2.)

22. The respondent knowingly and improperly participated in the two usurious loan transactions, prepared the documents therefore and advised Mr. and Mrs. McCain concerning the matter. (Admission of respondent; testimony of respondent; transcript p. 30.)

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23. The Florida Bar filed the complaint in this case with a copy by certified mail to the respondent at his record Bar address on September 15, 1987. The certified receipt was returned to the Bar with the signature of John Bennett and the date "9-19-87". Respondent admitted that John Bennett was his stepson. Therefore, I find that the respondent was served the complaint in a proper manner and it was properly received on his

behalf. (Personal inspection of postal receipts by Referee at trial; transcript pp. 4-6, 10, 48.)

24. Requests for Admissions were filed by The Florida Bar on September 25, 1987. (Case record.)

25. In spite of the fact that respondent denies receiving the complaint, he responded to the Requests for Admissions on October 27, 1987. (Case record.)

26. The respondent was retained as counsel for the Personal Representative of the estate of ██████████ ██████████ (Admission of respondent; composite Bar Exhibit 1.)

27. ██████████ ██████████ a resident of California, was named in the will to be the Personal Representative of the estate. He was the sole beneficiary. (Admission of respondent; Bar composite Exhibit 1.)

28. On March 8, 1978, Mr. ██████████ filed a petition for administration of the will and requested that he be appointed Personal Representative of the estate. (Bar composite Exhibit 1.)

29. On March 16, 1978, Mr. ██████████ executed the oath of Personal Representative and appointed a resident agent. (Bar composite Exhibit 1.)

30. Letters of administration were issued on March 20, 1978. (Bar composite Exhibit 1.)

31. The will and its codicil were admitted for probate on March 20, 1978. (Bar composite Exhibit 1.)

32. The notice of administration and notice to creditors was published on May 20th and May 27th, 1978. (Bar composite Exhibit 1.)

33. However, proof of publication was not promptly filed. On May 26, 1978 a letter from the circuit judge required that an inventory and proof of publication of the notice of administration be filed no later than June 15, 1978. Notwithstanding the court directions, the proof of publication was not filed until July 25, 1978. (Bar composite Exhibit 1.)

34. On June 20, 1978, the same judge issued an order to Mr. [REDACTED] copy to respondent. The order, noting that the inventory had not been filed as required by law, required that the inventory be filed no later than July 12, 1978. An inventory was eventually filed on July 25, 1978. Subsequently an amended inventory was filed. Both inventories reflected an item of real property consisting of a home with an estimated value of \$18,620.00. This was the only major asset of the estate listed on the inventory in the probate file. (Bar composite Exhibit 1; admission of respondent.)

35. After filing for two extensions to pay claims, the respondent failed to close the estate notwithstanding an order by the court dated June 4, 1979, to close the estate by July 2, 1979 and a second order dated

December 20, 1979, to close the estate by January 18, 1980. (Bar composite Exhibit 1.)

36. Accordingly, on February 26, 1980, the court filed an order terminating the proceedings, dismissing without prejudice the case and revoking the letters of administration. (Admission of respondent; Bar composite Exhibit 1.)

37. On or about June 5, 1981, [REDACTED] executed a deed prepared by the respondent to the real property which was described in the inventory of Mrs. [REDACTED]'s estate as having an estimated value of \$18,620.00. The grantee of the deed was the respondent and the grantor was described as the "sole surviving heir at Law and sole beneficiary of the Estate of [REDACTED] deceased". (Bar Exhibit 2.)

38. The deed was not recorded however until on or about February 23, 1982 as shown by a documentary stamp affixed to the deed. The amount on the documentary stamp reflects a consideration of \$10,000.00. In addition to the \$10,000.00 covered by the documentary stamp from the deed, the respondent paid Mr. [REDACTED] the sum of \$157.61 per month until respondent sold the property. (Bar Exhibit 2; testimony of respondent; transcript p. 40.)

39. On May 18, 1981, about eighteen days before Mr. [REDACTED] executed his deed to the respondent, the respondent entered into a contract of sale of the same

real property whereby he would sell the property to [REDACTED] and [REDACTED] [REDACTED] for a purchase price of \$24,000.00. (Bar Exhibit 3.)

40. Thus, respondent entered into a contract to sell the real property in question for a sum more than twice the amount that he was paying his client for it. (Bar Exhibits 2 and 3.)

41. That sale was not consummated, but on December 18, 1981, the respondent entered into a second contract for the sale of the same real property with Mr. and Mrs. [REDACTED]. The purchase price called for had risen to \$26,500.00. This sale was consummated on February 18, 1982. (Bar Exhibit 4 and 5.)

42. It was not until February 23, 1982, that the respondent recorded the deed from Mr. [REDACTED] to himself. (Bar Exhibit 2.)

43. Respondent made an unconscionable profit at the expense of his client, [REDACTED] [REDACTED] (Bar Exhibit 2 and 5.)

III. Recommendations as to whether or not the Respondent should be found guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

As to Complaint 70,829

I recommend that the respondent be found guilty and specifically that he be found guilty of violating Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility for engaging in conduct that reflects adversely on his fitness to practice law.

As to Complaint 71,144

I recommend that the respondent be found guilty and specifically that he be found guilty of violating the following Disciplinary Rules of the Code of Professional Responsibility:

1. Disciplinary Rule 1-102(A)(6) for engaging in conduct that adversely reflects on his fitness to practice law; and

2. Disciplinary Rule 5-104(A) for entering into a business transaction with a client when they had differing interests therein, i.e. for buying real property from a client for approximately \$10,000.00 when he had already entered into a contract with another party to sell the same real property for \$24,000.00 prior to acquiring title to the property. The real property was ultimately sold by the respondent for \$26,500.00.

IV. Recommendation as to Disciplinary measures to be applied:

1. I recommend that the respondent be disbarred from the practice of law in Florida as provided in Rule 3-5.1(f). I make this recommendation knowing that the respondent has not previously been disciplined by The Florida Bar primarily because of the unconscionable and reprehensible self-dealing of the respondent in his relations with a client in purchasing real property from the former Personal Representative of an estate for whom the respondent was attorney of record.

V. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.5(k)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 66 (DOB 1922)  
Date admitted to Bar: June 5, 1950  
Prior Disciplinary convictions and disciplinary measures imposed therein: None.

VI. Statement of costs and manner in which costs should be taxed: I find the following costs were reasonably incurred by The Florida Bar.

A. Grievance Committee Level Costs	
1. Administrative Costs	\$300.00
2. Transcript Costs	\$484.65
B. Referee Level Costs	
1. Administrative Costs	\$150.00
2. Transcript Costs	\$210.65
C. Miscellaneous Costs	
1. Investigator Expenses	\$184.45
2. Copying costs	\$67.00

TOTAL ITEMIZED COSTS: \$1396.75

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 5<sup>th</sup> day of February, 19 88.

  
FREDERICK T. PFEIFFER  
Referee

*2/8/88*  
Copies to:

John B. Root, Jr., Bar Counsel  
Herbert R. Swofford, Respondent  
John T. Berry, Staff Counsel, The Florida Bar, Tallahassee,  
Florida 32301

*Glein S. Goscher, Jud. Asst.*