7-26

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JEFFREY M. MART,

Respondent.
_____/

Case No. 70,413
[TFB No. 87-23,650(19)]

COMPLAINANT'S INITIAL BRIEF

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SYMBOLS AND EN

In this brief, the complainant, The Florida Bar, will be know as the Bar.

The referee's report will be referred to as R.

Beacon 21 Development Corporation will be referred to as Beacon 21.

The transcript for the final hearing on March 8, 1988, will referred to as T.

STATEMENT OF THE CASE

Problems with the respondent's handling of the Beacon 21 Condominium Development project were brought to the Bar's attention in August 1986. Thereafter, an extensive investigation was undertaken. Probable cause was found by the grievance committee on February 11, 1987. Respondent agreed to a temporary suspension which was ordered by this court on March 19, 1987. The formal complaint was filed on April 22, 1987. Respondent made substantial admissions of wrongdoing in his answer dated May 20, 1987. Criminal charges were brought against him and his motion for a continuance of the Bar proceedings was granted by the referee on December 30, 1987. The final hearing was held on March 8, 1988. The referee's report was signed on May 9, 1988. He recommended the respondent be found guilty of all the rules charged, including misappropriation, neglect, misrepresentation and trust account record keeping violations, and that he be disbarred from the practice of law for a period of three years as provided by former Integration Rule 11.10(5), (R p. 8). He further recommended the respondent enroll in an alcohol abuse program and pay the costs of the proceedings. He left open the question of restitution to be addressed in the future when and if the respondent applied for readmission (R p. 8).

The Board of Governor's of The Florida Bar reviewed the referee's findings and recommendations at their May 1988, meeting. The Board voted to approve the referee's findings of fact and guilt but to appeal his recommendations as to the length of disbarment. In the opinion of the Board a five year period of disbarment pursuant to Rule 3-5.1(f) of the Rules Regulating The Florida Bar is more appropriate given the rules in effect at the time probable cause was found and the sheer magnitude of the respondent's misappropriation. The Board agreed the respondent should enroll in an alcohol abuse program and be required to pay the costs of these proceedings now totalling $2,504.31. The Board further agreed that the question of restitution should be addressed by this court as something to be fully explored in the future as the extent of Chicago Title's loss is presently unknown.

STATEMENT OF THE FACTS

The following facts are a somewhat condensed version of the facts found in the referee's report dated May 9, 1988.

Respondent moved his law practice from Dade County to Martin County in 1984. He concentrated primarily in handling the legal business for the family enterprises which mainly included developing commercial properties. Respondent practiced law as Jeffrey Mart, P.A. and was president of Beacon 21 Development Corporation during its last year of existence to mid 1986. The respondent had a forty percent ownership share and his father, Gilbert Mart, had a sixty percent ownership share. Beacon 21 was a four phase residential condominium project in Martin County being constructed by Mart Development Corporation which was also owned by the Mart family members and in which the respondent had an interest.

In the beginning of May 1984, and continuing approximately through March 1986, the respondent closed in his capacity as attorney, president of Beacon 21 and as title agent for Chicago Title Insurance Company numerous units in phases one and two of Beacon 21. In those closings, deposits were paid to him as the escrow agent. Moreover, for each closing, either the respondent or his staff prepared the various legal documents involved

including warranty deeds, mortgages, closing statements, no lien affidavits and title insurance policies. None of these disclosed the underlying land and construction loans from First Fidelity Savings and Loan which later became American Pioneer Bank. A total of $5,259,000.00 had been loaned by American Pioneer for the purchase of the property and construction of the condominium units. All the notes and mortgages were executed by the respondent as president of Beacon 21. Each of the mortgages had provisions for partial releases as the condominium units were sold. The respondent also collected sums from each buyer that were due and payable to Chicago Title for title insurance. However, he failed to furnish those monies to the company in all instances.

Trust funds collected from the sales averaged between $60,000.00 and $70,000.00. They were placed in the respondent's trust account which was one of several bank accounts comprising the overall trust account. The account was not properly labelled a trust account but had been opened as one. The respondent was the sole signatory. Much of the money placed into the trust account was not used contemporaneously to secure partial releases from American Pioneer Bank as required. The paydown amount in phase one varied per unit but averaged over $45,000.00 while phase two paydowns totalled $56,800.00 per unit. Instead, the respondent utilized a portion if not the majority of these funds

for Beacon 21 which had encountered serious cash flow problems due to construction overruns.

In early 1986 Wilson Hyde, a senior vice president and senior loan officer with American Pioneer, determined that twenty-nine units had been sold wherein the bank had not received payments. (T pp. 59,62) When confronted on January 10, 1986, the respondent advised this was due to problems with his bookkeeper whom he recently terminated. That same day, the bank received payment for seven units reducing the number of unpaid units to twenty-two. However, after the January 10, 1986, meeting, eleven additional units were sold by Beacon 21 and closed by the respondent without payments to the bank. The final total was thirty-three units for an aggregate amount of $1,885,400.00 as of June 1986.

The respondent's attempts to secure alternate financing in 1986 ultimately failed and there were few if any funds left in the trust account to pay the bank the monies owed. During the period in question there was a continuing pattern of funds being diverted to Beacon 21 rather than to the bank as required.

Ultimately, Chicago Title purchased the entire loan package from American Pioneer Bank for approximately $3,000,000.00. However, their present financial posture is unknown since the

project which they now own is still viable with some possibility of potential profit.

The long time accountant for the Mart Enterprises testified at the final hearing that the respondent had not attempted to deceive him regarding financial matters. He also testified that the respondent's ability to manage business checking accounts or finances was open to question.

During the same time period, the respondent encountered other difficulties not directly related to the situation with Beacon 21 project paydowns. In 1984, he issued a title insurance policy in connection with a $1,600,00.00 loan from the Intercontinental Bank and failed to disclose a preexisting purchase money mortgage in favor of Mr. George Largay for approximately $100,000.00 The loan remains unsatisfied.

The respondent also secured a $300,000.00 loan for Beacon 21 from Commonwealth Savings and Loan Association in Miami. It was secured by the development's utility plant owned by the respondent's family but which was not titled to Beacon 21. The respondent closed the loan, prepared the various representations of warranties to the bank and wrote the appropriate title insurance policy but failed to make this disclosure. Moreover, the policy was issued to Commonwealth on March 31, 1986, after

Beacon 21 had been placed into Chapter 11 bankruptcy proceedings without disclosure to the lender's attorney. Respondent further borrowed another $300,000.00 from Mega Bank wherein Beacon 21 did not hold good title to the utility property. He failed to disclose this fact to the lender through the title policy and other documents he provided. He asserted the underlying title was common knowledge and issued corrective deeds when the problem became known.

After Beacon 21 declared bankruptcy, civil litigation brought by Chicago Title ensued. The respondent consented to a 3.2 million dollar award in favor of Chicago Title. (T pp. 51-52) He later unsuccessfully tried to have this set aside and he and his wife declared personal bankruptcy. (T pp. 110,137) Later, criminal charges were also filed. The respondent pled guilty to misdemeanor charges and was placed on a one year period of probation. (T p. 58)

The respondent consented to a temporary suspension from the practice of law in February 1987, which this court issued by order dated March 19, 1987. He currently teaches school in Palm Beach County, Florida. (T p. 139)

SUMMARY OF THE ARGUMENT

The Florida Bar agrees with the referee's findings of fact, but seeks review of the recommended discipline. The referee in this case recommended a three year period of disbarment pursuant to former Integration Rule 11.10(5). The Bar believes this is inconsistent with the current standards for imposing lawyer discipline. Rule of Discipline 3-5.1(f) provides for disbarment for a minimum period of five years. The Bar also argues that the respondent's admitted misconduct warrants this longer term of disbarment even under the old rules which would permit disbarment periods in excess of three years.

The respondent's systematic failure to forward the paydowns to American Pioneer for partial releases ultimately on thirty-three units resulted in a loss of close to 1.9 million dollars in principal and interest to the bank after the Beacon 21 project declared bankruptcy in 1986. The failure to make the required paydowns was not an isolated event but rather an ongoing problem for at least two years. Apparently the respondent made a sufficient number of paydowns to keep the bank from earlier discovering his activities. When a bank official confronted him, he remitted payment on only seven units. (R p. 3) Thereafter, eleven more units were sold without any paydowns being made to the bank. (R p. 3) He knew then that American Pioneer was aware

of the problem and would take action yet this did not seem to deter him. He simply was using his trust account as a revolving loan account in an attempt to keep Beacon 21 solvent.

Although no clients in the traditional sense were harmed, Chicago Title ultimately bought out the Beacon 21 project from American Pioneer Bank for approximately three million dollars. (R p. 3) This was necessitated by the improper activities the respondent engaged in while acting as Chicago Title's agent. (R p. 6; T pp. 48-49) The company's action prevented what might have been an extremely chaotic situation. Even if they ultimately make a profit on Beacon 21, this in no way excuses the gross misconduct of their agent who forced them into this situation.

In addition, the respondent maintained a large number of trust accounts. At one time he had as many as thirty-one bank accounts, approximately seven of which were trust accounts or his "trust account." (T p. 91) When he encountered problems with one account, he simply opened another. (T p. 89) He apparently failed to take the time to properly familiarize himself with the fundamentals of handling client funds and instead persistently pursued his simplistic solution to an increasingly complex problem.

The Bar submits that such irresponsible actions are inexcusable for an attorney who has been a member of The Florida Bar since 1972. The respondent attributed his difficulties to the effects of alcohol and an incompetent bookkeeper. However, the referee found his claim that alcohol abuse impaired his judgment was suspect. (R p. 5)

Respondent's misconduct severely tarnished the public's image of the legal profession. The criminal charges that arose after Beacon 21's collapse were widely publicized in Martin County where the respondent lived. The discipline imposed in this case will have a significant effect on the perception of the legal profession by the public. The question is not disbarment but rather the length of it under the circumstances and which rule of procedure applies.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF A THREE YEAR PERIOD OF DISBARMENT MADE PURSUANT TO FORMER INTEGRATION RULE 11.10(5) IS ERRONEOUS AND THE BAR'S RECOMMENDATION OF A FIVE YEAR PERIOD OF DISBARMENT EITHER PURSUANT TO RULE 3-5.1(f) OR DUE TO THE SERIOUSNESS OF THIS CASE IS THE APPROPRIATE LEVEL OF DISCIPLINE IN THIS CASE.

The referee wrote in paragraph 17 of his findings of fact:

> [R]espondent elected to use funds received in trust which properly belonged to American Pioneer over an extended period of time in an attempt to correct cash flow problems being experienced by the Beacon 21 condominium development project in Phases I and 11. When the bank discovered the apparent problem, respondent attempted to blame it on his staff. Notwithstanding making payments at that time on seven units, he closed an eleven additional units and failed to remit the necessary paydown amounts on those to the bank until the entire matter collapsed and the bank was owed some $1,885,400.00 as of June of 1986. The use of trust funds for purposes other than for which they are intended is amongst the worst types of misconduct an attorney can engage. It ranks with the offense of subornation of perjury and can never be condoned. It matters not that no client actually lost money in the traditional sense although Chicago Title is certainly still at risk and may incur substantial losses. It matters not that the money was not applied for personal purposes but rather used in an attempt to salvage a development project in which the respondent has a substantial interest. It would matter not if he had no interest in Beacon 21 but was merely doing this as an accommodation for his family members. The misdeeds present here are the misuse of the funds entrusted to the attorney for a specific purpose. I specifically find that even if the "impairment" were more obvious throughout the period, the magnitude of these misdeeds is such which calls for the ultimate discipline available.

The Bar submits the recommended discipline of a three year period of disbarment is not consistent with the current level of

discipline prescribed by Rule 3-5.1(f) of the Rules Regulating The Florida Bar which is more appropriate as the ultimate discipline recommended by the referee. The referee believed the length of the respondent's disbarment should be governed by former Integration Rule 11.10(5) as the misconduct the respondent was found guilty of occurred prior to the rule change in January 1987. (R p. 7) However, the Bar submits the present rule should govern as probable cause was found in this case on February 11, 1987, after the rule change. Furthermore, even if this court should find the old rule applies, the sheer magnitude of the respondent's misappropriation of funds rightfully due American Pioneer Bank and the repeated mishandling of his trust account warrant a five year period of disbarment.

During the final hearing, respondent's counsel cited The Florida Bar v. Hosner, 513 So.2d 1057 (Fla. 1987) to support his argument that former Integration Rule 11.10(5) should be used to determine the length of the respondent's disbarment. (T p. 81) However, the issue was not directly addressed in Hosner, supra. The footnotes merely stated that the old rules were superseded by the Rules Regulating The Florida Bar on January 1, 1987. That attorney was charged with violating the disciplinary rules in effect when the misconduct occurred which is different than applying the rules of procedure. The Bar presumes that portion of his case conducted in 1987 was done under the new Rules of

Discipline for procedure. Obviously, one cannot be found guilty of violating rules governing conduct that did not exist at the time the misconduct occurred.

The Bar argues that, although the Bar properly charged and the referee found the respondent had violated the old disciplinary rules in effect when the misconduct occurred, he should have been disciplined according to the new rules which were in effect even before probable cause was found. As could be anticipated, there appears to be a conflict of authority on the issue. In The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987), an attorney was disbarred pursuant to former Integration Rule 11.10(5) when the misconduct occurred in 1984 and the court issued its order in 1987. However, in The Florida Bar v. unnamed attorney, Confidential Case No. 70,172 (Fla. June 2, 1988), this court is considering on rehearing the question as to which set of rules applies in determining the appropriate level of discipline given a specific change in the language of the rules. In this particular case, the referee recommended a discipline no longer available to him due to the rule change.

Meanwhile, several cases decided by this court since the rule change have resulted in disbarments under the current rules even though the misconduct occurred prior to January, 1987. In The Florida Bar v. Gussow, 519 So.2d 603 (Fla. 1988) an attorney

was found guilty of violating one or more provisions of the former Integration Rule and Code of Professional Responsibility. However, he was ordered disbarred pursuant to Rule 3-5.1(f) of the Rules Regulating The Florida Bar.

Similarly, in The Florida Bar v. Bryan, 506 So.2d 395 (Fla. 1987), The Florida Bar filed a complaint against the attorney in 1986. Some of the charges arose out of a felony conviction for which he was suspended. He was ordered disbarred with no application for readmission to be tendered within five years after the date of the opinion. Obviously, this was ordered pursuant to Rule 3-5.1(f) of the Rules Regulating The Florida Bar since the opinion cites Rule 3-7.9 regarding the minimum waiting period for application for reinstatement.

The same question has been addressed with respect to reinstatements. In The Florida Bar, 425 So.2d 531 (Fla. 1982), an attorney who was disbarred in 1957 applied for reinstatement in 1982 which was the available procedure. He argued that he should not be required to take and pass The Florida Bar admissions test as a prerequisite to reinstatement as the rule in effect when he was disbarred made no provisions regarding reinstatement although that procedural route was available when disbarment was not termed permanent. The petitioner argued that the referee's recommendation violated both Federal and Florida constitutional

prohibitions against ex post facto laws. This court disagreed, stating "...that reinstatement proceedings are governed by the rules in effect at the time of application for reinstatement, unless the original discipline opinion otherwise provides or unless the rules at the time of disbarment otherwise provide." The Florida Bar, supra at p. 533.

This court further found the petitioner's ex post facto argument lacked merit. The issue being decided was not whether or not the current rules were being applied retroactively to the 1957 disbarment, but whether the 1957 rules permitted passage of the Bar exam as a prerequisite to readmittance. The petitioner's original disbarment order did not address the taking of the exam. As a result, this court found the prerequisite was not foreclosed and the petitioner would have to comply with the referee's recommendation.

The Bar submits the same reasoning should be applied to the present case. The respondent has no vested interest in the rules governing the length of disbarment. The Florida Bar, supra. For the respondent to argue otherwise, suggests he would not have engaged in the misconduct had he known the term for disbarment would be five rather than three years. The issue is whether or not the new procedural rules of Discipline apply to all cases pending as of January 1, 1987. The Bar submits they do and that

they apply as well to any misconduct cases occurring prior to the rule change and pending as of January 1, 1987. Here, the new rules were in effect before the formal disciplinary proceedings were commenced. Further, requiring a five year period of disbarment would not be ex post facto application of the new rules as former Integration Rule 11.10(5) did not expressly prohibit terms of disbarment longer than three years. The rule simply states that "...no application for admission may be tendered within three years after the date of disbarment or such longer periods as the court might determine in the disbarment order." Emphasis added. See The Florida Bar v. Cooper, 429 So.2d 1 (Fla. 1983); The Florida Bar v. Altman, 465 So.2d 514 (Fla. 1985); The Florida Bar v. Pierce, 498 So.2d 431 (Fla. 1986), and The Florida Bar v. Davis, 474 So.2d 1165 (Fla. 1985) for cases imposing disbarments for more than three years under the old rules.

Furthermore, Chapter One of the Rules Regulating The Florida Bar provides that "[A]11 disciplinary cases pending as of 12:01 A.M. January 1, 1987, shall thereafter be processed in accordance with the procedures set forth in The Rules Regulating the Florida Bar." Uniformity requires no less to avoid administrative chaos. The respondent's case clearly falls into this category even if the statement is interpreted to include those cases in the investigatory stage where no formal charges have been filed. The

question is whether the expanded time period is substantive or procedural. The Bar submits that if an attorney has no vested interest in the rules on reinstatement including a possible prerequisite of passage of the Bar exam, then certainly the length of time regarding disbarment should not be considered to be more important or possibly substantive in nature.

Even if the present rules were not to apply, the respondent's gross misconduct warrants a discipline more sever than a three year period of disbarment. He failed to timely remit the required paydowns to American Pioneer Bank on many of the units. (R p.3) Although he blamed the problem on his office staff, he failed to correct the problem even after being confronted by an officer from American Pioneer. (R p. 3) Thereafter, an additional eleven units were closed without the paydowns being forwarded to the bank. (R p. 3) As a result, by June, 1986, the respondent owed American Pioneer $1,885,400.00 on 33 units. (R p. 3)

As an agent for Chicago Title, the respondent was responsible for the title insurance for each unit sold. Additionally, either he or his staff prepared all of the various legal documents involved. (R p. 2) Yet most of these failed to disclose the underlying loans from American Pioneer Bank. (R p. 2) Ultimately, due to the respondent's failure to act properly

in his role as their agent, Chicago Title found it necessary to purchase the entire loan package from the bank for three million dollars. (R pp. 3,5) Although the Beacon 21 venture may eventually prove profitable, Chicago Title has exposed itself to a risk that would have been unnecessary but for the respondent's actions.

The respondent also engaged in improper activities with regard to a utility plant owned by the Mart family. He secured two loans, both for three hundred thousand dollars, wherein he asserted that Beacon 21 owned title to the utility plant when in fact it did not. (R p. 4) He testified the error was unintentional and that corrective deeds were issued when the problem was discovered. (R p. 4; T pp. 41-42) However, this serves to illustrate an habitual pattern of negligence with respect to his consistent failure to make proper and accurate disclosures.

Additionally, in 1984 the respondent issued a title insurance policy for a 1.6 million dollar loan without disclosing a preexisting purchase money mortgage in the amount of $100,000. (R pp. 3-4) At the time of the final hearing the respondent was unable to explain why he failed to make this necessary disclosure. (T p. 149)

The respondent admitted he had not handled his trust account properly. (T p. 50) Whenever his accountant informed him that problems had developed in a particular account, the respondent simply opened another rather than attempt to correct the problem. (T p. 89) As a result, he had a large number of accounts to maintain. At one point there were thirty-one bank accounts, approximately seven of which comprised his "trust account". (T p. 91) The respondent advanced funds from his trust account and commingled millions of dollars from other family ventures as well as his own money in the Beacon 21 account. (T pp. 93,130,131) During 1985 and 1986, he kept between $75,000 and $150,000 of his own funds in the account. (T pp. 128-129) Despite this, he certified on his bar dues statements during this time that his account was in substantial minimum compliance with the rules. (T pp. 50-51)

The referee found the respondent's assertion that alcohol abuse was a significant factor in his misconduct suspect. (R p. 5) In his report he found the respondent did not seek evaluation for his problem until November, 1986, well after the collapse of Beacon 21. The diversion of funds was not a short term or isolated action but occurred as early as 1984. (R p. 5) The respondent did not halt the improper activities even after being confronted by an American Pioneer officer. Eleven additional

unit were closed without any paydowns being remitted to the bank. (R p. 5) The referee further found that:

> [t]he unrefuted testimony of the former bookkeeper, his accountant and the bank official was that they dealt with Mr. Mart on a frequent basis and he did not appear to exhibit any outward symptoms of being impaired. Moreover, respondent's wife of nineteen years did not testify to observing obvious signs of impairment of (sic) personality changes in her husband other than he was having problems with his blood pressure medicine and he seemed to sleep more. She also stated he was under stress after they moved to Martin County and did not keep the regular work hours he had in Dade County. However, she did testify they tended to argue over his increased consumption of wine late in the evening. (R p. 5)

Even if he were impaired during this time, the Bar submits it still does not excuse, even partially, his misconduct given its magnitude. In The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986) an attorney was ordered disbarred for his conversion of trust funds totalling almost $200,000 over a four year period despite his admitted alcoholism. It was found insufficient to excuse his misconduct. Note, this attorney had also made full restitution.

In his report, the referee went on the say that:

> the respondent continued to function adequately during the time frame and that the obvious stress he found himself in was most probably due to the fact he was aware he was improperly diverting monies from the bank and that the situation regarding the development was not getting better but rather worse. I further find that even if the respondent were impaired to some degree during this time frame, it cannot excuse, even partially, respondent's misconduct give it's magnitude. Although no clients in the traditional sense were

> harmed, I specifically note that Chicago Title ultimately bought out the project from American Pioneer due to the improper activities of respondent acting as it's agent. Their action prevented what might have been an extremely chaotic situation. Even if they ultimately make a profit on the project, it in no way excuses the gross misconduct by their agent which forced them into that position. (R pp. 5-6)

The use of trust funds for purposes other than those for which they were entrusted is among the worst type of misconduct in an attorney can engage. The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). An attorney should guard his client's funds with greater diligence than his own. The Florida Bar v. Welty, 382 So.2d 1220, 1222 (Fla. 1980). Although no client in the traditional sense lost money, Chicago Title is still at risk and may incur substantial losses. It makes no difference that the money was not applied for personal purposes, but rather used in an attempt to salvage a development project in which the respondent had a substantial interest. It would not matter even if he had no interest in Beacon 21 but was merely doing this as an accommodation for his family members. (R p. 7)

In the past, similar gross misconduct has warranted disbarments for periods longer than three years. In Cooper, supra, an attorney's involvement in several fraud schemes warranted a twenty year disbarment. The total amount of money the attorney misappropriated through his various schemes was

significantly less than the amount the respondent owed American Pioneer for the paydowns he failed to make.

In The Florida Bar v. Nagel, 440 So.2d 1287 (Fla. 1983), an attorney was disbarred for ten years for converting client funds to his own use. He also pled guilty to criminal charges which arose out of the transactions. The attorney acknowledged the seriousness of his misconduct.

Similarly, a ten year disbarment was ordered in Altman, supra. The attorney was found guilty of a number of violations including misappropriation of client funds. He was ordered to make restitution to his clients in the amount of **$309,901.66** prior to reinstatement.

A five year period of disbarment was deemed appropriate in Gussow, supra. The attorney converted client funds to his own use. He engaged in numerous trust accounting procedure violations including distributing the proceeds of an estate with a check returned for insufficient funds.

In Pierce, supra, an attorney received a five year disbarment for mishandling his various trust accounts in additional to accepting a fee and failing to perform the necessary work. Two of his trust accounts were garnished by the

I.R.S. There were numerous overdrafts and checks returned for insufficient funds.

Finally, in Davis, supra, an attorney was disbarred for a period of five years for using client funds to satisfy personal obligations, failing to maintain his trust account in substantial minimum compliance with the rules, neglecting a client's case, and taking a loan from a client without advising him of a possible conflict of interest and thereafter defaulting on the loan. Note that all but Gussow, supra, were cases completed under the old rules.

An attorney was disbarred for a period of three years in The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981) for engaging in what this court termed continuing and irresponsible conversion of client funds. Such conduct was found to be totally inconsistent with the high standards of the legal profession. Likewise, the respondent engaged in a continuing and irresponsible pattern of converting funds properly due American Pioneer to the use of the Beacon 21 project. Furthermore, he continued to pursue this course of action even after discovery by the bank. Clearly, such conduct demonstrates a long standing attitude that is simply not consistent with the high privilege of practicing law in this state. That he is now sorry is of little consolation to Chicago Title which could stand to lose a substantial amount of money

including attorneys' fees and costs of pursuing their litigation against respondent.

Discipline should serve three purposes. It should be fair to society but not unduly keep from the public an otherwise qualified attorney. Second, it should also be sufficient to punish to breach of ethics and to encourage reform and finally should serve as a deterrent to those members of the Bar who cannot or will not follow the rules. The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). The magnitude of misconduct here present calls for disbarment. The only question is what the duration should be.

In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984), this court noted another important aspect of discipline, that of protecting the favorable image of the legal profession by imposing visible and effective discipline when serious violations occur. The facts surrounding the respondent's case have been well publicized but that should not matter given it's magnitude. (T pp. 3,4,105) The community is aware of the criminal misdemeanor charges to which the respondent pled no contest. This has tarnished not only his own reputation, but that of the legal community as well. An attorney has a responsibility to conduct himself in a manner consistent with the high standards of the profession regardless of whether or not he is acting in his

professional capacity. The Florida Bar v. Bennett, 276 So.2d 481,482 (Fla. 1973). The Bar submits that nothing less than a five year period of disbarment will do to reinforce this principle in the legal community for this attorney who simply does not understand the burdens associated with the privilege of being a member of The Florida Bar.

Additionally, the Bar requests this court to address in its opinion the question of restitution to Chicago Title upon the respondent's application for readmission to the Bar. The issue needs to be fully explored in the future as the full extent of Chicago Title's potential losses, including attorneys' fees and expenses presently cannot be determined. They now own Beacon 21 and the project may yet prove to be profitable. However, they would not have been forced into saving the project were it not for the respondent's actions.

CONCLUSION

Wherefore, The Florida Bar requests this Honorable Court to affirm the referee's findings of fact and recommendation of guilt, but reject his recommended discipline of a three year period of disbarment and order instead a five year period of disbarment, enrollment in an alcohol abuse program, and payment of costs of these proceedings. Additionally, the Bar requests that the question of restitution be addressed by this court's order as an issue to be fully explored in the future when and if the respondent applies for readmission to the Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief and Appendix have been furnished by ordinary U.S. mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by ordinary U.S. mail to Richard D. Kibbey, attorney for respondent, 416 Camden Avenue, Stuart, Florida, 33497: and a copy has been furnished by mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 1st day of July, 1988.

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