IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 8 1987
CLERK, SUPREME COURT
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THE FLORIDA BAR,	)	
Complainant,	)	Supreme Court Case No. 67,528
v.	)	
ARTHUR NEWMAN,	)	
Respondent.	)	

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

ANSWER BRIEF OF COMPLAINANT

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STATEMENT OF THE CASE

These disciplinary proceedings commenced on August 22, 1985 with the filing of a nine-count complaint by The Florida Bar against Respondent. [1/]

On September 11, 1985 the Supreme Court assigned a referee to hear this matter. On October 14, 1985 The Florida Bar sent notice scheduling this matter for final hearing before the referee on December 6, 1985.

On November 26, 1985 the referee entered an order of recusal and referred this matter to the Supreme Court for reassignment. The recusal of the referee was initiated at the request or suggestion of Respondent's counsel.[2/] On December 4, 1985 the Supreme Court assigned a second referee to hear this matter.

On December 6, 1985, The Florida Bar appeared before the second referee prepared to proceed with the final hearing, as originally scheduled. At that hearing

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1/ Respondent's brief refers to proceedings initiated by The Florida Bar seeking Respondent's temporary suspension (RB 3), The filing of a petition for temporary suspension is unrelated to these disciplinary proceedings, and has not been referred to this, or any other referee. Since the proceedings for a temporary suspension are not part of the record of these disciplinary proceedings, Respondent's reference to it is improper.

2/ See letter directed to Sid White from Respondent's counsel, dated December 9, 1985, wherein counsel suggests all Broward County Court Judges should be recused.

Respondent's Counsel moved to recuse the second referee. An order of recusal and request for reassignment to another referee was entered by the second referee on December 6, 1985.

On December 10, 1985 the Supreme Court entered an order terminating the appointment of the first two referees and assigned this case to the third referee, Leroy H. Moe (hereinafter referred to as "Referee").

On December 16, 1985 The Florida Bar sent notice scheduling this matter for final hearing before the Referee on January 24, 1986. Final Hearings were held January 24, 1986, March 20, 1986, March 21, 1986, June 19, 1986, June 20, 1986 and July 26, 1986.[3/]

These disciplinary proceedings concluded on July 26, 1986 at which time, the Referee announced that he found Respondent guilty, by clear and convincing evidence, of the allegations and violations set forth in each of the nine counts of the Complaint (TR 701). Following pronouncement of guilt, the Referee heard argument on discipline as well as testimony and evidence pertaining to mitigation.

[3/] The transcript of proceedings before the Referee incorporates six volumes, pages of which are consecutively numbered: Volume I reflects proceedings held January 24, 1986; Volume II reflects proceedings held March 20, 1986 (incorrectly stated on the cover page as March 21, 1986); Volume III reflects proceedings held March 21, 1986 (incorrectly stated on the cover page as March 22, 1986); Volume IV reflects proceedings held June 19, 1986); Volume V reflects proceedings held June 20, 1986; Volume VI reflects proceedings held July 26, 1986 (incorrectly identified on the cover page as a second Volume V).

On August 14, 1986 The Florida Bar forwarded to the Referee and Respondent's counsel a proposed Report of Referee, together with an affidavit of costs. On September 22, 1986 The Florida Bar filed a supplemental Cost Affidavit to include the court reporter's final bill. Respondent's counsel did not file an objection to either the proposed Report of Referee or the cost affidavits.

The Report of Referee, dated December 5, 1986, recommending Respondent's disbarment was received by The Florida Bar on December 10, 1986 together with a letter from the Referee requesting that the Bar retrieve the record from the Referee's office. The Florida Bar promptly obtained the record from the Referee's office and transmitted it to the Supreme Court.

The Report of Referee was considered and approved by the Board of Governors of The Florida Bar at its meeting held January 14 through January 17, 1987.[4/]

[4/] By letter from The Florida Bar dated December 12, 1986 the Bar notified the Supreme Court and Respondent's counsel that the Referee's report would be presented to the Board of Governors at its meeting scheduled for January 14 through 17, 1987. On January 13, 1987, one-day before the scheduled meeting of the Board of Governors, The Florida Bar received from Respondent's counsel a document styled Exceptions to Report of Referee (RB 4, footnote 3). This document was not filed with either the Supreme Court or the Referee and accordingly is not part of the record of these proceedings. Since the document submitted to the Board of Governors is not part of the record of the proceedings which is the subject of this review, Respondent's reference to it is improper.

Respondent seeks review of the Report of Referee recommending disbarment and contests both the Referee's findings of guilt and recommendation of discipline.

The Florida Bar recommends approval of the Report of Referee pursuant to which The Florida Bar seeks entry of an order disbarring Respondent.[5/]

5/ The Referee's report does not specify the minimum period of disbarment. Pursuant to Rule 3-5.1(f), Rules of Discipline, disbarment is for a minimum of five years after the date of disbarment.

STATEMENT OF THE FACTS

The complaint filed by The Florida Bar against Respondent alleges numerous disciplinary rule violations.

Count I of the Complaint involves the issue of trust accounting procedures and records and is based upon an audit of Respondent's trust accounts between the period January 1981 and May 31, 1984. The audit reflects that Respondent failed to adhere to the required minimum trust accounting procedures and failed to maintain complete trust account records, to wit: that Respondent commingled his funds with funds belonging to clients; failed to preserve all required trust account records; failed to clearly and expressly reflect the source and reason for all receipts and disbursements of trust funds; failed to maintain a file or ledger containing an accounting for each person from whom or for whom trust money was received; failed to prepare and/or preserve quarterly trust account balance reconciliations; and that Respondent's records contained unidentifiable deposits and withdrawals.

Count I of the Complaint alleges that Respondent's actions in connection with his trust accounting procedures and records constitute a violation of Disciplinary Rules 9-102(A) and 9-102(B)(3) of the Code of Professional

Responsibility and article XI, Rule 11.02(4), Integration Rule of The Florida Bar.

Count II of the Complaint is also based upon the audit of Respondent's trust account but is directed to the issue of Respondent's handling of trust funds. The audit reflects evidence of improper handling of trust funds, to wit: seventy-five (75) instances in which Respondent's trust account checks were issued against insufficient funds which created overdrafts in his trust accounts; twenty-one (21) instances in which Respondent's trust accounts were dishonored by his bank; shortages in the trust account resulting from trust account liabilities exceeding trust account assets; misappropriation by Respondent in utilizing client's funds for the benefit of persons other than the particular client from whom or for whom the funds were received, including other clients and himself.

Count II of the Complaint alleges that Respondent's improper handling of trust funds constitutes a violation of article XI, Rule 11.02(4), Integration Rule of The Florida Bar.

In support of its allegations involving Counts I and II of the Complaint, The Florida Bar presented the testimony of the Staff Auditor (TR 188-283, 297-307) through which documentary evidence to substantiate the audit was introduced into evidence. This evidence included the working papers

prepared by Respondent's accountants pertaining to their review of Respondent's trust accounts (EX 33-55); the Staff Auditor's working papers involving trust account reconciliations (EX 56), trust account balance analysis (EX 57-61), summaries reflecting trust account shortages or overages (EX 62), chronological analysis reflecting the book balances (EX 63-66), analysis of total bank transactions (EX 68-72); schedule of returned checks (EX 73); and the auditor's report dated September 14, 1984, (EX 67, and attached hereto as APP A)

In addition, The Florida Bar introduced the testimony of attorney WITHERS (EX 30) pertaining to a particular real estate transaction wherein Respondent represented the purchasers of property and WITHERS represented the seller. WITHERS' testimony is relevant to Respondent's handling of funds entrusted to him by his client for transmittal to WITHERS and the issuance of his trust account check which was dishonored (EX 31).

Respondent did not present testimony of any expert witness to refute the testimony of the Staff Auditor. In fact Respondent's counsel commented that Respondent's accountant whose working papers were submitted to the Bar "wasn't capable of addressing the issues" (TR 486). During the final hearing, Respondent's counsel sought a continuance to allow a second accountant an opportunity to analyze

Respondent's trust account. Respondent's request for a continuance was denied (TR 486, 487). In support of Respondent's request to continue the hearing, WARD, Respondent's second accountant, testified that he had been retained three weeks earlier for the purpose of reconstructing Respondent's trust account record. (TR 473). WARD did not refute the auditor's findings; his testimony was directed only to the procedure he would utilize to reconstruct the records and the time necessary for his review (TR 476-478).

Five of Respondent's former clients testified in an effort to establish that Respondent had been authorized to use clients' funds: ABRAM (TR 283-286), FULCHER (TR 491-493), RICHARDSON (TR 532-536), COLLINS (TR 562-567), SAHEIM (TR 573-577). In addition, in an effort to explain the dishonor of one of Respondent's trust account checks, MORILLAS testified that certain of his checks that he had given to Respondent had been dishonored (TR 442). MORILLAS was not a client and gave Respondent these checks as a loan (TR 449).

Further, Respondent introduced into evidence the deposition of Willie C. Wimes, an employee to support Respondent's claims of forgery of trust account checks totalling $500 (TR 639) and theft of cash amounting to $4,100 (RES EX 7 at 14) which had been entrusted to him for

deposit into Respondent's bank account[6/]. WIMES is a convicted felon (RES EX 7 at 25) who was employed by Respondent for odd jobs including handling Respondent's banking, making deposits and withdrawals and cashing checks (RES EX 7 at 7.) Respondent represented WIMES in many criminal matters (TR 639). Count III of the Complaint involves the issuance of fifteen checks to the Clerk of the Court of Dade County which were dishonored by the bank. The Complaint alleges that Respondent's actions evidence a pattern of unethical conduct involving the issuance of worthless checks in violation of Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility and article XI, Rule 11.02(3)(a) of the Integration Rule of The Florida Bar.

As evidence in support of its allegation, The Florida Bar introduced the records of the Clerk of the Court of Dade County pertaining to Respondent's checks which were dishonored (EX 32).[7/]

Respondent did not produce testimony or evidence to refute the Bar's allegation as to Count III of the Bar's Complaint involving the issuance of worthless checks to the Clerk of the Court.

[6/] WIMES could not recall whether the cash given to him was for deposit into Respondent's trust account (RES EX 7 at 15).

[7/] The Florida Bar affirmed to the Referee the trust account check listed in the Clerk's records had been previously stricken. It was not a factual allegation set forth in the Bar's Complaint and was not the subject of this disciplinary proceeding (TR 186-187).

Count IV of the Complaint involves Respondent's representation of DIAZ, a client, in connection with a personal injury matter and specifically involves Respondent's handling of settlement proceeds. The Complaint alleges that Respondent received funds in connection with DIAZ'S settlement and was authorized to utilize the funds to pay Diaz's outstanding hospital bill and remit the balance to Diaz. Respondent failed to promptly pay DIAZ's outstanding hospital bill. As a result, civil action was brought against DIAZ by the hospital for the unpaid bill. Respondent failed to appear at the pre-trial conference in connection with the civil action which resulted in the entry of default judgment against DIAZ. Respondent failed to promptly satisfy the final judgment which adversely affected Diaz's credit. Respondent satisfied the final judgment 4 1/2 years after he had been entrusted with the funds and only after DIAZ filed a Complaint with the Bar.

Count IV of the Complaint alleges that Respondent's failure to promptly and properly disburse DIAZ'S funds constitutes a violation of Disciplinary Rules 6-101(A)(3) and 9-102(B)(4) and 7-101(A)(1) of the Code of Professional Responsibility.

Count V of the Complaint alleges Respondent misappropriated the funds entrusted to him by DIAZ for payment of her hospital bill in violation of article XI, Rule 11.02(4) Integration Rule of The Florida Bar.

In support of the allegations set forth in Counts IV, V and VI of the Complaint, The Florida Bar presented the testimony of DIAZ (TR 22-43) and her brother, GARCIA (TR 54-60) to establish that Respondent was entrusted with the funds to pay DIAZ's hospital bills and was not authorized to use the funds for any other purpose. Their testimony involved their communications with Respondent as well as the consequences Respondent's actions had upon DIAZ.

In addition, HAYES, Bar Staff Investigator, testified as to his review of Respondent's trust account as it pertains to Respondent's handling of DIAZ's settlement proceeds (TR 66-80).

Neither Respondent nor any witness testified on Respondent's behalf to refute the Bar's allegations set forth in Counts IV and V of the Complaint, including the allegation Respondent had not been authorized by DIAZ to utilize the funds entrusted to him for any purpose other than payment of DIAZ's hospital bill. In fact, in his opening statement Respondent's counsel admits all the Bar's allegations relating to DIAZ with the exception of misappropriation, although neither Respondent nor any other witness testified to refute the Bar's claim of misappropriation. (TR 18-19).

Count VI of the Complaint alleges that Respondent failed to truthfully disclose to DIAZ her legal position,

misrepresented to the court in his motion to vacate the default entered in the civil action that payment had been made and misrepresented to The Florida Bar in his response that he has been holding the funds and merely forgot to make the payment. The Complaint alleges that Respondent's misrepresentations in connection with DIAZ constitute a violation of Disciplinary Rules 1-102(A)(4), 1-102(A)(6), 7-102(A)(5) of the Code of Professional Responsibility.

Count VII of the Complaint involves Respondent's handling of funds, a portion of which was to be utilized in connection with a bond on behalf of his client, Joseph Mills. The funds were transferred to Respondent by Western Union. Respondent failed to deposit into his trust account the funds for the bond and, in fact, utilized these funds for other unauthorized purposes.

Count VII of the Complaint alleges that Respondent's handling of funds entrusted to him for his client's bond constitutes a violation of Disciplinary Rules 9-102(A) of the Code of Professional Responsibility and article XI, Rule 11.02(4) of the Integration Rule of The Florida Bar.

In support of Counts VII of the Complaint, the testimony of Joseph M. Mills' wife, Nancee Kay Undem, before the grievance committee was introduced to establish that funds were transferred to Respondent to be used in connection with the bond (EX 22).

Count VIII of the Complaint involves an allegation that Respondent issued a check to the bondsman in connection with the bond he obtained on behalf of Mills. Respondent's check was dishonored for insufficient funds. Respondent thereafter redeemed the dishonored check by issuing a check from his trust account which was drawn on funds entrusted to Respondent on behalf of other clients. Respondent's use of other client's funds to redeem the dishonored check constitutes a misappropriation of trust funds.

Count VIII of the Complaint alleges that Respondent's actions of issuing a worthless check to the bondsman, failing to utilize funds entrusted to him for a bond for its intended purpose and misappropriating other clients' funds to redeem the dishonored check constitute a violation of Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility and article XI, rules 11.02(3)(a) and 11.02(4) of the Integration Rule of The Florida Bar.

Count IX of the Complaint involves an allegation that Respondent misrepresented to the bondsman and The Florida Bar the circumstances surrounding his receipt of funds in connection with the bond and the circumstances surrounding the issuance of Respondent's checks.

Count IX of the Complaint alleges Respondent's misrepresentations to the bondsman and The Florida Bar constitute a violation of Disciplinary Rules 1-102(A)(4) and

1-102(A)(6) of the Code of Professional Responsibility.

In support of Counts VIII and IX of the Complaint, SLATKO, the bail bondsman, testified as to the circumstances surrounding his receipt of Respondent's checks. The money order sent to Respondent was paid to him in cash (EX pg 23). The Staff Auditor testified that Respondent's trust account records do not reflect a deposit on behalf of Joseph Mills (TR 303).

Respondent did not present testimony of witnesses or any evidence to refute the Bar's allegations set forth in Counts VII, VIII, and IX of the Bar's Complaint.

Considering the testimony and evidence the Referee found Respondent guilty of the factual allegations and disciplinary rule violations set forth in each of the nine counts of the Bar's Complaint.

SUMMARY OF THE ARGUMENT

The Referee found clear and convincing evidence of Respondent's guilt as to the factual allegations set forth in each of the nine counts of the Complaint filed by The Florida Bar. The Referee further found that Respondent's misconduct involved a variety of disciplinary violations and in some cases multiple instances of a particular violation.

Contrary to Respondent's protestation of innocence, he has been found guilty of serious misconduct relating to his trust account and specifically, misappropriation. As noted by the Referee, Respondent's misuse of his trust account involves "robbing Peter to pay Paul type stuff, kind of like a fancy trust fund account" (TR 650).

In addition, Respondent has been found guilty of misconduct involving misappropriation, issuing worthless checks, neglect of a legal matter, failure to promptly pay or deliver to the client the funds the client is entitled to receive, intentional failure to seek the lawful objectives of his client, knowingly making a false statement of fact, and conduct that adversely reflects on fitness to practice law.

The Referee's recommendation of disbarment is justified based solely upon the nature of Respondent's misconduct and without considering the character traits noted by the Referee involving defiance, denial and lack of responsi-

bility (TR 837-839) which Respondent prominently displayed throughout these proceedings.

Moreover, the time period involved in these disciplinary proceedings is reasonable considering Respondent's actions which began with furnishing The Florida Bar with misinformation in his initial responses and included requesting continuances even as late as the sixth and last of the final hearings. As noted by the Referee the Respondent plays with "delay, foot dragging, denial, refusal and defiance" (TR 837).

ISSUE I

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS WARRANTED

In order to respond to Respondent's argument that the Referee's recommendation of disbarment is unwarranted or unjustified, the actions of Respondent which are the basis for the recommended discipline must be clearly established.

The Florida Bar vehemently objects to Respondent's attempts to trivialize his misconduct by characterizing his actions as involving "poor judgment" in handling a small claims matter, failure to pay one medical bill on behalf of a client, and poor recordkeeping (RB 17).

Further, Respondent's representation that the "Referee specifically found that none of Respondent's clients failed to receive the monies timely due to them" is inaccurate and not supported by a specific reference to either the referee's report or the record of the proceedings. In fact, in making such misstatement Respondent ignores the Referee's findings which are specifically directed to the issue of misappropriation.

> Respondent's actions of utilizing trust funds for the benefit of persons other than the particular client from whom the money was received constitute misappropriation of funds.
>
> (RR 4)
>
> * * *
>
> Respondent misappropriated Diaz's trust funds
>
> (RR 8)

* * *

> Respondent's use of other clients' trust funds to pay the Mills' bond constitutes a misappropriation of clients' trust funds.
>
> (RR 10)

It is the Bar's position that disbarment is fully justified and warranted where it is based upon a referee's finding of misappropriation or misuse of client's funds. As stated by this Court in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979):

> misuse of clients' funds is one of the most serious offenses a lawyer can commit. . . . We give notice. . . . to the legal profession of this state that henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured.
>
> Id at 785.

Respondent cites Breed to support his position that discipline should be based upon reason and prior decisions involving similar misconduct and offers cases as authority to justify the imposition of discipline less severe than disbarment. However, many of the cases cited by Respondent as such authority do not involve a referee's finding of misappropriation of client funds, a factor which is present in the case sub judice: The Florida Bar v. Padrino, 500 So.2d, 525 (Fla. 1987); The Florida Bar v. Carter 12 FLW 102 (Case No. 66,266, Feb. 12, 1987) (improper supervision of

nonlawyer personnel in recordkeeping of an estate) [8/]; The Florida Bar v. Heston, (501 So.2d 597 (Fla. 1987); The Florida Bar v. Fitzgerald, (491 So.2d 547 (Fla. 1986) (misrepresentation, with mitigating factors cited); The Florida Bar v. Bryan, 396 So.2d, 783 (Fla. 1979) ("mis-management" of a client's funds as opposed to "actual misappropriation" mitigating factors cited); The Florida Bar v. Toothaker, 477 So.2d 551 (Fla. 1985) (neglect of a legal matter; breach of fiduciary duty as escrow agent by failing to disclose that his client's check entrusted to him as a deposit in a real estate transaction had been dishonored).

[8/] In his brief, Respondent has overlooked the referee's specific finding in Carter that the respondent be found not guilty of violating Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility (conduct involving fraud, dishonesty, deceit, or misrepresentation). The respondent in Carter was found guilty of failing to supervise his office personnel's recordkeeping in connection with an estate which resulted in the respondent's inability to submit an accurate statement of expenses to the personal representative of the estate. Respondent's assertion in his brief that Carter involved submission of an inaccurate statement of expenses is misleading in that it suggests that the respondent in Carter had a willful intent to deceive and had been found guilty of misconduct involving fraud, dishonesty, deceit or misrepresentation.

It is incongruous that Respondent cites Breed to support one argument and yet overlooks the clear policy of this Court as promulgated in Breed, to wit: attorneys who misuse client funds face disbarment, even where there is no injury to the client. Disbarment is appropriate in the case sub judice based upon reason (the policy established in Breed) as well as prior decisions involving similar misconduct which illustrate that this Court is not reluctant to enforce its policy of disbarment where an attorney has misused client funds. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986), The Florida Bar v. Segal, 462 So.2d 1091 (Fla. 1985), The Florida Bar v. Tarrant, 464 So.2d 1191 (Fla. 1985); The Florida Bar v. Baker, 419 So.2d 1054 (Fla. 1982); The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981); The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981); The Florida Bar v. Owen, 393 So.2d 551 (Fla. 1981); The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981). See also The Florida Bar v. Knowles, 12 FLW 62 (Case No. 66,822, December 30, 1986) where the referee's recommendation of disbarment was upheld regardless of alcoholism presented by Respondent as a defense or a mitigating factor.

Moreover, the case sub judice is not limited to an isolated instance of misappropriation. As reflected in the

referee's report, the Referee specifically found Respondent guilty of improper handling of his trust account as reflected by overdrafts in Respondent's trust account (RR 3), trust account checks which were dishonored by the bank (RR 3), trust account liabilities in excess of trust account assets (RR 4).

In addition to findings involving misappropriation and improper handling of Respondent's trust account the Referee found Respondent guilty of misconduct involving trust account recordkeeping (RR 2); issuance of checks against insufficient funds (RR 6); failure to pay a hospital bill from funds withheld for that purpose which resulted in an action brought against his client and ultimately a final judgment; failure to satisfy a final judgment which adversely affected his client's credit rating; willful failure to take prompt and proper action to protect his client's legal interests (RR 7,8); misrepresentation to a Court, the Bar, and a client (RR 9, 13).

The Referee found that Respondent's actions constitute multiple instances involving a variety of disciplinary violations: Disciplinary Rules 1-102(A)(4) (two instances); 1-102(A)(6) (four instances) 6-101(A)(3) (one instance), 7-101(A)(1) (one instance), 9-102(B)(3), 9-102(B)(4); Integration Rules 11.02(4) (five instances), and 11.02(3)(a) (two instances).

The referee's report reflects that a factor considered by the Referee in recommending discipline was Respondent's guilt of numerous violations involving different types of misconduct (RR 12). Respondent argues that it was error for the Referee to conclude that Respondent engaged in cumulative misconduct because, according to Respondent, cumulative misconduct relates only to prior misconduct of a similar nature. However, Respondent cites no authority for his position.

By defining cumulative misconduct only in terms of prior misconduct of a similar nature, Respondent has demonstrated a misapprehension of the principle of "cumulative misconduct." It is The Florida Bar's position that cumulative misconduct refers to multiple instances of misconduct regardless of the nature of the misconduct or whether it occurred prior to or contemporaneously with the conduct in question. Accordingly, although subsequent acts of misconduct which is similar in nature to previous misconduct justifies enhanced discipline, The Florida Bar v. Hunt, 441 So.2d 618 (Fla. 1983), multiple instances of unethical conduct alone justifies enhancement even where there is a lack of similarity between either the nature of the various instances of misconduct or any prior misconduct. See The Florida Bar v. Shapiro, 450 So.2d 842 (Fla. 1984).

See also The Florida Bar v. Harden, 448 So.2d 1017 (Fla. 1984) where the Supreme Court rejected the referee's recommendation of a three-year suspension and ordered the respondent disbarred for conduct involving multiple instances of misuse of trust funds.

Moreover, The Florida Bar contends that prior disciplinary action may properly be considered a factor to justify enhancement of discipline, even in the absence of similarity in nature between the prior misconduct and misconduct under review. See The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981).

Notwithstanding this position, The Florida Bar maintains that there is a similarity in nature between Respondent's misconduct which is the subject of the instant complaint and one of Respondent's two prior private reprimands. In 1979 Respondent was privately reprimanded for failing to promptly satisfy his clients' debt from the proceeds entrusted to him. As a result of Respondent's actions a judgment was entered against his clients and their bank account was garnished. Respondent did not return the clients' funds until after the client's filed a complaint with The Florida Bar (See EX 79). As noted by the Referee, Respondent's prior misconduct is similar in nature to the misconduct alleged in Count IV of the instant Complaint

involving Respondent's failure to promptly satisfy the debt of DIAZ from funds entrusted to him for that purpose.

Respondent further alleges that the Referee improperly based his recommendation of disbarment on Respondent's refusal to admit misconduct. As authority for his position, Respondent cites The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). However, in so arguing Respondent apparently overlooks the fact that in Lipman this Court affirmed the referee's recommendation of disbarment based upon the clear and convincing evidence of the misconduct. Like the instant case, the misconduct in Lipman involved irregularities in the respondent's trust account and his failure to comply with trust accounting procedures. In the case sub judice, the irregularities in Respondent's trust account, Respondent's failure to comply with trust accounting procedures, and the other misconduct alleged in the Complaint has been established by clear and convincing evidence. Accordingly, based upon the Lipman decision, the Referee's recommendation for disbarment should be upheld regardless of whether in recommending discipline the Referee considered Respondent's manfestation of lack of remorse.

Notwithstanding this position, The Florida Bar would further add that there is an inherent inconsistency between

Respondent's position that the possibility of rehabilitation should be considered by the referee in recommending discipline (RB 16) and his objection to the referee's consideration of Respondent's attitude or demeanor. It is evident that Respondent does not object to the Referee's consideration of Respondent's attitude as a factor in recommending discipline, but rather to the Referee's conclusions based upon such consideration; specifically the Referee's failure to find that Respondent has been rehabilitated or has demonstrated the possibility of rehabilitation.

Rehabilitation presumes acknowledgment of wrongdoing and initiation of corrective behavior. Possibility of rehabilitation is clearly lacking where, as in the case _sub judice_, the Respondent manifests continuous denial of wrongdoing (bordering on defiance). As noted by the Referee in his comments to the Respondent:

> Defiance is just reeking out of you.
>
> (TR 828)
>
> * * *
>
> [T]he whole lot of areas of your life, let's say, they reek of it defiance and denial; and as a matter of fact, those habits are harder to break than an arm or a leg, really. Not until people are really inclined do they start changing their lives.

So why should I believe that all of a sudden you've seen the light when quite frankly the hearing indicates a lot of continuing denial and defiance and deep defensiveness?

(TR 830, 831)

Not only does Respondent refuse to acknowledge wrongdoing, but he has attacked the Bar for refusing to accept his explanation and agree to a plea of a private reprimand:

> [Referee]: You have tried to do it your own way, you didn't get your way, so you didn't try, isn't that correct?
>
> * * *
>
> [Referee]: You couldn't get a private reprimand, so you said you would go to trial
>
> (TR 829)
>
> * * *
>
> [Referee]: The only other thing I'm concerned with, one more thing, the just plain lack of responsibility. The counter attacks against the Bar and basically the feelings of defensiveness. Like they're in a conspiracy, out to get you. Fortunately, or unfortunately, whatever, the Bar is not on trial here today [R 838]. . . .
>
> I'm appalled at the lack of responsibility . . . . It concerns me in the area of the fitness to practice law;
>
> (TR 838-839)

ISSUE II

THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT AS TO ALL NINE COUNTS OF THE BAR'S COMPLAINT IS SUPPORTED BY EVIDENCE

As acknowledged by Respondent, a referee's findings and recommendations will be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986); The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985). Further, it is for the referee to weigh the credibility of the witness; any conflicts in the evidence are properly resolved by the referee sitting as the finder of fact for the Supreme Court. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). The Florida Bar v. Collier, 12 FLW 142 (Sup. Ct. 67,850, March 19, 1987).

Although Respondent asserts that there is no evidentiary support for the "majority" of the findings set forth in the Referee's report (RB 25), Respondent fails to both identify the particular finding Respondent claims is erroneous and support his claim by reference to the record.

A. An audit of Respondent's trust account was justified.

The first matter raised by Respondent is whether the audit of Respondent's trust account was justified. The Florida Bar will respond to this issue notwithstanding the fact that justification for the audit has not been the subject of a specific factual finding by the Referee as reflected in his report.

Respondent's assertion that the audit of Respondent's trust account was based upon the return of a trust account check issued to the Clerk of the Court is both factually inaccurate and, even if true, is without merit since under such circumstance an audit would have been justified.

It is the Bar's position that a full Bar investigation and audit was warranted based solely upon DIAZ'S complaint to The Florida Bar alleging that Respondent's failed to satisfy her outstanding hospital bill from funds entrusted to him for that purpose (see Counts IV, V and VI of the Complaint). An investigation based upon these allegations would necessarily include review of Respondent's trust account records to determine whether Respondent handled his client's funds in accordance with the proper trust accounting procedures.

In the instant case HAYES, Staff Investigator, initiated his investigation of the DIAZ complaint in February 1983 [TR 87] with an interview of Respondent. At the initial interview Respondent was requested to furnish

"documentation" relative to checks issued in connection with his representation of DIAZ [TR 84]. This documentation was not immediately produced by Respondent [TR 85]. On February 21, 1983, Respondent advised Hayes by telephone that:

> He [Respondent] was anxious to cooperate with The Florida Bar and stated money had always been available in his trust account. And at that time he did not have his trust accounts.... they were in the possession of his accountant and that he would send a letter to the accountant authorizing him to make available the necessary records . . . . (Emphasis added)
>
> (TR 85-86)

Even in his written response to the DIAZ complaint submitted to The Florida Bar, Respondent maintained that he had been holding $2,000 from the DIAZ settlement (EX 19, attached hereto as Appendix A) and that he merely "forgot" to pay the hospital (EX 20, attached hereto as Appendix B).

In addition to DIAZ, The Florida Bar received information from other parties (SLATKO and Clerk, Dade Circuit Court) alleging conduct involving the issuance of worthless checks (See Counts VII and VIII of the Bar's Complaint). An audit of Respondent's bank and trust account was fully warranted based upon the allegations set forth in the complaints filed with The Florida Bar.

Although procedurally the Bar initially sought voluntary production of Respondent's bank records, a subpoena was subsequently issued by the grievance committee chairman to ensure Respondent's compliance. As cited but

apparently overlooked by Respondent, an audit may be conducted "when requested by a grievance committee" pursuant to article XI, Rule 11.02(4)(c)(vi), Integration Rule of The Florida Bar.

As evidenced by Respondent's correspondence to The Florida Bar in 1983 (EX 20, APP B), Respondent was apparently irked then, as he is now, by the Bar's insistence in pursuing its investigation and reviewing his records. In his testimony before the Referee Respondent confirmed that upon receipt of the subpoena, he became "livid" (TR 819). It is evident that Respondent's argument that The Florida Bar proceeded with an audit without justification is but another manifestation of Respondent's irritation with his having been the subject of a Bar investigation and audit.

B. <u>The Bar's audit and investigation revealed evidence of misappropriation</u>.

The Referee found Respondent guilty of misappropriation as alleged in Count II based upon the evidence revealed through the audit, to wit: issuance of trust account checks against insufficient funds, trust account checks dishonored by the bank, trust account liabilities which exceeded trust account assets and utilizing trust funds for the benefit of persons other than the particular client from whom the money was received (RR 3,4; see also auditor's report, EX 67, attached hereto as APP C).

Respondent did not present testimony of any expert witness or any evidence to refute the auditor's findings which, interestingly, were based upon the worksheets submitted to the Bar Staff Auditor by Respondent's accountants (TR 218).

In his brief, Respondent claims that there was no evidence that Respondent utilized trust monies "without the permission of each and every client," and that "each client testified that over the years permission was granted to the Respondent to utilize trust monies" (RB 27). In making these representations, however, Respondent specifically overlooks, the testimony of DIAZ and her brother, GARCIA, as well as the admissions made to the Referee by Respondent and his counsel:

> [Respondent]: . . . There is no testimony, aside from Garcia, that someone ever said I couldn't use this money . . . (Emphasis added)
>
> (TR 826)
>
> * * *
>
> [Respondent's counsel]: [W]e did not deny that Mr. Newman used Garcia/Diaz' money . . . . (Emphasis added)
>
> (TR 684-685)
>
> * * *
>
> [Respondent's Counsel]: There is no question that Mr. Newman neglected to pay Jackson Memorial Hospital. There is no question that his trust account dipped below the amounts necessary to pay Jackson Memorial Hospital. In, as you pointed out again perceptively, again, at the conclusion of the last hearing, accurately you pointed out that you got the impression that it was a rob Peter to pay Paul type situation, except, fortunately, it didn't escalate where the house of cards collapsed.

> It is obvious, I think, and reasonable for you to draw the conclusion that internal funds of my (sic) one client were utilized to pay obligations or responsibilities of another. That's how we know, for example, that the $4,000.00 of the monies that were due Jackson Memorial were not able to be paid, which should have been. (Emphasis added)
>
> (TR 685-686)

Moreover, as reflected in the auditor's report (Ex 67; APP C) as of May 31, 1984 Respondent's records, as reconstructed by the Staff Auditor, reflected an open balance (monies which should have been held in trust) totalling $144,124.12 involving at least thirty-three (33) clients:

Client	Balance
Alexander, Ann	$ 700.00
Bailey, David	482.26
Barnes, C.	836.03
Blum	.78
Chazanow	2,148.88
Dargans	5,797.05
Dean	3,046.00
Gobel, Dorothy	.86
Gonzalez, G. & B.	3,417.36
Katz	16,287.64
Mercier/Vidal	1,772.50
Miller, Donald	539.50
Mintz	1,000.00
Neil	2,000.00
Pillado	8,600.08
Redwin Ratti	122.45
Roberts, Calvin	1,200.00
Rodriguez, Ana	3,050.59
Rogriguez, Angel	2,519.97
Sahien	35,932.00
Smith	194.77
Smith, Bob	5,615.00
Straud	1,015.00
Tucker, Mary	1,000.00
Vera	15,125.31
Vera-Johnson	21.69
Walton	13,200.00
White	918.00

White, E.	459.00
A.N. Trustee	4,000.00
Pamela Alexander and Faxan:	3,250.00
Lee and DIAZ	9,871.40
Total Open Balance 5-31-84	$ 144,124.12

However, as of May 31, 1984, Respondent's trust account balance was $2,540.84 (EX 67, APP C at 3).

Respondent did not present to the Referee testimony and evidence from each of the thirty-three clients listed above to establish both that they had authorized Respondent to use their funds and that they had been repaid. In fact, of the clients listed above, only one (SEHEIM) testified and his testimony indicated that he didn't know when he loaned Respondent money (TR 579) or have any record of financial transactions with Respondent (TR 579) or the interest rate (TR 580) and that he was repaid in check or cash from a party other than Newman (TR 583). Respondent's own testimony confirms that there is no documentary evidence to establish repayment of SAHEIM (TR 643). Such documentation, reflecting the date, source and amount of funds paid is obviously necessary to satisfy the Staff Auditor that there is no open balance remaining for the particular client in question.

In addition to SAHEIM, clients ABRAMS, FULCHER, RICHARDSON and COLLINS testified that they had given Respondent permission to use their funds. These witnesses, however, could not identify with any reasonable certainty an

amount, date authorization was purportedly given to Respondent, or nature of the transaction. Moreover, as reflected in the auditor's report (EX 67, APP C at 5, 6), these witnesses all had negative trust account balances (overdisbursement). Their testimony concerning authorization purportedly given to Respondent to use their funds and Respondent's purported repayment of the borrowed funds is, therefore, not relevant to the issue of eliminating the open trust account balances since these balances pertain to funds which Respondent owes to clients.

Moreover, Respondent conveniently overlooks the fact as an attorney he may be in possession of funds for the benefit of parties other than his client. Accordingly Respondent's clients' permission to utilize funds, assuming arguendo it had been given, may be inadequate authorization. This situation may be illustrated by Respondent's representation of DIAZ wherein Respondent confirmed to the hospital, in writing, that he was aware of the hospital's lien in the amount of $4,105.04 and was protecting same by withholding from the DIAZ's settlement a sum sufficient to satisfy the hospital lien (EX 15, attached hereto as APP D). Under these circumstances, a lienholder looks to an attorney for protection and it is unethical for an attorney to disburse the proceeds to his client, himself, or any other party, without the permission of the lienholder.

Another example is where an attorney acts as an escrow agent in connection with a real estate transaction. As an escrow agent, an attorney has an obligation to protect the funds given to him and a client's purported permission to utilize the escrowed funds is inadequate justification for his borrowing of the funds. Under such circumstances, it is unethical for an attorney to disburse the escrow funds to his client, himself, or any other party absent the consent of all parties to the transaction. In the case <u>sub judice</u>, Respondent admits that in representing RICHARDSON in a purchase of property, he utilized funds given to him as a deposit without the permission of the seller (TR 616) (see also testimony of WITHERS, seller's attorney, EX 30, at 14, 15).

The Florida Bar submits that to support a finding of misappropriation it is sufficient for the Bar to establish that Respondent's trust and bank records reflect money owed to clients in excess of funds on deposit; the evidentiary burden is on Respondent to account for these missing funds to the satisfaction of the referee. The Referee's specific findings as to misappropriation in the case <u>sub judice</u> may be construed as resolving any conflicts in testimony in favor of The Florida Bar and a rejection of the testimony of Respondent's witnesses and Respondent's position that he was authorized to use the funds of every client whose funds had been entrusted to him.

C. Respondent is unfit to practice law.

In this section as well as throughout his brief Respondent mischaracterizes the testimony and evidence presented to the Referee in a transparent attempt to trivialize his actions as being merely an oversight, technical violations or poor judgment.

First, contrary to Respondent's assertion, funds entrusted to him to pay DIAZ's hospital bill did not remain in his trust account (RB 29) until belatedly forwarded to the hospital with the remaining balance disbursed to DIAZ.

The testimony of staff investigator HAYES establishes that he examined Respondent's bank records for his trust account at Central National Bank during the period March 31, 1978 through November 24, 1980 (TR 70); that on August 8, 1978 Respondent deposited into his trust account a settlement check received on behalf of DIAZ (TR 71-72); that Respondent's bank account closed with a zero balance (TR 79); that there was no evidence of a transfer of the funds received on behalf of DIAZ to any other trust account (TR 79); that between the date of deposit of DIAZ's funds into the trust account and the date Respondent closed his account Respondent's bank account balance fell below $4,105, (the amount of hospital lien) (TR 73; EX 11); below $2,000 (the amount he withheld from settlement) (TR 75-77; EX 12); and below $1105.00 (the balance owed to the hospital after

partial payment of $3,000 had been paid) (TR 79; EX 13).

The testimony and evidence presented by the Bar clearly establish that the funds Respondent received on DIAZ's behalf was not preserved in his trust account, was not utilized for its intended purpose and therefore had been been misappropriated. The fact that Respondent paid DIAZ'S outstanding hospital bill 4 1/2 years after receipt of the funds and only after the complaint had been filed is not relevant to the Bar's allegation that Respondent improperly handled funds entrusted to him in connection with his representation of DIAZ and specifically that Respondent misappropriated these funds.

Respondent's feeble attempt to explain his failure to promptly pay DIAZ'S hospital bill as an oversight or mere "forgetfulness" when, in fact, the evidence clearly establishes that the funds had been misappropriated, is pure fantasy. Moreover, to accept the "forgetfulness fantasy", one would have to believe that Respondent suffered severe memory lapses following numerous inquiries concerning the status of payment from DIAZ, her brother and the hospital[9/]

[9/] See EX 21, hospital records including notations reflecting extensive communication with Respondent in an effort to collect the bill.

and that neither the filing of a lawsuit nor the entry of a final judgment against DIAZ "jogged" his memory. Apparently the only effective reminder for Respondent was the filing of a complaint against him with The Florida Bar.

Moreover, the testimony of DIAZ confirms that she had been reported to credit agencies and became the subject of collection actions (TR 36, 38; EX 6). The evidence clearly establishes that Respondent was fully aware that collection action had been initiated against DIAZ, as reflected in his letter to a collection agency, dated March 28, 1979 confirming that the outstanding bill would be paid upon settlement (EX 7). (Respondent's letter was sent seven months after he received DIAZ's settlement proceeds). Even if DIAZ's credit had not been threatened, it is reasonable for any person, attorney or nonlawyer, to anticipate that credit might be adversely affected by refusal to pay an obligation; it is, in fact, unreasonable to believe that either the obligation itself or action by credit agencies would disappear if ignored.

As a final point, in his motion to set aside the default entered against DIAZ (included in EX 5, attached hereto as APP E), Respondent represented to the Court that there was meritorious defense in that the money had been paid. In his written response to DIAZ's complaint that he filed with the Bar, Respondent represented that he had been holding the funds but forgot to make payment. Both

representations are inconsistent with each other and neither is true: Respondent had neither paid the debt, as reflected in his motion to set aside the default, nor had he been holding the funds as reflected in his response to The Florida Bar. The record in this case clearly establishes that Respondent misappropriated the DIAZ funds and later sought to conceal his theft with lies. Such conduct exceeds the "poor judgment" characterization suggested by Respondent and is but another example of Respondent's unfitness to practice law.

Likewise, in his brief, Respondent concedes that he did "not properly" explain to the Bar investigator (RB 31) the circumstances surrounding the check given to SLATKO which was dishonored by his bank and the redemption of the dishonored check by a check drawn on his trust account. Respondent explains his response to The Florida Bar as an attempt to "avoid having The Florida Bar believe he was acting as a surety for his client" (RB 31). Respondent's admission demonstrates his propensity for willful misrepresentation in an effort to conceal what he believes might be unethical conduct. Such action by Respondent is but another example of Respondent's unfitness to practice law.

Perhaps the most persuasive evidence in support of Respondent's unfitness to practice law, is found in Respondent's testimony and his attorney's admissions:

> [Respondent's counsel]:. . . . Mr. Newman used the trust account as a float.
>
> (TR 698)

* * *

> [Respondent's counsel]:. . . . Mr. Newman did not go into detail in testimony nor could he, because quite frankly, the written statements that he made to the Bar prior to, I think, being represented by counsel, appeared to be confusing and inconsistent. I don't think Mr. Newman <u>intended to lie to the Bar</u>. He found himself in a very awkward position. . . . (Emphasis added)
>
> (TR 689)

* * *

> [Respondent's counsel]:. . . . It must be a pretty shabby situation when you are down to bouncing 15 to 25 checks to the circuit court. . . .
>
> (TR 693)

> [Respondent's counsel]:. . . . Mr. Newman kept deplorable accounting-trust accounting records. Terrible records. Records that are confusing and records in which are errors and omissions.
>
> (TR 694)

In response to his attorney's inquiry concerning how he discovered the purported theft of funds from his trust account, Respondent answered:

> I think I had one of girls in the office or else I went to the Bank to find out what my balance was in the trust account. It just didn't ring a bell, what they told me and what I pride myself on, my memory.
>
> I'm lousy bookkeeper, <u>but I don't forget</u>. <u>If you ask me what I had in the bank at any time, I'll come within a few pennies of then and now</u>, my own personal account. Trust account was overall written down that day, the figure. I remember what I got in response to the inquiry didn't ring a bell with what I knew I should have. (Emphasis added)
>
> (TR 592)

Later, in response to the Bar's inquiry concerning his bank balance, Respondent answered:

[Respondent]:	You're asking me now to tell you what my balance was at a given day in 1982?
[Bar Counsel]:	Yes, sir.
[Respondent]:	From looking at the statement or from memory?
[Bar Counsel]:	From memory.
[Respondent]:	No way. I can't. TR 617

* * *

[Bar Counsel]:	. . . You have a checkbook, do you not? You have a checkbook for your trust account?
[Respondent]:	Correct.
[Bar Counsel]:	Did that checkbook have a running balance in it?
[Respondent]:	No.
[Bar Counsel]:	In the trust account, you didn't have a running balance?
[Respondent]:	No.
[Bar Counsel]:	Why not?
[Respondent]:	I'm not going to lie to you.
[Bar Counsel]:	Why not?
[Respondent]:	Why not? Why should I?
[Bar Counsel]:	How could you know when you wrote a check that you had money to cover it if you don't have a running balance?

[Respondent]: I wouldn't write a check if I didn't have money to cover it. I know what's in the account.
(TR 619-620)

Even Respondent's former attorney characterized Respondent's trust accounting procedures as a "genuine nightmare in his bookkeeping system" (TR 715).

However, as commented by the Referee, there appears to be a "method" in Respondent's "madness. . .an attempt to cover a paper trail" (TR 837). Only through a Bar audit involving a meticulous, arduous process of reconstruction of records was The Florida Bar able to uncover the willful attempts by Respondent to conceal the evidence of blatant misappropriation. Respondent's handling of his trust account and client funds reflect a total disregard for the fundamental concept of preservation of trust funds and protection of his clients' interests and property.

This Court has disbarred an attorney for gross neglect of his trust account even where there is no evidence of conversion of client funds. The Florida Bar v. Hunt, 441 So.2d 618 (Fla. 1983). In so doing, this Court has recognized the principle that gross neglect of an attorney's trust account causes serious harm to the public. Id at 620.

Accordingly, whether the "nightmare" in Respondent's trust account is the result of gross neglect or reflects a willful attempt to cover a trail of records which substantiate misappropriation, Respondent's disbarment is justified. Moreover, considering Respondent's

misrepresentations to the Bar, the Court and other parties, it is evident that he lacks the character to remain a member of The Florida Bar.

ISSUE III

THE FLORIDA BAR ACTED APPROPRIATELY IN ITS INVESTIGATION OF RESPONDENT AND PRESENTATION OF EVIDENCE OF THE REFEREE.

Respondent's position that The Florida Bar acted improperly in its investigation is based upon events which occurred prior to the proceedings before the Referee which is the subject of this review, and in fact, prior to the grievance committee hearings. In support of his argument, Respondent relies almost exclusively upon correspondence which has not been presented to the Referee and is not part of the record of this case.

While The Florida Bar recognizes Respondent's right to present to the Referee any evidence he feels is relevant, it is absolutely improper for Respondent to append documents to his brief which have not been either presented to or considered by the Referee. As a result, in conjunction with the filing of this answer brief, The Florida Bar has filed a Motion to Strike this issue as well as the documents appended to Respondent's brief in support thereof. Should the Court deny our Motion to Strike, The Florida Bar offers

this response to Respondent's allegations and in accordance with the Rules of Appellate Procedure, unless permitted by the Court, will restrict its argument and supporting documentation to the record in this case.

A. The Florida Bar did not delay its investigation

Respondent begins his argument by incorrectly asserting that the complaint by DIAZ was filed February 2, 1982. Such statement is based upon the testimony of the Staff Investigator HAYES as to the date he became involved in the DIAZ investigation. However, the record reflects that the year 1982 was in error and the witness corrected the date to February 2, 1983 (TR 86-87). Moreover, the testimony of Respondent's former counsel confirms he began representing Respondent in 1983 (TR 706) and Respondent's initial response to The Florida Bar in the Diaz matter is dated December 23, 1982, stamped received December 27, 1982 (EX 19). Accordingly, there is no evidence to support Respondent's assertion that the investigation of the DIAZ complaint was initiated in February 1982.

Moreover, a complaint was filed with the Supreme Court on August 22, 1985, (2 1/2 years after Respondent was contacted by the Staff Investigator) based upon the findings of probable cause by the grievance committee following an audit and investigation.[10/] Accordingly, whether due to arithmetical error or otherwise, Respondent's suggestion

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[10/] See also Respondent's testimony which suggests a two-year period of investigation and contradicts the four-year period asserted in Respondent's brief (TR 655).

that The Florida Bar waited four years to present this complaint to a grievance committee is factually inaccurate.

All the complaints which are the subject of the instant proceedings involve an issue of Respondent's handling of funds. As characterized by his former counsel, Respondent's trust account records were a "genuine nightmare" (TR 715). Notwithstanding the condition of his records, the Bar thoroughly investigated the complaints which are the basis of these proceedings. The investigation included an audit involving a reconstruction of Respondent's records.

The Staff Auditor testified that the total time that elapsed for the audit was 616 days out of which he was waiting for records from Respondent a total of 539 days (TR 799-800). The Bar's investigation continued, including as acknowledged by Respondent's former counsel, Saturdays, late afternoons and weekends (TR 717-718). Further, as acknowledged by Respondent's former counsel, even as late as January 1985, The Florida Bar sought production of client files for review by the staff auditor, access to which had been previously denied (TR 718-719).

Accordingly, it is the Bar's position that the time involved in the Bar's investigation was reasonable and, further, considering the nature of the complaints and the condition of Respondent's records even a substantially longer period of time would not have been unreasonable.

Notwithstanding the Bar's denial of Respondent's claim of delay by The Florida Bar the record of these proceedings before the referee clearly establishes delay on the part of Respondent. Following the filing of its Complaint, The Florida Bar continually sought to bring this matter to final hearing and promptly filed its first notice scheduling the final hearing on December 6, 1985. The Florida Bar was unexpectedly met with the recusal at the request of Respondent's counsel, of two referees, the second of which occurred on the day of trial.

Thereafter, the scheduling of the final hearings were delayed due to the busy trial schedule of Respondent's counsel (TR 115-116). Even one hearing (July 26, 1987) was held on a Saturday to accommodate Respondent's counsel's schedule (TR 870).

In addition, during the final hearing, Respondent requested continuances to allow a second accountant an opportunity to review Respondent's trust account records. Respondent's requests for a continuance were denied (TR 474, 487, 654, 656). As noted by the referee:

> [Referee]. . . I don't find you're making efforts to resolve the problem. I find just the contrary. I'm not directing those remarks to you as his lawyer, but I certainly find <u>there has been every effort to stall and delay.</u> (Emphasis added)
> (TR 487).

* * *

> [Referee]: It wasn't your fault you had to be in Federal Court. Wasn't anybody's fault his [Respondent's] wife got to (sic) sick. Mr. Ward has other business. One delay after another. But it's going to end.
>
> (TR 488)
>
> * * *
>
> [Referee]: [T]here is no question in my mind this case, and most proceedings involving you evidently are playing with delay, foot dragging, denial and defiance. . . .
>
> (TR 837)

Not only does the record clearly establish delay on the part of Respondent, but it is apparent that Respondent has benefited from rather than been prejudiced by delay in that he has remained a member of The Florida Bar and has retained the privilege of practicing law. Accordingly, Respondent's argument should be rejected because he has failed to establish both delay on the part of The Florida Bar and resulting prejudice. See The Florida Bar v. Lipman, 497 So.2d 1165, 1167 (Fla. 1986).

Respondent's assertion that The Florida Bar has obtained the same results as originally offered at the initiation of the Bar's investigation is inaccurate. Respondent's former counsel concedes that while Respondent was willing to admit to violations involving trust accounting procedures, he insisted that there had been no misappropriation and offered only a private reprimand (TR 706-707), although in order to "get rid of it," Respondent was willing to accept a public reprimand (TR 722).

After hearing the testimony and considering evidence, the Referee found Respondent guilty of misappropriation and recommended disbarment. Disbarment was the discipline sought by The Florida Bar which was rejected by Respondent (TR 722). Even now, Respondent rejects disbarment as evidenced by these proceedings for review.

B. Respondent's Cooperation

Respondent does not cite to the record of these proceedings in support of his claim that The Florida Bar "continually" referred to the fact that Respondent was "uncooperative". Moreover, the referee's report does not reflect that the referee's recommendation as to discipline was based upon a finding that Respondent was uncooperative. Accordingly, Respondent's cooperation, or lack thereof, is not an issue.

Notwithstanding this position, The Florida Bar maintains that the findings and supporting evidence of deliberate misrepresentations to The Florida Bar in its investigation of the DIAZ and SLATKO matters (RR 8-9, 10) reflects conduct by Respondent intended to deceive The Florida Bar and otherwise thwart its investigation. If cooperation includes the qualities of honesty and forthrightness, then Respondent's cooperation is lacking in this case.

Moreover, disbarment is warranted based upon the nature of the conduct involved in this case and Respondent's cooperation, assuming arguendo that it had been given, would not be sufficient to mitigate the discipline.

C. Respondent is Responsible for the Cost and Length of the Bar's Investigation.

In the proceedings before the Referee Respondent has attempted to divert attention from his actions which have given rise to these disciplinary proceedings by attacking The Florida Bar for what is essentially the Bar's refusal to accept both Respondent's misrepresentations as being truthful and support a consent judgment for a private reprimand.

There is no evidence nor has Respondent cited to the record to demonstrate improper conduct on the part of The Florida Bar, to wit: that charges were "continually" added or dropped or that these disciplinary proceedings were based upon a complaint which was not supported by a grievance committee's findings of probable cause. As noted by the Referee, Respondent's constant attacks against the Bar and feelings of defensiveness manifest a "plain lack of responsibility" (TR 838).

It is the Bar's position that both the cost and length of these disciplinary proceedings are directly related to Respondent's delay, defiance and denial. As Respondent

stated, "What do I have to lose by going to trial" (TR 830). Respondent chose to litigate and vigorously contest the Bar's allegations; Respondent lost and neither the expense nor extensive time involved in these proceedings can be attributable to any action on the part of The Florida Bar.

CONCLUSION

The Referee's findings and recommendations are fully supported by the record in this case. The Florida Bar recommends that the Supreme Court approve the Report of Referee and enter an order of disbarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Answer Brief of Complainant was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301, and that a true and correct copy was mailed to Rhea P. Grossman, Attorney for Respondent, 2710 Douglas Road, Miami, Florida 33133-2728 this 3 day of April, 1987.

PATRICIA S. ETKIN
Bar Counsel