IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, )

Complainant, ) Supreme Court Case no. 66,013

vs. )

LOUIS VERNELL, JR. )

Respondent. )

)



On Petition for Review of
the Referee's Report in a
Disciplinary Proceeding.

**AMENDED**
**MAIN BRIEF OF RESPONDENT SUPPORTING CROSS-PETITION FOR REVIEW AND INCORPORATED ANSWER TO BRIEF OF COMPLAINANT**

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## SUMMARY OF ARGUMENT

In responding to the Bar's arguments, it is submitted that there simply is no basis for its claim that Vernell failed to deliver the "Schlesinger" check to his client, William Fahrenkopf.

As noted, not only was such delivery, in fact, effected, but Mr. Fahrenkopf did thereupon, and pursuant to his agreement with Vernell, endorse such check for deposit to Vernell's Trust Account. The evidence in this regard is undisputed.

Similarly, there is no basis for the Bar's contention that Vernell received any proceeds beyond that which Mr. Fahrenkopf specifically agreed to and was otherwise fully aware of. Although the Bar prefers not to consider the existence of Mr. Fahrenkopf's written agreement of July 19, 1981, the fact remains, he did make such agreement; that he was fully satisfied with the same; and that he, Mr. Fahrenkopf, did receive all of the proceeds to which he was lawfully entitled.

Albeit, and with respect to Count I, the mere addition of Vernell's name as co-payee on the "Schlesinger" check does not, per se, constitute either a material alteration or a violation of the Professional Code of Ethics. The evidence in this regard is undisputed and affirmatively demonstrated that, notwithstanding such addition, BOTH Mr. Fahrenkopf and Mr. Vernell fully and properly endorsed such check. Moreover, neither the maker, Sheldon Schlesinger, nor the payee, William

Fahrenkopf, were in any wise prejudiced, injured or damaged in any way as a result of such addition.

## REQUEST FOR ORAL ARGUMENT

LOUIS VERNELL, JR., as the Respondent herein, herewith requests oral argument on both the Petition for Review as filed herein by Complainant and the Cross-Petition for Review as filed herein by Respondent.

LOUIS VERNELL, JR., Respondent
160 Sunny Isles Boulevard
North Miami Beach, Florida 33160

## INTRODUCTION

In this brief, the Complainant "The Florida Bar" will be referred to herein as either the "Bar" or "Complainant". The Respondent "Louis Vernell" will be referred to herein as either "Respondent" or "Vernell". Other parties/witnesses herein will be referred to by their respective surnames.

For reference, the following symbols will be used:

"Tr." refers to the Transcript of Proceedings dated July 31, 1985.

"Tr.2" refers to the Transcript of Proceedings dated September 12, 1985.

"A" refers to accompanying Appendix.

"R.R." refers to the Report of Referee.

"SUP. R.R." refers to the Supplemental Report of Referee.

"COMP. EX." refers to Complainant's Exhibits attached to the Transcript of Proceedings dated July 31, 1985.

"RES. EX." refers to Respondent's Exhibits attached to the Transcript of Proceedings dated July 31, 1985.

"S.D." refers to deposition of Sheldon Schlesinger taken June 21, 1985 and received in evidence as Complainants Exhibit #1.

"M.M." refers to Respondent's Motion and Memorandum for Reconsideration and/or Mitigation with accompanying exhibit.

## STATEMENT OF THE CASE AND OF THE FACTS

1- Course of Proceedings and Disposition before Referee

On October 12, 1984, the Florida Bar filed a three (3) Count Complaint against Respondent charging him with sundry violations allegedly arising out of his prior representation of one William Fahrenkopf.[1]

In Count I of the Complaint, Vernell is specifically accused of adding his name as a payee to a check written by his co-counsel, Sheldon Schlesinger to Mr. Fahrenkopf. Although the Bar alleged that such act, per se, consistuted a material alteration there was no allegation that the same was done with fraudulent design or purpose or that anyone (including the client) suffered or sustained any damages whatsoever.[2] Moreover, and prior to the deposit of such check to Vernell's Trust Account (as agreed to by Mr. Fahrenkopf), the endorsements of both Mr. Fahrenkopf and Mr. Vernell were duly and properly placed on the subject check.

In Count II of the Complaint, Vernell is charged with receiving a portion of the proceeds of the medical malpractice claim of Mr. Fahrenkopf which the Bar asserts was

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1/ At the outset, it should be noted that Mr. Fahrenkopf neither filed, nor desired to pursue any complaint against Vernell with the Florida Bar (TR. 93). Moreover, and in his own sworn statement, Mr. Fahrenkopf expressed his total satisfaction with the actions and conduct of Mr. Vernell, and otherwise rejected any suggestion of impropriety or unethical conduct on his part (RESP. EX. 2, p 6; A.1).

2/ As noted, the Referee specifically found that Mr. Fahrenkopf had, in fact, received all funds due him from Vernell (SUPP. R.R. 1).

not included in a retainer agreement previously executed by and between the client (Mr. Fahrenkopf) and Sheldon Schlesinger, Esq. (COMPL. EX. 5).[3]

As an incident thereto, the Bar complains that Vernell failed to deliver a settlement check drawn by Sheldon Schlesinger and made payable to the client, William Fahrenkopf notwithstanding that such check had been "entrusted" to Vernell along with a "closing statement" for presentment to, and execution by, the client.[4]

In Count III of the Complaint the Bar charges that Vernell's receipt of a portion of the settlement proceeds was improper in that the same was not provided for in the "Schlesinger" retainer agreement nor the closing statement as prepared by him.[5]

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3/ As noted, infra, the Bar chose, in its complaint, to omit any reference whatsoever to a specific written agreement executed by the client, wherein Mr. Fahrenkopf expressly agreed to the payment of such portion of the proceeds to Vernell (RESP. EX. 1). As further noted, infra, the Bar first denied the existence of such agreement, then claimed it was forged; then conceded its authenticity; and finally, took a fourth and final position at trial whereat it asserted that it was ". . . not going to question whether that 1981 document was a valid and binding contract or not. . ." (TR. 187).

4/ Conspicuously absent from the Bar's Complaint, is any reference to the fact that not only did Vernell, in fact, deliver such check and closing statement to the client, but upon receipt thereof, the client promptly endorsed the check over to Vernell in accordance with his own express agreement with Vernell, while at the same time approving and executing the closing statement as presented to him by Vernell. Significantly, Vernell's delivery of both the check and the closing statement to Mr. Fahrenkopf was effected within 24 hours of Vernell's receipt of the same.

5/ As noted, such Count, again omits any reference to the specific written agreement executed by Fahrenkopf (A.1) which

In response to such Complaint, Vernell filed his "Answer and Affirmative Defenses" wherein he specifically denied any wrongdoing or impropriety on his part.

Additionally, and in his Answer, Vernell set forth in detail (with supporting exhibits) numerous affirmative defenses serving not only to establish the total propriety of Vernell's actions and conduct, but otherwise demonstrating the client's complete satisfaction with the same; such satisfaction being evidenced, among other things, by the client's receipt of all funds due him and his acceptance and endorsement of Vernell's check which bore the specific legend: "IN FULL, NET PROCEEDS DUE ON ACCOUNT OF FAHRENKOPF VS. SUTTON, ET AL. AND JACKSON MEMORIAL, ET AL."

Albeit, and upon the issues as framed by the Complaint and Answer, the cause came on for trial before the Honorable W. Herbert Moriarity, as Referee.

On August 9, 1985, the Referee rendered his report wherein be recommended that Vernell be found not guilty as to Counts II and III (relating to Vernell's alleged wrongful receipt and his accounting of funds derived from the

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specifically provided for such payment and further ignores Mr. Fahrenkopf's knowing execution and/or endorsement of both the "Schlesinger" check and the "Vernell" check, as well as the three (3) page closing statement submitted for his approval; all of which convincingly demonstrated Mr. Fahrenkopf's total agreement and acceptance of the net proceeds paid to him, as well as the aggregate sum received by Vernell.

Fahrenkopf settlement), but however, recommended that Vernell be found guilty as to Count I (relating to the addition of Vernell's name as payee on the "Schlesinger" check).

In so recommending, the Referee nonetheless specifically found and determined:

1) That the client had, in fact, received the full amount of proceeds appropriately due him; and

2) That all disbursements as made under the "Settlement Agreement" and, to Vernell, pursuant to the July 19, 1981 written agreement, were with the full knowledge and approval of Mr. Fahrenkopf.

Subsequently, and in order to clarify any doubts as to the propriety as to the amounts actually disbursed to, and accepted by Mr. Fahrenkopf, the Referee, in his Supplemental Report made the following specific findings and determinations, to wit:

> "The Referee must emphasize that while the Respondent was found to be guilty as to Count I, the client received all funds due him in this matter by the Respondent, as set forth in the client, Mr. Fahrenkopf's voluntary statement under oath, dated January 3, 1984, marked Respondent's Exhibit No. 2, and further, Mr. Sheldon Schlesinger, Esq., the co-attorney for Mr. Fahrenkopf, has no grievance against the Respondent, Mr. Vernell, in that Mr. Fahrenkopf, the client, received the funds due him and was satisfied."
>
> (SUP. R.R. dated September 16, 1985).

Albeit, and as an incident to his findings as to Count I (the addition of Vernell's name as payee), the Referee recommended that Vernell receive a public reprimand and that costs in the amount of $4,302.96 be taxed against him.

From such Report(s), the Bar filed its Petition for Review seeking review of the Referee's recommendation as to Counts II and III as well as the disciplinary action recommended by the Referee.

Respondent, Vernell, thereupon filed his own Cross-Petition for Review seeking review of the Referee's recommendation as to Count I and the consequent recommendation of any disciplinary action as against him.

From such course of proceedings, the within cause is thus presented to this Honorable Court for its respective consideration and determination.

2- Statement of the Facts

Significantly no where in either the Bar's "Statement of the Case" or in its "Statement of the Facts" (Bar Brief, pgs. 1-7) is there any reference whatsoever to the statements of any of the five (5) witnesses whose testimony was received at Trial of the cause.

Indeed, and although the Bar seeks review of the Referee's recommendations as to Counts II and III based upon its claim that his findings "are clearly erroneous", its entire "Argument" with respect thereto (Bar Brief, pgs. 7-17)

similarily fails to include or refer to any testimony whatsoever, save and except for one singular and somewhat irrelevant question and answer found on page 10 of its brief.

Accordingly, and inasmuch as the "Bar's Statement of the Facts" fails to appropriately and/or fully address itself to either the facts as presented, or the record as adduced, the Respondent feels impelled to restate the same, viz.____

At the outset, it is submitted as being undisputed that William Fahrenkopf was, in fact, the client and that he had become a paraplegic as a result of the alleged negligence of Jackson Memorial Hospital and others (Resp. Ex. 2, Tr. 101, 102, 135-143).

Although Mr. Fahrenkopf and Vernell had been friends for over 20 years and, on occasion, Vernell had represented him in various criminal matters, it was not until a day or two prior to the expiration of the Statute of Limitations that the first contact was had between them regarding the case (Tr. 140,141; RES. EX. 2; A.1).

Albeit, and because of the critical urgency of the situation, Vernell devoted his immediate and entire efforts and energy in filing a complaint within the limited time remaining.[6]

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6/ As noted, Sheldon Schlesinger, Esq. who later entered the case at Respondent's urging, characterized Vernell's efforts as follows:

(Excerpts from testimony of Sheldon Schlesinger)

* * *

Q. Mr. Vernell was the one that saved this case from banishment by reason of the running of the Statute of Limitations; was he not?

A. No question about that.

Q. Had he not filed this suit when he filed it, Mr. Fahrenkopf would never have recovered anything; is that correct?

A. No question about it.

(M.M. 10)

* * *

MS. GREENE: So Mr. Vernell filed the lawsuit before your firm was associated on the case?

THE WITNESS: Oh yes. What I am syaing to you is that he cranked the whole thing up.

If he didn't act the way he did under the circumstances, there would have been no lawsuit.

(M.M. 11)

* * *

MS. GREENE: I have a few questions. Do you know how much work Mr. Vernell did on this case? You mentioned that he went to the pretrial conference and that he attended the deposition.

THE WITNESS: He did more than that. He salvaged this case. If it wasn't for Lou Vernell, this case would have gone down the tubes.

MS. GREENE: Could you explain that?

THE WITNESS: He filed the initial complaint in the case. He recognized that he was hard up against the statute.

He broke into the Clerk's office, banging on the door to get the thing filed.

If it wasn't for Lou Vernell acting as expeditiously as he did under the circumstances, this man wouldn't have gotten a penny. The statute would have been blown.

Thereafter, he communicated with the client. He was with the client. He took the client's deposition when the cleint was deposed. Lou Vernell is an able trial lawyer.

(M.M. 11)

Albeit, and after filing the subject complaint, Vernell recommended to Mr. Fahrenkopf that the case could best be handled by a medical malpractice expert, i.e., Sheldon Schlesinger, who not only had been a friend of Vernell's for over 25 years, but who had also worked in his offices during their respective early careers as attorneys (TR. 142, RESP. EX. 2, pp. 1,2).

Following arrangements initiated by Vernell, Mr. Schlesinger undertook to represent Mr. Fahrenkopf and on June 24, 1981, Mr. Fahrenkopf and Mr. Schlesinger entered into, and executed, a "Retainer Agreement and Authority to Represent" (COMP. EX.; A.3).

As noted, prior to the execution of such retainer agreement, Vernell had neither requested, nor obtained any agreement or understanding whatsoever from Mr. Fahrenkopf regarding either fees or costs and, as evidenced, Vernell was solely motivated by a desire to aid a friend for over 20 years (T. 27,51).

With respect to the "Schlesinger" retainer agreement, the undisputed testimony evidenced that at no time did Vernell ever request, expect or anticipate receiving any part of the fee which Mr. Fahrenkopf agreed to pay Mr. Schlesinger under their agreement (TR. 28,29,30,46,48). To the contrary, it was not until AFTER Mr. Fahrenkopf's case was settled for the sum of One Million (1,000,000.00) Dollars that, for the first time, there was any discussion whatsoever

regarding a division of the Schlesinger fee, with such subject being brought up by Mr. Schlesinger, not Vernell, as reflected in the following colloquy with Mr. Schlesinger, viz.____

> "Q. Did you have any agreement with Mr. Vernell at that time as to a division of fees?
>
> A. No, sir.
>
> (S.D. p 23; COMP. EX. 1, p 23)
>
> * * *
>
> Q. He brought Mr. Fahrenkopf to your office because he felt that you were the type of fellow that was capable of handling this type of litigation and had experience in this field, is that correct?
>
> A. Yes, sir.
>
> Q. Did you have any agreement with Mr. Vernell as to any fees at that time?
>
> A. No, sir.
>
> Q. When was it that you first had any agreement with him as to any fees?
>
> A. The case was closed and we collected the money and we were going to dismiss. We stepped back with it, we looked at it. I thought that Mr. Vernell's contribution to the case, that the fact that he worked with it, the fact that he covered hearings, worked side by side and had done what I considered to be an excellent job, warranted an equal division of fees and Mr.

Vernell was satisfied with that and I was satisfied with it."

(S.D. pp. 23,24; COMPL EX. 1 pp. 23,24)

In any event, and following the execution of the "Schlesinger" retainer agreement, Mr. Fahrenkopf felt concern and apprehension that Vernell may have abandoned him, especially since he had no prior relationship with Mr. Schlesinger and moreover, no less than two (2) other attorneys had previously rejected and/or failed to proceed with his claim (TR. 44, 139; RESP. EX. 2, p. 142).

Accordingly, and because of such concern and other considerations, Mr. Fahrenkopf insisted upon executing an agreement which would provide Vernell with an additional ten (10%) percent of any recovery which might be realized from his malpractice claim. In this regard, the undisputed testimony of Vernell reflected:

"Q. And you were going to get ten percent of the recovery. But for what? What services were you supposed to perform to merit the ten percent, to your understanding?

A. He wanted me to more or less communicate with him, to act as liaison, to keep him advised. If he had any questions concerning the case, he could call me.

It also was reflective of his appreciation for monies that I had advanced to him or gave to him and kindness I had shown.

The cases I had handled in the past for him --

Q. You had been paid for those, hadn't you?

> A. No, that is not correct. Mr. Fahrenkopf had indicated -- and I would like to feel that this is typical and marks my relationship with a friend, who I regarded as a friend, that I was always there when he needed me.
>
> That is what I think motivated the ten percent additional fee. He insisted on it. It was not me. That was his idea, not mine.
>
> (TR. pgs. 48-49)

Albeit, and as an incident to such insistence, Mr. Fahrenkopf, did, thereafter execute a letter/agreement on July 19, 1981 which specifically provided that in addition to the fees and costs payable under his agreement with Simons and Schlesinger, that Vernell would receive an extra and/or additional bonus payment of ten (10%) percent of the recovery (RESP. EX. 1; A.2). Indeed, the reason(s) for such agreement were underscored and are best illustrated in Mr. Fahrenkopf's own sworn statement, viz.

> "Following discussion and review of the medical records obtained by Mr. Vernell, and an examination of the complaint, Mr. Schlesinger agreed to represent me in the action. In furtherance of additional discussions had regarding the fee, I did execute a retainer agreement employing the firm of Simons and Schelsinger (Exhibit A attached) providing for 40% of the gross recovery for attorney's fees.
>
> Shortly thereafter, I became concerned that the fees which might be received by Mr. Vernell under the Schlesinger agreement would not be, in my mind, sufficient to adequately compensate him for both the legal

and moral obligations which I felt I owed to Mr. Vernell. In this regard, I considered the following matters.

(1) I would have had no claim and no possiblity of recovery without the prompt and diligent action of Mr. Vernell.

(2) During the twenty years of my relationship with Mr. Vernell, he represented me in various matters, either for nominal fees or without any compensation whatsoever.

(3) For almost nine months from the time Mr. Vernell first became acquainted with the case, he continually assisted me in my needs, i.e. - buying food, books and other items for my needs and comfort; arranging for my visits to the hospital; paying utility bills, advancing money to me and in my behalf, all without either an accounting or expectation of repayment.

(4) During such time, Mr. Vernell would frequently visit me both at my apartment and in the hospital. Additionally, I was able to frequently speak with Mr. Vernell and his family on the telephone - both with respect to the case and on a friendly vein, designed to keep my spirits up.

(5) Further, Mr. Vernell and members of his family would visit me on Holidays and on one Thanksgiving, Mr. Vernell took me to his home to spend the day and have Thanksgiving dinner with his family.

(6) Mr. Vernell personally laid out the monies to file the suit, obtain medical records, costs and other sums in my behalf.

> For these and other reasons, I decided that I would like to additionally compensate and otherwise repay Mr. Vernell for his extraordinary efforts, services and expenditures beyond the amount of the fees required under the Schlesinger agreement. Accordingly, and without any suggestion, influence or coercion on the part of Mr. Vernell, I advised him that I would like to reflect my gratitude and appreciation by paying to him an additional 10% of any recovery which might be obtained in my behalf."
>
> (RESP. EX. 2, pp. 2,3; A.1)

Significantly, and at the time such "bonus" agreement was executed by Mr. Fahrenkopf, in 1981, there was little prospect or expectation that the same would be meaningful or otherwise result in a successful recovery (TR. 51,52).

Fortunately, however, thru the joint efforts of Mr. Schlesinger and Vernell, Mr. Fahrenkopf's claim of malpractice was settled for the gross sum of One Million ($1,000,000.00) Dollars.[7]

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7/ In addition, and thru the "extra" efforts of Vernell, Mr. Fahrenkopf was later discharged and exonerated from any liability for unpaid medical expenses aggregating a sum in excess of $250,000.00 (TR. 151-153, RESP. EX. 5 and 6). As noted, Mr. Fahrenkopf's sworn statement specifically credits Vernell with such $250,000.00 added "bonus", i.e.:

> "Finally, negotiations for settlement appeared imminent and, after heated and exhaustive effort and discussion, it was agreed that my claims would be settled for $1,000,000.00. Although this amount was represented to be the maximum which would be paid, Mr. Vernell persisted in obtaining for me as additional benefits a complete "wipe out" and discharge of all of my medical expenses which approximated over $250,000.00. I personally credit Mr. Vernell

Thereafter, and as an incident to such settlment agreement, a check in the amount of $1,000,000.00 made payable jointly to Mr. Fahrenkopf, Mr. Schlesinger and Mr. Vernell was received, endorsed and thereupon deposited to the trust account of Mr. Schlesinger for clearance.

Upon clearance, Mr. Schlesinger then issued his check payable to Mr. Fahrenkopf in the gross sum of $582,900.98 representing the balance of the total settlement as received, less all costs, fees and expenses as included in a three (3) page closing statement prepared by Mr. Schlesinger (COMP. EX. 4; A.4). Following such preparation and issuance, both the check and closing statements were then given to Vernell late Friday afternoon, July 22, 1983, for presentment and delivery to Mr. Fahrenkopf.

In this regard, and in alluding to the precise areas of responsibility "entrusted" to Vernell concerning such check and closing statement, Mr. Schlesinger testified:

> "MR. SCHLESINGER: I didn't -- I gave Lou the documents and I gave Lou the check and I said, "Lou, please have our respective client execute the documents and make sure that they are signed before you turn this check over to him." And Lou did that."
>
> (M.M. 2)

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with obtaining such additional benefit for me (even after Mr. Schlesinger had completed the negotiations for settlement)."

Mr. Schlesinger went on to testify that he fully expected and anticipated that Vernell not only could, but would, make alternative arrangements for the negotiation and depositing of the subject check after giving the same to Mr. Fahrenkopf, i.e.____

> "MS. GREENE: At that point, you anticipated that Mr. Vernell would give the $582,000 check to Mr. Fahrenkopf?
>
> MR. SCHLESINGER: Or if not give it to him, make the arrangements for a depository and take care of some of the financial matters that sometimes you do for a client, depending upon what their condition is."
>
> (M.M. 2)

Moreover, and in zeroing in upon the very crux of the Bar's claim of material alteration and/or ethical violation, Mr. Schlesinger testified:

> "MR. SCHLESINGER:
>
> Q. Did the addition of Vernell's name as a payee in any way affect the validity of your check? Did it create any additional obligation on you as the maker?
>
> A. No. In my opinion, the obligation, as evidenced by the check, was in the form of a check."
>
> (S.D. p 35; COMPL. EX. 1, p 35)

Accordingly, and in keeping with Mr. Schlesinger's understanding and direction, Vernell, together with his wife and child, went to Mr. Fahrenkopf's residence early the next

day, i.e., Saturday, July 23, 1983, to deliver, and have executed, the check and documents as received from Mr. Schlesinger.

On such occasion, Mr. Fahrenkopf carefully reviewed the closing statement and specifically acknowledged his acceptance and approval of the same on each of the three (3) pages which comprised the same (COMPL. EX. 4; A.4).[8]

In addition to such closing statment, Vernell also delivered to Mr. Fahrenkopf Mr. Schlesinger's check in the amount of $582,900.98 which, pursuant to their respective agreement, was thereupon endorsed by Mr. Fahrenkopf for deposit to Vernell's Trust Account.

Thereupon, and in a simultaneous exchange of checks, Mr. Fahrenkopf delivered back to Vernell the Schlesinger check which he had already endorsed and, in exchange, received from Vernell his check dated July 23, 1983 in the amount of $482,900.98, made payable to "William Fahrenkopf", with such check bearing the specific legend:

> "IN FULL, NET PROCEEDS DUE ON ACCOUNT OF FAHRENKOPF vs. SUTTON, et al. AND JACKSON MEMORIAL, et al." (A.5)[9].

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8/ As noted, such statement reflected not only all costs and expenses incurred, but also a division of the attorney fees payable under the "Schlesinger" 6/24/81 retainer agreement, with Schlesinger dividing such fee equally with Vernell.

9/ As noted, the difference between the Schlesinger check of $582,900.98 and Vernell's check in the amount of $482,900.98 represented the exact amount (10% of the recovery) which Mr. Fahrenkopf had agreed to pay to Vernell under, and in accordance with, his written agreement of July 19, 1981 (RESP. EX. 1; A.2).

Albeit, and in anticipation of such exhange of checks and Vernell's receipt of a fully negotiable check bearing Mr. Fahrenkopf's endorsement, Vernell (as a matter of safety and precaution) added his own name as a co-payee thereon, for the singular purpose of restricting the negotiability thereof following Mr. Fahrenkopf's endorsement thereon (TR. 166-168; 177-182).

As noted, the addition of Vernell's name in no wise affected either the rights, liabilities or obligation of Mr. Schlesinger, as the maker, nor of Mr. Fahrenkopf as the payee and, indeed, the precise amount which was required to be paid by Mr. Schlesinger ($582,900.98) was, in fact, paid and the precise amount which was required to be received by Mr. Fahrenkopf ($482,900.98) was, in fact, received by him.

The record in this regard evidences that every detail relating to such transaction, including the exchange of checks; the acceptance by Mr. Fahrenkopf of the net sum of $482,900.98 as full payment of all proceeds due him, as well as the addition of Vernell's name on the "Schlesinger" check were not only fully known to, and acknowledged by, Mr. Fahrenkopf, but the same were, in all respects, fully agreed to by him, as evidenced by Mr. Fahrenkopf's own sworn statement, i.e.,

> "Accordingly, on Saturday, July 23, 1982, Mr. Vernell, his wife, Janet and their six year old daughter, Kimberly, came to my apartment.

At such time, Mr. Vernell told me that Mr. Schlesinger insisted that I execute an accounting of costs and fees and to sign my written approval of the same. Fortunately, the costs were approximtaely $6,000.00 less than the original estimate which had been provided to me at the time I endorsed the $1,000,000.00 check.

I carefully examined the disbursement schedule which had been prepared by Mr. Schlesinger (Exhibit C) and signed all three pages of the same.

Mr. Vernell then presented me with two checks, i.e. - one in the amount of $582,900.98 issued by Mr. Schlesinger, and the other in the amount of $482,900.98 issued by Mr. Vernell. I was aware that in addition to my name, Mr. Vernell's name had been added to the larger check (issued by Mr. Schlesinger) and that the endorsements of both myself and Mr. Vernell would be necessary in order to secure payment of the check.

It was my understanding and agreement that such larger check ($582,900.98) was to be deposited in Mr. Vernell's Trust Account and that he would issue me a check for such amount less the sum of $100,000.00 in accordance with the Supplemental Fee Agreement of July 19, 1983.

Accordingly, and regardless of whether or not Mr. Vernell's name appeared or did not appear on the $582,900.98 check, it was my understanding and agreement that the same would in any event be deposited in Mr. Vernell's Trust Account and that he would issue me a check for the net amount of $482,900.98 from such account.

Although Mr. Vernell wanted to delay issuing the $482,900.98 check until

> after the larger check had cleared, I assured him that I would hold such check until the following Friday before depositing the same.
>
> Upon such assurance, Mr. Vernell signed and presented me with his check for $482,900.98 (Exhibit D) and, I thereupon endorsed and returned to Mr. Vernell, Mr. Schlesinger's check for $582,900.98 (Exhibit E).
>
> (RESP. EX. 2, pp. 4,5)

Albeit, and after such exchange of checks and the execution by Mr. Fahrenkopf of the closing statements, Mr. Fahrenkopf was both elated and pleased at the results obtained as well as the funds received by him (TR. 129,157, 158).

Unfortunately, however, the happiness then experienced by Mr. Fahrenkopf and his anticipation of a "new life" (with an electric wheelchair) was somewhat short lived, with the entry upon the scene of a Mr. Clifford Metcalfe, Mr. Fahrenkopf's long lost brother-in-law with whom he had not communicated for years.

In a somewhat concerted effort to "assist" Mr. Fahrenkopf in the handling of his newly found wealth, Mr. Metcalfe established an "investment trust" which presumably was to mature <u>after</u> the expiration of Mr. Fahrenkopf's limited life expectancy as a paraplegic.[10]

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[10]/ Mr. Fahrenkopf died in 1985 less than two (2) years after settlement.

In any event, and as incident to such "rediscovered" love and affection, Mr. Metcalfe assumed control of Mr. Fahrekopf's settlement proceeds. Thereupon, and as a result of Mr. Metcalfe's "management" of the "investment" fund, Mr. Fahrenkopf was forced to continue residing in the same squalor as he did before his settlement (TR. 110,118,119), as evidenced in the following testimony of Ronnie Martin, a friend of Mr. Farenkopf's for over 25 years, viz.

> "Q. Did you notice any difference in how Mr. Fahrenkopf lived before he got the money and after he got the money?
>
> A. The same. Exactly the same.
>
> Q. Could you tell in what kind of condition he lived?
>
> A. He was living in a federally subsidized housing apartment, paying about $60 a month. He had the same wheelchair that he had before. His apartment was the same. His clothes were the same. His bed was the same.

(TR. p 118)

The coincidence of Mr. Metcalfe's presence with Mr. Fahrenkopf's settlement proceeds is underscored in the fact that along with Mr. Metcalfe's advent on the scene, Mr. Fahrenkopf was instructed to stay away from not only Mr. Martin, but Vernell as well (TR. 60,108).

Indeed, and against such background, the undisputed evidence reflects that it was this same Mr. Metcalfe who not

only instigated false complaints and charges as against Vernell,[11] but who also caused the retention of Angel Castillo, Esq. of the law firm of Morgan, Lewis & Bockus to represent Mr. Fahrenkopf in proceedings against Vernell (TR. 82,83).

Albeit, and as a result of totally erroneous and/or incomplete information being furnished to him, Mr. Castillo (at the behest of Mr. Metcalfe) filed suit against Vernell. Altho such suit was ultimately settled, it was nonetheless deemed to be essential that some of the totally false statements and allegations instigated by Mr. Metcalfe be corrected and that the record be accordingly set straight.

Thereupon, a six (6) page affidavit together with five (5) annexed exhibits (RESP. EX. 2; A.1) was presented to Mr. Fahrenkopf for approval and execution by his own attorney Angel Castillo (TR. 79).

In detailing the procedure utilized in causing such affidavit to be executed, Mr. Castillo testified that he first sent the affidavit over to Mr. Fahrenkopf for his own review and examination; then a day or two later, he went to Mr. Fahrenkopf's apartment with a legal assistant, Susan Pigula, who was also a Notary Public (TR. 73). He then again reviewed the statement with Mr. Fahrenkopf and, after his

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11/ Among the false charges made by Mr. Metcalfe was his statement to Mr. Schlesinger that Vernell's check to Mr. Fahrenkopf had bounced for "insufficient funds" which "drove Mr. Schlesinger "straight up a wall" (COMPL. EX. 1, p 29; S.D. 29), with a similar report being made to Mr. Castillo (TR. 85).

approval of the same, Mr. Fahrenkopf then signed each of the six (6) pages of the affidavit, whereupon both Mr. Castillo and Ms. Pigula respectively witnessed and notarized Mr. Farenkopf's sworn statement (TR. 79).

It is submitted that such sworn statement, in its entirety, was received in evidence as RESP. EX. 2 and, for the convenience of the Court, the same is likewise included in its entirety in the accompanying Appendix (A.1)

Respectfully, and as may be noted from such detailed affidavit, the same not only serves to completely negate any inference of wrongdoing or impropriety on the part of Vernell, but additionally serves to contradict the earlier complaint instigated by Mr. Metcalfe which the Bar felt obliged to introduce as evidence in the cause.

In accordingly noting the inconsistences between the "Metcalfe" complaint and the subsequent sworn statement of Mr. Fahrenkopf, Mr. Castillo testified as follows:

> "Q. You had the same notary public with you at that time, didn't you?
>
> A. Correct.
>
> Q. And she took the acknowledgement of Mr. Fahrenkopf, that these were true and correct statements, did she not?
>
> A. Correct.
>
> Q. And he said that?
>
> A. Correct.

Q. Did you explain to Mr. Fahrenkopf that this affidavit was a statement that completely disavowed the allegations in the complaint that were verified?

A. I explained to him that there were inconsistencies and I didn't want him to sign it unless it was true."

(TR. 79)

* * *

"Q. Why would you let your client sign an affidavit that completely contradicted a former affidavit attached to a verified complaint?

A. During the course of the proceedings, we had obtained additional discovery and Mr. Fahrenkopf's own memory and his recollection of events had changed.

I told him that if that was the way he now remembered the facts better and if this statement was true, that he should sign it; otherwise, he should not."

(TR. 80,81)

Indeed, even the sworn statement of Mr. Farenkopf (RESP. EX. 2; A-1) reflects a determined effort on the part of Mr. Fahrenkopf to fully and accurately set forth the true facts of the situation and his relationship with Vernell, as evidenced in the following:

"My name is William Fahrenkopf and I presently reside at 1301 Northwest Seventh Street, Miami, Florida.

I am making the following statement freely and voluntarily in an effort to truthfully and accurately

> reflect my previous relationship with Louis Vernell, Esquire, and his handling and participation in a malpractice claim filed in my behalf in the Dade County Circuit Court, under Case No.: 80-20252 (CA 05), wherein Jackson Memorial Hospital and others were named as defendants.
>
> In this regard, I have since mid November, 1983, had the opportunity to review certain documents and to otherwise refresh my recollection in these and related matters. Accordingly, and in an effort to clarify and/or correct any misunderstandings or factual errors concerning such relationship and events, I herewith state as follows:
>
> (RES. EX. 2; A.1)

As noted, following such "preamble" Mr. Fahrenkopf thereupon related <u>in detail</u>, his entire relationship with Mr. Vernell. Accordingly, and as noted therefrom, not only did Mr. Fahrenkopf affirm, <u>upon oath</u>, his total satisfaction with Vernell's actions and conduct but, as further noted, even his then attorney, Mr. Castillo testified that Mr. Fahrenkopf continuously refused to pursue or participate in any grievance complaint against him, viz.____

> "Q. Did Mr. Fahrenkopf ever tell you that he wasn't interested in your pursuing any complaints against Mr. Vernell before the Florida Bar?
>
> A. <u>Mr. Fahrenkopf told me at all times that he did not want to pursue a complaint with the Florida Bar</u>."
>
> (TR. 93)

Albeit, and aside from Mr. Fahrenkopf's own sworn

statement (which served to fully exculpate Vernell from any onus of wrongdoing), the testimony of every other witness appearing in the cause, likewise demonstrated the total absence of any wrongful intent or improper action on the part of Vernell, e.g.____

The testimony of RONNIE MARTIN (TR. 101-119) demonstrated that he had been a close friend of Mr. Fahrenkopf since 1959 (TR. 101); that he was familiar with Mr. Fahrenkopf's accident and medical problems as well as all phases of the ensuing litigation (TR. 103-106); that he was likewise familiar with Mr. Fahrenkopf's agreement of July 19, 1981 which provided for the payment to Vernell of 10% of the gross recovery and that it was Mr. Fahrenkopf's intention at all times to live up to the same (TR. 107,108); that Mr. Fahrenkopf was fully satisfied with the amount of money received by him (TR. 109); that until Mr. Metcalfe "arrived on the scene", he would visit with Mr. Fahrenkopf "two and three times a week" (TR. 109); that before Mr. Fahrenkopf's settlement, nobody from his family ever saw or visited with him (TR. 111); that Mr. Fahrenkopf never indicated to him that "Mr. Vernell had done anything wrong with regard to his case" (TR. 112); and that all of the statements made by him in Exhibit F of Mr. Fahrenkopf's affidavit were true and correct (TR. 117,118).

The testimony of SHELDON SCHLESINGER is equally clear that he had no complaint or grievance as against

Vernell and that with respect to the addition of Vernell's name on his check, he specifically testified that the same did not in any way affect the validity of his check or create any additional obligation on his part (S.D. 35,36).

Indeed, Mr. Schlesinger's sole concern in the matter was related to his interest for Mr. Fahrenkopf and inasmuch as Mr. Fahrenkopf was completely satisfied with Vernell's actions and conduct, he likewise, was satisfied, viz.____

> "MR. SCHLESINGER: I want to make a satement.
>
> Lou Vernell is an excellent lawyer. He is an able trial lawyer. He is well schooled. He can represent a client in almost any area.
>
> If he has not harmed Mr. Fahrenkopf and if Mr. Fahrenkopf is satisfied with his representation and has no grievance against him I have no grievance against him.
>
> Had he not altered the check in the manner in which he did and simply had Mr. Fahrenkopf endorse it to Lou Vernell trust account and sign it in that form and he deposited it in his trust account, I wouldn't have gone up the wall the way that I did.
>
> I went to the Bar for a singular purpose and that was at the time to make sure that Mr. Fahrenkopf was protected.
>
> I want that for the record. I make no grievance. I don't know why he altered it, if it was bad judgment of what his thinking was under the circumstances.
>
> But if the client was not hurt, that's fine.

(M.M. 3,4)

The testimony of JANET VERNELL, Vernell's wife,

further served to corroborate the close personal relationship which existed with Mr. Fahrenkopf, i.e.____ "Bill had become almost part of the family . . ." (TR. 129); that her husband continually administered to the needs of Mr. Fahrenkopf and, thru extraordinary effort, he was successful in preventing the amputation of one Mr. Fahrenkopf's legs (TR. 132,133); that she was present on the occasion that Mr. Fahrenkopf had received and endorsed the check issued by Mr. Schlesinger (TR. 125,126); that Mr. Fahrenkopf endorsed Mr. Schlesinger's check and gave it back to Vernell who thereupon presented his own check to Mr. Fahrenkopf (TR. 123,124); that Mr. Fahrenkopf was "happy" and "elated" on such occasion (TR. 127).

Albeit, and aside from the testimony of each of such witnesses, the additional testimony of Vernell (TR. 27-66, 136-182) otherwise and further fully served to dispel any doubts relaring to either the bona fidees of his intentions and/or the propriety of his actions and conduct in the cause.

Accordingly, and upon the testimony and evidence as adduced in the cause, the Respondent submits that the Bar's Complaint, and each Count thereof, are without substance or merit, either in fact or in law.

## ARGUMENT

I. THE REFEREE ERRED IN FINDING AS A MATTER OF LAW THAT THE ADDITION OF VERNELL'S NAME ON THE "SCHLESINGER" CHECK WAS IMPROPER AND/OR IN VIOLATION OF DISCIPLINARY RULE 1-102(A)(4) AND (6) OF THE CODE OF PROFESSIONAL RESPONSIBILITY AND INTEGRATION RULE 11.02(4).

In considering the within issue, it is respectfully submitted that under applicable law, the mere addition of Vernell's name as a payee on the "Schlesinger" check does not, per se, constitute either a material alteration or a violation of the Professional Code of Ethics.

In this regard, the attention of this Honorable Court is respectfully directed to the fact that, notwithstanding such addition, BOTH Mr. Fahrenkopf as well as Vernell duly and properly endorsed such check prior to its "agreed" deposit to Vernell's Trust Account.

As noted, absolutely no harm, prejudice or damage resulted to either the maker of such check, Sheldon Schlesinger, or to the payee, William Fahrenkopf. Moreover, no benefit or advantage whatsoever was derived by Vernell in adding his name as a payee on the subject check.

In accordingly considering any possible benefit to Vernell, it is significant to note that the Referee felt impelled to make the following specific finding:

> "The Referee must emphasize that while the Respondent was found to be guilty as to Count I, the client received all funds due him in this matter by the Respondent, as set forth in the client, Mr. Fahrenkopf's voluntary statement

> under oath, dated January 3, 1984, marked Respondent's Exhibit No. 2, and further, Mr. Sheldon Schlesinger, Esq., the co-attorney for Mr. Fahrenkopf, has no grievance against the Respondent, Mr. Vernell, in that Mr. Fahrenkopf, the client, received the funds due him and was satisfied."
>
> (SUPP. R.R. 1)

Certainly, had the situation been reversed and, in lieu of Vernell adding his name, he had, instead, struck the name of one or more payees from the check, then it could well be said that such actions could not possibly be countenanced nor condoned. Here, however, the converse was true, and certainly, it cannot reasonably be contended that the simple and "innocent intending" act of adding his name as a co-payee on the "Schlesinger" check, followed by his endorsement and that of Mr. Fahrenkopf could possibly result in, or constitute a violation of the Code of Professional Ethics.

Albeit, and aside from the total absence of any ethical violation, it is submitted that under applicable law, the mere addition by Vernell of his name to the "Schlesinger" check could not otherwise constitute a "material alteration of a negotiable instrument" as charged in Count I of the Bar's Complaint.

The law in this regard appears to be aptly expressed in Thomas v. Osborn, 13 Wash.App. 371, 1975, 53C Pac. 228, where the Court considered whether additions made to a negotiable note constituted a material alteration. In rejecting

such claim, the Court specifically noted that not only was there no change in the rights of the parties, there was (as in the case at bar) "no attempt to acquire for the payee any funds to which he is not entitled", i.e. ____

> "The second contention of the defendant-makers is that the addition to the note was a fraudulent and material alteration under the statute. In order for an alteration to discharge a party from liability on a note, it must have been (1) a material alteration, and (2) fraudulent...."
>
> "...The comment to RCW 62A, 3-407 says on the subject of materiality:
>
> > Any alteration is material only as it may change the contract of a party to the instrument; and the addition or deletion of words which do not in any way affect the contract of any previous signer is not material. But any change in the contract of a party, however slight, is a material alteration; and the addition of one cent to the amount payable, or an advance of one day in the date of payment, will operate as a discharge if it is fraudulent."
>
> "...We conclude that neither the recording of the instrument nor the addition of the addendum to the instrument changed the relationship of the parties, materially affected the form of the document, the time of payment, or the sum payable. The alteration did not attempt to acquire for the payee any funds to which he was not entitled."
>
> (Id. at p. 12)

In Holliday v. Anderson, 428 S.W.2d 479, the Court

considered the effect of physically changing a note by adding the words "on demand" in the space where the date for payment had been left blank and by further adding the word "at" to specify a place for payment.

As in the case at bar, the Court in Holliday noted that "the rights of a subsequent holder are not involved in this case", and specifically held:

> "...Even if the instrument was physically changed, consequently, there is no alteration in rights or obligation concerning time of payment. They are the same in legal effect with or without the added words. The defense of material alteration is not supportable."

The principle in this regard was otherwise stated in Central State Bank v. Powar & Ferraioli Enterprises, Ltd., 395 NYS.2d 328 as follows:

> "[1] The argument that the change of the place of payment is a material alteration and, therefore, is one that would discharge the maker of the note from any liability thereunder, is untenable under the provisions of Section 3-407 of the Uniform Commerical Code. This section provides that in order for an alteration to discharge a maker, it must be both material and fraudulent. O'Brien, Inc. and Hellen M. O'Brien do not allege that the note was fraudulently indorsed by P & F to its bank, or that P & F had no legal right to negotiate the note."
>
> (Id. at p. 329)

In Midway National Bank of St. Paul v. Ray, 395 N.W.2d 644 the Court considered the pertinent portions of the

U.C.C. relating to material alterations and held as follows:

> "[2] Unless an alteration is both material and fraudulent, it does not discharge the signer. Hannah v. State Bank, 195 Minn. 54, 261 N.W. 583 (1935) (good faith correction of mistake in chattel mortgage - no cancellation of instrument); Spiering v. Spiering, 138 Minn. 119, 164 N.W. 583 (1917) (good faith correction of the amount stated in note - no discharge of maker).
>
> Any alteration is material only as it may change the contract of a party to the instrument;"

The Court went on to hold:

> "[4,5] Since the parties agreed to a varying interest rate, the handwritten notations on the note are not material alterations. They did not change the parties agreement and were not made with an intent to defraud. Under these circumstances, appellant's obligation to repay the note was not discharged. See Spiering, 138 Minn. at 120-21, 164 N.W. at 583."

As noted, the same code provision relating to material alteration was considered by the Court in Curtis v. First National Bank of Commerce, 280 S.E.2d 404, where the Court held:

> "[6] As against one not a holder in due course, for a party to be totally discharged by virtue of an alteration of an instrument subsequent to his signing, four criteria must be met: 1) it must change his contract, 2) it must be significant or material, 3) it must be fraudulently made, and 4) it must be made by the holder. 2 Bender's

> U.C.C. Service 12-99, § 12, 25[1], Commerical Paper. It is therefore clear that we must first determine whether the contract was changed insofar as the defendant is concerned and whether such change was significant or material - for the alteration must be both material and fraudulent in order to discharge the defendant.

Significantly, in Katski v. Boehn, 241 A2d 129, the Court considered the effect of striking out the name of one of the payees by another co-payee on four (4) different checks which were thereafter negotiated and deposited. The Court in such instance determined that the same was neither fraudulent nor material since such alteration(s) did not affect the obligations of either the maker or the endorsers.

As noted, the addition of Vernell's name as a payee could not possibly result in any professional violation, especially where none of the parties to the instrument were prejudiced or damaged in any way. Likewise, and under the facts in the case sub judice, there certainly was no criminal violation which could be attributed to Vernell's actions as was, almost incredulously, claimed by the Bar during hearing had in the cause.

In this regard, the Court in People v. Miller, 434 NYS.2d 33 considered whether adding names of additional payees to money orders constituted such a criminal violation. In such case, both the Court and "the People" agreed that it did not.

Moreover, and as an additional matter, this Honorable Court is specifically directed to Vernell's testimony wherein he stated that his sole intent in adding his name as payee was for purposes of safety and precaution and to otherwise prevent any possible injury or damage which might result from either the theft or loss of a check of such magnitude ($582,900.98), especially where: (1) upon, and as an incident to, Mr. Fahrenkopf endorsing the same, such check would thereupon become immediately negotiable and capable of being cashed by anyone holding or coming into possession of the same; (2) such check could not possibly be deposited for at least two (2) days after Mr. Fahrenkopf would have endorsed the same, i.e.____ from Saturday, July 23, 1983 to Monday, July 25, 1983; (3) even if a restructive endorsement would have been placed upon the check, the same could not have prevented an unauthorized negotiation and/or cashing of the check (see City of Deerfield Beach v. Florida National Bank of Palm Beach County, infra); and (4) except for adding his name as a co-payee on the check, there was no other way (in Vernell's judgment and opinion) that the check could be totally protected from unauthorized negotiation following Mr. Fahrenkopf's endorsement thereon.

In this regard, it was Vernell's stated position that he felt such added protection was especially necessary in the face of the extraordinary circumstances then present (TR. 177-182).

Clearly, and as noted, in City of Deerfield Beach v. Florida National Bank of Palm Beach County, 428 So.2d 779 (Fla.App. 4 Dist. 1983) such judgment and opinion of Vernell, supra, was fully supported and sustained, viz.____

In the Deerfield Beach case, suit was brought against the Florida National Bank for paying proceeds on a check upon which a restrictive endorsement had previously been placed, but later stricken by the payee. The Court totally rejected such claim, holding:

> "On the merits of this appeal, appellant presents no authority to support a cause of action by a payor against banks which accept and pay checks after a payee crosses out restrictive language by the payor and adds reservation of rights language in an attempt to avoid an accord and satisfaction. We see no reason to require banks to scrutinize any check for payor language intended to operate as an accord and satisfaction, compromise or release and then monitor any changes made by the payee in avoidance. Appellant would require banks to determine contractual relationships between payor and payee which are totally outside the contract of the check itself. Such a requirement "would be destructive and an unjustified impediment to the flow of commerce."

It is accordingly and respectfully submitted that upon a consideration of the foregoing, there is no basis either in fact or in law, to support a finding that the actions of Vernell in adding his name as a co-payee on the "Schlesinger" check constituted either a "material alteration

of a negotiable instrument" or a violation of the Professional Code of Ethics.

Albeit, and notwithstanding that the findings of a Referee are presumed to be correct and should not be disturbed unless clearly erroneous, it is submitted that such principle of law relates solely to evidentiary matters and considerations. In the case sub judice, there never was any dispute as to the fact that the addition was made . . . the sole issue was, and still is, whether the same constitutes improper or unlawful conduct as a matter of law.

It is accordingly and fervently prayed that this Honorable Court will find and determine that the subject addition does not, under applicable law, constitute improper or wrongful conduct to an extent as to warrant disciplinary action.

## ARGUMENT

II. WHERE THE BAR WHOLLY FAILS TO DEMONSTRATE FROM THE EVDIENCE ADDUCED AND/OR THE RECORD IN THE CAUSE THAT THE REFEREE ERRED IN FINDING VERNELL NOT GUILTY AS TO COUNTS II AND III OF THE BAR'S COMPLAINT, SUCH FINDINGS AND RECOMMENDATIONS OF THE REFEREE WITH RESPECT THERETO SHOULD BE SUSTAINED.

Needless to state, and under applicable rule and law, the absolute burden to show that the Referee erred as to Counts II and III is upon the Bar.

In this regard, Florida Bar Integration Rule 11.09(3)(e) specifically prescribes:

> "Burden. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified."

In accordingly applying such Rule to the case at Bar, it is submitted that the Bar has not only failed to sustain such absolute burden, but that its arguments are not at all supportive of its Petition for Review.

In this regard, it is significant to note that except for <u>one</u> singular question and answer found on page 10 of its Brief, the Bar has otherwise totally failed to refer or otherwise relate its argument to <u>any</u> of the testimonial evidence as adduced at Trial of the cause.

Needless to state, in considering that the Trial transcript comprises approximately 200 pages of testimony (including the Schlesinger deposition) it is hardly conceivable that the Bar could, in good faith, suggest that it

has even remotely sustained its burden of establishing that the findings of the Referee, with respect to Counts II and III "are clearly erroneous or without support in evidence" as mandated by Florida law, The Florida Bar v McCain, 1978, 361 So.2d 800; The Florida Bar, 1975, 323 So.2d 257; The Florida Bar v. Baron, 1981, 392 So.2d 1318.

Moreover, and in further considering the Bar's arguments with respect to Counts II and III (Bar Brief, pages 7-12) it is especially significant to note that, in addition to the total absence of any factual basis to support its position, the Bar's arguments, also fail to demonstrate any legal or case authority to support its claim that the Referee's findings are erroneous.

Certainly, and upon a consideration of the evidence adduced and the record proper, it cannot reasonably be contended that the Referee's findings herein, as to Counts II and III are either "clearly erroneous" or that the same "are lacking in evidentiary support".

Accordingly, and upon the foregoing, the Respondent prays that this Honorable Court will dismiss and otherwise deny the Bar's Petition for Review with respect to Counts II and III.

## ARGUMENT

III. THE RECORD AFFIRMATIVELY DEMONSTRATES THAT THE ACTIONS AND CONDUCT OF VERNELL IN THE CASE SUB JUDICE DO NOT WARRANT OR JUSTIFY THE IMPOSITION OF ANY DISCIPLINARY ACTION OR PENALTY.

In considering the within issue, it is deemed to be incredulous that, upon the facts and circumstances as presented herein, the Bar could possibly suggest or move for Vernell's disbarment.

Interesting enough, such suggestion was made by Bar counsel to the Referee at hearing held September 12,1985 at which time the Referee totally rejected any possibly basis or rationale for such severe penalty.

As noted, the Referee responded to the Bar's suggestion of disbarment as follows:

> "THE REFEREE: Let me say this, gentlemen. I'm going to read through these items.
>
> But I will state for the record, on the case that I have heard, I couldn't in good conscience recommend that he be disbarred.
>
> Within the guidelines, I will read through the other items here and decide what recommendation I want to make and I will take into consideration the cumulation. But in listening to this case -- and like many cases, maybe I only heard the tip of the iceberg. I don't know.
>
> But the proof that is in front of me is, in my opinion -- and I don't know whether Mr. Vernell is good, bad or indifferent up to this point.
>
> His violation, as I found it, was that he should not have typed his name on that check. That's

really what he should have not done."

(TR. 2, p. 16,17)

As noted, Vernell has been a member of the Florida Bar since June, 1951 (a period of 35 years).

Although Vernell concedes the presence of prior disciplinary action, it is suggested that the last event which occasioned the same, occurred in the year 1971, or approximately 15 years prior to this date.

Significantly, the Referee, in the case sub judice, fully considered not only the Bar's charges in the case at Bar, but also the entire history of disciplinary action as proferred by the Bar at "sentencing hearing".

In accordingly finding from the totality of the evidence and arguments as presented, that Vernell should receive a public reprimand, the Bar has clearly not sustained its burden of demonstrating error on the part of the Referee with respect to such recommendation.

It is accordingly, and humbly submitted that upon the record herein, the Bar's Petition for Review with respect to the Referee's recommendation of public reprimand should be denied.

## CONCLUSION

The Respondent respectfully submits that the Referee's findings of not guilty as to Counts II and III are eminently correct and fully supported in the evidence presented.

Albeit, and with respect to Count I, it is submitted that there is no evidence demonstrating any fraudulent purpose or intent on the part of Respondent in causing his name to be added as co-payee on the "Schlesinger" check, nor is there any evidence to suggest that such addition impaired, altered or, in any wise, changed any of the rights or obligations of either the maker, Sheldon Schlesinger, or the payee, William Fahrenkopf.

Inasmuch as the clear finding of the Referee demonstrates that Mr. Fahrenkopf did, in fact, receive all of the funds to which he was entitled, it is submitted that Respondent neither intended to, nor did he, in fact, violate any Disciplinary Rule or Code of Professional Ethics or Conduct.

The Respondent accordingly and respectfully prays that this Honorable Court will grant his Cross-Petition for Review and dismiss all counts as contained in the Bar's Complaint with prejudice.

Respectfully submitted,

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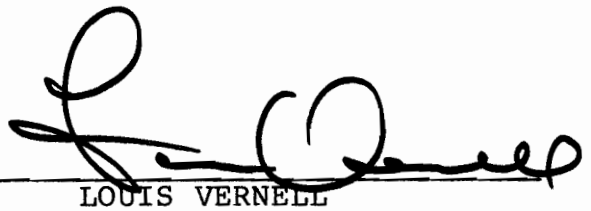
BY 
LOUIS VERNELL

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has this 17th day of February, 1986 been mailed to Thomas Edward Backmeyer, Co-Bar Counsel, Concord Building, Suite 810, 66 West Flagler Street, Miami, Florida 33130; Patricia S. Etkin, Bar Counsel, The Florida Bar, Suite 211, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131; John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida 32301-8226 and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226.


LOUIS VERNELL