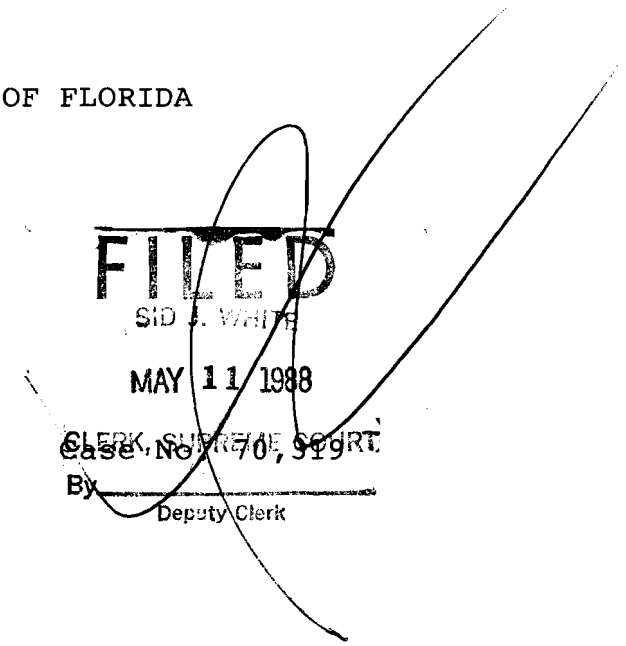
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Petitioner,

vs.

CASE NO. 70,919

CHARLES MCCALL MIMS,

Respondent.
_____/

INITIAL BRIEF IN
SUPPORT OF PETITION FOR REVIEW

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PRELIMINARY STATEMENT

In this Brief, Petitioner, THE FLORIDA BAR, (Complainant below) will be referred to as "The Florida Bar." Respondent, CHARLES MCCALL MIMS, will be referred to as "Respondent."

References to the transcript of hearing before the Referee will be (TR - page number) and references to exhibits introduced at the hearing will be (TFB Exhibit - number), References to the Referee's Report will be (RR - page number).

STATEMENT OF THE CASE AND FACTS

On April 2, 1987, The Florida Bar filed a five count Complaint against Respondent, each count citing multiple violations of Disciplinary Rules. The Honorable William J. Tolton was appointed on April 21, 1987 to act as referee in this proceeding. Requests for Admissions were filed by The Florida Bar and served on Respondent April 28, 1987. The Florida Bar filed a Motion to Deem Matters Admitted and for Summary Judgment on June 10, 1987 based upon Respondent's failure to answer either the Complaint or the Request for Admissions. Notice of Hearing dated July 9, 1987 was furnished to all parties setting down the Bar's Motion to Deem Matters Admitted and Motion for Summary Judgment for hearing on July 22, 1987; also noticed were Final Hearing dates of September 17 and 18, 1987. No pleadings were filed by Respondent prior to hearing on the Bar's motions set for July 22, 1987. On that date, Respondent appeared and submitted for filing an Answer to the Complaint and Answer to Request for Admissions.

On September 17 and 18, 1987, Final Hearing was held before the Referee. Evidence and witnesses were presented by the Bar relating to the five counts of misconduct charged against Respondent. Respondent appeared pro se and presented

no witnesses other than himself. At the conclusion of the two day hearing, the Referee issued an order requiring both parties to submit written closing arguments. The order required The Florida Bar to submit its written closing arguments within ten days from the date of the conclusion of the hearing. Respondent was ordered to submit written closing arguments on his behalf within five days from the date of receipt of the Bar's Written Closing Arguments. The Bar's Closing Arguments were served on Respondent on September 25, 1987 and returned receipt indicates Respondent's receipt on September 26, 1987. Respondent's Closing Arguments due no later than October 1, 1987 were served on The Florida Bar on October 6, 1987.

The Referee issued his First Report of Referee on November 25, 1987 indicating findings of guilt on Counts I and II as to various charges cited in the Bar's Complaint.

The facts and circumstances leading to findings of guilt against Respondent in Count I of the Bar's Complaint deal with the complaints by two of the Respondent's former clients, Ms. Willer Culp and Ms. Louise Getts. Also included in Count I of the Bar's Complaint was misconduct relating to Respondent's trust account. These charges were based on an audit performed by The Florida Bar which was precipitated by the complaints of Ms. Getts and Ms. Culp.

Sometime in December 1983, Ms. Louise Getts retained Respondent to file guardianship proceedings for her two minor children, Georgianne Lea Huling and William Eldridge Urquhart. (TFB Exhibit #2 at 77). The guardianship was funded by $4,200 in proceeds from the sale of real property. Sometime during March of 1984 and again in June 1984, Ms. Getts requested that the guardianship funds be placed into an interest bearing account. (TFB Exhibit #2 at 78). Numerous unsuccessful attempts were made by Ms. Getts to communicate with Respondent. (TFB Exhibit #2 at 79). At least one time before the end of 1984, Ms. Getts was successful in communicating with Respondent and renewed her request that the guardianship funds be placed into an interest bearing account. (TFB Exhibit #2 at 79-80). According to Respondent, he informed her that he had already done so. (Respondent's closing argument at 7). In her attempts to locate and communicate with Respondent, Ms. Getts made at least two trips from her home in Georgia to meet with Respondent. (TFB Exhibit #2 at 80-81). On one of the two trips made in 1984, Ms. Getts reviewed the probate court file and discovered that an accounting had been filed with a signature that was not her own. (TFB Exhibit #2 at 81, 83 and 84). Ms. Getts subsequently discovered that contempt proceedings had been initiated by the probate court based on the failure to file an annual return. (TFB Exhibit #2 at 84-85). Following her discovery she wrote to the probate judge seeking an accounting

and the release of the funds and filed a complaint with The Florida Bar. (TFB Exhibit #2 at 98; TR 57).

On August 20, 1985, Mr. Danny Kepner, a member of the First Judicial Circuit Grievance Committee was contacted by then Chairman of that committee, Mr. Robert Davis Bell, and was requested to initiate an investigation of Ms. Getts complaint against Respondent. (TR 28-29). Mr. Kepner immediately initiated his investigation by calling Respondent's office on several occasions on August 20 and 21, 1985 leaving messages on both occasions for Respondent to contact him and indicating that the matter was urgent. (TR 35). After receiving no return phone calls, from Respondent, Mr. Kepner went to Respondent's office on August 22, 1985. (TR 36). Mr. Kepner identified himself as a member of the grievance committee and advised Respondent that he was investigating complaints by Ms. Getts and Ms. Culp and that he needed certain information from Respondent. (TR 36). Mr. Kepner specifically inquired about the $4,200 that was being held as guardianship funds for Ms. Getts' two minor children. (TR 37). Respondent advised Mr. Kepner that these funds were being held in a separate account in his name and promised to provide bank statements to Mr. Kepner that same day, August 22, 1985. (TR 37, 40 and 483).

When Respondent failed to contact Mr. Kepner on August 22, 1985, Mr. Kepner called Respondent on August 23, 1985 and left an urgent message. (TR 40-41). Because he had still received no word from Respondent, Mr. Kepner went to Respondent's office with a subpoena on August 26, 1985. (TR 42). Respondent again promised to provide documentation in the form of a bank statement by noon the next day. (TR 42-43). When Mr. Kepner went to Respondent's office that next day, August 27, 1985, Respondent admitted to Mr. Kepner that he had "borrowed" the $4,200 in guardianship funds from his trust account. (TR 43-44).

Respondent attempted to justify the use of these trust funds by assuring Mr. Kepner that he had always been in the position to "cover" these funds by obtaining money from either members of his family or a client that owed him money. (TR 45). Mr. Kepner determined that immediately before his meeting with Respondent on August 27, 1985, Respondent had deposited funds into his trust account in the amount of $4,630. (TR 45). Respondent advised Mr. Kepner that these funds had been obtained from a client/friend. (TR 45-46).

The second complaining party in Count I, Ms. Willer Culp, had retained Respondent in 1985 to handle a real estate transaction. (TR 185). The closing on this transaction occurred in March of 1985. (TR 203). Net proceeds from the

closing in the amount of $10,271.98 were to be held by Respondent in trust for Ms. Culp. (TR 83). These funds were to be used in conjunction with funds from another source to repurchase Ms. Culp's homestead property in Cantonment, Florida from Liberty Bank. The property had been the subject of foreclosure proceedings, and Liberty Bank held a foreclosure judgment on the property. (TR 10-11, 186, 187). The source of the other funds was a loan which had been arranged with the First Union Bank in Pensacola. (TR 188).

On June 26, 1985 the funds from the second source, First Union Bank became available. (TR 13, 188). At that time the only thing that remained to be done was the transmittal of funds from Respondent to Liberty Bank's attorney, Mr. Charles Hoffman. (TR 14). Mr. Hoffman made a number of phone calls and wrote two letters to Respondent, June 28, 1985 and July 26, 1985, requesting Respondent's immediate attention. (TR 13-15, 18). Mr. Hoffman testified at the final hearing that Liberty Bank was anxious to finalize the foreclosure sale back to Ms. Culp and that the delay in finalizing was causing some concern to the bank. (TR 15, 16, 25).

Ms. Culp made repeated attempts to speak with Respondent and to meet with him but these attempts were unsuccessful. (TR 190-191). In attempt to finalize the repurchase of her homestead property Ms. Culp had contacted Mr. Hoffman, and

determined that the delay was the result of Mr. Hoffman's inability to communicate with Respondent. (TR 192-193). She was advised at one point that the repurchase would have to be completed within the next week. (TR 192-193). Despite Ms. Culp's and Mr. Hoffman's attempts to finalize this transaction, Respondent failed to transmit the funds to Mr. Hoffman until August 26, 1985, after Ms. Culp had contacted the Bar for assistance and after Mr. Kepner's repeated demands for action by Respondent. (TR 16, 193-194).

Mr. Kepner went to Respondent's office on August 22, 1985, the same day he inquired about the Getts guardianship funds. (TR 36). When Mr. Kepner inquired about the funds being held in Ms. Culp's behalf, Respondent admitted writing over to himself funds which belonged to Ms. Culp in an amount in excess of his earned fee. (TR 38-39). Respondent also admitted that the amount indicated on the ledger card did not accurately reflect the amount actually held in the trust account for Ms. Culp. (TR 39). At the final hearing, Respondent admitted that he really had no way of knowing exactly how much had been written over to himself due to inadequate record keeping. (TR 472-473).

The complaints of Ms. Getts and Ms. Culp precipitated an audit by The Florida Bar of Respondent's clients' trust account. On September 10, 1985, Mr. Clark V. Pearson, Chief

Auditor for The Florida Bar, went to Respondent's office and initiated an audit of Respondent's trust account. (TR 70). For the next three weeks, Mr. Pearson audited Respondent's clients' trust account records for the period of time inclusive of October 1982 through September 1985. (TR 70). Because the trust account records were incomplete, Respondent was given every opportunity to explain or resolve apparent shortages in the trust account. (TR 73-74). In addition to having shortages in the trust account, the audit report indicated the following: (1) incomplete trust account records; (2) failure to prepare and retain trust account reconciliations; (3) incomplete or nonexistent documentation as to receipts, disbursements, and transfers; (4) at least 24 checks during a 24 month period which were presented for payment when there were either insufficient or uncollected funds in the account; (5) and commingling of personal funds with client funds in the trust account. (TR 75-76) (TFB Exhibit #1).

Mr. Pearson testified at the final hearing that the $4,200 in guardianship funds for Ms. Getts' children did not remain in Respondent's trust account, that there was no indication in the trust account records of these funds being placed in a separate account and that Respondent had disbursed the funds for his own personal benefit. (TR 79). The funds were replaced into Respondent's trust account in August of 1985.

(TR 80). Despite Mr. Pearson's repeated requests, Respondent provided no documentation to support his contention that these replacement funds had been provided by an alleged friend/client, a Mr. Rodney Davidson. (TR 80-81).

Mr. Pearson's audit report indicates that in June 1985, when the disbursement to Liberty Bank on behalf of Ms. Culp should have taken place, the confirmed shortage for Respondent's trust account was $7,710.00. (TFB Exhibit #1).

The audit report also indicates that confirmed shortages for each of the 24 months of the audit ranged from $347.13 in November of 1983 to $7,710 in June of 1985. (TR 89 and TFB Exhibit #1). Mr. Pearson testified that he made an appointment with Respondent to go over the audit report with him and to allow him to provide documentation to reduce apparent shortages in the trust account. (TR 72). Respondent did not keep that appointment and made no contact with Mr. Pearson prior to the grievance committee hearing. (TR 72).

Based upon the audit report prepared by Mr. Pearson and the affidavit of Mr. Danny Kepner, a Petition for Temporary Suspension was filed by The Florida Bar and granted by this Court on November 19, 1985. Respondent remains suspended under that order.

The misconduct attributed to Respondent in Count II of the Bar's Complaint deals with his representation of a Ms. Judy Nelson on a number of legal matters arising out of a fire which destroyed Ms. Nelson's mobile home and caused the death of her child's father. Respondent was retained initially in December of 1981 to negotiate with an insurance company for the proceeds of a policy that covered the mobile home and its contents. (TR 338). Respondent was also retained to initiate probate proceedings for the estate of the child's father, William Roy Perkins, to establish a guardianship for the couple's daughter, Crystal Lynn Perkins, and to file a law suit against the father's life insurance company. (TR 326-328; 331).

Respondent successfully negotiated payment of the insurance proceeds on the mobile home, and the payoff of the mobile home. For these services he charged a $1,500 fee. Respondent prepared a partial accounting which reflects disbursement of the insurance proceeds. (TFB Exhibit #3). The accounting indicates that in addition to the $1,500 fee, Respondent deducted $317.60 as escrowed costs for the probate and guardianship matters and for the law suit against the life insurance company. (TR 330). By Respondent's own admission, these escrowed costs were never used for the purposes stated in the partial accounting nor were they ever returned to Ms. Nelson. (TR 330-334, 445).

From the time he was first retained in December of 1981, until the date of his temporary suspension in December of 1985, Respondent failed to file probate proceedings in the estate of Mr. Perkins. As a result, Ms. Nelson was denied the benefit of $1,600 which represented Mr. Perkins one-half interest in the insurance proceeds on the furnishings of the mobile home. (TR 335-336, 345-347). It was only through the assistance of a pro bono attorney that the probate matter was finally filed and the $1,600 in insurance proceeds disbursed to Ms. Nelson in 1987. (TR 347-348, 350).

As to Count I, the Referee found Respondent guilty of violating article XI, Rule 11.02(4) (trust accounting rules and procedures), Rule 11.02(3)(b) (misconduct constituting a felony or misdemeanor) of the Integration Rule of The Florida Bar and Disciplinary Rules 1-102(A)(3) (illegal conduct constituting moral turpitude), 1-102(A)(4) (conduct involving dishonesty, deceit, or misrepresentation), 1-102(A)(2)(sic) (failure to carry out a contract of employment), and 7-101(A)(1) (failure to seek lawful objectives of a client) of the Code of Professional Responsibility of The Florida Bar.

As to Count II, the Referee found Respondent guilty of violating article XI, Rule 11.02(3)(a) (acts contrary to honesty, justice or good morals) of the Integration Rules of The Florida Bar and Disciplinary Rules 1-102(A)(6) (conduct

that adversely reflects upon fitness to practice law), 6-101(A)(3) (neglect of a legal matter), Rule 7-101(A)(1) (failure to seek lawful objectives of a client), and Rule 7-101(A)(3) (prejudicing a client during the course of a professional relationship) of the Code of Professional Responsibility of The Florida Bar.

The Referee found Respondent not guilty of misconduct charged in Counts III, IV, and V of the Bar's Complaint.

After submission of Arguments as to Appropriate Discipline by both parties, a Second Report of Referee was issued on January 19, 1988. The Second Report of Referee, Referee recommended that Respondent be suspended from the practice of law for a period of three years and that prior to his petitioning for reinstatement he be required to: (a) make complete restitution to his former clients as a result of his misconduct; (b) reimburse The Florida Bar Clients' Security Fund for claims paid on behalf of the Respondent; and (c) attain a passing score on the Multistate Professional Responsibility Examination. The Referee further recommended that in the event that Respondent is reinstated or readmitted to the practice of law he be placed on probation for three years, during which time he would be subject to the random and periodic audits of his clients' trust accounts.

At the meeting terminating March 18, 1988, the Board of Governors of The Florida Bar met and, pursuant to Rule 3-7.4(e), Rules of Discipline, directed the undersigned Bar Counsel to petition for review of the Referee's recommended discipline of three years and to seek disbarment.

This brief is filed in support of The Florida Bar's Petition for Review.

SUMMARY OF THE ARGUMENT

Respondent in this matter, Charles McCall Mims, knowingly and intentionally misappropriated $4,200 of funds belonging to the guardianship of a client's two minor children. Additionally, Respondent's failure to maintain proper trust accounting records, and to abide by the rules of trust accounting procedure resulted in shortages in his trust account and delayed the disbursement of funds belonging to another client. An audit of Respondent's trust account revealed numerous violations of trust accounting rules and procedures including commingling and shortages. In another matter, Respondent neglected a client's case for approximately four years and failed to disburse to her escrowed costs.

The seriousness of Respondent's misconduct viewed in light of aggravating circumstances, including Respondent's prior disciplinary record, warrants the imposition of disbarment rather than the three year suspension recommended by the referee.

The referee conceded in his report that disbarment would be the appropriate discipline for Respondent but for Respondent's "diligent defense" of himself in the disciplinary proceeding and the referee's perception that Respondent

appeared genuinely sorry for his misconduct. However, diligent defense is not recognized as a mitigating factor in disciplinary proceedings nor is there any evidence in the record that Respondent did diligently defended himself at any stage of the disciplinary proceedings. In fact, the evidence is to the contrary. The record is also devoid of any evidence of remorse on the part of Respondent. The nature of Respondent's defense indicates that, as of the time of the final hearing, he still did not appreciate the seriousness of his misconduct.

The Florida Bar has petitioned for review of the referee's recommendation of three year suspension and requests this Court to reject the referee's recommendation and order that Respondent be disbarred from the practice of law.

ARGUMENT

DISBARMENT IS THE APPROPRIATE DISCIPLINE FOR AN ATTORNEY WHO HAS INTENTIONALLY MISAPPROPRIATED CLIENTS' TRUST FUNDS WHERE THE ATTORNEY HAS BEEN PREVIOUSLY DISCIPLINED ON TWO OCCASIONS.

The essential facts concerning Respondent's misconduct are not now in dispute, nor were they in dispute at the time of the Final Hearing before the referee. Respondent admitted at the Final Hearing and in his written closing argument that he had knowingly and consciously made a decision to remove clients' funds from his trust account and use them for his own purposes.

After an entry of guilt has been made in a disciplinary proceeding, the decision regarding an appropriate disciplinary sanction should be based on all facts and circumstances in light of applicable disciplinary rules and cases previously decided by this Court.

The Florida Standards for Imposing Lawyer Sanctions, (hereinafter referred to as Florida Standards) adopted by the Board of Governors of The Florida Bar in November of 1986, suggest a theoretical framework to be considered by courts in determining the appropriate disciplinary sanction;

1. What ethical duty did the lawyer violate (a duty to a client, the public, the legal system, or a professional?);

2. What was the lawyer's mental state (did the lawyer act intentionally, knowingly, or negligently?)

3. What was the extent of the actual or potential injury caused by the lawyer's misconduct (was there a serious or potentially serious injury?); and

4. Are there any aggravating or mitigating circumstances?

Florida Standards at 13.

Applying this theoretical framework to the instant case, the first determination to be made is the nature of the ethical duty violated by Respondent. The duty violated in this case is the most sacred duty owed to a client, the preservation of funds or property belonging to a client. This Court has recognized the importance of this duty in a number of cases. See The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). In The Florida Bar v. Tunsil, 503 So.2d 1230 at 1231 (Fla. 1986), this Court stated: "In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list."

The duty to preserve funds belonging to a client is so important that even improper record keeping, where no misappropriation occurs, can result in discipline against an attorney. This is so because funds belonging to a client are

put at risk. The Supreme Court of California in Chefsky v. State Bar, 36 Cal.3d 116, at 123, 680 P.2d 82 (1984) observed that "[e]ven if [the attorneys'] conduct were not willful and dishonest, gross carelessness and negligence constitute a violation of an attorney's oath faithfully to discharge his duties and involve moral turpitude."

Where the misappropriation of client's funds is knowing, intentional, and for the lawyer's own benefit, disbarment is the only appropriate discipline, absent compelling mitigating circumstances.

The referee in the instant matter conceded in his referee's report that disbarment was an appropriate penalty:

> "I determine that Respondent's age and length of practice worked against him, i.e., the Respondent should have known better and his conduct cannot be excused because of youth, inexperience, or ignorance. Further, I found his disciplinary record a disturbing feature and a definite aggravating factor in the penalty phase. The standards set out in the Florida Standards for Imposing Lawyer Sanctions were also given careful consideration. All of the above can be used to corroborate Complainant's request that Respondent be disbarred. The primary reason this referee felt a less severe sanction was appropriate was Respondent diligently defended himself against the Bar's accusations and seemed to want to redeem himself and state afresh. He appeared to me as genuinely interested in learning from his mistakes. These things seemed to be largely absent in cases cited by Complainant where the lawyer was disbarred. Second Report of Referee (as to Sanctions) at 2 (emphasis supplied).

The aggravating factors noted by the Referee were clearly present in the record before this Court. Respondent was admitted to the practice of law in 1972. Twice previously, Respondent has been disciplined by this Court. The first occasion was September 10, 1982 when Respondent received a private reprimand for neglecting a probate matter and failing to communicate with his client. Again on January 29, 1987, Respondent received a one year suspension for neglecting another matter and for failing to carry out a contract of employment.

This Court has held that cumulative misconduct, particularly where the misconduct is of a similar nature, warrants enhancement of the discipline to be imposed against an accused attorney. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982). This Court has also held that cumulative misconduct will be dealt with more severely than isolated instances of misconduct. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), citing The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).

Section 9.22 of the Florida Standards recognizes prior disciplinary offenses, a pattern of misconduct and multiple offenses as aggravating factors. Also recognized as aggravating factors are the submission of false evidence, false statements, or other deceptive practices during the

disciplinary process, refusal to acknowledge the wrongful nature of conduct, the vulnerability of the victim, and indifference to making restitution.

The record is replete with evidence establishing that Respondent made false statements and engaged in deceptive practices during the disciplinary process. The First Report of Referee finds that with regard to the misconduct charged in Count I Respondent, "tried to avoid confrontation and was evasive with both Ms. Culp and Danny Kepner of the grievance committee." First Report of Referee at 2. When first confronted by the grievance committee's investigating member, Mr. Danny Kepner, Respondent advised Mr. Kepner that the funds belonging to the guardianship for Ms. Getts' two minor children were being held in a separate account in his name and promised to provide bank statements to verify this fact. (TR 37, 40 and 483). In fact, as Respondent later admitted, these funds were not being held in an account in his name. (TR 484, 485). Although Respondent testified that replacement funds were being held by a Mr. Rodney Davidson, a client/friend, Respondent presented no evidence to substantiate his testimony.

The record also contains evidence clearly establishing the vulnerability of two of Respondent's former clients. Ms. Culp, though well educated, was in poor physical health and in

dire financial straits at the time she hired Respondent. (TR 182-184). Ms. Nelson was an unemployed single parent with an eighth grade education. (TR 338).

With regard to restitution, there is no evidence in the record which indicates Respondent's willingness to make restitution to Ms. Nelson on the unexpended cost deposit. Although restitution had been made to Ms. Culp and Ms. Getts, it should be noted that this restitution was made only after both clients had complained to The Florida Bar and after repeated inquiries on the part of the grievance committee's investigating member, Mr. Danny Kepner. Pursuant to Section 9.4 of the Florida Standards, forced or compelled restitution should not be considered as either aggravating or mitigating.

The referee clearly felt that based on the facts contained in the record, together with Respondent's prior disciplinary record, disbarment was the appropriate discipline. The referee, however, stopped short of recommending disbarment because in his words, "Respondent diligently defended himself against the Bar's accusations and seemed to want to redeem himself and start afresh." Second Report of Referee at 2. This conclusion by the referee is simply not supported by the record. In the initial stages of the disciplinary proceeding, Respondent was not cooperative and did not follow through on

promises to provide requested information. (TR 53-54). During the time the audit was being conducted, Respondent was warned on September 10, 1985 by the Bar's auditor that his trust account was overdrawn and that he should take immediate steps to prevent the return of trust account checks. In spite of this warning, on September 24, 1985, checks were presented when there were not sufficient funds in the trust account to cover the checks. (TR 90). Although the Bar's auditor requested that Respondent present documentation or verification for replacement funds allegedly provided by Mr. Rodney Davidson, Respondent failed to provide any documentation or verification. (TR 80-81). The day before the date scheduled for the hearing before the grievance committee, the Bar's auditor scheduled an appointment to meet with Respondent and to review the audit report. This was done in order to enable Respondent to have an opportunity to explain some of the apparent shortages reflected in the audit report. Respondent failed to keep this appointment with the auditor. (TR 72). At the final hearing, the Bar's auditor testified that during the time the audit was being conducted Respondent did not appear to understand the gravity of taking trust account funds and using them for his own personal purposes, and that Respondent did not appear remorseful. (TR 90). The auditor also testified that although he explained to Respondent that his presence would be required in order to provide explanations on undocumented matters, Respondent's

absence hampered efforts to complete the audit. (TR 91-92). Under cross-examination by Respondent the auditor further testified; "I don't really believe that you appreciated the seriousness of what had transpired." (TR 103).

Respondent failed to file an answer to either the Bar's Complaint or the Request for Admissions until after a Motion to Deem Matters Admitted and Motion for Summary Judgment had been filed by the Bar and a hearing held on the motion. No response to the Bar's motions was filed by Respondent; however, he did appear at the hearing set for the motions and tendered answers to the Complaint and the Request for Admissions. These actions can hardly be characterized as "diligent defense." At the final hearing, Respondent called no witnesses in his own behalf and relied only on his own testimony. Subsequent to the Final Hearing, the referee ordered Respondent to submit a Written Closing Argument five days from the date of receipt of the Bar's Written Closing Argument. The certified mail return receipt indicates receipt of the Bar's pleading on September 26, 1987 and yet Respondent's Closing Argument was not served on the Bar until ten days later, on October 6, 1987.

"Diligent defense" is not recognized either by this Court or by the Florida Standards as a mitigating factor in

disciplinary proceedings. Even if it were recognized as such, the record clearly does not support such a finding.

Neither does the record support the referee's finding that Respondent "seemed to want to redeem himself" and that he appeared to be "genuinely interested in learning from his mistakes." The closest Respondent came to acknowledging the wrongful nature of misconduct was his characterization of the handling of the Getts guardianship funds as "very poor". (TR 478). Respondent also characterized his use of the trust funds as "extremely poor judgment." (TR 479).

The very nature of Respondent's defense indicates that he still does not appreciate the gravity of his misconduct. Throughout the final hearing he continued to defend his actions based on his assertion that he had made arrangements with a friend to "cover" the funds taken. (TR 464). Respondent further insisted that funds allegedly held in the bank account of a friend/client constituted security for the misappropriated trust funds. (TR 457). Respondent acknowledged at the Final Hearing that he used the funds belonging to the Getts' guardianship at a time when he was in dire need of money. (TR 455). Respondent testified that he had sold a boat to a man by the name of Rodney Davidson approximately one and one-half years before and as a result of the transaction, Mr. Davidson then owed him approximately

$5,000. (TR 455). When Respondent made demand for the money, Mr. Davidson allegedly had the money in a credit union account and was holding it there in order to secure a loan to buy a car for his daughter. (TR 455-456). When the friend indicated reluctance to withdraw the money from the credit union account, Respondent's own testimony establishes that he offered to use the guardianship funds and requested assurance that his friend would immediately replace the funds upon request. (TR 456).

In Respondent's Memorandum as to Mitigation, he states "The Respondent's efforts in having secured other funds prior to his making use of the Getts money should certainly have diminishing effect on the extent of culpability otherwise incident to a misappropriation of property." At 3. As this Court quoted with approval from the Referee's Report in The Florida Bar v. Breed, 378 So.2d 783, 784 (Fla. 1979), "[t]he willful misappropriation of client funds should be the equivalent of a capital offense. There should be no excuses." (emphasis supplied).

In the past this Court has not hesitated to disbar attorneys for misappropriating client funds, particularly when the misappropriation was coupled with other misconduct such as neglect or where the attorney has been previously disciplined. This Court disbarred an attorney in 1978 for

mishandling and neglecting client's matters, and for failing to return costs and unearned fees. The Florida Bar v. Allen, 361 So.2d 163 (Fla. 1978). The opinion in Allen specifically noted the attorney's previous suspension. In The Florida Bar v. Harden, 448 So.2d 1017 (Fla. 1984), this Court disbarred an attorney for multiple violations including misuse of trust funds, failure to carry out contracts of employment, neglect, commingling of trust funds, failure to maintain proper records, and failure to promptly pay over funds belonging to clients. Harden, like Respondent herein, had been temporarily suspended for the same misconduct. No prior discipline was noted in the Court's opinion disbarring Harden. In The Florida Bar v. Lehman, 417 So.2d 648 (Fla. 1982) and The Florida Bar v. Anderson, 240 So.2d 152 (Fla. 1970) the attorneys were disbarred for abandoning clients and violating trust accounting rules and procedures even where the attorneys had no record of prior discipline.

In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), the Court issued a stern warning to attorneys that it would not hesitate in the future to disbar an attorney for misappropriating clients trust funds. Subsequent to the decision in Breed, this Court has disbarred attorneys who misappropriate clients' funds. See The Florida Bar v. Bond, 460 So.2d 375 (Fla. 1984), The Florida Bar v. Nagel, 440 So.2d 1287 (Fla. 1983), The Florida Bar v. Turrant, 464

So.2d 1199 (Fla. 1985); and The Florida Bar v. Sterling, 478 So.2d 1064 (Fla. 1985).

Finally, it is essential, in determining the appropriate level of discipline in a grievance matter, to consider the purposes for discipline as set forth in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970);

> "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time, not denying the public services of a qualified lawyer as a result of undue harshness for imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations."

Pahules at 132. The paramount purpose for discipline is protection of the public. Misappropriation of clients trust funds and neglect of clients legal matters have potentially far reaching effects for individual clients and the public in general.

Disbarment is the only appropriate discipline for an attorney that willfully and intentionally disregards his fiduciary responsibility by misappropriating clients' trust funds. Any other discipline would not provide sufficient protection for the public and would seriously erode the confidence of the public in the legal system's ability to

monitor its own. Disbarment, the most severe penalty which can be imposed against an attorney, is the only penalty which sends a clear message to other attorneys that might be tempted to engage in similar misconduct.

Section 4.11 of the Florida Standards provides that "disbarment is appropriate when a lawyer intentionally or knowingly converts client's property regardless of the injury or potential injury." Respondent's misconduct in this case, by his own admission, involved the intentional and knowing conversion of a client's property to his own use. Although there was no actual injury to the clients in terms of loss of money or property or diminished legal rights, the potential for injury was great with regard to Ms. Getts and Ms. Culp. Respondent's delay in finalizing the repurchase of Ms. Culp's home caused Ms. Culp needless anxiety and undermined her confidence in the legal profession.

Section 4.41(c) of the Florida Standards is also applicable in this matter and provides that disbarment is appropriate when:

> (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
>
> (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. (emphasis supplied).

The evidence contained in the record with regard to Counts I and II indicates a pattern of neglect in the handling of matters for Ms. Culp, Ms. Getts, and Ms. Nelson. Ms. Getts and Ms. Culp experienced potential prejudice and Ms. Nelson experienced actual prejudice. Respondent's failure to file the probate matter deprived Ms. Nelson of the use and benefit of $1,600 in insurance benefits for a period of approximately five years.

CONCLUSION

Respondent has been found guilty of the most serious type of attorney misconduct. He intentionally and willfully misappropriated trust funds belonging to a client for his own use and purpose and in doing so violated his most sacred duty to his clients. Additionally, Respondent neglected clients' matters and failed to handle trust account funds in such a manner to safeguard clients' funds.

Numerous aggravating factors including two separate instances of prior discipline further support disbarment as the appropriate discipline.

Based upon the nature and seriousness of Respondent's misconduct, the presence of numerous aggravating factors, and in light of the Florida Standards and cases cited herein, The Florida Bar strongly urges this Court to reject the referee's recommended discipline of three years and impose upon Respondent disbarment from the practice of law. The Florida Bar further requests that before submitting an application for readmission that Respondent be required to: (1) make complete restitution to former clients named herein that were damaged as a result of his misconduct and (2)

reimburse The Florida Bar Clients' Security Fund for claims paid in his behalf. In the event Respondent is readmitted to the practice of law, The Florida Bar requests that Respondent be placed on probation for a period of three years during which time he would be subject to random audits of his clients' trust accounts by The Florida Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been mailed regular U.S. mail and by certified mail # P675 195 794, return receipt requested, to CHARLES M. MIMS, Respondent, at his Bar address of 908 Kinney Drive, Pensacola, Florida 32504-8127 this 11th day of May, 1988.

SUSAN V. BLOEMENDAAL
Bar Counsel