IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ARTHUR NEWMAN,

Respondent.

Supreme Court Case No: 67,528

On Petition for Review

INITIAL BRIEF AND APPENDIX OF RESPONDENT SUPPORTING PETITION FOR REVIEW

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INTRODUCTION AND PRELIMINARY STATEMENT

This is a brief in support of a Petition for Review of a Referee's Report in a Disciplinary Proceeding involving the Respondent. The Petition for Review was initiated by the Respondent (App.1).

The Complainant, THE FLORIDA BAR, will be referred to as either "THE FLORIDA BAR, "THE BAR", or "COMPLAINANT". The Respondent, ARTHUR NEWMAN, will be referred to herein as either "Respondent" or "NEWMAN".

Other parties and/or witnesses herein will be referred to by their respective surnames for clarity.

Because this is a review in a Disciplinary Proceeding, the record on appeal consists of five volumes of testimony presented to the Referee on January 23, 1986, March 21, 1986, March 22, 1986, June 19, 1986, June 20, 1986, and July 26, 1986. The pages contained in these volumes have been consecutively numbered 1-871. Respondent will refer to this record with the symbol "TR" followed by the page. (Regardless of volume).

Respondent will present an Appendix which will be designated as "App." followed by the appropriate page number.

Exhibits presented at the time of the hearing before the Referee will be referred by the numbers as orginally used by the Referee. When possible the exhibits will also be referenced to the page in the transcript of proceedings where the exhibit is identified and accepted into evidence.

STATEMENT OF THE CASE AND FACTS

A. Course of Proceedings and Disposition Before the Referee.

This disciplinary action commenced with the filing of a nine count Complaint by THE FLORIDA BAR against Respondent on August 22, 1985.[1]/ (App.15-28).

Count I alleged violations by Respondent of Disciplinary Rules 9-102(a) and 9-102(B)(3)[trust account violations during 1981 and 1982].

Count II alleges violations of Rule 11.02(4) of the Integration Rule [improper handling and misappropriation of trust funds for 1981, 1982, 1983 and part of 1984].

Count III alleges violation of Disciplinary Rule 1-102(A)(6)[for conduct adversely reflecting on the fitness to practice law because personal office checks were returned for insufficient funds in 1981 and 1982].

Count IV alleges violation of Disciplinary Rules 6-101 (a)(3), 9-102(B)(4) and 7-101(a)(1)[neglecting a legal matter and failing to pay client funds immediately and failing to seek the lawful objectives of a client].

Count V alleges a violation of Rule 11.02(4) of the Integration Rule [misappropriation of trust funds, $900.00, in 1982].

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[1]/ The Respondent will discuss the proceedings and investigation leading up to the August, 1985 Complaint in his argument set forth in Issues I and III, infra.

Count VI alleges violation of Disciplinary Rules 1-102(A)(4), 1-102(A)(6) and 7-102(A)(5) [conduct involving fraud, dishonesty and deceit reflecting on the practice of law by making a false statement in pleadings before a County Court Judge in 1983].

Count VII alleges violation of Disciplinary Rule 9-102 (a)[failing to preserve the identity of trust funds of a client].

Count VIII alleges violation of Discipinary Rule 1-102(A)(6)[conduct adverse to the fitness of practicing law by unauthorized use of "trust monies.

Count IX alleges violations of Disciplinary Rules 1-102(A)(4) and 1-102(A)(6)[conduct involving dishonesty which adversely reflects the fitness to practice law for not being truthful in response to a Bar inquiry in January of 1983].[2]/

Simultaneously with the filing of the Complaint, the Florida Bar sought the temporary suspension of Respondent (App. 29-40), which request was denied by this Honorable Court.

Thereafter, Respondent filed a Motion to Dismiss the Complaint as it related to Counts I and II (App.41-42) and additionally filed his Answer and Affirmative Defenses to the entire Complaint (App.43-51).

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[2]/ Respondent realizes that it is not appropriate to argue the merits of the Complaint filed against him while setting forth the course of proceedings and disposition before the Referee; however, Respondent wants to point out to this Honorable Court that although the 14 page Complaint and all its alleged violations seems to substantiate the Referee's recommended discipline, the matters, when viewed in the light of the actual record and evidence, becomes less shameful and more in line with the everyday practice of law. Respondent is in no way making light of the matter, however, when the actual record is reviewed, it will be clear that Issue III is relevant to the determination of these proceedings.

A Referee was appointed on December 6, 1985, and proceedings commenced on December 19, 1985. The testimony of the proceedings are comprised in five volumes and over 800 pages. The hearings concluded on July 26, 1986. On that date the Referee announced that he found the Respondent guilty on all nine counts of the Complaint (TR.700-701). On August 22, 1986, the complete transcript of all the proceedings was forwarded to the Referee. The Report of the Referee was entered on December 5, 1986 (App.2-14). In addition to finding Respondent guilty as to all nine counts as set forth in the Complaint, the Referee found that Respondent violated each section of the Disciplinary Rules as set forth in the Complaint. The Referee concluded his Report by recommending disbarment. The Respondent contests the Referee's factual determinations as set forth in his Report[3]/; the recommendations of guilt based on the erroneous conclusions of fact made by the Referee; and the Referee's Recommendation as to discipline.

The Report of the Referee as filed on December 5, 1986, was considered by the Board of Governors of the Florida Bar at its meeting which ended January 16, 1987. On January 23, 1987 (Friday) a letter notifying the Supreme Court of said meeting with a copy to Respondent's counsel was mailed (App.62).

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[3]/ Respondent was so aggrieved by the factual determinations made by the Referee that Exceptions to the Report of the Referee were filed by Respondent on January 12, 1987 (App.52-61), with the Board of Governors, which, Respondent has been informed was never considered by the Review Committee prior to notifying the Supreme Court of its meeting on January 16, 1987.

The Florida Bar indicated that as of February 2, 1987 (less than five working days from receipt of said letter) a jurisdictional Petition for Review had to be filed on behalf of the Respondent since the Florida Bar would not be seeking review.[4]/

Respondent timely filed his Petition for Review (App.1).

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[4]/ Although numerous calls were made to the Florida Bar as well as the Clerk of this Honorable Court, Respondent could not determine how the date of February 2, 1987 was arrived as the "deadline" for filing a Petition. The Florida Bar, however, was apprised of the interpretation of Rule 11.09(3)(a) in its handling of The Florida Bar v. Ellis Rubin, 362 So.2d 12 (Fla. 1978) at page 14, footnote 8, nevertheless, the Complainant still placed Respondent under the pressure of filing a Jurisdictional Petition within five working days.

B. Statement of the Facts.

Although the Florida Bar has chosen to accept, in total, the Referee's Report and not file a Petition for Review (App.62), it is submitted that the acts of Respondent which are alleged to be breaches of the Rules of Discipline, whether taken individually or cumulatively, lack the critical urgency to disbar Respondent as the Referee and Complainant would have this Honorable Court believe.

At first blush, the Referee's Report would seem to indicate that Respondent actively participated in numerous violations of the Code of Professional Responsibility. However, the Complaint evolved through two (2) Complaints filed by clients; THE BAR'S own audit of Respondent's trust account from January 1981 through May, 1984; and certain office account checks returned for insufficient funds from the clerk's office between 1980 and 1982.

Respondent would like to set forth in great detail the events which transpired each day commencing on February 2, 1982, when THE FLORIDA BAR began its investigation. (TR.83-84; App. 316-317). Likewise, Respondent would like to go through all 858 pages of testimony presented to the Referee to show that there is a total lack of evidentiary support for the Referee's findings. Neither time, space nor the Rules of Appellate Procedure would permit such an extensive analysis.

The Respondent, however, will attempt to set forth the facts as supported by the record to coincide with the

chronological order of Counts I through IX of the Complaint as filed against Respondent.

On May 16, 1983, the Complainant asked for and received a certified list from the Clerk of the Circuit Court, Eleventh Judicial Circuit, indicating that between 1980 and 1982 there were approximately 15 office checks representing filing fees which were returned for insufficient funds. (R-185; App.130)[5]/ Respondent was notified that one of the fifteen checks was a trust account check. (R-703-706; App.131-134).

On or about May 9, 1983, Pedro Pizarro, Branch Auditor for Complainant was first contacted to begin an audit of Respondent's 1981-1983 trust records (R-191; App.135). Subsequent to the analysis of the 1981 trust account records, Mr. Pizarro then audited 1982. (R-200; App.135). The original request from Ms. Etkin was for an audit covering the years 1981 through 1983, however the auditor took it upon himself to do each year individually. (R-201; App.137).

Nevertheless, by March 7, 1983, (App.65) THE BAR knew there was no trust check violations which fact was verified by the bank on May 11, 1983 (App.71) and the Complainant withdrew any allegations concerning that one trust account check as being an error on the part of THE BAR. (R-186-188, 704; App.138-140; 141).

Respondent filed an appropriate Motion to Dismiss Counts I and II (App.63-64) on the basis that none of the seven

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[5]/ These allegations are the subject of Counts II and III to be later discussed. The Clerk's office did not initiate this Complaint.

circumstances listed in Integration Rule 11.02(c) existed which would allow for the audit for years 1981 through 1984. The Motions were similarly renewed before the Referee (R-662-663; App.144-145). An additional year (1984) was aded to the audit due to the length of the investigation.

Respondent had at all times conceded that his trust account records for 1981, 1982 and 1983 were lacking in certain specific requirements. Separate ledger cards were not kept on each trust transaction, however closing statements were in all his files and those that were reviewed by the auditor, resulted in corrections and modifications on Exhibit 73 and Exhibit 67 presented by the Complainant to the Referee. (R-360-367; App.146-152).

Count I also charges Respondent with co-mingling his trust account monies with his personal monies and not preserving all required trust account records. The Respondent, his attorney, and his accountant all endeavored to supply all trust accounting records as directed.[6]/

Nevertheless, according to the auditor's own testimony he received nearly all of the documents needed for the audit and he made no effort to obtain the documentation that he did not receive, either by contacting Respondent, Respondent's attorney, Respondent's accountant or utilize the subpoena power of the Grievance Committee to obtain the original bank records. (R-326-332; App.153-159).

6/ The constant reference to Respondent's refusal to cooperate with THE FLORIDA BAR will be discussed in Issue III, infra.

At no time did the auditor take into consideration that each one of Respondent's clients gave him permission to utilize monies held in trust for them.[7]/

The auditor determined that Respondent's authorized use of trust monies, and his replacement of those monies was a co-mingling of funds. (R-349-360; App.160-171) Commencing in 1984 the auditor admitted that Respondent had been keeping much better trust account records although he found a technical violation relating to the ledger cards (R-135-136; App.172-173). Mr. Myron R. Kahn, a certified public accountant, testified that since July of 1984, he has established a bookkeeping system for Resondent's trust accounts which conform to the Rules of The Florida Bar. (R-778-782; App.174-178). The accountant personally keeps the trust records and performs a monthly reconciliation.

Albeit, the Complainant charged Respondent with violations of trust account bookkeeping procedures which he has remedied, but the Complainant also charged Respondent with misappropriation of trust funds. Using an auditing procedure known as "negative balances" the Complainant charged Respondent in Count II of the Complaint with misappropriation of clients' funds and the Referee accepted these findings and determined that Respondent was guilty of (1) writing checks that were dishonored, (2) misappropriating clients' funds, and (3) the unauthorized utilization of clients' funds. The Complainant did stipulate that no client of Respondents ever filed a claim

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[7]/ This matter will be more fully developed when discussing Count II of the Complaint.

against THE FLORIDA BAR Clients' Trust Fund (R-463; App.179). Further, Respondent presented evidence that between 1981 and 1984 the following clients gave Respondent permission to utilize monies that were being held in trust and that all monies were properly accounted for and returned to the client when requested: Theodore Richardson (R-532; App.180); Lawrence Collins (R-565; App.180-A); Bernard Saheim (R-575-576; App.182-183); Barry Fulcher (R-491-493; App.184-186); Leonard S. Abrams (R-283-284; App.187188).[8]

The Complainant through its auditor and exhibit 67 marked into evidence before the Referee charged Respondent with misappropriating some $144,000.00 because of monies withdrawn from the trust account and the auditor could find no specific deposits back into the trust account. This created a "negative balance" relating to those clients. (R-391-396; App.189-194) There are no claims that any monies were stolen. (R-396; App.194). Only that the auditor could not allocate specific funds deposited to the trust account to specific clients. (R-400; App.195). However, during cross-examination, the auditor did admit that using the accounting papers from Respondent's accountant, the net amount which cannot be allocated to any client is a grand total of $3,440.23; in other words, the trust account owes Respondent money (R-403; App.196). The auditor admitted that the negative balances which are the basis for the Referee's determination that Respondent

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[8] These names of clients, with addresses were given to THE BAR on July 19, 1984. (App.111-113).

misappropriated clients' funds would be changed if he were able to trace the off-setting deposits to a specific client. (R-523; App.197). There is no question that no client was even given a trust account check which was returned for insufficient funds or uncollected funds. (R-420; App.198)[9]/

On or about February 2, 1982, one of Respondent's clients filed a Complaint against him.[10]/ The Complainant's investigator [Hayes] began his investigation. However, at that time, there were no allegations about insufficient funds or checks returned for insufficient funds relating to Respondent's trust account. In fact, the investigator Hayes did not return to speak with Respondent for more than a year after his first visit in February, 1982. (R.85; 142) It was after the second visit in 1983, that he, too, began an audit of Respondent's trust account for August 13, 1978, through September 1978 (R-85-87; App.142-143-A.[11]/

The nature of the Complaint concerned a settlement that Respondent obtained from Ms. Diaz in the amount of $13000.00. $3000.00 was paid directly to Jackson Memorial

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[9]/ This question was asked to the auditor and he requested time to check all of his records and if he found any he would report back. This question and response took place on March 22, 1986. The auditor again testified on June 20, 1986, and made no contrary statement.

[10]/ This Complaint is the subject matter of Counts IV, V and VI of the Complaint.

[11]/ This trust account audit is the subject of Count V of the Complaint.

Memorial Hospital, $3000.00 was paid to Ms. Diaz, $5000.00 was paid to Respondent as a fee and $2000.00 was retained by Respondent to pay any final medical bills. There was a remaining hospital bill in the approximate amount of $1100.00. Respondent forgot about the bill until he was notified by Ms. Diaz' brother that a lawsuit was filed in the County Court against Ms. Diaz by Jackson Memorial Hospital. Ms. Diaz had already moved back to Puerto Rico, however her brother who was residing at that same address accepted service. At the time the Pretrial Conference was scheduled Mr. Newman was in Key West on a criminal matter. He forgot to attend and a default judgment was entered against Ms. Diaz. Mr. Newman moved to set aside the default and following the Rules of Civil Procedure alleged that he had a meritorious defense. The Complainant's position has been that: (1) During the period of time the Respondent was supposed to be holding the $2000.00 in his trust account his balance went below $2000.00 and therefore he misappropriated trust monies; (2) that he did not promptly handle a client's matters; and (3) that in stating he had a meritorious defense in his Motion to Set Aside the Judgment, he made a false statement to the County Court. (R-33- 52; App.247-266).

The second Complaint by a client was filed by a bondsman who wrote a $1000.00 bond for one of Respondent's clients. Respondent paid $100.00 for the premium, however since his client did not have "ties to the community" he gave the bondsman a personal check in the amount of $1000.00 (post-dated)

in order to fully protect the bondsman. Respondent's client disappeared, the bond was escreated, and the bondsman deposited the check which was returned for insufficient funds. The bondsman immediately complained to THE FLORIDA BAR (that was in September of 1982). Respondent "redeemed" the check that was returned from the bank by giving the bondsman a $1000.00 check made payable from his trust account. Subsequently the escreature was remitted. (R-148-174; App. 289-315). THE BAR charged Respondent with not placing the original monies he received from his client into his trust account although the evidence is completely devoid of any statement by anyone that the monies that were wired to Respondent as a retainer for representation of Mr. Mills was intended to be in his trust account; further that he gave a trust account check in the amount of $1000.00 for which he did not have funds to cover said check; and third that he was untruthful to THE BAR when he explained the circumstances concerning the matter. (R-148-174; App.289-315).

SUMMARY OF THE ARGUMENT

In contesting the Referee's Recommendation of Discipline, the Respondent maintains that disbarment is too harsh under the facts and circumstances of this case. Respondent was guilty of poor maintenance of books and records and poor policies and procedures regarding his trust account between 1981 and June of 1984. Respondent never misappropriated any clients' funds. Respondent used poor judgment in handling two clients' matters, however neither client lost money and both were satisfied with his services up to the time of the filing of the Complaint. The Respondent never engaged in fraud or dishonesty and Respondent has made every effort to correct those matters complained about relating to his trust account procedures. The severity of the recommended discipline by the Referee, as the statements of the Referee clearly indicate, can be attributed to Respondent's refusal to plead guilty, show remorse, and to satisfy the Referee's preconceived notion that Respondent was defiant and not humble and thus did not possess the character necessary to continue to practice law. See The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986).

Further, the Respondent rejects the Referee's findings of fact with respect to Counts I through IX and maintains that the Referee's findings of fact and the corresponding recommendations of guilt on each and every count is clearly erroneous and lacking in evidentiary support in the record. The Referee's apparent characterization of Respondent's misappropriation of trust funds is based on an accounting procedure wherein the

auditor determined "negative balances" without taking into consideration Respondent's authorization to use trust monies and the timely and full repayment of those trust monies. Further, the record is void of any evidence that the Respondent failed to seek the lawful objectives of a client or failed to place trust monies into his trust account or engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. See The Florida Bar v. Neely, 12 FLW 86 (S.Ct. Case No. 66,914, January 29, 1987).

The Respondent appreciates the seriousness of these Complaints, however, with respect to the conduct of THE FLORIDA BAR in the investigation of Respondent, the record will clearly indicate that from the time THE FLORIDA BAR began its audit of Respondent's trust account, based on its own error, Respondent was placed in the same position as a "dead man waiting for the doctor to arrive."

The Complainant began its investigation of a letter from a client sent in February of 1982. A request for an audit did not commence until a year later after the Complainant "found" an alleged trust account check returned for insufficient funds.[12]/ The Complainant audited four years of trust records, one year at a time. See Murrell v. The Florida Bar, 122 So.2d 169 (Fla. 1960) and The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978). The Report of the Referee was not filed for almost five years after Respondent was notified that a Complaint was filed against him.

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[12]/ Counsel for Respondent requested as early as November, 1983, that the two Complaints from clients (Counts IV, V, VI, VII, VIII and IX) be handled separately instead of waiting for the audit to be concluded. (App.80, 81)

ISSUE I

THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS NOT WARRANTED OR JUSTIFIED.

In Bar grievance matters the ultimate disciplinary penalty is left to the Supreme Court. In imposing discipline to a member of the Bar, the Supreme Court has always recognized that discipline should be fair to both the public and the attorney, with the ultimate object of such discipline being the correction of the wayward tendencies in the accused lawyer while offering to that lawyer a fair and reasonable opportunity for rehabilitation. The Florida Bar v. McKenzie, 219 So.2d 9 (Fla. 1975); The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978).

Additionally, disbarment is generally reserved for the most infamous type of misconduct and is justifiable where the possibility of rehabilitation and restoration to ethical practice is least likely. Thus, the basis for discipinary action against a member of the Bar should (1) give due regard to the public interest; (2) afford reasonable opportunity for rehabilitation, if possible; (3) be sufficiently severe to serve as a detriment to others. The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961); The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970).

A. How has Respondent hurt the public?

Respondent believes that the Referee made numerous erroneous and unjustifiable factual determinations in recommending guilt as to all nine counts of the Complaint. Nevertheless

Respondent believes that even if this Honorable Court approves the Referee's Recommendations of Guilt, the discipline suggested is unrealistic and unjustified.

The Referee made the following statements in his Recommendation for Disciplinary Measures:

> In mitigation, it is acknowledged that no client of the Respondent has filed a Complaint against the Florida Bar Client Security Fund for money taken by the Respondent; Respondent has recently taken steps to remedy his past trust account procedures and the Respondent has a fairly good record considering the length of time he has been practicing law.
>
> Additionally, the Respondent has a stable family life and does not drink to excess or use drugs. (App.12-13).

In actuality, the Respondent poorly maintained the books and records of his trust account; failed to make orderly reconciliations of his trust account; failed to properly maintain and supervise his office account; failed to promptly pay the last medical bill of a client's settlement and then used poor judgment in handling a small claims matter filed in reference to that medical bill; and advanced his own monies to protect a bondsman against an estreature by one of his clients. The estreature was remitted and the monies returned to the Respondent (R-168-170; App.199-201). The client was well satisfied with Respondent's services up until the time she learned that <u>one</u> medical bill had not been paid (R-52; App.202). The Referee specifically found that none of Respondent's clients failed to receive the monies timely due to them.

Although the Complainant, as well as the Referee, have made numerous references to the fact that Respondent was uncooperative, Respondent and his counsel fully cooperated with THE FLORIDA BAR regarding the audit, which at all times, Respondent claimed to be improper and done for harrassment purposes.[13]/

B. Why did the Referee recommend disbarment?

The pronouncements by the Referee at the conclusion of the hearing on July 26, 1986, sums it up quite adequately:

> The Referee: What do you think your problem is? I mean your life is a mess.
>
> Mr. Newman: Was, was.
>
> The Referee: Was?
>
> Mr. Newman: My--
>
> The Referee: Your money, your practice, personal life, family, divorce, income taxes--
>
> Mr. Newman: I was divorced in 1974.
>
> The Referee: That's one thing. That's one of your problems right there. You have to take the cotton out of your ears and stuff it in your mouth and listen for a while.
>
> Defiance is just reeking out of you. Alright. What's the problem?
>
> Mr. Newman: What can I say? When you think defiance is-- I'm trying to rehabilitate. I know I was wrong.

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[13]/ Respondent's cooperation will be more fully set forth in Issue III, infra.

For the record, I'm not trying to fight the Court.

The Referee: **It just seems like a normal thing for me, you know, if the Bar was after me I would swallow my pride and say, here I surrender, I'm not going to fight, I've been wrong take my licks and get on with it. Instead this case has been going on--**

Mr. Newman: We tried that.

The 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? (R-828-829; App.203-204).

In addition to the oral pronouncements made by the Referee, the recommendations include a consideration of two private reprimands in 1970 and 1979. In fact, the Referee specifically found that the private reprimand in 1979 dealt with entrusted monies from a client which resulted in a judgment entered against that client when Respondent did not promptly satisfy the debt. The Referee analogized this private reprimand with Count IV in the Complaint. Aside from the fact that there is no evidence in the record concerning the 1970 or 1979 reprimands, in truth and in fact, the 1979 reprimand was based on an agreement wherein Respondent returned monies to a client because the Respondent could not help set aside the judgment that had already been rendered against that client prior to Respondent being engaged.

The Referee goes on to recommend disbarment and states:

> This recommendation is based on the cumulative nature of the violations; the continuous denial (bordering on defiance) of wrongdoing; the different types of violations and the refusal of the Respondent to take action to cure his methods of operation despite repeated warnings and ongoing investigations. (App.12).

First, the Referee's reliance upon the "cumulative" nature of the violations in order to increase the recommended discipline is misplaced. "Cumulative misconduct" relates to previous disciplinary history and cumulative misconduct of a similar nature. The two private reprimands referred to by the Referee as well as the nine dissimilar counts of misconduct set forth in the Complaint do not comprise the type of cumulative misconduct which would warrant the extreme discipline of disbarment. See The Florida Bar v. Felder, 425 So.2d 528 (Fla. 1982); The Florida Bar v. Hunt, 441 So.2d 618 (Fla. 1983).

Further, as clearly set forth in The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986), it is improper for a Referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct or on "lack of remorse" presumed from such refusal.

What is even more disturbing is the Referee's statement that:

> One thing that really puzzles me, you spend all this time on mitigation, I haven't heard anything in mitigation and I haven't heard one word in mitigation, that's the thing that puzzled me, really. (R-868-869; App.205-206).

Respondent presented his previous attorney, the Honorable A. Jay Cristol (R-701-725; App.207-231) who set forth the chronology of the events, his attempts to work out a plea arrangement, and his attempts to fully cooperate with THE BAR. Clients testified, but more than that, Respondent's present certified public accountant testified that he has set up all of Respondent's trust accounting to comply and conform with the present rules regulating such accounts. (R-777-790; App.232-245).

Respondent himself agreed to allow THE FLORIDA BAR to continually audit his trust account without notice (R-825; App.246).

Certainly, the reasons given by the Referee in recommending disbarment are unwarranted when no clients' funds were lost due to Respondent's actions and no payments were made by the Florida Bar Client Security Fund. Further after 24 years[14]/ of practice the two private reprimands are not in any way similar to the nine counts set forth in the Complaint.

C. Is the recommended discipline of disbarment in line with punishment imposed on other attorneys for similar misconduct?

The Supreme Court recognizes that although each attorney and his actions must be individually assessed in meteing out punishment, a Referee cannot totally ignore prior

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[14]/ The private reprimand from 1970 is not only more than 17 years from the date of this brief, it was a grievance committee admonishment.

actions and discipline given to other attorneys in similar situations. If prior decisions are to be ignored, discipline of attorneys would be capricious rather than reasoned and would therefore not accomplish its purpose. The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979).

On January 5, 1987, Blas E. Padrino was given a public reprimand and probation after he was found guilty of failing to keep trust account records and to follow trust account procedures in accordance with the prescribed minimum requirements of THE FLORIDA BAR. The Court found that because there was no misappropriation of client funds and he lacked prior disciplinary action a public reprimand together with probation and quarterly reports by a C.P.A. was sufficient. Here the Supreme Court recognized the fact that no misappropriation of clients' funds was a mitigating circumstance. In the case sub judice, the Referee found no mitigation even though there was no misappropriation of clients' funds. 12 FLW 71(Case No. 68,350).

On January 5, 1987, Paul G. Block was disciplined because he was found guilty of improprieties in trust accounting procedures and the return of a trust account check for insufficient funds. His discipline consisted of a public reprimand and a three year probationary period together with monthly reconciliations by a certified public accountant. 12 FLW 65 (Case No. 68,799).

On January 29, 1987, Frank J. Heston was disciplined for co-mingling personal and trust funds, for poor maintenance of books and records and poor policies and procedures regarding

his trust account, for failing to reconcile his trust account, and for failing to notify his bank that they were to notify THE FLORIDA BAR if any trust account check was dishonored. The Referee recommended and the Supreme Court approved a public reprimand and a two-year probationary period.

On July 17, 1986, John P. Fitzgerald was disciplined for conduct involving dishonesty, fraud, deceit and misrepresentation a public reprimand was given. The Florida Bar v. Fitzgerald, 491 So.2d 547 (Fla. 1986).

On January 29, 1987, Kenneth Padgett had his previous suspension extended for three months, nunc pro tunc, for engaging in conduct contrary to honesty, justice and good morals; for mishandling trust funds; for conduct involving dishonesty, fraud, deceit and misrepresentation; and for conduct adversely reflecting on the fitness to practice law; failure to prepare and execute written settlement statements; and inadequate trust records. At the time of this discipline, Mr. Padgett was previously under suspension for six months. 12 FLW 88 (Case No. 68,158).

Even in cases where monies were taken, but where an attorney has made restitution prior to the Supreme Court's review, consideration has been given to that attorney as in The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980).

This same type of discipline, that is reprimand and/or minor suspension, when funds are not lost or stolen, appears in The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981); The Florida Bar v. Bryan, 396 So.2d 165 (Fla. 1981).

On February 12, 1987, this Honorable Court issued a three month suspension against Brinly S. Carter as reported in 12 FLW 102 (Case No. 66,126) wherein Mr. Carter was not even required to prove rehabilitation after his three month suspension although the findings of the Referee that he maintained inadequate records in connection with an estate, submitted an inaccurate statement of expenses to the personal representative of that estate and failed to exercise meaningful supervision over his staff in connection with the estate record keeping thus engaging in conduct involving dishonesty, fraud, deceit or misrepresentation even though Mr. Carter had been previously reprimanded twice for prior misconduct. 12 FLW 102 (Case No. 66,126).

Stephen W. Toothaker, Case No. 65,518, on October 10, 1985, was given a public reprimand after being found guilty of two counts of conduct adversely reflecting on his fitness to practice law because he mishandled two legal matters. In that instance, this Court approved the recommendations of the Referee that the Respondent [Toothaker] was capable of competently continuing the practice of law and that the two instances he failed to maintain the necessary integrity did not require more than a public reprimand. The Florida Bar v. Toothaker, 477 So.2d 551 (Fla. 1985).

Accordingly, the totality of this matter and the above noted cases clearly indicate that the recommended discipline is inappropriate and unjust.

ISSUE II

THE REFEREE'S FINDINGS THAT RESPONDENT WAS GUILTY OF ALL NINE COUNTS OF MISCONDUCT IS CLEARLY ERRONEOUS.

Respondent recognizes that a Referee's findings and recommendations will be upheld unless clearly erroneous and without support in the record. Further it is for the Referee to weigh the credibility of the witnesses before him. Nevertheless, Respondent contends that not only are many of the Referee's findings clearly erroneous, but there is no evidentiary support in the record for the majority of the findings of fact set forth in the Referee's Report. See The Florida Bar v. Neely, 12 FLW 86 (January 29, 1987, Case No. 66,914); The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986).

A. Did the Florida Bar have a right to do an audit of Respondent's trust account between the years 1981 and 1984, and if so, did Respondent, in fact misappropriate clients' funds?

Integration Rule 11.02(c) provides that audits for cause may be conducted under the following circumstances:

> (i) A trust account check is returned for insufficient funds or for uncollected funds, absent bank error.
>
> (ii) A Petition for Credit or Relief is filed on behalf of an attorney.
>
> (iii) Felony charges are filed against an attorney.
>
> (iv) An attorney is adjudged insane or mentally incompetent, or is hospitalized under the Florida Mental Health Act.

(v) A claim against the attorney is filed with the Client Security Fund.

(vi) When requested by a Grievance Committee or the Board of Governors of the Florida Bar.

(vii) Upon Court Order.

In the instant case, the Complainant's excuse for ordering an audit was based upon THE BAR'S mistaken belief that a $54.00 check made payable to the Clerk of the Circuit Court was a trust account check which was returned for insufficient funds. By March 7, 1983 (App. 65) THE FLORIDA BAR knew that no trust account check of Respondent's was returned for insufficient funds. This fact was verified by the bank on May 11, 1983 (App.71). Nevertheless, THE FLORIDA BAR maintained its position and proceeded to audit four years of Respondent's trust account. Appropriate motions were filed. Since the Referee is only entitled to determine factual issues, it is up to this Honorable Court to determine whether THE FLORIDA BAR is legally entitled to pursue Counts I and II of the Complaint.

B. Was there a misappropriation?

On the assumption that THE FLORIDA BAR was legally entitled to conduct its audit, the results of the audit certainly do not warrant the Referee's findings as specified in his report as to Counts I and II (App.2-4).

The Complainant has produced testimony from its auditor that using an accounting procedure known as "negative

balances" the Respondent has misappropriated clients' funds for his own use. Amazingly, Complainant's position is that once said negative balances are placed into evidence, the burden is on the Respondent to show where the money went. (R-682-683; App.283-284) Contrary to the Complainant's position, it is the obligation of the Complainant to identify any specific sum of money which it claims Respondent is alleged to have appropriated to his own use in order to obtain a factual determination of guilt as to those charges, more specifically, guilt as to Count II. See The Florida Bar v. Randolf, 238 So.2d 635 (Fla. 1970).

No where in the 858 pages which comprise the record of evidence presented against the Respondent is there any evidence contradicting the fact that trust monies which were utilized by the Respondent and which caused the "negative balances" were done so without permission of each and every client. In fact, each client testified that over the years permission was granted to the Respondent to utilize trust monies and never once did a client not receive all monies due when demand was made. In fact, each client testified that they were not owed any monies nor did they have to "wait" for monies to be returned to them. As this Court held in The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981) the breach of Disciplinary Rules by an attorney was not in borrowing money of a client with a client's permission, but in failing to repay that money when it was demanded and due. In fact, the Referee found that Mr. Golden also violated the

Disciplinary Rules by not keeping adequate records of his trust accounting procedures and a public reprimand was meted out as appropriate discipline.

The record affirmatively shows that the office checks which were returned from the clerk's office between the years 1980 and 1982 were written on an account wherein his office staff were included as signatories. The account contained monies which did not belong to clients. At no time did the Clerk of the Circuit Court of the Eleventh Judicial Circuit stop accepting office checks from the Respondent for filing fees and since 1982 no other office checks were ever returned for insufficient funds. (Ex. 32, R-185-186).

C. Do the two clients' Complaints indicate that the Respondent is unfit to practice law?

Respondent's "misconduct" in dealing with two clients had been misconstrued factually.[15]/ These misconceptions lead to the erroneous findings of guilt as hereinafter set forth:

The record clearly indicates that Respondent properly handled Ms. Diaz and her settlement (R-33-52; App.247-266). Respondent admitted that he forgot to pay the final bill to Jackson Memorial Hospital. He had previously paid part of the bill ($3000.00) but the balance of the monies remaining in his

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[15]/ The procedure followed by THE BAR relating to these two Complaints will be discussed in Issue III; infra.

trust account were not promptly forwarded. Jackson Memorial filed a suit in the County Court to collect a balance due of $900.00. The record also shows that because of a conflict Respondent had in a criminal trial in Key West, he missed the Pretrial Hearing scheduled in the County Court when the lawsuit was filed against his client. Respondent admits that he used poor judgment in attempting to set aside the default, but the Complainant charges, and the Referee so finds, that in filing a Motion to Set Aside the Default and alleging that Respondent had a meritorious defense, he has violated the applicable Disciplinary Rules.

Respondent's Motion to Set Aside the Default followed the Florida Rules of Civil Procedure. Although it is an afterthought, clearly, Jackson Memorial Hospital did not have jurisdiction over Ms. Diaz since she had permanently moved back to Puerto Rico at the time service was made on her brother. (R-61; App.286) Even so, Respondent satisfied the judgment and, all attendant expenses and costs. (R-62-63; App.287-288) The major concern of the Referee was that the credit of Ms. Diaz was affected. (App.9) No where in the record does it show that the judgment was ever recorded or that Ms. Diaz had any problem with her credit[16]/ because of that lawsuit. In twenty-four (24) years of practice, this instance of failing to carry out his representation of a client, cannot be considered to adversely

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[16]/ The idea of hurting Ms. Diaz' credit came from a gratitious remark by her brother (R-60; App.285).

reflect on his fitness to practice law. See The Florida Bar v. Toothacker, 477 So.2d 551, (Fla. 1985).

The Referee then accepted the auditor's "negative balance" accounting process and determined that at one point during the period of time Respondent was holding $2000.00 in his trust account relating to the claim and payment due Jackson Memorial Hospital, his bank balance went below $2000.00 and therefore Respondent misappropriated his client's funds. Again, Respondent's client testified that all monies due to her were paid to her and except for the payment of the hospital on a belated basis, no monies were taken or stolen from his client. (R-62-63; App.287-288).

The Referee made findings of fact and recommendations of guilt in Counts VII, VIII and IX based upon the prior testimony[17]/ of the estranged wife of a client of Respondent. (R-148; App.289) The witness had no personal knowledge of any of the matters, and in fact, the record affirmatively shows that Respondent was forwarded monies from his client's employer. Those monies were not trust monies nor were they ever considered to be trust monies. The fact that Respondent had given the surety a personal check (post-dated) to protect the bondsman, and later exchanged that check for a trust account check, was determined by the Referee to indicate that the monies received on behalf of Mr. Mills belonged in

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[17]/ Grievance Committee hearing transcripts pages 13-39.

Respondent's trust account. (R-164-175; App.305-315) Respondent was sent his fee together with monies for the premium for a bail bond. The record affirmatively shows that the bond which was estreated was remitted back to the bondsman who returned to Respondent the monies which were represented by that trust account check. (R-164; App.305) What the record also indicates is that the grievance was filed by the bondsman after the first check, that is the personal check, was returned for insufficient funds (R-164-166; App.305-307). As brought out in cross-examination of the bondsman, the procedure followed by the Respondent comported with local custom and practice by criminal lawyers in the South Florida area. (R-159-163; App.300-304). Respondent did not violate any Disciplinary Rules except in not properly explaining to the investigator what happened since he wanted to avoid having THE FLORIDA BAR believe he was acting as a surety for his client.

A Referee's findings of fact are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Neely, 12 FLW 86 (Case No. 66-914, January 29, 1987). In this case, with the exception of the Referee's findings that Respondent poorly maintained his books and records regarding his trust account; failed to make trust account reconciliations or maintain ledger cards; and that he was neglectful in paying the medical bill for Ms. Diaz, the 858 pages of testimony do not support the findings of fact and recommendations of guilt on all nine counts and their "sub-parts."

ISSUE III

THE RECORD AFFIRMATIVELY DEMONSTRATES THAT THE ACTIONS AND CONDUCT OF THE FLORIDA BAR IN INVESTIGATING THE RESPONDENT AND PRESENTING EVIDENCE TO THE REFEREE CONSTITUTE AN ABUSE OF THE POWERS GIVEN TO THE FLORIDA BAR UNDER THE INTEGRATION RULE OF THE FLORIDA BAR, HAVE PREJUDICED RESPONDENT AND INFLICTED AN UNDUE BURDEN UPON RESPONDENT NOT CONTEMPLATED BY THE RULES OF PROFESSIONAL CONDUCT.

A. Why did the Florida Bar wait four years to hear a Complaint filed February 2, 1982 and another four years on the second Complaint filed September, 1982?

The Complaint by Ms. Diaz (Garcia) involving Counts IV, V and VI was filed on February 2, 1982 (R-83-84; App.316-317). The Complaint filed by the bondsman Slatko was filed in December, 1982. (R-154-155; App.268-269) Nevertheless, both these matters were consolidated to be heard together with a trust account audit which was not begun until May 9, 1983 (R-191; App.135). During that period of time, Respondent was represented by attorney A. Jay Cristol. On July 22, 1983, attorney Cristol inquired as to the status of the Diaz (Garcia) and Slatko matters (App.75).

The first request for an early hearing on the matters involving clients was by letter dated April 1, 1983. (App.66) At that time Mr. Cristol was seeking a vacant seat on the Board of Governors and wanted to conclude as much of this matter as possible to avoid any conflict. Again, a request was made on November 22, 1983, when the Honorable A. Jay Cristol asked that the two grievances involving the clients be scheduled and the trust matters deferred until the audit was complete. (App.80).

These requests went totally unanswered. There certainly was no additional discovery necessary and individually the clients' Complaint was of minor nature. This uncalled for and inordinate delay which was specifically caused by THE BAR, in light of the fact that Respondent did not have a record of prior disciplinary activity, was in and of itself a penalty as far as Counts IV, V, VI, VII, VIII and IX are concerned. The only explanation for allowing four years to lapse to take care of these simple matters was to enable THE BAR to present this "overwhelming" amount of misconduct to a Referee. These facts are evidenced by the correspondence between A. Jay Cristol, Patricia S. Etkin, Assistant Staff Counsel, Steven Brown, Chairman, Grievance Committee and Respondent. (App.92-108).

After nearly five years of investigation, THE BAR has the exact same results as outlined in the offer to settle the matter in the two-page letter of Judge Cristol dated February 25, 1983 (App.318-319) and July 6, 1983. (App.76-77).[18]/ Instead, THE BAR attempted to hold off on two minor Complaints until it could determine a way to "get" Respondent through the trust account audit. See The Florida Bar v. Randolf, 238 So.2d 635 (Fla. 1970); The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978); Murrell v. The Florida Bar, 122 So.2d 169 (Fla. 1960); The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).

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[18]/ In fact, the Respondent executed an admission of minor misconduct in 1984 (App.322-323.

B. Did Respondent cooperate with the Florida Bar?

Throughout the 858 pages of testimony, THE FLORIDA BAR continually referred to the fact that Respondent was uncooperative and it was his fault that the audit took four years. A selected exchange of letters and correspondence with the auditor, Respondent's counsel, Respondent and staff counsel clearly shows that Respondent, his attorney and accountant in every way attempted to cooperate. In those checks and statements that were not in Respondent's possession, Respondent directed the bank to reproduce them. On the other hand, THE FLORIDA BAR and/or the auditor made no attempt to obtain any additional records (R-326-332; App.153-159 and App.65-122).

During the testimony on mitigation, the Honorable A. Jay Cristol explained to the Referee the efforts he expended in attempting to satisfy staff counsel and to settle the matter. (R-703-716; App.270-283).

The most distressing testimony in the 858 pages before this Honorable Court is that question by counsel for Respondent directed to Judge Cristol as follows:

> Question: . . . Judge Cristol, did there come a time that you discovered, after Ms. Etkin [staff counsel] became involved in the investigation of the Florida Bar, she opened up files that you believe to have been investigated and closed?. . .

> The Witness: There were a number of files that had been closed for no probable cause. I'm not sure how many, but were reopened later and added. Whether they were ultimately disposed of before this date or not, I don't know. I believe that they were all, again, closed on a no probable cause basis. They were not for particularly serious matters. I don't recall, but they were those events that occurred. (R-711; App.278).

On March 7, 1983, the Honorable A. Jay Cristol notified Ms. Etkin that the trust account check which she claims was returned for insufficient funds was in error. (App.65). An illegible check was forwarded to Mr. Cristol on April 5, together with a notation that an additional check was found (office check) and would be added to the list of February 17, 1983. (App.67). On that same day Ms. Etkin formally notified Judge Cristol that an investigation would commence for all bank records pertaining to Respondent's trust account from November, 1980 through the present. At the time of the letter (App.68) the "present" was April 5, 1983. By May 11 (App.71) the bank verified the fact that there were no trust violations. Nevertheless, THE BAR continued up through June 12, 1984, when Judge Cristol requested additional information concerning unknown charges reflected on correspondence (App.104). The response from Ms. Etkin was basically that he was not representing Mr. Newman in those additional matters and he had no right to know about them. (App.107-108).

Judge Cristol even went so far as to supply the names and addresses of clients of Mr. Newman who had authorized the

use of his trust monies together with all other matters relating to his trust records through May of 1984 (a full year of additional audit because of the activities of Ms. Etkin). (App.111-113).[19]/

C. Do the Rules of Discipline govern all Florida attorneys?

The Code of Professional Responsibility and Integration Rule of THE FLORIDA BAR sets forth the rules governing the conduct of attorneys. Not only attorneys in private practice, but attorneys representing THE FLORIDA BAR as well.

Respondent in no way denies his responsibility to the public, to his clients or to his profession. He has readily admitted from the beginning of the investigation that he had violated certain trust accounting procedures. Since 1984, however, Respondent has rehabilitated himself as to his trust accounting procedures. Respopndent then as well as presently commands respect from the bench and THE BAR and has maintained a practice of law that is commensurate with the high standards of the legal profession.

Respondent believes that he has been unduly burdened and prejudiced, due to the manner in which two 1982 clients' Complaints were deliberately "kept alive" until a trust audit

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[19]/ Prior to the taking of testimony before the Referee, sworn statements were taken by staff counsel of all clients listed by the auditor for verification of authorization for use of trust monies. These statements were offered into evidence by Respondent and the Referee refused their admission. The auditor refused to acknowledge these statements although he was present when the statements were recorded.

that took four years to complete was ready to present to a grievance committee. The extensive transcript and length of hearings are mainly the result of the actions of staff counsel in continually adding to the various charges, then dropping various charges and maintaining this investigation up through 1985, when counsel representing Respondent was appointed to the Federal Bankruptcy Court and new counsel had to come in and sift through three years of materials.

The totality of the burdensome position placed upon Respondent can be clearly seen in the cost affidavit (App.122-128) which was filed seeking the sum of $33,374.45 of which $23,681.49 was only for the audit and investigative costs. A sum that is quite unreasonable and outlandish considering the length of time it took THE FLORIDA BAR to bring this matter to a Referee when Respondent's lawyer, in early 1983, offered a plea negotiation admitting trust account violations on February 25, 1983, and offered an executed admissions form on October 8, 1984. (App.318-328). See The Florida Bar v. Craig, 261 So.2d 138 (Fla. 1972).

CONCLUSION

Certainly, and upon consideration of the evidence, or lack of evidence in the record, the fact that Respondent has corrected the matters complained about, that no clients lost any money and that the actions by THE FLORIDA BAR contributed in disciplining the Respondent for the past five years, Respondent

accordingly and respectfully prays that this Honorable Court will grant his Petition for Review and determine that the Referee's Findings of Fact, Recommendations of Guilt and Recommendation of Discipline are unjustified and erroneous.

In the alternative, if this Honorable Court determines that Respondent should be suspended for more than three months and one day, that a date for readmission be included in the opinion. See The Florida Bar v. Roth, 12 FLW 60 (Dec. 24, 1986).

Respectfully submitted,

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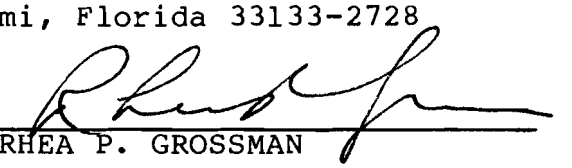
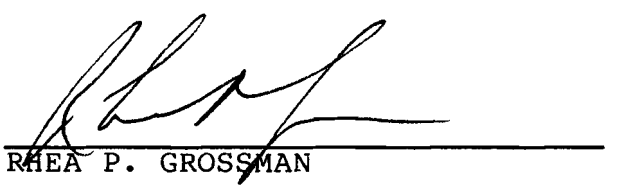
By: 
RHEA P. GROSSMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Respondent together with attached Appendix was furnished by U.S. Mail on this 2nd day of March, 1987, to the the following: Patricia S. Etkin, Bar Counsel, The Florida Bar, Suite 211 Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131; and John A. Boggs, Director of Lawyer Regulation, The Florida Bar, The Florida Bar Center, Tallahassee, Florida 32301-8226.


RHEA P. GROSSMAN