IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

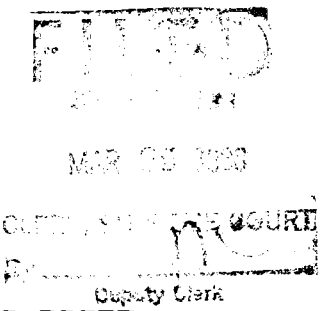
Complainant,

vs.

DAVID E. DESERIO,

Respondent.
_____/

Case No. 70,587
TFB No. 86-16,337(06A)



THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, David E. Deserio, will be referred to as "the respondent". The appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "C" will refer to the complaint filed in this cause. "TR1" will refer to the transcript of the final hearing held on October 15, 1987. "TR2" will refer to the transcript of the hearing on Respondent's Motion for Rehearing held on Janaury 13, 1988. "RR" will refer to the Report of Referee. "R" will refer to the record in this case.

STATEMENT OF THE FACTS AND OF THE CASE

The respondent's rendition of the facts in his initial brief are somewhat distorted and thus, in the interest of clarity, The Bar sets forth the following facts:

In April, 1984, Mr. D.C. Wheeler, a past client and business partner of respondent, asked the respondent to assist him in locating investors for an oil venture in Texas. (TR1.83,L.23-25). In an effort to assist Mr. Wheeler, the respondent contacted a client of his, Raymond Tassinari, and requested that he meet with Mr. Wheeler to discuss an investment opportunity. (TR1.81,L.1-3).

Mr. Tassinari met with the respondent and Mr. Wheeler and agreed to invest the $500,000.00 required as a deposit to purchase certain oil leases in Texas. (TR1.15,L.5-8; TR1.16,L.2-5).

In June, 1984, Mr. Tassinari entered into a written agreement with the respondent and Mr. Wheeler regarding the purchase of the oil leases in Texas. (R. Bar Exhibit #1). Mr. Tassinari did not have $500,000.00 in cash to invest in the venture and, as a result, he mortgaged some property he owned in Pasco County, Florida, for $450,000.00. The respondent handled the closing on Mr. Tassinari's mortgage loan. (TR1.16,L.9-16;TR1.19, L.19-20). Prior to the closing on the mortgage, the respondent contacted Mr. Wheeler and informed him that, after payment of closing costs, Mr. Tassinari could only invest $234,325.00 in the

oil venture rather than $500,000.00. The respondent testified that Mr. Wheeler agreed to accept Mr. Tassinari's investment of $234,325.00 since he (Mr. Wheeler) had already made the $500,000.00 deposit required to purchase the oil leases. (TR1.46, L. 1-25; TR1.47, L.1-10). The respondent handled the closing on the mortgage and on June 27, 1984, deposited the $450,000.00 mortgage proceeds into his trust account. (TR1.90, L.20-24; R. Bar Exhibit #4). Mr. Tassinari's trust funds of $450,000.00 were to be disbursed in accordance with a loan disbursement sheet prepared by the respondent and executed by Mr. Tassinari. (R. Bar Exhibit #3). The respondent paid the closing costs on Mr. Tassinari's mortgage loan from the $450,000.00 in his trust account. (R. Bar Exhibit #2; R. Bar Exhibit #4). After paying the closing costs on Mr. Tassinari's loan, $277,767.93 of Mr. Tassinari's money remained in the respondent's trust account. (R. Bar Exhibit #2). The loan disbursement sheet prepared by the respondent, provided that the remaining trust funds of Mr. Tassinari were to be disbursed as follows:

a. $234,325.00 was to be paid by the respondent to D.C. Wheeler as Mr. Tassinari's investment in the oil venture in Texas.

b. $40,500.00 was to remain in the respondent's trust account as an interest reserve, to make six (6) monthly interest payments of $6,750.00 on Mr. Tassinari's mortgage loan for $450,000.00.

c. $2,942.93 was to be used by the respondent as attorney's fees and costs to travel to Texas to deliver to Mr. Wheeler a check in the amount of $234,325.00, and also to protect Mr. Tassinari's interest in the oil venture by verifying the existence of a contract with Austin Oil for the purchase of the oil leases. (TR1.21,L.3-21;

TR1.22,L.1-25; R. Bar Exhibit #2).

On June 27, 1984, the respondent withdrew $234,325.00 of Mr. Tassinari's money from his trust account and purchased two (2) Park Bank Cashier's Checks. One cashier's check was made payable to D.C. Wheeler in the amount of $210,825.00 and the other cashier's check was made payable to Park Bank of Florida in the amount of $22,500.00. (TR1.115,L.7-17; R. Bar Exhibit #4).

The cashier's check made payable to the Park Bank of Florida for $22,500.00 was used by the respondent to satisfy his wife's loan with the bank. (TR1.115,L.15-19).

At the final hearing in this cause, the respondent testified that the sum he paid to D.C. Wheeler was $23,500.00 less than what was authorized by Mr. Tassinari, because Mr. Wheeler agreed to loan him $23,500.00 to satisfy the bank loan. (TR1.91,L.4-25).

The testimony of Raymond Tassinari, the complaining witness in this cause, and Ernest Kirstein, Florida Bar Staff Investigator, conflicted with the aforementioned testimony of the respondent. Both Mr. Tassinari and Mr. Kirstein testified that they were informed by D.C. Wheeler that when the respondent gave him the cashier's check for $210,825.00, he was told that the check was short $23,500.00 due to the fact that Mr. Tassinari had authorized the respondent to reduce said sum for attorney's fees. (TR1.34,L.22-25; TR1.35,L.8-16; TR1.127,L.21-25; TR1.127,L.1-9).

Mr. Tassinari also testified that when he discovered that

Mr. Wheeler received $210,825.00 rather than $234,325.00, he confronted the respondent and was told by the respondent that he kept $23,500.00 because Mr. Wheeler owed him that money. (TR1.31,L.8-12).

At the time the respondent delivered the cashier's check in the amount of $210,825.00 to Mr. Wheeler, he prepared an addendum to the initial agreement entered into between the respondent, Mr. Tassinari, and Mr. Wheeler. (R. Bar Exhibit #3). The addendum credited Mr. Tassinari with paying Mr. Wheeler $234,325.00 as opposed to $210,825.00 which was actually received by Mr. Wheeler.

The respondent was paid $2,942.93 as attorney's fees and travel expenses, to deliver the check to D.C. Wheeler and to protect Mr. Tassinari's interest by verifying the existence of a contract to purchase the oil leases described in the June 8, 1984 agreement. (TR1.21,L.3-12; TR1.22, L.1-25; R. Bar Exhibit #2). The respondent left Texas without ever verifying the existence of a contract for the purchase of the oil leases.

As it turned out, a contract with Austin Oil for the purchase of the oil leases described in the agreement of June 8, 1984 never existed. The oil venture in Texas was a scam, and Mr. Tassinari lost in excess of $210,825.00. (TR1.36,L.218).

With regard to the $40,500.00 held in respondent's trust account for the purpose of making six (6) monthly interest payments on Mr. Tassinari's $450,000.00 loan, the respondent made three (3) interest payments for a total of $20,250.00. The

respondent failed to make the last three (3) interest payments totaling $20,250.00 due to the following facts which appear in the record:

a. The respondent, Mr. Wheeler and Mr. Jolitz were partners in a business called "The Phone Book". (TR1.100,L.17-25; TR1.101,L.1-4,25; TR1.102,L.1-2; TR1.117,L.25; and TR1.118,L.1-9).

b. Prior to August 25, 1984, Mr. Wheeler gave the respondent a check in the amount of $20,000.00. The respondent was to pay the $20,000.00 to Thomas Jolitz and associates, so that Jolitz could pay the business expenses of "The Phone Book". (TR1.99,L.16-25; R. Bar Exhibit #4).

c. On August 25, 1984, the respondent deposited Mr. Wheeler's $20,000.00 check into his trust account and on the same date, before Wheeler's check cleared the bank, he gave Thomas Jolitz a trust account check for $20,000.00. (TR1.61,L.17-22; TR1.99,18-24; R. Bar Exhibit #4).

d. Neither Mr. Jolitz nor Mr. Wheeler were clients of the respondent at the time the $20,000.00 was deposited and disbursed from the respondent's trust account. (TR1.101,L.13-25; TR1.117,L.25; TR1.118,L.1-9).

e. Mr. Wheeler's $20,000.00 check bounced and as a result, on September 10, 1984, the bank charged back to respondent's trust account, the sum of $20,000.00. (TR1.61,L.23-25; TR1.62,L.1-14; and R. Bar Exhibit #4).

f. As a result of the foregoing, Mr. Tassinari's trust funds of at least $20,000.00 were used by the respondent to pay Thomas Jolitz, to fund a venture in which the respondent was a partner. (R. Bar Exhibit #4).

As of October 15, 1987, the date of the final hearing in this cause, the respondent had not reimbursed Mr. Tassinari the $23,500.00 not paid to D.C. Wheeler nor the $20,250.00 of interest payments on the mortgage loan due MacDill Columbus Corporation.

When the defendant defaulted on his obligations, Mr. Tassinari filed a complaint with The Florida Bar.

Pursuant to Mr. Tassinari's complaint with The Florida Bar, the respondent's trust account was audited by Pedro Pizarro, Branch Staff Auditor of The Florida Bar. The audit conducted by Mr. Pizarro established that the respondent did not make monthly reconciliations of client trust funds; client ledger cards were incomplete; there were no cash receipts or disbursement journals; many of the deposit slips and checks available were not properly identified with the clients' names; there were shortages in the respondent's trust account which eventually resulted in the respondent's trust account being closed out by the bank for an overdraft in the amount of $21,369.16; and the respondent commingled personal funds with client trust funds. (R. Bar Exhibit #4).

On October 15, 1987, a final hearing was held before the referee. At the conclusion of the final hearing, the referee recommended that the respondent be found guilty of each and every allegation of the Bar's complaint. Further, the referee recommended that the respondent be disbarred from the practice of law and that he pay the cost of the Bar's proceedings.

Subsequent to the final hearing, the respondent filed a Motion for Rehearing alleging that the Report of Referee contained improper findings and recommendations.

On January 13, 1988, a hearing was held on Respondent's Motion for Rehearing and, after hearing arguments of counsel, the

referee denied respondent's motion.

This Brief is filed in answer to respondent's Initial Brief in support of his petition for review.

SUMMARY OF ARGUMENT

The respondent's initial brief presents several arguments alleging that the referee's findings in his report are erroneous and that his recommended discipline is inappropriate.

First, respondent argues that the referee's finding that respondent misappropriated Mr. Tassinari's trust funds was predicated solely upon the uncorroborated hearsay testimony of D. C. Wheeler. This same argument was made to the referee during a hearing on Respondent's Motion for Rehearing held on January 13, 1988. The referee strongly disagreed with this argument and denied respondent's motion. The record is repleat with facts that support the referee's finding of misappropriation regardless of Mr. Wheeler's statements contained in the record.

Second, respondent states that there was not clear and convincing evidence to support the referee's findings that respondent used client trust funds for his own purposes, and that respondent failed to protect Mr. Tassinari's interest by not verifying the existence of a contract with Austin Oil. The Bar responds that the respondent's own testimony supports the referee's finding now challenged by respondent. The referee's findings were also supported by three witnesses produced by The Bar. The respondent further challenges the above findings on the grounds that he was denied Due Process since the Bar's complaint did not specifically allege that an attorney/client relationship

existed or that respondent used client trust funds for his own benefit. The Bar complaint neither specifically alleged that an attorney/client relationship existed between Mr. Tassinari and respondent nor did it allege that respondent used client trust funds for his own use. However, the complaint contained general allegations sufficient to put respondent on notice of both claims. Furthermore, this Court has held that evidence of unethical conduct, not squarely within the scope of The Bar's accusations, is admissible, and if, established by clear and convincing evidence, should be reflected in the report by the referee. The Florida Bar vs. Stillman, 401 So.2d 1306 (Fla. 1981).

Third, respondent challenges the referee's finding that respondent did not have Mr. Tassinari's authorization to deduct $23,500.00 from the funds tendered to D.C. Wheeler. The respondent takes the position that he did not need Mr. Tassinari's authorization. The respondent's position is in direct conflict with Integration Rule 11.02(4).

Finally, the respondent argues that the referee's recommendation of disbarment is inappropriate since there was inadequate evidence to support the referee's finding that respondent violated Integration Rule 11.02(4) and DR 1-102(A)(4).

"A referee's findings of fact are presumed to be correct unless clearly erroneous or lacking in evidentiary support". The Florida Bar vs. Stalnaker, 485 So.2d 815 (Fla. 1986). The Florida Bar vs. McCain, 361 So.2d 700 (Fla. 1978). The

respondent fails to rebut the presumption of correctness. Therefore, The Bar asks this Court to uphold the referee's findings of fact and his recommendations, which are abundantly supported by the record.

ARGUMENT

THE REFEREE'S FINDINGS, WHICH WERE BASED ON AND SUPPORTED BY THE RECORD AND NOT BASED SOLELY ON HEARSAY TESTIMONY, SHOULD BE UPHELD.

The respondent argues that the referee's finding that "after arriving in Texas, the respondent informed Mr. Wheeler that he had a cashier's check for $210,825.00 rather than $234,325.00, due to the fact that Mr. Tassinari owed him $23,500.00 and had authorized him to reduce said amount from the $234,325.00 net proceeds of the mortgage," was based on hearsay testimony that was totally unreliable and uncorroborated. Further, the respondent argues that the only evidence in support of this finding was the testimony of Bar Investigator Ernest Kirstein.

The aforementioned finding of the referee was not based on hearsay testimony. Furthermore, contrary to the respondent's argument, the referee's finding was supported by the testimony of two of complainant's witnesses, Raymond Tassinari and Ernest Kirstein.

By way of background, on June 27, 1984, respondent deposited $450,000.00 of Mr. Tassinari's money into his trust account. Mr. Tassinari instructed the respondent to disburse $234,325.00 of his trust funds to Mr. D.C. Wheeler, after traveling to Texas and verifying that Mr. Wheeler had a contract with Austin Oil to

purchase certain oil leases.

On June 28, 1984, the respondent traveled to Texas and delivered a check to Mr. Wheeler in the amount of $210,825.00 rather than $234,325.00. (R. Bar Exhibit #2; R. Bar Exhbit #4).

The testimony which respondent complains of was not offered by The Bar to prove the truth of the matter asserted, but instead, it was offered as an explanation for the discrepancy in the amount authorized to be paid and the amount actually paid to D.C. Wheeler.

When The Bar made an inquiry of Mr. Tassinari in regards to a conversation he had with Mr. D.C. Wheeler about the aforementioned discrepancy, respondent's counsel objected to the testimony as being unreliable and uncorroborated hearsay. At that time, respondent's counsel informed the referee of the fact that Mr. Wheeler was a convicted felon, serving twenty (20) years in prison. (TR1.33,L.4-9). Although Bar Counsel argued that hearsay is admissible in Bar proceedings pursuant to The Florida Bar vs. Dawson, 111 So.2d 427 (Fla. 1959) and The Florida Bar vs. Vannier, 498 So.2d 896 (Fla. 1986), such an argument was not necessary because The Bar did not offer the testimony for the purpose of proving the truth of the matter asserted. Furthermore, the referee did not consider Mr. Tassinari's testimony, regarding his conversation with D.C. Wheeler, to be hearsay, in light of his statement that "the evidence being offered by this witness is simply what Wheeler said. The witness is not saying whether it is true or not. He's just saying this

is what the man said". (TR1. 33, L.23-25). Based on the foregoing, the referee overruled the respondent's objection.

Based on the referee's ruling, Mr. Tassinari then testified in response to questions propounded by Bar Counsel as follows:

> Q. Okay. I don't understand that. What did Mr. Wheeler tell you in regards to the twenty-three thousand five hundred dollars that was not included in the monies that he received from you?
> A. He said there was an agreement between Deserio and myself, and this sum was suppose to be for previous attorney's fees owed Deserio.
> Q. By you?
> A By me.
> Q. Okay. Did you authorize Mr. Deserio to take the twenty-three thousand five hundred dollars out of the two hundred thirty four thousand three hundred and twenty-five dollars?
> A. No. And I did not know about it until nine (9) months later.
> Q. At the time that Mr. Deserio delivered the checks to Mr. Wheeler did you owe Mr. Deserio attorney's fees?
> A. No, I absolutely did not. (TR1.35,L.8-24).

Subsequent to Mr. Tassinari's testimony above, the respondent testified that after depositing Mr. Tassinari's funds of $450,000.00 into his trust account, he called D.C. Wheeler and requested a loan of $23,500.00. Respondent further testified that D.C. Wheeler authorized him to deduct $23,500.00 from the $234,325.00 that Mr. Tassinari agreed to invest in the oil venture. (TR1.90, L.20-25, TR1.91,L.1-25).

In rebuttal of respondent's testimony above, Ernest Kirstein, Florida Bar Staff Investigator, testified about a conversation he had with D.C. Wheeler. On direct examination by Bar Counsel, Mr. Kirstein testified as follows:

Q. What did Mr. Wheeler tell you about the two hundred thirty four thousand three hundred and twenty-five dollars that he was to receive from Mr. Tassinari?
A. Mr. Wheeler told me that he came to the Tampa area in April, 1984, where--.
Q. Just specifically about the two hundred thirty four thousand dollars.
A. As far as the two hundred thirty four thousand dollars, he advised me that Mr. Deserio had arrived in Texas on or about--if I might look June 28, 1984, and furnished him a check in the amount of two hundred ten thousand eight hundred twenty-five dollars.
He told Mr. Deserio that the check should be, as he understood, in the amount of two hundred thirty four thousand three hundred and twenty-five dollars, that it was twenty-three thousand five hundred dollars short, and he wanted to know why.

That Mr. Deserio advised him that Mr. Tassinari had owed him that money and told him that he could take it out of the funds that Mr. Tassinari was furnishing to Mr. Wheeler. (TR1.127,L.14-25; TR1.128,L.1-7).

Mr. Kirstein took copious notes during the above-described conversation with D.C. Wheeler. At the conclusion of the conversation with D.C. Wheeler, Mr. Kirstein took his notes and prepared an affidavit for Mr. Wheeler's signature. After preparing the affidavit, Mr. Kirstein mailed the affidavit to Mr. Wheeler's address. When Mr. Kirstein failed to receive the affidavit back from Mr. Wheeler, he contacted Mr. Wheeler's attorney in Texas, Ben Stevens. Mr. Stevens informed Mr. Kirstein that his client would not sign the affidavit due to the fact that it would incriminate his client in conjunction with a federal investigation which was taking place at the time. (TR1.130,L.12-25; TR1.131,L.1-25; TR1.132,L.1-9).

Even if the above testimony of Mr. Tassinari and Mr. Kirstein is considered to be hearsay, this Court has stated that "In Bar discipline cases, hearsay is admissible and there is no right to confront witnesses face to face. The referee is not barred by the technical rules of evidence". The Florida Bar vs. Vannier, 498 So.2d 896, at 898 (Fla. 1986).

In addition, even if this Court determines that the referee should not have allowed the testimony of Mr. Tassinari and Mr. Kirstein in regards to their conversation with Mr. Wheeler, the respondent's testimony as to why he paid D.C. Wheeler $210,825.00 rather than $234,325.00 was contradicted by further testimony from Mr. Tassinari. Mr. Tassinari testified that when he discovered that Mr. Wheeler received $210,825.00 rather than $234,325.00, he confronted the respondent and was told, by the respondent, that he kept $23,500.00 because Mr. Wheeler owed him that money. (TR1.31,L.8-12).

The referee obviously discarded the respondent's sworn testimony based on the contradictory testimony of Mr. Tassinari. As a result, the referee apparently accepted the explanation that D.C. Wheeler related to both Mr. Tassinari and Mr. Ernest Kirstein.

Furthermore, it is important to note that after the final hearing in this cause, the respondent filed a Motion for Rehearing which was heard on January 13, 1988. During the hearing on January 13, 1988, respondent's counsel argued, "If Wheeler's testimony is incorrect, this case takes a whole different look.

If he has deceived Mr. Kirstein and Mr. Tassinari, with all due respect to the court, and I've handled Bar matters for years, this case is an entirely different case." (TR2.6,L.4-10,). The referee responded by stating "It may be to you. I don't believe it would be to me". (TR2.6,L.12-13,). The referee's statement clearly shows that he did not consider the hearsay or non-hearsay testimony of D.C. Wheeler to be of any great significance to the case or to his recommendations of guilt. Accordingly, the referee's findings of fact should be upheld.

THE REFEREE'S FINDING THAT MR. TASSINARI DID NOT AUTHORIZE RESPONDENT TO TAKE $23,500.00 WAS SUPPORTED BY THE RECORD AND CONSTITUTES MISCONDUCT.

The respondent, in his initial brief, argues that the referee's finding that "Mr. Tassinari did not authorize respondent to take $23,500.00 from the $234,325.00 entrusted to respondent," assumes that respondent needed Mr. Tassinari's permission. Respondent further argues that authorization from Mr. Tassinari was neither necessary nor proper since a portion of Mr. Tassinari's trust funds was reimbursement to Mr. Wheeler for the $500,000.00 investment Mr. Wheeler claimed he had made.

The respondent's arguments are in direct conflict with the testimony of Mr. Tassinari and with Integration Rule 11.02(4), of the Code of Professional Responsibility. Integration Rule 11.02(4) states in part, as follows:

> "Trust funds and fees. Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose."

A review of the record shows that on June 26, 1984, Mr. Tassinari entrusted the respondent with $450,000.00. Mr. Tassinari's funds were entrusted to the respondent for a specific purpose, as was established by a loan disbursement sheet prepared by respondent and executed by Mr. Tassinari. (R. Bar Exhibit #2).

According to the loan disbursement sheet, $234,325.00 of Mr. Tassinari's $450,000.00 in respondent's trust account, was to be

paid to D.C. Wheeler.

The Audit Report of Pedro Pizarro (R. Bar Exhibit #4) establishes that on June 27, 1984, Park Bank charged the respondent's trust account the sum of $210,825.00 for the purchase of cashier's check, No. 93424 payable to D.C. Wheeler, and the sum of $22,500.00 for the purchase of a cashier's check, No. 93425, made payable to Park Bank of Florida. (R. Bar Exhibit #4, at p. 6,7).

The respondent testified that prior to traveling to Texas, he called D.C. Wheeler and requested a loan of $23,500.00 to satisfy a loan obligation, and obtained Mr. Wheeler's permission to deduct said amount from the $234,325.00 that Mr. Tassinari agreed to invest in the oil venture in Texas.

Testimony elicited from Mr. Tassinari conflicted with the above testimony of the respondent. Bar Counsel inquired of Mr. Tassinari as to whether or not he asked respondent why the check to Mr. Wheeler was for less than $234,325.00. Mr. Tassinari's response was, "Yes, and he told me that Wheeler owed him the money; for what reason I do not know". (TR1.31,L.8-12).

Regardless of this conflicting testimony of the respondent and Mr. Tassinari, the fact remains that the respondent violated Integration Rule 11.02(4) since he failed to disburse Mr. Tassinari's trust funds in accordance with the loan disbursement sheet.

The respondent further argues that at the time he requested the $23,500.00 loan, the funds were Mr. Wheeler's to do with as he pleased, so long as Mr. Tassinari was given proper credit towards the oil deal. Contrary to respondent's argument, Mr. Tassinari's trust funds of $234,325.00 were not to become Mr. Wheeler's funds until the respondent traveled to Texas and verified the existence of a contract with Austin Oil.

Mr. Tassinari testified that he paid the respondent $2,942.93 for attorney's fees and expenses to travel to Texas, to deliver a check to D.C. Wheeler in the amount of $234,325.00, and to protect his interest by verifying the existence of a contract with Austin Oil for the purchase of the oil leases described in the agreement dated June 8, 1984. (TR1.21,L.19-25; TR1.22,L.1-12).

It is important to note that D.C. Wheeler never had a contract with Austin Oil, he never paid the $500,000.00 deposit required to purchase the oil leases, and he undeniably stole Mr. Tassinari's funds of $210,825.00.

The respondent could have protected Mr. Tassinari's funds if he had required verification of a contract with Austin Oil prior to disbursing the funds to Mr. Wheeler.

During the hearing on Respondent's Motion for Rehearing held on January 13, 1988, the referee stated:

> "The money was taken by Mr. Deserio before he ever met Mr. Wheeler in Texas. He had already taken the money out of the trust account and used it for his own personal purposes without the authority of his client and that happened before he ever saw Mr.

Wheeler in Texas". (TR2.15,L.1-6).

The referee's findings contained in the Report of Referee are clearly supported by the record and, as such, are not subject to review. A presumption of correctness attaches to a referee's findings because the referee has had an opportunity to personally observe the demeanor of witnesses and to assess their credibility. The Florida Bar vs. Stalnaker, 485 So.2d 815 (Fla. 1986). Respondent has failed to demonstrate that the referee's findings are either erroneous, unlawful, or unjustified, and, therefore, the findings should not be overturned.

THE REFEREE'S FINDING THAT RESPONDENT APPLIED $20,000.00 IN CLIENT FUNDS TO HIS OWN PURPOSE WAS SUPPORTED BY THE RECORD AND RESPONDENT WAS CHARGED IN THE COMPLAINT WITH VIOLATING INTEGRATION RULE 11.02(4) AND THUS WAS NOT DENIED PROCEDURAL DUE PROCESS.

Respondent argues that the referee's finding that "Respondent utilized a minimum of $20,000.000 of client trust monies for his own purpose and not for the purpose in which the money was entrusted to him" is flatly wrong and unsupported by the evidence.

On June 27, 1984, the respondent deposited into his trust account, $450,000.00 of Mr. Tassinari's funds obtained from a mortgage loan. The $450,000.00 was placed in respondent's trust account for a specific purpose and was to be disbursed in accordance with a loan disbursement sheet prepared by respondent and executed by Mr. Tassinari. (R. Bar Exhibit #2; R. Bar Exhibit #4).

The respondent did not disburse Mr. Tassinari's trust funds in accordance with the loan disbursement sheet.

It was the respondent's own testimony which caused the referee to make the findings which respondent now challenges.

At the final hearing, the respondent testified as follows, in response to questions propounded by his counsel:

Q. Now, you had some forty thousand five hundred dollars in your trust account to make these interest payments with; isn't that right?
A. Uh-huh.
Q. And these were monthly interest payments?
A. Correct.
Q. The first payment was due when?
A. July, I think.

Q. Of 1984?
A. Yeah.
Q. Did you make these six (6) payments?
A. I made three of the payments.
Q. Okay.
A. July, August and September.
Q. Was there any reason why you did not make the October payment?
A. There was no funds available at that time to make the payments.
Q. What event occurred that caused the funds to be unavailable?
A. There were a couple of events.

One was Mr. Wheeler, as I said, was here during that summer doing other transactions, and one of the transactions he got involved in was to invest in a business and he deposited some money in my trust account, and a check was written on that, and this was what, you know, just ripped it as far as I'm concerned, was Mr. Wheeler.

He indicated to me that the check was good and wrote the check, and the check comes back "account closed".... (TR1.98,L.23-25; TR1.99,L.1-25; TR1.100,L.1).

The respondent further testified that on the same date in which he deposited Mr. Wheeler's $20,000.00 check into his trust account, he disbursed a $20,000.00 trust check to Thomas Jolitz, on behalf of Mr. Wheeler. (TR1.100,L.12-16).

As reflected above, Mr. Wheeler did not have any funds in the respondent's trust account since Wheeler's $20,000.00 check bounced; and as a result, $20,000.00 of other clients' funds were paid to Mr. Jolitz.

The respondent's testimony above caused the referee to make the following inquiry:

The Court: Who is Thomas Jolitz?
The Witness: Mr. Jolitz was to be an associate of Mr. Wheeler's in this transaction.

He indicated that he was going to take this money and pay some business expenses with it.

The Court: Were you involved in that deal personally or why were you running it through your trust account?

The Witness: Because Mr. Wheeler was involved in it, and Mr. Jolitz was involved in it, and they asked me to be involved from--for another reason than from the standpoint of seeing that the money got disbursed in the transaction.

I had drawn an agreement; I think they were buying it.

The Court: Were you using your trust account in a manner that you had no relationship to at all?

The Witness: No, No. I believe there was a contract to purchase receivables and other assets in the business, and the business. I can't remember whether I did--.

The Court: Were you acting as an attorney for somebody? I would like to get it straight what you were doing in that transaction. Were you somebody's lawyer? Wheeler's lawyer? Is that why you had his money in your trust account?

The Witness: I really don't know. It was very--it was just a business transaction. I don't even remember if I drew the contract. I may have.

The Court: In other words, you don't know whether you were acting as a lawyer or not, is that what you're saying?

The Witness: Not in that sense. I believe if my memory serves me right, they were going--there was some possibility of me having a participation in that. (TR1.100,L.17-25; TR1.101,L.1-25; TR1.102,L.1-2).

In response to Bar Counsel's inquiry, the respondent further testified as follows:

Q. Were you involved in the venture with Mr. Wheeler and Mr. Jolitz regarding The Phone Book?

A. There was a contract that was drawn up, and I don't remember whether I drew it or not, but I may have been mentioned in there, potentially having some right to The Phone Book.

> I believe Mr. Wheeler had a right and Mr. Jolitz had a right, and I don't even remember, but I'm sure there was some mention of me in there having a position there, because I didn't represent either one of them. (TR1.117,L.25; TR1.117,L.1-9).

There was further evidence that respondent was in fact a partner in "The Phone Book". Mr. Ernest Kirstein, a Florida Bar Staff Investigator, testified at the final hearing that during a conversation, Mr. Wheeler informed him that the respondent and Mr. Jolitz were his business partners in the venture called "The Phone Book". (TR1.130,L.17-21).

Based on the respondent's own testimony and the testimony of Ernest Kirstein, it was shown that the respondent used other client trust monies to finance a business venture called "The Phone Book", wherein he was a partner; such conduct clearly violates Integration Rule 11.02(4), with which the respondent was charged in The Bar's complaint.

The respondent further objects to the referee's finding that he used $20,000.00 of clients' funds for his own purpose, since The Bar's complaint never mentioned the respondent's participation in "The Phone Book". The respondent is correct. The Bar's complaint did not contain facts regarding the respondent's partnership status in "The Phone Book". In fact, The Florida Bar did not know that the respondent was a partner in "The Phone Book" until the respondent himself testified about his participation therein.

The Florida Bar's complaint charged the respondent with failing to pay $20,250.00 of Mr. Tassinari's trust funds to MacDill Columbus Corporation, with having a shortage in his trust account in excess of $20,000.00, and with violating Integration Rule 11.02(4). (C.at p.4,5). Furthermore, the audit report of Pedro J. Pizarro, Branch Staff Auditor for The Florida Bar, was attached to The Bar's Complaint as "Exhibit D". (C.at p.5). Mr. Pizarro's audit report set forth the fact that respondent's trust account was short in excess of $20,000.00 due to the bounced check of D.C. Wheeler and respondent's trust account check in the amount of $20,000.00 made payable to Thomas Jolitz. (R. Bar Exhibit #4).

The respondent utilized D.C. Wheeler's bounced check for $20,000.00 and his $20,000.00 trust account check to Thomas Jolitz, to explain the shortage in his trust account and to explain his failure to pay $20,250.00 worth of Mr. Tassinari's trust funds to MacDill Columbus Corporation.

Now the respondent asks this Court to overturn the referee's finding that he used client trust funds for his own use because The Bar did not allege those facts in its Complaint.

In The Florida Bar vs. Stillman, 401 So.2d 1306 (Fla. 1981), this Court held as follows:

> "It was proper for the referee, in making his report, to include information not charged in The Florida Bar's Complaint. Evidence of unethical conduct, not squarely within the scope of The Bar's accusations, is admissible, and such unethical conduct, if established by

> clear and convincing evidence, should be reported because it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed." (Stillman, at 1307).

The referee's finding was based on clear and convincing evidence established through the respondent's own testimony, and should be upheld.

THE REFEREE'S FINDING THAT RESPONDENT FAILED TO PROTECT MR. TASSINARI'S INTEREST IS SUPPORTED BY THE RECORD.

The respondent argues that the referee's finding that "Respondent was to protect Mr. Tassinari's interest" and failed to do so "in that he did not verify the existence of a contract with Austin Oil", was not supported by clear and convincing evidence.

Once again, the respondent's own testimony supports the referee's finding of fact. In response to his attorney's inquiry, the respondent testified as follows:

> Q. Now, again, what did you do, if anything, to ensure there actually was a deal going down?
> A. Well at the time of drafting, I said, "Butch, I would like to see--you know, is there a contract, or what stage of degrees, or address is it in?"
>
> There were two points he brought up. He said he had an attorney in Eastland, Texas, and he gave me the name, and I do not have the name to this day, but I said, "Fine, let's go down there and see this attorney."
>
> He said, "Well, we're modifying the agreement," and he explained to me that he would get me the agreement, more than happy to take me down and meet the lawyer and so on and so forth.
>
> I said, "Fine, let's get on with it," and to look at the oil wells to see that it was real oil wells.
>
> I had done other deals with Butch, and I didn't have any, you know, feeling that he was at that time--that there was, you know--we had just gotten through some other transactions--I mean they drilled--redrilled a sixteen thousand (16,000) foot well in Louisiana the previous year. I wasn't with him, involved in that, but I knew it was done. It was a four million dollar

($4,000,000.00) transaction.

So he said, "Fine."

So the next day we got in the car and we went down the road and he made some stops along the way, and we looked at the wells and got to the end of the day, and I went to the telephone, called the lawyer; the lawyer wasn't available.

We stayed over the next day. The lawyer was--I don't know if he was in Court, or he was--whatever he was doing, we had to go somewhere else, and I said, "Butch, I need you to get this agreement."

He said, "Don't worry, I'll see that you have it. If you don't get it before you go back, you'll get it. Don't worry about it."

But I did examine the wells. The wells were there. They were real; they were producing, he even went up to the other well which was, I guess--it's referred to as a security or a backup in this transaction, and that well was producing. It was producing eighty (80) or one hundred (100) barrels a day....

I felt that if anything happened, if the financing could not occur, there would be a way through oil production to reimburse Mr. Tassinari for any exposure. (TR1.93,L.23-25; TR1.94,L.1-25; TR1.95,L.1-9 and 15-17).

Respondent's testimony as set forth above, supports the referee's finding.

The referee's finding is also supported by the testimony of Mr. Tassinari. Mr. Tassinari testified that he paid the respondent $2,942.93 for attorney's fees and expenses to travel to Texas, to deliver a check to D.C. Wheeler, and to protect his interest by verifying the existence of a contract for the purchase of the oil leases described in the June, 1984, agreement. (TR1.21,L.19-25; TR1.22, L.1-12).

Again, the respondent argues that The Bar's Complaint does not charge him with the responsibility of protecting Mr. Tassinari's interest, and that The Bar's Complaint does not allege an attorney/client relationship.

Although The Bar's Complaint does not specifically state that an attorney/client relationship existed between the respondent and Mr. Tassinari, it does allege that Mr. Tassinari paid the respondent attorney's fees of $2,500.00 and air fare expenses to Texas of $442.93. (C. at p.2).

Furthermore, as discussed in the proceeding argument, The Florida Bar vs. Stillman, supra, provides that it is proper for the referee to include in his report information not charged in The Bar's Complaint, since evidence of unethical conduct is relevant to the respondent's fitness to practice law.

By reason of the foregoing, the referee's finding with respect to the respondent's failure to protect Mr. Tassinari's interest should be upheld.

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS APPROPRIATE BASED ON THE CLEAR AND CONVINCING EVIDENCE SHOWING CONVERSION OF CLIENT FUNDS AND CONDUCT INVOLVING FRAUD, DECEIT OR MISREPRESENTATION.

The respondent argues, in his initial brief, that the referee's recommendation of disbarment is inappropriate because there was no evidence to support the referee's findings that the respondent converted client funds to his own use and that respondent violated DR 1-102(A)(4).

The Bar takes issue with respondent's argument. "A referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking evidentiary support." The Florida Bar vs. Stalnaker, 485 So.2d 815, 816 (Fla. 1986); The Florida Bar vs. McCain, 361 So.2d 706 (Fla. 1978), The Florida Bar vs. Wagner, 212 So.2d 770, 772 (Fla. 1968). Further, Rule 3-7.6(c)(5), Rules of Discipline, specifically states that, "Upon review, the burden shall be upon the party seeking review to demonstrate that a Report of Referee sought to be reviewed is erroneous, unlawful, or unjustified." Respondent has not sustained his burden. Instead, respondent attempts to excuse or justify his behavior by unsupported allegations and facts.

As discussed in the preceding arguments, the referee's findings, which are challenged by respondent, are supported by clear and convincing evidence.

In review, the following facts taken from the record constitute clear and convincing evidence of respondent's

violation of DR 1-102(A)(4) and Integration Rule 11.02(4):

1. On June 27, 1983, respondent placed Mr. Tassinari's mortgage loan proceeds of $450,000.00 into his trust account. (TR1.90,L.8-12 and 20-24; R. Bar Exhibit #4).

2. Mr. Tassinari authorized the respondent to pay Mr. D.C. Wheeler the sum of $234,325.00 from the loan proceeds in respondent's trust account. (TR1.21,L.22-25; R. Bar Exhibit #2).

3. The respondent only paid D.C. Wheeler the sum of $210,825.00 rather than $234,325.00 as instructed. (TR1.27,L.16-25; TR1.127,L.14-25, TR1.128,L.1-7; R. Bar Exhibit #4).

4. The respondent had Mr. Wheeler sign an addendum agreement acknowledging receipt of $234,325.00 rather than $210,825.00. (R. Bar Exhibit #3).

5. When Mr. Tassinari discovered that the respondent paid Mr. Wheeler $210,825.00 rather than $234,325.00, he confronted the respondent and was told that Mr. Wheeler owed respondent the difference. (TR1.53,L.4-14).

6. Mr Tassinari authorized the respondent to pay $40,500.00 of the loan proceeds in respondent's trust account to MacDill Columbus Corporation for interest on the $450,000.00 loan. (TR1.22,L.16-25, TR1.23,L.1-6; and R. Bar Exhibit #2).

7. Respondent failed to pay $20,250.00 worth of interest payments on the loan, to MacDill Columbus Corporation. (TR1.98,L.23-25, TR1.99,L.1-15; R. Bar Exhibit #4).

8. On October 18, 1984, the respondent's trust account reflected a balance of $1,638.53. On the same date, respondent's

trust account should have maintained a minimum balance of $43,750.00, to cover the $23,500.00 not paid to D.C. Wheeler plus $20,250.00 worth of interest payments not paid to MacDill Columbus Corporation. (R. Bar Exhibit #4).

9. On December 17, 1984, respondent's trust account was closed by the bank for an overdraft in the amount of $21,369.16. (R. Bar Exhibit #4).

10. As of the final hearing, Mr. Tassinari had neither reimbursed the $23,500.00 not paid by respondent to D.C. Wheeler nor had he been reimbursed the $20,250.00 worth of interest reserve held by the respondent in his trust account for Mr. Tassinari. (TR1.117,L.2-7).

A summary of the above shows that Mr. Tassinari entrusted the respondent with $450,000.00 of his funds; the funds were placed in respondent's trust account for a specific purpose; Mr. Tassinari's funds were not applied to the purpose they were intended although he was deceived into believing otherwise; and Mr. Tassinari has not been reimbursed his missing trust funds of $43,750.00 even though a demand was made. These facts clearly constitute a violation of Integration Rule 11.02(4), and DR 1-102(A)(4) and, therefore, the referee's findings are supported by the record.

In addition to finding respondent guilty of violating Integration Rule 11.02(4), and DR 1-102(A)(4), the referee also found the respondent guilty of violating Integration Rule 11.02(4)(b), The Florida Bar Bylaws Section 11.02(4)(c)2, Bylaws

Section 11.02(4)2e, Bylaws Section 11.02(4)(c)2f, Bylaws Section 11.02(4)(c)3a, Bylaws Section 11.02(4)(c)3b, Bylaws Section 11.02(4)(c)3c, Bylaws Section 11.02(4)(c)2b, Bylaws Section 11.02(4)(c)2c, DR 1-102(A)(6), and DR 9-102(A).

Respondent argues that a public reprimand is the appropriate discipline for this case. In arguing for a public reprimand, respondent cites several cases, none of which deals with misconduct as serious as respondent's misconduct. The cases cited by respondent deal with minor technical violations of trust accounting procedures and trust account shortages which were restored by the accused attorney.

In this case, respondent converted client trust funds to his own use, he failed to replace the misappropriated funds, and his trust accounting procedures were so inadequate that The Florida Bar Auditor, Pedro J. Pizarro, could not perform a comprehensive analysis of the respondent's trust account.

The referee's recommendation of disbarment in this case is supported by recent case law involving similar misconduct and by current standards for imposing laywer sanctions. In The Florida Bar vs. Breed, 378 So.2d 783 (Fla. 1979), the referee found that Breed converted client trust funds to his own use and recommended disbarment. In recommending disbarment, the referee expressed the following:

> "If one looks strictly at the conduct of a lawyer's practice, the misuse of clients' funds, whether it be using commingled funds or otherwise, is certainly one of the most serious offenses a lawyer can commit. Few offenses have such an adverse public

> impact...The willful misappropriation of client funds should be The Bar's equivalent of a capital offense, there should be no excuses". (Breed, at 784).

This Court disapproved the referee's recommendation of disbarment since disciplinary proceedings involving similar misconduct had not resulted in disbarment in the past; however, in disapproving the referee's recommendation, this Court issued a warning to the legal profession by stating the following:

> "We give notice, however, to the legal profession of this state that henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured." (Breed, at 785)

Since Breed, this Court has disbarred attorneys who have misappropriated client trust funds. See The Florida Bar vs. Davis, 474 So.2d 1165 (Fla. 1985); The Florida Bar vs. Rodman, 474 So.2d 1176 (Fla. 1985); The Florida Bar vs. Knowles, 500 So.2d 140 (Fla. 1986); The Florida Bar vs. Pierce, 498 So.2d 431 (Fla. 1986); The Florida Bar vs. Davidson, 504 So.2d 1237 (Fla. 1987); and The Florida Bar vs. Leopold, 399, So.2d 978 (Fla. 1981). In The Florida Bar vs. Leopold, supra, Leopold misappropriated funds from clients' trust accounts for personal use and commingled private funds with trust account funds. Leopold repaid, to his clients, all misappropriated trust funds except approximately $1,700.00 which was being held in the Court registry because of a dispute over ownership. In addition, Leopold had a prior disciplinary record which reflected a private reprimand in 1966 and a public reprimand in 1975. The referee in

Leopold recommended that Leopold be suspended for two (2) years.

The Florida Bar sought review of the referee's recommendation, arguing that disbarment was the appropriate discipline for Leopold's misconduct. This Court held that Leopold exhibited an inability to conduct his activities according to the profession's standards in light of his previous disciplinary record. In such regards, this Court stated:

> "Considering this prior misconduct with his present reprehensible misconduct-one of the most serious offenses a lawyer can commit-in determining the appropriate discipline, we agree with The Florida Bar that disbarment of Leopold is warranted". (Leopold, at 979).

The respondent's misconduct in this case is as serious as the misconduct of Leopold. As in Leopold, the respondent converted client trust funds to his own use, and he has a prior disciplinary record of a public reprimand. However, contrary to Leopold, the respondent did not make restitution to his client.

According to Florida's Standards for Imposing Lawyer Sanctions (hereinafter referred to as The Standards) approved by The Florida Bar's Board of Governors in November, 1986, disbarment is the appropriate sanction for respondent's misconduct.

The following section of The Standards applies to respondent's misconduct in this case:

> Section 4.1 "Failure To Preserve The Client's Property": Under this section, disbarment is appropriate when a laywer intentionally or knowingly converts client property regardless of injury or potential injury.

Under Section 4.1, aggravating and mitigating factors can be considered in determining whether the appropriate sanction for an attorney's conduct should be increased or decreased.

Section 9.2 of The Standards sets forth aggravating factors that may justify an increase in the degree of discipline to be imposed. The referee found several aggravating factors present in this case, to wit:

a) respondent had a prior disciplinary record;
b) respondent displayed dishonest or selfish motives;
c) respondent refused to acknowledge the wrongful nature of his conduct;
d) respondent had substantial experience in the practice of law; and
d) respondent showed indifference to making restitution. (RR, at 4).

Section 9.3 of The Standards sets forth mitigating factors that may justify a reduction in the degree of discipline to be imposed. The referee did not find any mitigating factors present in this case. (RR, at 4).

Clearly, under The Standards, respondent committed a disbarable offense. In this case, there are no mitigating factors, which would justify reducing the degree of discipline from disbarment to a public reprimand.

Furthermore, at the conclusion of the final hearing in this cause, the referee stated:

> "Well it's clear to me by clear and convincing evidence that Mr. Deserio is guilty on all counts, all allegations, each and every one.
>
> The evidence is overwhelming, overwhelmingly clear that Mr. Deserio defaulted on his

> obligations of an attorney as set forth in the Complaint--very serious, very seriously so.
>
> I'm sorry I have to announce that, but that's very clear to me." (TR1.149,L.6-17).

Based on the foregoing, The Florida Bar requests that this Court approve the referee's recommendation and disbar respondent from the practice of law in this state.

CONCLUSION

The issues before this Court are whether or not the referee's findings of fact in his report are supported by the record and whether the referee's recommended discipline of disbarment is appropriate for the respondent's misconduct. The referee's findings of fact in his report are clearly supported by the record, and, in many instances, are supported by the respondent's own testimony. In addition, the referee's recommended discipline of disbarment is supported by the record, by recent case law, and by the current standards for imposing lawyer sanctions.

The respondent seeks to obscure the facts of this case. The referee heard the testimony of all witnesses and reviewed the exhibits. As the trier of fact, the referee had the opportunity to assess the credibility and observe the demeanor of the witnesses. Accordingly, his findings of fact and conclusions of law should be upheld unless it can be shown that they are clearly erroneous or lacking in evidentiary support.

WHEREFORE, The Florida Bar asks this Court to uphold the referee's findings and approve the referee's recommended discipline of disbarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished By U. S. Regular Mail to Scott K. Tozian, attorney for respondent, at his record bar address of 412 East Madison Street, Suite 909, Tampa, Florida 33602; and a copy to John T. Berry, Staff counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida, 32399-2300, this 24th day of March, 1988.

Bonnie L. Mahon
BONNIE L. MAHON