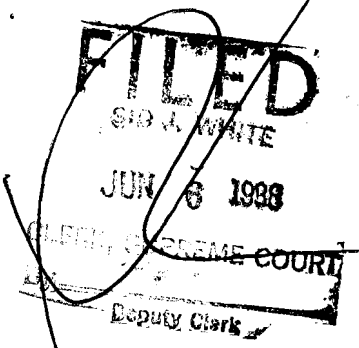
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Petitioner,

vs. Case No. 70,319

CHARLES McCALL MIMS,

Respondent.
_____/

RESPONDENT'S REPLY BRIEF

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Summary of Argument requested but not received.

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STATEMENT OF THE CASE AND FACTS

This proceeding was initiated pursuant to a five count Complaint filed against the Respondent by The Florida Bar on April 2, 1987. The Honorable William J. Tolton was appointed by this Court on April 21, 1987 to serve as Referee. The Complaint, together with a Request for Admissions, was served on the Respondent April 28, 1987. For reasons constituting excusable neglect, the Respondent's Answer to the Complaint and Answer to Request for Admissions were not submitted by him until July 22, 1987. Following an investigation into the matter establishing the reasons for the Respondent's untimely responses, The Florida Bar withdrew a previous Motion to Deem Matters Admitted and Motion for Summary Judgment. Thereafter, on September 17 and 18, 1987, a Final Hearing on the Bar's Complaint was held before the Referee.

Based on the admissions of the Respondent, the evidence presented at Final Hearing, and the Closing Arguments of the parties, the Referee issued his First Report of Referee on November 25, 1987, finding the Respondent guilty with respect to charges set forth in Counts I and II of the Complaint, and not guilty with respect to Counts III, IV and V. The Respondent, by his own admission, was found guilty of having appropriated trust funds in amount of $4,200 to his own use. The defense

submitted by the Respondent that substituted funds had been secured by him prior to his having used the trust monies (TR 456-457, 477) was deemed irrelevant by the Referee with regard to determination of guilt. The Respondent, by his own admission, was found guilty of having violated trust accounting rules and procedures and commingled operating or personal funds with trust funds. As a direct result of the Respondent's inadequate accounting procedures, the Respondent failed to timely satisfy the outstanding indebtedness of a client. Lastly, the Respondent, also by his own admission, was found by the Referee to have neglected a legal matter in having failed to complete a probate matter for a client. The underlying circumstances precipitating the acts and omissions upon which the Referee's findings of guilt are based were those of personal civil litigation and severe business reverses suffered by the Respondent. (TR 437-439, 443-444; Respondent's Memorandum as to Mitigation 1-3).

Well prior to the initiation of any proceedings against him, the Respondent returned to his client, Ms. Louise Getts, the $4,200 trust monies which had been used by him. The monies were returned together with all accrued interest. (TR 462-463). Also prior to the initiation of any proceedings against him, the Respondent satisfied, albeit untimely, the outstanding indebtedness of another client, Ms. Willer Culp; the indebtedness having not been timely satisfied for reason of shortcomings in the Respondent's accounting procedures. In this matter also, all accrued interest attributable to the Respondent's delay

was personally sustained by him. (TR 446-447). At the time of the Bar's audit of the Respondent's trust account, the Respondent rectified his prior accounting shortcomings, and the Respondent thereafter diligently adhered to the trust accounting rules and procedures of The Florida Bar. The Respondent admitted the gravamen of the charges resulting in the Referee's findings of guilt, and the Respondent endeavored to fully cooperate with the Bar in these proceedings and in its audit of his trust account. (TR 485-486; Respondent's Closing Argument 9-11).

In attempt to try the matter de nova, the Bar advances in its brief a number of assertions regarding the Respondent's dealings with Ms. Getts, and regarding also the Bar's audit of the Respondent's trust account; none of which were shown by either clear or convincing evidence at Final Hearing, and none of which were included among the findings of fact made by the Referee.

The Respondent has never before been involved in trust accounting improprieties, nor has the Respondent ever before been accused or involved in any manner with respect to misappropriation of a client's funds. The acts and omissions upon which the Referee's findings of guilt derive in Count I of the Complaint constitute the sole occurence of such nature. In September 1982, the Respondent received a private reprimand for having failed to timely consummate a probate matter on behalf of a client. The incident was isolated and of a relatively

minor nature, and the complaining client continued thereafter to engage the services of the Respondent in other matters. (Respondent's Memorandum as to Mitigation, 3). In January 1987 the Respondent received a one year suspension for conduct which was deemed to have constituted neglect of a legal matter. Although the conduct of the Respondent in that instance came under the general heading of neglect, it nonetheless was of a wholly dissimilar nature from the conduct upon which the Referee's finding of guilt is based with respect to Count II of the Complaint. (Respondent's Memorandum as to Mitigation, 3-4). Finally, pursuant to this Court's Order of Temporary Suspension issued for reason of the identical matters set forth in Count I of the Complaint, the Respondent has been effectively suspended from the practice of law since November 20, 1985.

As previously indicated, the Respondent made full restitution to clients concerned in Count I of the Complaint, well prior to the commencement of these proceedings. And at the time of Final Hearing, the Respondent was lacking only in the amount of $317 from having made full and complete restitution to all former clients. (TR 353; Respondent's Closing Argument, 12).

Subsequent to the issuance of the First Report of Referee (As to Guilt), both parties submitted to the Referee their written arguments as to the appropriate discipline to be imposed upon the Respondent. In its argument, the Bar recognized

that suspension of the Respondent from the practice of law would not be an inappropriate sanction to be imposed in these proceedings, and the Bar requested that in the event a period of suspension be recommended by the Referee "such period be no less than three years duration and that prior to his petitioning for reinstatement, that Respondent be required to: (1) make complete restitution to former clients damaged as a result of his misconduct; (2) reimburse the Florida Bar Clients Security Fund for claims paid in his behalf; and (3) attain a passing score on the Multistate Professional Responsibility Exam". The Bar further requested that in the event of reinstatement the Respondent "be placed on probation for three years, during which time he would be subject to random audits of his clients' trust accounts". (Complainant's Written Closing Arguments as to Appropriate Discipline, 8).

On January 19, 1988, the Referee issued his Second Report of Referee (As to Sanctions). As disciplinary measures to be applied in these proceedings, the Referee recommended precisely the alternative recommendation that had been submitted to him by The Florida Bar and quoted above.

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ARGUMENT

THREE YEARS SUSPENSION IS AN APPROPRIATE DISCIPLINE FOR AN ATTORNEY FOR MISAPPROPRIATION OF TRUST FUNDS WHERE THE ATTORNEY HAS NO DISCIPLINARY HISTORY OF SIMILAR CONDUCT, AND THERE EXISTS IN MITIGATION THE ATTORNEY'S ADMISSION OF MISCONDUCT, COOPERATION, REMORSE AND RESTITUTION.

The Bar contends that the Referee in the instant matter conceded in his report that disbarment of the Respondent was an appropriate penalty. By the same token, however, the Bar itself has conceded within its written argument submitted to to the Referee that suspension of the Respondent for a period of three years would also be an appropriate disciplinary measure applicable to these proceedings. (Complainant's Written Closing Arguments as to Appropriate Discipline, 8). After careful and deliberate consideration of all pertinent factors, the Referee concurred with, and indeed followed to the letter, the Bar's alternative recommendation as to appropriate disciplinary measures.

This Court has held as recently as 1986 that the findings and recommendations of the referee in an attorney disciplinary

proceeding will be upheld unless the findings and recommendations are clearly erroneous or without support in the evidence. The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986), citing with approval The Florida Bar v. Hoffer, 383 So. 2d 639 (Fla. 1980) and The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978).

The evidence presented at Final Hearing amply supports both the findings and the recommendations of the Referee. And the Bar, at its own volition, has conceded as much. Nevertheless, the Bar now contends that not only are the recommendations of the Referee erroneous, but (in view of the foregoing decisions) clearly erroneous. A review of the record reveals the Bar's contention, however, clearly erroneous.

Because the Respondent has on two occasions been previously disciplined (albeit for matters wholly unrelated to a misappropriation of trust funds), the Bar maintains that mitigating factors and circumstances, including the Respondent's admission of misconduct, his restitution of misappropriated funds, cooperation and remorse, should not properly be taken into consideration in determining punishment. The Bar's position is akin to that taken by the Bar in The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981), wherein the Bar asserted that this Court should not take into consideration in determining appropriate discipline matters relating to restitution, admissions and cooperation. In response to the assertion, this Court stated:

> "This position is contrary to the philosophy and practice of discretionary penalties in professional

> disciplinary processes as well as in the criminal process. It is only when a penalty is expressly mandated for particular conduct that a guilty plea, cooperation, or restitution may not be taken into account in determining the appropriate punishment." (Pincket at 803).

Likewise, in The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986), this Court found as proper mitigating circumstances in determining the measure of discipline for a misappropriation of trust funds, the attorney's repayment of the misappropriated funds, his cooperation and remorse.

With regard to the Respondent's cooperation with the Bar, the Referee found, in an isolated and solitary instance, the Respondent to have been initially evasive with a representative of the Bar. But this incident was rectified by the Respondent at the meeting with the representative immediately following. The Respondent thereafter and steadfastly endeavored to fully cooperate with the Bar and its representatives. (TR 44-45, 483-485; Respondent's Closing Argument 9-11). The Respondent's conduct of evasiveness with the Bar's representative was that of a fleeting and solitary incident, extremely limited in scope and extent. The occurence should not in equity operate to negate the Respondent's subsequent and overall cooperativeness.

The Bar contends that the Respondent failed to meet with the Bar's auditor prior to the scheduled Grievance Committee hearing and to then provide documentation to reduce apparent shortages in the trust account. But the Respondent's failure to have been present precisely at the time of the auditor's

appearance at his office is in nowise indicative of uncooperativeness on the part of the Respondent, by any standard. Moreover, the appointment had not been made by the auditor for the purpose of allowing the Respondent to document reduction of apparent shortages, and the auditor did not testify to that purpose. (TR 72). The Respondent had previously been refused by the auditor any further opportunity to demonstrate reductions of the apparent shortages. (Respondent's Closing Argument, 11). The auditor's report had been prepared by him prior to his scheduled appointment with the Respondent, and was intended to be submitted the following morning to the Grievance Committee. The report was not intended by the auditor to be altered.

The goals of attorney discipline were enuciated by this Court in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970):

> "In cases such as these, three purposes must be kept in mind in reaching our conclusions. 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 the services of a qualified lawyer as a result of undue harshness in 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).

In its brief, the Bar has asserted that among the three goals enuciated within the Pahules opinion, the first is paramount; the protection of the public. The Respondent is in complete agreement with the Bar's assertion, and the Respondent

submits that the disciplinary measures recommended by the Referee are well designed to achieve that end. Noteworthy in this regard is the recommended requirement that in the event that the Respondent be reinstated to the practice of law, "he be placed on probation for three years, during which time he would be subject to random and periodic audits of his clients' trust accounts". (Second Report of Referee, 2).

The second goal of attorney discipline enuciated in Pahules is also served by the Referee's recommended sanctions. Three years' suspension is by no means a light or moderate punishment. But suspension as opposed to disbarment, combined with the additional safeguards recommended by the Referee, is certainly conducive to reformation and rehabilitation.

Lastly, the Referee's recommended disciplinary measures are designed to achieve the third goal enuciated in Pahules. The Respondent can well attest to the acute and continuing remorse, distress, embarrasement and humility which this ordeal of his own making has produced. Its indelible mark is upon him and apparent even to the casual observer. Any attorney with knowledge of the Respondent's plight would most assuredly be deterred from the conduct in which the Respondent engaged.

* * * * * *

CONCLUSION

The recommendations of the Referee as to disciplinary measures to be imposed in this proceeding are amply supported by the record. The recommendations were, in fact, authored by the Bar itself and submitted to the Referee as an appropriate alternative to the extreme and severe sanction of disbarment. The measures recommended by the Referee are most appropriate to serve the goals of attorney discipline as enuciated by this Court in The Florida Bar v. Pahules, supra. The Bar has failed to meet its requisite burden for a rejection of the Referee's recommendations, and the Respondent respectfully requests this Courts approval and adoption of the Referee's Reports.

Respectfully submitted,

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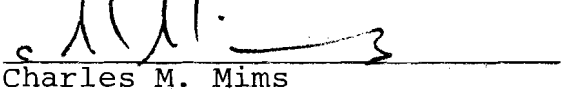
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Reply Brief has been served on Susan V. Bloemendaal, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, by hand delivery this 6th day of June, 1988.



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