Accepted as is - per SJW 11-21-88

IN THE SUPREME COURT OF FLORIDA

Case No. **70,376**

THE FLORIDA BAR,

Complainant,

vs.

STU RT L. STEIN,

Respondent.
_____/

AMENDED BRIEF OF RESPONDENT

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ISSUES ON REVIEW

Issue One:

THE GRIEVANCE COMMITTEE WAS WRONG IN NOT ALLOWING THE PRESS ACCESS TO THE HEARING AFTER THE RESPONDENT WAIVED HIS RIGHT OF CONFIDENTIALITY, AND THAT THE FAILURE TO ALLOW THE PRESS ACCESS REQUIRES A REVERSAL FOR A NEW HEARING.

and

THE HOLDING OF THIS COURT IN FLORIDA BAR V. SIMON, 171 So.2d 372 (Fla. 1964) RESTRICTING ACCESS TO THE PUBLIC TO GRIEVANCE COMMITTEE HEARINGS WHEN A RESPONDENT ATTORNEY WAIVES THE RIGHT OF CONFIDENTIALITY SHOULD BE REVERSED.

Issue Two:

THE STAFF OF THE FLORIDA BAR SHOWED PREJUDICE AGAINST THE RESPONDENT IN THE MANNER IN WHICH THIS CASE WAS HANDLED AND SUCH ACTIONS DENIED THE RESPONDENT EQUAL PROTECTION OF THE LAW AND FUNDAMENTAL DUE PROCESS.

and

THE RESPONDENT WAS DENIED A FAIR HEARING BEFORE THE GRIEVANCE COMMITTEE TO THE EXTENT THAT A REVERSAL IS REQUIRED FOR A NEW HEARING BEFORE ANOTHER GRIEVANCE COMMITTEE WHICH IS NEUTRAL, FAIR AND UNBIASED.

Issue Three:

THE DENIAL OF PRE-HEARING DISCOVERY DEPOSITIONS OF MEMBERS OF THE GRIEVANCE COMMITTEE DENIED THE RESPONDENT THE ABILITY TO PROVE HIS AFFIRMATIVE DEFENSES AND WAS A DENIAL OF A FAIR HEARING AND DUE PROCESS.

and

THE ACTION OF THE FLORIDA BAR IN SEEKING A PROTECTIVE ORDER ON THE DEPOSITIONS OF THE MEMBERS OF THE GRIEVANCE COMMITTEE WAS A REVERSAL OF ITS POSITION BEFORE THIS COURT IN CASE NO. 70,549, AND SUCH REQUIRES A REVERSAL.

Issue Four:

THE EVIDENCE PRESENTED TO THE REFEREE WAS NOT CLEAR AND CONVINCING ON THE TWO COUNTS FOR WHICH THE RESPONDENT WAS FOUND GUILTY AND THE REPORT OF THE REFEREE SHOULD BE REVERSED.

Issue Five:

THE PUNISHMENT OF SIX MONTHS SUSPENSION IS UNWARRANTED UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

and

THE ORDER OF RESTITUTION IS NOT BASED ON VALID LOGIC OR THE EVIDENCE ADDUCED AT THE HEARING, NOR WAS THIS INJURY RAISED IN THE PLEADINGS

PRELIMINARY STATEMENT

This Brief is filed by the Respondent, STUART L. STEIN, from an adverse ruling in a discipline matter. The Respondent is a member of The Florida Bar and subject to the rules outlined in the former Disciplinary Rules and the current Rules Regulating The Florida Bar.

This case is before the Court for review based on the Petition for Review served August 25, 1988, that was taken from an adverse ruling by Referee Ellen Morphonios.

The following symbols are being used in this brief to designate portions of the record:

R-_____ indicates the transcript of the final hearing.

GC1-_____ indicates the transcript from the first Grievance Committee hearing.

GC2-_____ indicates the transcript from the second Grievance Committee Hearing.

P-_____ are pleadings and papers filed in the Prohibition case. The numbers are the ones in the file of the Respondent and may not be the same as with the Court's or the Complainant's file. The particular item will be described in detail.

PH-_____ indicates the page number of the transcript of the hearing of December 4, 1988, before the Referee.

RP-_____ are the pleadings and papers filed in this case. The numbers are the ones in the file of the Respondent and may not be the same as with the Court's or the Complainant's file. The particular paper or pleading is described in detail.

The Referee below took judicial notice of the Petition for Writ of Certiorari and Alternative Writ of Prohibition that was filed in this court. See transcript of final hearing, page **459**.

STATEMENT OF THE CASE

The involvement of THE FLORIDA BAR with this case began with a letter from Ms. Frances Wilson and her daughter, Ms. Tammy Wilson, to THE FLORIDA BAR. CG1-Fla Bar No. 2. A lenghty response was made by letter from the Respondent, STUART L. STEIN. GC1-Fla Bar No. 3.

After receipt of the letters and review by the Staff of the Complainant in Fort Lauderdale, it was sent to grievance committee. The Respondent was noticed that this matter was to be the subject of a grievance committee hearing. The targeted Rules of Discipline were announced in the Notice. CG1-Fla Bar No. 1.

There were two hearings that were held on this matter by the same Grievance Committee. The first was held on April 17, **1986.** The second was held on July 17, **1986.**

At the first hearing, the Committee Chair ruled to require the rule of sequestration of witnesses. CG1-5. The Chair then reversed its ruling and allowed both Francis and Tammy Wilson to hear each other's testimony. GC1-7. During a break in the testimony of the complaining witnesses, the Committee went into executive session and felt that additional charges should be investigated concerning the activities of the Respondent. GC1-71. The Committee then adjourned. GC1-78.

The second hearing was set for July 17, **1986.** The

Respondent requested that the hearing be open to the public and the press prior to the time the court reported started to transcrbe the hearing. On the basis of The Florida Bar v. Simon, 171 So.2d 272 (Fla. 1964), the reporter from The Miami Herald was asked to leave. GC2-5 A request to continue the hearing to review the ruling excluding the press was denied. GC2-10. At that point the Respondent announced that he and his counsel would leave the hearing and would not participate without the presence of the press. GC2-18.

This second hearing continued without the Respondent and his counsel. The Committee, after hearing the testimony and meeting in executive session, found probable cause on violations of Article XI, Rule 11.02(4); DR 9-102(B)(2); (3) and (4); DR 1-102(A)(4), (6); Rule 11.02(3)(A) and (B); violation of F.S.§812 regarding theft, and, lastly DR 5-101(a). GC2-80.

Nine months, less two days, after the finding of probable cause, the Complainant caused the four page complaint in this matter to be served charging nine violations of either the Integration Rules or Disciplinary Rules. RP-1. Circuit Judge Ellen Morphonios of Dade County was appointed the Referee in this matter. RP-7.

Subsequent to the filing of the Complaint, the Respondent filed a Petition for Writ of Prohibition and Alternative Petition for Common Law Writ of Certiorari with

this Court under Case No. 70,549. P-1. The relief requested was denied without an opinion on September 29, 1987. P-17.

Discovery continued on this instant case before the Referee. The final hearing was held on two dates: April 15, 1988, and April 20, 1988, at the office of the Complainant in Fort Lauderdale.

A final Report of the Referee was issued on June 15, 1988, RP-37, finding the Respondent guilty on just two of the nine formal charges brought by the Complainant, to wit: Disciplinary Rules 1-102(A)(6) [a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law] and 9-102(B)(3) [a lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them] of the Code of Professional Responsibility.

The Respondent was found not guilty of the charged violations of Disciplinary Rules 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation], 5-101(A) [except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal

interests], 9-102(B)(2) [a lawyer shall identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safe keeping as soon as practicable] of the Code of Professional Responsibility and Florida Bar Integration Rule, Article XI, Rules 11.02(3)(a) [the commission by a lawyer of any act contrary to honesty, justice or good morals constitutes cause for discipline], 11.02(3)(b) [if the alleged misconduct constitutes a felony or misdemeanor, The Florida Bar may initiate disciplinary action] and 11.02(4)(b) preservation of records pertaining to the property of a client]. RP-37.

The Report of the Referee was silent as to a violation of Article XI, Rule 11.02(4) [money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose1 which was charged in the Complaint. It is believed that it was the intention of the Referee to find the Respondent not guilty of violation of this rule. Logic dictates this conclusion. The original Report also finds the Respondent not guilty of violating DR 1-102(A)(6), a charge for which the Respondent was found guilty in the paragraph just prior. (A corrective Order [RP-431 on the inconsistent finding was entered on August 19, 1988, after the file was forwarded to this Court and after the Board of Governors of The Florida Bar approved

the initial Report of the Referee.) It is believed that in preparing the Report for the Referee and the corrective order, the Complainant erred in the original and in the corrective order by not reflecting the "not guilty" finding for the ninth charge.

The Motion for Rehearing (RP-38) was denied by the Referee (RP-40) on June 30, 1988. The Petition for Review was timely filed less than 30 days after the Board of Governors of The Florida Bar notified the Respondent and his attorney that no petition for review would be filed by the Complainant.

This Brief follows.

STATEMENT OF THE FACTS

The Respondent, STUART L. STEIN, is a Florida attorney in iFort Lauderdale, Florida. The complaining witnesses below are Ms. Frances Wilson and Ms. Tammy Wilson.

FACTS PRIOR TO GRIEVANCE COMMITTEE HEARING

The Wilsons supported themselves by engaging in the business of roadside sales. R-490. More specifically they sell fireworks during the July 4th season in South Florida. In preparing for the July 4th holiday sale dates in 1985, the Wilsons discovered that they had to post a $10,000.00 bond for each roadside stand they operated within Broward County, up to a maximum of $50,000.00, in addition to the liabilty insurance they had each year. R-490. This was required by a new Broward County Ordinance.

The Wilsons, who normally set up four or five stands in Broward County, did not have the financial ability to comply with the new bonding provision of the Broward County Ordinance. It was then that the Respondent was contacted by the Wilsons for help. Years before, the Respondent also was retained for a fireworks matter by the Wilsons. R- 273.

After meeting the Respondent and discussing the problem, the Wilsons were told that the legal fee to attack the bond ordinance would be $5,000.00 plus costs. R-494. The Wilsons had no objection to the amount of the fee or the

services to be provided by the Respondent, however, they had no money to pay it. All they had was fireworks with an approximate value of $10,000.00 that they told the Respondent they had for the holiday season. R- 495. They offered to give these fireworks to the Respondent for security for his fee. R-495. No mention was ever made that the fireworks had not, in fact, been paid for by the Wilsons. The Respondent never obtained the invoice listing of the fireworks, R-495, before July 4, 1985. The Wilsons dispute this fact. The invoices stated at the bottom that, "All claims and returned goods must be accompanied by this bill." Bar's No. 5 in evidence.

A written agreement was prepared by Respondent between himself and the Wilsons giving the fireworks as security for the legal fee. Bar's No. 1 in evidence. After the agreement was signed, on June 14, 1985, the Respondent sent his agent, Henry Reiter, to take possession of the warehouse in which the fireworks were kept. R-398. This warehouse was specifically rented by the Wilsons to hold the fireworks. No other materials owned by the Wilsons were stored there. R-292. All of the fireworks in that warehouse were to stand as security for the legal fees. R-499.

At the warehouse, Mr. Reiter inspected the contents and took two pictures of the cartons of fireworks. R-401. Mr. Reiter did not think that the total amount of fireworks

in the wearhouse equalled the $10,000.00 claimed value. R–404. Neither Mr. Reiter nor the Wilsons sought to take an actual carton by carton inventory of the contents. Mr. Reiter then attempted to secure the warehouse with two locks on behalf of the Respondent. R–401. One of his locks did not fit either of the two holes on the warehouse door. R–401, 402. After he placed his one lock on the door, the Wilsons placed their lock in the other hole. R–402.

The Respondent as required by the Agreement, then filed suit against Broward County to declare the bond provision of the ordinance unconstitutional. After perfection of service of process, and two hearings, the bond provisions of the Broward County Ordinance was declared unconstitutional on a preliminary showing before the Circuit Judge, and enforcement of the Ordinance by the Broward County Sheriff was enjoined. R–508, 509. The Wilsons then were able to sell fireworks during the July 4, 1985, holiday season without posting a bond.

An understanding was reached btween the Respondent and the Wilsons that thye would take 20% of the fire–works in the warehouse to sell without any payment. As they would sell fireworks, they would pay the sum of $1,250.00 for each of four remaining 20% units of the fireworks. At that time the Respondent would be fully paid on his legal fee. R–243; 496, 497. Mr. Reiter would control these deliveries. R–245.

It was clear that the Respondent was to have sole control of the fireworks and that two locks were to be placed on the wearhouse by the Respondent. R-245, 246.

The Wilsons never contacted Mr. Reiter to obtain either their first allocation of fireworks or to pay any money on the outstanding bill. R-405. On Monday, July 1, 1985, the Respondent tried to telephone the Wilsons. Their phone was disconnected. R-511. On Tuesday, July 2, 1985, the Respondent received a call from Frances Wilson at his office. R-49, 517. At that time Ms. Wilson offered the total sum of $1,500.00 for all of the fireworks in the warehouse. R-49, 518. The Respondent told her that he would have no problem giving her $1,500.00 worth of fireworks for that money, but that he would not give her the entire contents for that sum. R-49, 518. Ms. Wilson replied that $1,500.00 worth of fireworks would not stock even one roadside stand. R-49, 518.

The Respondent then told Ms. Wilson over the telephone, that should he not be paid the monies due that he would sell the fireworks on July 4, 1985, to protect his interests. R-49, 50. It was understood between the parties that the fireworks had no commercial value after July 4, 1985. R-47, 504 and R-225 for statement of Harry Rubin.

The testimony of Deborah Keller is substantially the same as that of the Respondent concerning this telephone

conversation. R-310, 311; 333-335.

After the phone call, the Respondent then removed almost all of the the fireworks from the warehouse and secured them at his law office. R-60. The Respondent called a locksmith to remove the Wilson's wrongfully placed lock on the warehouse. R- 60, 519. He identified himself to the security guard at the warehouse. R-519.

On July 2 or 3, 1985, the Respondent made contact with Mr. Harry Rubin of P & H Company, Inc., another fireworks dealer, to see if they would be interested in purchasing the secured items if the Wilsons did not pay the legal fee. R- 524, et seq. The initial contact with Mr. Rubin was made through his attorney Ernest Kollra. R-5.

When the Respondent was not paid by July 3, 1985, he contacted Mr. Rubin and set up an inspection of the fireworks at his office for the morning of July 4, 1985. This meeting took place and Mr. Rubin purchased for $700.00 fireworks having approximately a $1,000.00 wholesale value. R-225, 527-529. This amount was paid by check. R- 224, 529.

The afternoon of July 4, 1985, the Respondent was contacted by telephone by Frances Wilson, who stated that she had all of the $5,000.00 and wanted to pick up the fireworks. R-361, 537. She was informed by the Respondent to pick up the fireworks at his office from his secretary,

Deborah Keller. R-362, 537. Both Wilsons came to the office and took only some of the remaining cartons of fireworks, although they easily had room to take all of them. R-364, 365. They gave Ms. Keller the $5,000.00 and demanded and received a receipt which reflected 32 cartons were taken and that "X" amount of cartons were left. R-362. The figure supplied for the number of cartons taken was the count of the Wilsons', for Ms. Keller was away from the actual cartons preparing the receipt and counting money. R-318, 319.

Weeks later, the Wilsons came to the office of the Respondent. He gave them an itemized account of his bill that credited the sale of the $700.00 to Mr. Rubin's company. R-339. The Respondent offered to deliver the remaining cartons from his storage facility and gave the Wilsons the key to the warehouse where some 15 cartons remained. R- 336. It was then that the Wilsons started to complain and threatened to go to The Florida Bar, claiming that the actions of the Respondent cost them $30,000.00 or $40,000.00. R-544. The threats were repeated in conversations with Deborah Keller. R-323, 324.

The Wilsons then wrote a long letter to The Florida Bar articulating their complaint. GCl-Bar No. 2

GRIEVANCE COMMITTEE HEARING

There were two hearings before the Grievance

Committee. As mentioned in the Statement of the Case, the working press was not allowed to attend the second hearing although the Respondent waived his right to confidentiality. GC2-5. When the Committee Chairman refused to grant a continuance so that the Respondent could research the issue of the denial of the press attendance, the Respondent left the hearing. GC2-18. The Committee then continued the hearing, took testimony and found probable cause on eight different charges. GC2-80. At the final hearing before the Referee, it was learned for the first time, through the testimony of Howard Zeidwig, the Committee Investigator, that the committee was mad at the Respondent. R-209-210.

After the hearing, the Respondent informed The Florida Bar that he would be moving to New Mexico. Nine months after the finding of probable cause, and two weeks after a letter of inquiry to The Florida Bar about the Respondent's discipline record for admission to the New Mexico Bar (see attachment to P-1) the complaint in this cause was filed. RP-1 (Complaint).

THE PROHIBITION/CERTIORARI CASE

After this instant case was filed with this Court, the Respondent filed a Petition for a Writ of Prohibition and Alternative Writ of Common Law Certiorari. P-1. The Petition was denied. P-17.

Raised in the Petition was the issue concerning

the Complainant THE FLORIDA BAR filing this instant complaint to assure that the Respondent would not be admitted to another jurisdiction as an attorney because of a pending discipline matter. P-1. Further allegations were made that the Grievance Committee sought to extort money from the Respondent to pay off Frances and Tammy Wilson and settle their complaint. P-1.

Complainant THE FLORIDA BAR repeatedly stated that the case was based on spurious allegations, and denied any impropriety. P-8, 11, 13. In the pleading titled THE FLORIDA BAR'S RESPONSE TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION AND ALTERNATIVE PETITION FOR COMMON LAW WRIT OF CERTIORARI, dated August 18, 1987, the Complainant THE FLORIDA BAR stated:

> 3. The Honorable Ellen J. Morphonios, Referee, was appointed to hear the complaint in this cause. Judge Morphonios could certainly take any testimony deemed appropriate to resolve any and all issues in this cause.

P- 11. The reference to "this cause" can only mean the Petition for Prohibition and Certiorari.

This Court denied the Writ, and the Respondent was faced with the task of proving his allegations of extortion and wrongful acts in the discovery phase of the discipline action to support his affirmative defenses. Such efforts, however, were thwarted at the inception. Discovery deposi-

tions in this area were frustrated by the filing of a Motion for Protective Order by the Complainant (RP-19) and the granting of the Protective Order by the Referee. RP-27.

DISCIPLINE CASE

The four page Complaint in this case was served by the Complainant on April 15, 1987 - nine months after the finding of probable cause. RP-1. It was a one count complaint that alleged certain material facts and concluded in charging a violation of nine ethical rules. RP-1, ¶20.

An Answer and Affirmative Defenses was filed. RP-11. The Affirmative Defenses included the allegations of attempted extortion, an unfair grievance committee hearing and the vindictive appearance of filing the complaint right after receiving the letter from the Respondent seeking all discipline matters for his application to the Bar of another State. The Affirmative Defenses were denied. RP-12.

A first set of interrogatories were propounded to the Complainant to clarify what acts of the Respondent were violations of the rules charged. RP-13. After a motion to compel (RP-17) was granted (RP-26) more specific answers were supplied by the Complainant (RP-28) which acted as a Statement of Particulars such as those under Florida Rules of Criminal Procedure 3.140(n).

A second set of interrogatories were propounded by the Respondent. These interrogatories sought the names and

addresses of all members of the Grievance Committee and the staff of THE FLORIDA BAR concerned with this case. RP-15. The Complainant raised objections to those interrogatories. RP-19. At the hearing of December 4, 1987, it was agreed between the parties that the Referee would hear the objections. RH-23 The ruling of the Referee sustained the objections of THE FLORIDA BAR and precluded any discovery concerning the allegations of extortion or wrongful acts of the Grievance Committee. RP-27 and RH-29. The Order allowed the deposition of Howard Zeidwig, Esq., the investigative member of the Grievance Committee, but limited the scope of questions he could be asked. RP-27, paragraph 5.

The final hearing before the Referee was held on April 15, and 20, 1988.

Opening statements were then heard on behalf of the Complainant (R-12) and the Respondent (R-17). The Respondent was then called as a regular witness by Complainant THE FLORIDA BAR. R-37. He testified that he told the Wilsons that the legal fee had to be paid before July 4th. R-47. He further testified that when Ms. Frances Wilson spoke with him on the telephone on July 2, 1985, she demanded all of the fireworks for $1,500.00. Respondent STEIN replied that he would give $1,500.00 worth of fireworks for that amount of money and warned he would sell the fireworks if he doesn't get his entire fee by July 4,

1985. R-49,50.

The Respondent also testified to the oral agreement on the distribution of fireworks in the five installments. R-51. The Respondent said that he told the Wilsons on the July 2, 1985, phone call that "If I don't get the money by July 4th, I'm going to sell it (the fireworks) on July 4th. That was our deal." R-54.

The Respondent testified that when he called Mr. Harry Rubin, he told Rubin that he couldn't sell the fireworks until July 4th, and that he did meet with Rubin at 10:00 A.M. the morning of July 4, 1985. R-57. STEIN also testified that he was told by Frances Wilson that if these fireworks had to be sold this year because the list of fireworks that can be sold change from year to year and, therefore, they would be worthless after July 4th. R-59. Ernest Kollra, the attorney for P & H Enterprises, Inc. also testified that the fireworks were worthless after July 4th, R-6, 11, as did Harry Rubin. R-225.

The Respondent then detailed the conversations between himself and the grievance committee investigative member, Mr. Zeidwig, and the ongoing conversations concerning the payment of money to the Wilsons to drop the investigation. R-65-68.

Testimony was elicited on the issue of the filing of this complaint to stop the Respondent from being admitted

to the Bar of another state. R-70-77; 84-86.

Then Thomas Rushing, the supplier of fireworks to the Wilsons, was called to the stand. R-87. Mr. Rushing testified that he was not paid the $10,000.00 for the fireworks that the Wilsons gave as security to the Respondent. R-104. Mr. Rushing also testified that he lent an additional $11,000.00 to the Wilsons. He has only received back the sum of $6,100.00 for the total of $21,000.00 worth of money and goods he advanced to the Wilsons. R-105. This amount was paid in one lump sum on July 5, 1985. R-113.

Frances Wilson was then called as a witness. R-151. Wilson acknowledged the signing of the retainer agreement (R-156) and admitted that she was going to buy her fireworks back before July 4th. R.-158. She denied that she was told that the Respondent would sell the fireworks if he was not paid. R-159. She denied that the agreement was to only have the Respondent's locks on the warehouse in which the fireworks were stored. R-162. Although the Respondent admits that he received a copy of the invoice from Rushing after July 4, 1985, from the Wilsons, Frances Wilson does not state that it was given to the Respondent before that time - only that it was given. R-166. Ms. Wilson denies that there was an installment plan for her to get the fireworks, but, in the next breath, states that she

would pay some money and get some fireworks. R-169.

Ms. Frances Wilson also thought at the time she made the initial complaint to THE FLORIDA BAR that Howard Zeidwig was her attorney. R-175,176. Ms. Wilson disputes the oral agreement that the monies on the retainer were to be paid prior to July 4th. R-177, 178. And she denies that she was told that the Respondent was going to sell the fireworks. R-179.

Wilson does admit, however, that her phone was disconnected on July 1, 1985, for non-payment. R-179. She does not remember if she ever told the Respondent that she was trying to reach him. R-180. Ms. Wilson told the secretary of the Respondent that she is going to the Bar if he (the Respondent) did not pay her money. R-182. This agreed with the testimony of Deborah Keller. R-323, 324.

Frances Wilson also testified that during the selling season, it was the "sunshiniest time we've had in about five years." R-300, 301. Exhibit H was introduced by the Respondent to show that it rained every day in South Florida for the full week before July 4, 1985. R-513.

Tammy Wilson also was called by the Complainant. Her testimony parrotted her mother's statement.

Howard Ziedwig was called out of turn by the Respondent. R-185. He was the investigating attorney for the Grievance Committee. R-186. Mr. Ziedwig said that he

viewed the problem with the Wilsons initially as a fee dispute. R-188. Mr. Ziedwig stated that he wasn't aware that an attorney had to have a perfect inventory. R-192. He related what was discussed by the Committee, presumably in executive session. R-192, 193, 194. Zeidwig notes the Wilsons demanded $10,000.00 from the Respondent. R-199.

Mr. Ziedwig is unsure if he spoke to Ms. Frances Wilson when she was at the Denny's restaurant meeting with the Respondent and Alice Reiter. R-203-206. Ziedwig also agreed that he could have given the impression that if the civil claim of the Wilsons was satisfied by the Respondent, the grievance should be over. R-208, 209,

Mr. Ziedwig stated affirmatively that the Committee was mad at the Respondent both before and during the hearing. R-209, 210.

Mr. Harry Rubin was then called and buttressed the testimony of the Respondent stating that he bought the fireworks on July 4th, and that the fireworks on July 5th would have been worth absolutely nothing. R-225. Rubin also testified as to the poor reputation for truthfulness of the Wilsons. R-225-239.

Alice Reiter, Esq. was then called by the Respondent. R-239. Her testimony supported that of the Respondent, as did that of Henry Reiter R-394.

Closing arguments were allowed, R-567, for the

Complainant and R-579 for the Respondent. The Referee then made the findings below from the bench. **R-628.**

ARGUMENT

ISSUE ONE

THE GRIEVANCE COMMITTEE WAS WRONG IN NOT ALLOWING THE PRESS ACCESS TO THE HEARING AFTER THE RESPONDENT WAIVED HIS RIGHT OF CONFIDENTIALITY, AND THAT THE FAILURE TO ALLOW THE PRESS ACCESS REQUIRES A REVERSAL FOR A NEW HEARING.

and

THE HOLDING OF THIS COURT IN FLORIDA BAR V. SIMON, 171 So.2d 372 (Fla. 1964) RESTRICTING ACCESS TO THE PUBLIC TO GRIEVANCE COMMITTEE HEARINGS WHEN A RESPONDENT ATTORNEY WAIVES THE RIGHT OF CONFIDENTIALITY SHOULD BE REVERSED.

The Respondent was noticed for a Grievance Committee hearing on the complaint filed by Frances Wilson and her daughter Tammy Wilson. GC1-Fla Bar No.1. The meeting of the Committee was set for May 17, 1986. The aforementioned notice recited those areas of the Code of Professional Responsibility the Committee was going to investigate. At this hearing testimony was had from Frances Wilson. GC1-26. Cross examination was had by the attorney for the Respondent. GC1-66. The Committee, after the testimony of Ms. Frances Wilson, chose to recess to another time to allow the broadening of the investigation to include other potential charges against the Respondent. GC1-70 et seq.

The second hearing was held on July 17, 1986. GC2 - Fla Bar No. 11. At that time the Respondent invited a

reporter for the Miami Herald. When the reporter was introduced to the Committee, there were non-transcribed discussions among and/or between the Respondent, his attorney, the Committee members and Staff of the Complainant.

Upon the presentment to the Committee by Staff of the case of The Florida Bar v. Simon, 171 So.2d 372 (Fla. 1964), the reporter was asked to leave. The reasoning was placed on the record as follows:

> MS. NEEDELMAN: Yes. This case specifically addresses that the only part of the proceedings which the Respondent may make public information at the grievance level is the notice, a copy which was attached to the motion before the court (sic) and the only thing would be anything that has to be served upon him.
>
> And I would submit that it would not be appropriate for the press to sit in at the Grievance Committee hearing and that the only thing at this point that could be made public would be anything that would have to be served upon you.
>
> At this time, there has not been a finding of the Grievance Committee and the only thing at this time that will be served upon you would be the notice of complaint, notice of hearing and the Committee's finding once that is made, and that as held in this case, the proceedings of the Grievance Committee is not something that would be public.

GC2-6, 7.

This reasoning was upheld by the Committee notwithstanding the Respondent's waiver of his right to confidentiality under the then applicable rules. GC2-6. At that time a continuance was requested by the Respondent to review

the case and case law. GC2-10. This request was denied. GC2-10. The respondent then left, refusing to take part in a non-public hearing. GC2-18.

The action of the Committee was wrong as a matter of law in denying access to the hearing by the Press when the accused attorney waived his right to confidentiality. Simon is not applicable to the former Integration Rule, or the current Rules Regulating The Florida Bar.

The Court in Simon, at 374, made the accurate parallel between the operation of grievance committees in 1964, and the operation of the grand jury system. A re-examination of the rules in effect in 1986 is now required.

In 1964, as now, the Grand Jury process was absolutely secret and confidential. F.S. §901.01 ~~et~~ seq. No person may be present at the sessions of the grand jury except the witness under examination, the state attorney and/or his assistants, a court reporter and interpreter. F.S. §905.17(1). When the grand jurors deliberate or vote, no person can be present. F.S.§905.17(2). The testimony heard before the grand jury is secret (F.S. §905.24) and can only be disclosed upon statutory exceptions. F.S. §905.27.

As outlined in Simon, in 1964, an attorney who is the target of a grievance committee is not allowed to be present during testimony. Discipline matters at the committee in 1964 were a copy of grand jury proceedings.

However, in 1986, quite the opposite was true. The accused attorney had the right to be present during all testimony before a grievance committee. Rule 11.04(3) of Art. XI of Integration Rule (1986). The complaining witness had the right to be present during the testimony. Rule 11.04(4) of Art. XI of Intergration Rule (1986). Below, both the Respondent and the two complaining witnesses were present during testimony.

The Complainant felt bound by this Court's opinion in Simon, no matter that the Integration Rules were vastly different over twenty years later.

If the grievance committee rules allow the accused attorney and his counsel to be present during the taking of testimony, then the evidence against said attorney is not secret. If, in the alternative, the reason for confidentiality is to protect the attorney from public knowledge of false and/or defamiotry accusations, it should be the right of the accused attorney to waive such confidentiality.

The Respondent wanted a hearing that was open to the press, not closed in a Star Chamber. Public trials are guaranteed by Article I, Section 16 of the Florida Constitution for persons accused of crimes. To be placed in a discipline procedure that could result in the taking away of ones license to practice law should grant no less right to a public hearing, if one is requested.

The theory of a public trial is that persons would be less likely to lie in a public forum before the press and ones neighbors. When the dust settled, only two of the charges were found meritorious by the Referee, out of the nine charges brought. It is the position of the Respondent that a public hearing before the grievance committee would have assured a fair hearing and a decision of "no probable cause" would have been rendered.

This cause should be remanded to a new grievance committee for a hearing, in public, on the two violations of the Code of Professional Responsibility, to wit: DR 1-102(A)(6) and DR 9-102(B)(3).

ISSUE TWO

THE STAFF OF THE FLORIDA BAR SHOWED PREJUDICE AGAINST THE RESPONDENT IN THE MANNER IN WHICH THIS CASE WAS HANDLED AND SUCH ACTIONS DENIED THE RESPONDENT EQUAL PROTECTION OF THE LAW AND FUNDAMENTAL DUE PROCESS.

and

THE RESPONDENT WAS DENIED A FAIR HEARING BEFORE THE GRIEVANCE COMMITTEE TO THE EXTENT THAT A REVERSAL IS REQUIRED FOR A NEW HEARING BEFORE ANOTHER GRIEVANCE COMMITTEE WHICH IS NEUTRAL, FAIR AND UNBIASED.

The major thrust of the Grievance Committee and Staff of the Complainant was to attempt to have the Respondent settle the civil claim of the complaining witnesses Frances Wilson and Tammy Wilson. The understanding of the Respondent and his counsel was that should this settlement be reached, the problem with the Grievance Committee would go away. R-254; 263 and R-547-552.

Further, that either while pressing his position to open the hearing to the public, or during the investigation of the Respondent, the Committee became "mad" at him. R-209-210. Although Howard Ziedwig denied any intent to extort, R-211, the fact that the original fee received by the Respondent was $5,000.00 and the amount that the Wilsons demanded, and that Ziedwig knew about, was over double that amount (either $10,000.00 or $14,000.00 - R-199), creates an issue of fact on the existence of extortion.

Fundamental Due Process under the Fifth and Fourteenth Amendment to the United States Constitution requires, at the very least, a hearing before a neutral panel. A fair hearing before a fair tribunal is a basic requirement of due process. Nebraska Press Association v. Stuart, 427 U.S. 539, 95 S.Ct. 2791. A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair and impartial. Brownell ~~v.~~ ~~We~~ Shung, 352 U.S. 180, 77 S.Ct. 252. The Referee also expressed concern if the Committee was "mad" before the finding of probable cause. R-210. The answer to the question was yes. R-210, line 14.

If the Respondent is not entitled to an absolutely neutral panel, then certainly he is entitled to one that does not move beyond traditional prosecutorial parameters to be the kind of forceful advocate for the alleged victims as existed below.

The Complainant takes the position that The Florida Bar has the ability to move forward on discipline cases even though a civil settlement is in fact reached. See Integration Rule 11.04(4) of Art. XI (1986) The Respondent does not dispute the rule. But it was the Complainant, through Mr. Zeidwig, that sought the payment of money. It was the respondent who from the very start did not want the Bar to be used as a means of extortion. R-547-548. This

headlong rush to seek the refund of the Respondent's earned fee, and then some, destroys any appearance of a fair panel.

The question of staff prejudice is also an issue. The probable cause in this case was found on July 17, **1986.** No action was taken by the Complainant to file this instant Complaint (RP-1) until April **15, 1987 -** nine months, less two days after a finding of probable cause. This complaint appeared, mirabula dictu, about two weeks after the date of the letter from the Respondent to the Complainant requesting an itemized listing of his discipline record for an application for admission to the bar of another state. P-1, Appendix 3. See, also, testimony of Respondent R-70 to **75.**

All of these issues herein discussed were not subject to discovery because of the granting of the protective order. RP-27. There is certainly enough probable cause raised by the Respondent on these issues to require further action below, and prove, prima facia, a denial of Due Process.

In the context of this case, it is clear that the Complainant is guilty of overkill. The Complainant charges nine violations of the Discipline Rules, but was able to prove only two: one substantive and the other general. It was the Complainant that told this Court in the pleading titled THE FLORIDA BAR'S RESPONSE TO PETITIONER'S REPLY TO THE FLOIRDA BAR'S RESPONSE TO PETITIONER'S RESPONSE AND

ALTERNATE MOTION TO STRIKE that all the allegations made against the Respondent can be proved by clear and convincing evidence. P-13, paragraph 3. Yet the Referee dismissed all of the most serious charges, including that one claiming a felony or misdemeanor, presumably for theft, under Article XI, Rule 11.02(3)(a), immediately at the end of the hearing. Concerning the criminal accusations, the Referee stated:

> . . . I am not the slightest bit concerned about accusations of dishonesty or anything like that.
>
> I don't think that Mr. Stein had the first intention of improperly stealing anything, and I don't think there is the first thing that would point to that. I'm not thinking about it, and if there is ever any reviewing body subsequently, I would strongly recommend they talk to me if they ever thought about filing such a charge.
>
> There, in my opinion, is absolutely no intent to steal. There may be an awful lot of bad judgment but there is no intent to steal that I see. If we were here on a theft charge, we wouldn't be here because I would have cut it many hours ago.

R-597. The trier of fact found no evidence of a crime, yet the Complainant filed the charge and told this Court that it could prove it by clear and convincing evidence. By this finding alone, one must pause to wonder if the allegations of the Complainant were filed in good faith.

Based on the foregoing, it is clear that the Respondent was denied a fair hearing before the Grievance Committee and his treatment by the Staff of the Complainant

was unfair at worst and questionable at best. The case should be reversed with directions to have another grievance committee outside of the Seventeenth Judicial Circuit review the complaint of the Wilsons de novo and that staff counsel for The Florida Bar should be from an office other than Fort Lauderdale.

ISSUE THREE

THE DENIAL OF PRE-HEARING DISCOVERY DEPOSITIONS OF MEMBERS OF THE GRIEVANCE COMMITTEE DENIED THE RESPONDENT THE ABILITY TO PROVE HIS AFFIRMATIVE DEFENSES AND WAS A DENIAL OF A FAIR HEARING AND DUE PROCESS.

and

THE ACTION OF THE FLORIDA BAR IN SEEKING A PROTECTIVE ORDER ON THE DEPOSITIONS OF THE MEMBERS OF THE GRIEVANCE COMMITTEE WAS A REVERSAL OF ITS POSITION BEFORE THIS COURT IN CASE NO. 70,549, AND SUCH REQUIRES A REVERSAL.

The granting of the Protective Order on the depositions of the members of the Grievance Committee and staff rendered the affirmative defenses raised to the Complaint unprovable. RP-11, RP-27, RH-23 et seq. As a result, the affirmative defenses were denied. RP-37, ¶16.

The issues raised in the Affirmative Defenses (RP-11) were also raised in the Petition for Writ of Prohibition and Alternative Writ of Common Law Certiorari. P-1 (Petition). The Complainant consistently stated that the issues raised were based on spurious allegations, and THE FLORIDA BAR denied any impropriety in the handling of the case. P-8, 11, 13. In the pleading titled THE FLORIDA BAR'S RESPONSE TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION AND ALTERNATIVE PETITION FOR COMMON LAW WRIT OF CERTIORARI, dated August 18, 1987, the Complainant THE FLORIDA BAR stated:

> 3. The Honorable Ellen J. Morphonios, Referee, was appointed to hear the complaint in this cause. Judge Morphonios could certainly take any testimony deemed appropriate to resolve any and all issues in this cause.

P- 11. The reference to "this cause" can only mean the Petition for Prohibition and Certiorari. In reply, the Respondent filed the pleading titled PETITIONER'S REPLY TO THE FLORIDA BAR'S RESPONSE TO PETITIONER'S RESPONSE AND ALTERNATIVE MOTION TO STRIKE as follows:

> 10. The Respondent THE FLORIDA BAR suggests that this Court deny the Writ and allow Judge Morphonios to take testimony about the questions raised in this case - presumably during the time the Petitioner would be tried on the Complaint previously filed.
>
> 11. The Petitioner does not want to investigate THE FLORIDA BAR, its Fort Lauderdale Staff, attorney Zeidwig, the Wilsons and all others that may have been involved in this case. But that is what would happen if the Writ is denied. Such investigation by the Petitioner may certainly be improper, and furthermore, whatever facts which may be uncovered would be challenged as tainted for the Petitioner was the subject of discipline.

P-12. When this Court denied the Writ, the task then fell to the Respondent to investigate the charges to prove the affirmative defenses. This effort was killed before it started by the granting of the protective order. RH-23 et seq., P-27.

Once before this Respondent complained about

problems with The Florida Bar. There was a violation of the confidentiality rules in a former discipline matter concerning the Respondent. The Court took note of same in The Florida Bar v. Stein, 471 So.2d 36 (Fla. 1985). There is no vehicle currently in place to investigate The Florida Bar for any alleged wrongdoing or violation of the Rules.

What the Complainant has done is to build a protective shield around itself that no one can enter, no matter how serious the allegation of wrongdoing. The position of first telling this Court, as outlined above, that testimony on the issues raised by the Respondent will be heard by the Referee, and then telling the Referee that these areas should not to heard is absolutely outrageous. This bare denial of wrongdoing by The Florida Bar should have no greater weight than the denial of ethical wrongdoing by the Respondent. Both sides have the right to prove their cases. The Respondent was denied the right to prove his.

It is interesting to note that Referee Morphonios, after hearing live testimony, went beyond her restrictions. The last sentence of the Order stated that the ". . . deposition of Howard Zeidwig shall be limited to statements made by Tammy and Frances Wilson to him regarding his investigation of their complaint against Stuart L. Stein and Mr. Zeidwig's knowledge of what transpired at a meeting between the Wilsons and Respondent at a Denny's restaurant." RP-27.

The Referee question Mr. Zeidwig about matters beyond this limitation. R-210. And the answer to these questions only lends credibility to the allegations made by the Respondent.

It is clear that the Respondent was denied his right to prove up the affirmative defenses. Should he have been given the chance to do *so,* and have been successful, this appeal would not be necessary.

This cause should be reversed for a new trial on the two charges for which the Respondent was found guilty, and direct the Referee to allow discovery on the affirmative defenses.

ISSUE FOUR

THE EVIDENCE PRESENTED TO THE REFEREE WAS NOT CLEAR AND CONVINCING ON THE TWO COUNTS FOR WHICH THE RESPONDENT WAS FOUND GUILTY AND THE REPORT OF THE REFEREE SHOULD BE REVERSED.

The burden of proof to find an Attorney guilty of a violation of the former Code of Professional Responsibility is by clear and convincing evidence. This standard was first articulated in Slomowitz v. Walker, 429 So.2d 797 (Fla. 4th DCA 1983). In Slomowitz, the court states that:

> . . . clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witness testifies must be distinctly remembered; the testimony must be precise and explicit and the witness must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz, at 800. This Court approved this definition in State v. Mischler, 488 So.2d 523 (Fla. 1986).

The Respondent was found guilty of violations of DR 9-102(B)(3), which reads as follows:

> (B) A lawyer shall:* * *
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

He also was found guilty of DR 1-102(A)(6), which

is the catch-all provision, which reads:

> (A) A lawyer shall not:
>
> * * *
>
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

In the Supplementary Answers to Interrogatories RP-28, answer number 9, the Complainant stated:

> The Florida Bar repeats and realleges the answers stated above in paragraphs 2 - 8 and the answer stated in paragraph 10, herein.
>
> Where, as in the case at bar, an attorney has embarked upon a course of misconduct exhibiting total indifference to his client and a quest for personal gain at other's expense, the Supreme Court has consistently upheld findings and recommendations of violation of DR 1-102(A)(6) which provides that an attorney shall not engage in other conduct adversely reflecting on his fitness to practice law apparently recognizing that by openly, notoriously and intentionally breaching other fundamental ethical precepts the attorney has thereby, by dint of the cumulative nature of violations, engaged in the "other" conduct referenced in DR 1-102(A)(6).

Emphasis added. Should this Court find that there was no clear and convincing evidence to prove the Respondent guilty of a violation of DR 9-102(B)(3), then the finding of guilt on DR 1-102(A)(6) must also be reversed.

The thrust of the case of the Complainant on this DR 9-102(B)(3) count is that it was the responsibility of the Respondent to have given the Wilsons a full itemized list or inventory of every box of fireworks that was taken

for security for the legal fee. See opening statement of the Complainant, R-17 and finding of fact contained in paragraph 9 of the Report of the Referee. RP-37.

However there is no requirement to give any client such a detailed inventory. The second edition of Professional Ethics of The Florida Bar, © 1987, has no opinion referenced to DR 9-102(B)(3) that would give any guidance to attorneys who hold security from clients to protect fees. The Referee, therefore, was wrong as a matter of law when she required that the Respondent had a duty to issue a full receipt. RP-37 ¶9.

(It should be noted that new Rule 4-1.15 of the Rules Regulating The Florida Bar is still silent as to any requirement of an inventory of client's property. All that is required is that "Other property shall be identified as such and appropriately safeguarded.")

Henry Reiter, Respondent's Agent, took pictures of the boxes that were in storage. R-42 Fla Bar No. 4. Nothing more is required. The Respondent sold some of the security to satisfy his fee, and he gave "appropriate accounts to his client regarding them." R-42, Fla Bar No.6.

If the Respondent had all of the inventory secured during the time of his possession, there is no need for an inventory. Neither Tammy Wilson or Frances Wilson testified to demanding a detailed receipt or inventory from either the

Respondent or Henry Reiter, nor is there a requirement to have presented one to them without demand. The only time this would cause a problem is when the client, as in this case, tries to defraud the attorney by making false claims about "missing" items. But theft was not proved, and conversion was not alledged.

And, further, if the list from Rushing (R-42, Fla Bar No. 5) is considered the inventory, taking the Complainant's position, there was no need for an inventory since one already existed. (Although Frances Wilson testified that the list was given to the Respondent [R-166] there was no time pinned down on when this was given. The Respondent freely admits that he was in fact given the list, but it was after the July 4th weekend.)

In answer to the question of why he didn't make a list, the Respondent testified that he started with a whole - he didn't make a list of what he had. He kept accurate records of what was sold, then he knew that he had the whole, less what was sold. R-78. As counsel for the Respondent said in his opening statement, even a count of the boxes would not be enough for the Bar. One must open each carton to count if the number of rockets that appear on the label are in fact in the boxes. R-22.

What may be below is a civil action against the Respondent by the Wilsons for the alleged "missing" cartons.

But this is not an ethical violation. It also presumes that the Wilsons can prove up a prima facia case. The real issue is the allegation of the missing boxes. The Wilsons testify that all of the fireworks obtained from Mr. Rushing were in the warehouse and were given to the Respondent. The cross examination of Ms. Frances Wilson and Ms. Tammy Wilson raise serious doubts as to the truth of this claim.

If the Wilsons purchased all of their fireworks for the 1985 season from Mr. Rushing and placed them with the Respondent, they would not have had any fireworks to sell prior to the return of the security. Yet they did have fireworks. Tammy Wilson testified that she and her mother had $50.00 worth of fireworks left from the previous year. R-454. So from this $50.00 worth of fireworks, the Wilsons were able to parlay this small stake to over $1,500.00 to offer the Respondent on July 2, 1985. R-49. Frances Wilson testified that this small stake of fireworks that was left over enabled her to raise the $1,500.00. R-169.

It was only when the Respondent refused to release all of the fireworks for the $1,500.00 that the Wilsons went to another company to buy more fireworks to sell. R-169.

The Wilsons keep no records of their business, and file no income taxes. GC2-13, 14.

The only logicial conclusion to be reached from the above facts is that the Wilsons lied in claiming that the

Respondent received all of the inventory they obtained from Mr. Rushing. No stretch of the imagination would find that $50.00 worth of fireworks can be parlayed into $1,500.00. It is only by taking some of the fireworks from the Rushing delivery that such funds can be raised. And, following this logical reasoning, this is the reason why the Respondent was not given the Rushing list before July 4, 1985, as he testified. Two facts support this conclusion. First, if the list was given prior to July 4th, Henry Reiter would have verified the possession of all of the cartons. Second, the list itself says that "All claims and returned MUST be accompanied by this bill," presumably for refund or credit. R-42, Fla Bar No. 5. It would have been clear that there was no need to sell the items if the fee was not paid for the Respondent could have returned the cartons and claimed the refund. Or, in the alternative, in checking the invoice by calling Mr. Rushing, the Respondent would have found out that the fireworks were not, if fact, paid for, but were on assignment. He would then have not moved forward on the civil case.

Therefore, as a matter of fact and law, Referee was incorrect in finding that the Respondent violated DR 9-102(B)(3).

Although the Complainant relied upon all of the other specific alleged violations to find the Respondent

guilty of a violation of DR 1-102(A)(6), the Referee did make a finding of fact in paragraph 13 of the Report that certain actions of the Respondent were " . . . completely adverse and reflecting on his ability to serve as an attorney." However the facts contained in this paragraph were not plead as a separate ethical violation in either the Complaint (RP-1) or in the Supplementary Answers to the Interrogatories (RP-27). Additionally, the Referee based this on the incorrect finding that the Wilsons had no notice of the impending sale if they did not pay the Respondent, and the incorrect statement of the law that such notice had to be given. R-630.

Since the Referee found that there was no crime committed by the Respondent, then his entry into the premises of the warehouse was not wrongful. This is consistent with the Respondent's claim that the entire warehouse and its contents were transfered to him. If the entry was not wrongful, neither is the distress sale of the collateral which was about to loose all its value within a 24 hour period. F.S. §§679.105(c) [for definition of collateral]; 679.503 [right of secured party to take possesion of collateral]; 679.504(3) [allows exception for sale without notice if collateral is to decline speedily in value]. There was no breach of the peace to get the collateral. Quest v. Barnett Bank of Pensacola, 397 So.2d 1020 (Fla. 1st

DCA, 1981).

The Referee was incorrect as a matter of law that the sale of the goods was wrongful for there was no actual notice to the Wilsons. This is based on two reasons. First, the Respondent testified that he told Ms. Frances Wilson that he was going to sell the items on July 4th during the telephone call of July 2, 1985. R-49, 50. This was confirmed by the testimony of Deborah Keller. R-310, 311. Second, F.S.§679.504(3) allows the sale of collateral that will decline speedily in value without notice.

The findings in paragraph 13, 14, and 15 are contrary to the UCC, as stated above. Further, notice was in fact given by telephone to the Wilsons by the Respondent, as overheard by Deborah Keller. The testimony of the witnesses on behalf of the Complainant was not to the level of creditibilty as required by Slomowitz, considered in light of the testimony presented by the Respondent.

ISSUE FIVE

THE PUNISHMENT OF SIX MONTHS SUSPENSION IS UNWARRANTED UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

and

THE ORDER OF RESTITUTION IS NOT BASED ON VALID LOGIC OR THE EVIDENCE ADDUCED AT THE HEARING, NOR WAS THIS INJURY RAISED IN THE PLEADINGS

The Respondent is currently a member in good standing of The Florida Bar and the State Bar of New Mexico. The Respondent is winding down his Florida practice, has his house for sale and expects to move to New Mexico upon the receipt of a binding contract to sell his home.

The Respondent has been previously disciplined by this Court. See The Florida Bar v. Stein, 471 So.2d 36, (Fla. 1985) and The Florida Bar v. Stein, 484 So.2d 1233 (Fla. 1986). In the first case, the Respondent, on three combined complaints, was given a ten day suspension. On the second case, a three year probationary period. The probationary period will be up in Feburary, 1989. There has been no problem with the Respondent's probation.

None of the previous disciplines concerned the the property of a client, in trust or for security.

The Referee recommends a suspension of six months and restitution to Mr. Thomas Rushing in the amount of $6,900.00. RP-37, paragraph IV.

SUSPENSION

The initial demand by the Complainant for punishment requested a one year suspension of the Respondent and restitution to be paid to Mr. Rushing, and not the Wilsons, the former clients of the Respondent. R-639. In the face of the finding of guilt, the Respondent's attorney suggested an extention of the probation that this Court required in 1986. R-647.

Any suspension of 91 days or more requires proof of rehabilitation. Rule 3-5.1(e) of the Rules Regulating The Florida Bar. To prove rehabilitation can take upwards of three months to many years. A suspension of 91 days or more destroys a private practice because there is no definite time certain when the attorney will be again allowed to practice. Yet a suspension is not required here.

In cases where failure to keep records was the major ethical lapse, this Court has ordered either public reprimand (The Florida Bar v. Michael Tobin, 377 So.2d 69) or probation (The Florida Bar v. Power, 497 So.2d 946). In both of those cases each attorney had no previous discipline record. The Respondent is aware of the Florida Standards for Imposing Lawyer Sanctions, and Standard 9.2 which allows prior disciplinary offenses to be considered an aggrevating factor. However, it should not aggrevate the punishment to the level of a suspension greater than that which would

require proof of rehabilitation.

This Court's holding in the case of The Florida Bar v. Shupack, 523 So2d. 1139 (Fla. 1988), is helpful. Shupack was announced by this Court on April 21, 1988, just days after the sentence was entered in this case by the Referee. Shupack was found guilty of violations of Florida Bar Integration Rules, article XI, Rule 11.02(3)(a) [conduct contrary to honesty, justice and good morals) and Disciplinary Rules 1-102(A)(4) [conduct involving dishonestly, fraud, deceit or misrepresentation] and 7-102(A)(7) [counseling or assisting a client in conduct known to be illegal or fraudulent]. Shupack was previously suspended for 30 days for a prior violation of DR 1-102(A)(4). The Florida Bar v. Shupack, 453 So.2d 404, (Fla. 1984). The Respondent has never been cited for the instant substantive ethical violation in his former cases. In each Shupack case the nature of the violation was intentional, i.e.: not the failure to provide an inventory as claimed by the Complainant, as in this case. This is a significant difference. This Court found that the conduct of Mr. Shupack constituted a serious offense, and imposed a 91 day suspension which requires proof of rehabilitation.

Considering that even the current Rules Regulating The Florida Bar does not articulate the requirement of giving a client an inventory of items a lawyer takes either

in trust or for security, (Rule 4-1.15), the Respondent should not suffer the punishment of a suspension greater than 90 days. Quite the contrary, if sanctions are to be imposed, should the Court not grant the relief in each of the other sections of this brief, a continuation of his probation for an additional three years, or until he moves to New Mexico, would be more appropriate.

One must also wonder why the Complainant in this case requested a one year suspension when it only requested a six month suspension in Shupack. The same staff attorney for The Florida Bar was responsible for both cases. The Respondent has also testified below about his problems with the members of the Board of Governors, including comments by one Member of the Board stating that the Respondent will never be admitted as an attorney to another state, as long as the Bar has its hooks into him R-658; suing the Complainant in this Court over the last Bar elections R-658, 659 (Supreme Court Case 72,074) and the Bar considering the Respondent a professional malcontent. R-659. There is no question that there is no love lost between the Respondent and The Florida Bar. The Respondent has no knowledge if these matters entered into the recommendation of discipline by the Complainant.

The hardship of a suspension in excess of 90 days on the Respondent was outlined in the record. R-660.

The appropriate sanction is a continuation of the probation of the Respondent for an additional three years, or a suspension for no more than 90 days.

RESTITUTION

The restitution issue was not based on any rational deduction from the evidence produced. The complaining witnesses say that they lost business because they were unable to have the fireworks to sell. Yet the evidence is clear that when they were tendered the cartons, they refused to take all that were there. R-364, 365. Mr. Rushing testified that he received $6,100.00 from the Wilsons after July 4, 1985, and this was credited to the $21,000.00 they owed him. R-105.

It was not the fault of the Respondent that the Wilsons are unable to pay their debts. The Wilsons had the ability to have all the fireworks. Whatever losses they sustained may have been due to the rains for the week prior to July 4, 1985. Such weather hampers the sale of all roadside firework businesses. R-513, Exhibit H. Or there may be dozens of other unknown reasons.

The Referee found that the fee charged the Wilsons by the Respondent was reasonable, particularly in view of the results of getting the ordinance declared unconstitutional, and it was found to be reasonable even if the case was lost. R-637.

The recommendation that the Respondent pay the sum of $6,900.00 to Mr. Rushing makes no sense. The ethical lapse of the Respondent was not the proximate cause of the loss to either Mr. Rushing or to the Wilsons. Rain was the proximate cause of the business failure of the Wilsons. Further, there was no proof that the Wilsons did not earn in excess of the $6,100.00 they paid Rushing. They could have earned a much greater amount and just made a business decision not to pay Rushing any more money. Why should the Respondent be forced to pay monies for the Wilson's failure to pay their legitimate debts?

Lastly, this is exactly the result that the Wilsons originally sought from the Respondent. They first sought to use The Florida Bar to obtain the return of the $5,000.00 fee the Respondent rightfully earned. Then the extortion moved to over $10,000.00. This Court should not follow this twisted reasoning.

The recommendation of restitution of $6,900.00 should be overruled. Should any restitution be made, the Court should remand for a full hearing on the question, or, in the alternative, order restitution no greater than $5,000.00, the fee received by the Respondent. This would take away from him the benefit of his efforts as a consequence of his ethical failure.

CONCLUSION

The Report of the Referee should be rejected as outlined in the brief for the reasons therein contained.

CERTIFICATION

I HEREBY CERTIFY that a true copy of the foregoing was mailed to JACQUELYN PLASNER NEEDELMAN, ESQ., Staff Counsel, The Florida Bar, Cypress Financial Center, 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, FL 33309, this 18th day of November, 1988.

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s/27/supreme-13