IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DAVID E. DESERIO,

Respondent.

CONFIDENTIAL

CASE NO: 70,587

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

This disciplinary proceeding is before this Court upon Respondent's Petition for Review of the Report of Referee. The complaint consisted of two counts, the second of which The Florida Bar voluntarily dismissed prior to the trial in this cause. [R. 13]. With regard to Count I, the Referee recommended the Respondent be found guilty of "all allegations, each and everyone". [R. 149]. At least one factual finding of the Referee is not relevant to the issue of misconduct. Moreover, the Referee makes factual findings constituting misconduct which were not alleged by the Bar in its complaint. Respondent seeks review of these factual findings on the basis that they were not charged in the Bar's complaint, and thus the Respondent was not noticed, nor could he adequately defend.

Furthermore, the Referee makes findings of fact which were based exclusively upon hearsay evidence. The Respondent likewise seeks review of the findings so predicated.

The Referee recommended that the Respondent be disbarred from the practice of law in Florida based upon the recommended findings of fact and recommended findings as to those disciplinary rules and provisions of the Integration Rule that were violated. The Respondent seeks review of this recommended discipline.

STATEMENT OF THE FACTS

Symbols and abbreviations used in this brief are as follows:

R.	=	Page of transcript testimony taken at referee hearing on October 15, 1987.
Resp. Ex.	=	Respondent's Exhibit
Comp. Ex.	=	Complainant's Exhibit
Mot. Rehearing	=	Motion for Rehearing heard January 13, 1988.

The majority of the facts alleged by The Florida Bar in its complaint were admitted by Respondent. [R. 5 - 12]. Those facts are substantially as follows:

In April, 1984 Respondent introduced Mr. Dwight (D. C.) Wheeler to the complaining witness [redacted] [R. 14, 15]. Mr. Wheeler was interested in finding investors for an oil venture in which he was involved in Texas. [R. 15]. After speaking with Mr. Wheeler, Mr. [redacted] decided to participate in this venture. [R. 15]. Because Mr. [redacted] did not have the $500,000.00 investment Mr. Wheeler requested, Mr. [redacted] mortgaged some Pasco County property which he owned. [R. 16]. As a result thereof, Mr. [redacted] borrowed $450,000.00. [R. 19]. Initially, the entire $450,000.00 was placed into Respondent's trust account. [R. 90]. From that amount, various closing costs were paid including a fee paid to Respondent for his work on the deal and the handling of the loan. [R. 87 and Comp. Ex. 2]. After the various closing costs were paid, $339,267.93 remained for Mr. [redacted]'s use.

[Comp. Ex. 2]. Of that amount, $234,325.00 was earmarked for payment to Mr. Wheeler as Mr. [redacted]s investment in the referenced oil deal. [R. 20, 21].

Within 24 hours of receipt of the mortgage funds, Respondent telephoned Dwight Wheeler and requested that Mr. Wheeler loan him $23,500.000 from the $234,325.00 amount which Respondent was holding for Mr. Wheeler's benefit. [R. 89, 90]. Mr. Wheeler authorized a deduction, in the amount of $23,500.00, as a loan to Respondent. [R. 91]. On or about June 27 or 28, 1984 Respondent traveled to Texas to deliver to Dwight Wheeler the remaining $210,825.00 Respondent was holding. [R. 92]. However, because Mr. Wheeler had loaned the $23,500.00 to Respondent, the receipt signed by Mr. Wheeler acknowledged receipt of the full $234,325.00 and thus gave Mr. [redacted] credit for all of the investment funds. [R. 24, 93, Comp. Ex. 3]. Although, Respondent did not advise Mr. [redacted] of the loan at the time it was made, Mr. [redacted] was so advised by Respondent in October, 1984. [R. 103]. Furthermore, the affidavit of [redacted] attached to Respondent's Motion for Rehearing indicates Mr. Wheeler also told Mr. [redacted] of the loan.

However, Mr. Wheeler ultimately failed to close the oil deal and Mr. [redacted] lost the $210,000.00 given to Mr. Wheeler for that purpose. [R. 37, 109]. Mr. Wheeler also caused Respondent to lose $20,000.00 for a check written on an

account closed, and moreover, Respondent filed a law suit against Mr. Wheeler on another oil deal and received a substantial default judgment against him. [R. 111].

Additionally, $40,500.00 was held by Respondent in his trust account from the mortgage funds to make interest payments towards the mortgage taken out by Mr. [redacted] on the Pasco County property. [R. 98, 99]. Respondent made three of these monthly payments in the months of July, August and September of 1984. [R. 99]. However, Respondent deposited a check which was written on a closed account in the amount of $20,000.00 from Dwight Wheeler, and an insufficient funds check in the amount of $18,493.05 from Mr. [redacted] into his trust account. [R. 61 - 63, 99 - 103]. Unfortunately, Respondent transferred monies out of his trust account on behalf of Mr. Wheeler and Mr. [redacted], equivalent to and contemporaneous with receipt of their checks, and therefore a deficit was created. [R. 61 - 63].

With respect to the [redacted] check the Park Bank did not notify Respondent of insufficient funds until October 23, 1984, nearly three months after the check had been deposited on July 28, 1984. [R. 62, 63]. Even The Florida Bar auditor found such an occurrence "unusual". [R. 62]. Accordingly, Respondent was unable to make the last three interest payments on behalf of Mr. [redacted] in the amount of $6,500.00. [R. 99]. Litigation against the Park Bank is still pending based

upon the Bank's failure to timely notify Respondent of the returned check of [redacted] [R. 74]. Subsequent efforts to recover the $20,000.00 from D. C. Wheeler were unsuccessful. [R. 72].

Notwithstanding the loss of over $38,000.00, by reason of these two bad checks, Respondent replaced approximately $18,000.00, as evidenced by the deficit balance of $21,369.16 when the account was closed by Park Bank on December 17, 1984. [R. 113, Comp. Ex. 4].

The facts further showed that Respondent had trust account problems with incomplete trust records and commingling of personal and client funds. [R. 64, 65]. Respondent explained that the trust account problems were enhanced by the death of his accountant who never returned all of Respondent's trust records, and additional loss of records in moving his law office. [R. 108].

SUMMARY OF ARGUMENT

Respondent seeks review of the Referee's Findings of Fact which were predicated solely upon the uncorroborated hearsay testimony of Dwight (D.C.) Wheeler, a convicted felon. Mr. Wheeler's testimony is the sole testimony which would indicate, in any fashion, that Respondent misappropriated the funds of Mr. [redacted]

Additionally, Respondent seeks review of the Referee's finding that $20,000.00 of client trust fund monies were utilized for Respondent's own purpose. Moreover, Respondent seeks review of the Referee's finding that Respondent failed to protect Mr[redacted]s interest by not verifying the existence of a contract with Austin Oil. The Respondent objects to these latter two factual findings based upon the lack of "clear and convincing evidence" to support these findings and based upon the fact that the Bar does not allege that an attorney/client relationship existed or that Respondent used any trust monies for his own benefit. Basic due process motions would require notice of allegations of misconduct, prior to findings of wrongdoing.

Respondent further seeks review of the importance and or relevance of the Referee's finding that Respondent did not have Mr. [redacted]s permission to deduct $23,500.00 from the funds tendered to Dwight Wheeler.

Finally, Respondent seeks review of the Referee's recommendation of disbarment which cannot stand in light of the total absence of any reliable, competent evidence of misappropriation on part of the Respondent. The Florida Bar has failed to meet its burden of proving its case by clear and convincing evidence, and in particular, the allegation of conduct involving fraud, deceit and misrepresentation. Accordingly, the Referee's recommendation of disbarment is too harsh and wholly inappropriate.

THE REFEREE ERRED IN HIS FINDINGS WHICH WERE BASED EXCLUSIVELY UPON THE HEARSAY TESTIMONY OF D. C. WHEELER IN THAT THE HEARSAY WAS TOTALLY UNRELIABLE AND UNCORROBORATED.

The Referee below found that "[a]fter arriving in Texas, the Respondent informed Mr. Wheeler that he had a cashier's check for $210,825.00 rather than $234,825.00 due to the fact that Mr. [redacted] owed him $23,500.00 and had authorized him to reduce said amount from the $234, 825.00 net proceeds of the mortgage." This finding, if upheld, constitutes the only conduct involving "fraud, deceit and misrepresentation" in the case below.

This finding was vehemently denied by Respondent at trial and the only evidence in support of this finding was the testimony of Bar investigator, Ernest Kirstein.

Mr. Kirstein testified, over the objection of Respondent's counsel, that he called a man named Dwight Wheeler in Odessa, Texas and spoke to him about this case. [R. 125]. Mr. Kirstein had never previously spoken with Mr. Wheeler. [R. 125]. Mr. Kirstein related that Mr. Wheeler claimed to have accepted $210,825.00, instead of $234,325.00 because Respondent stated Mr. [redacted] owed the difference to Respondent. [R. 128]. Despite receiving the lesser amount, Mr. Wheeler acknowledged signing a receipt for $234,325.00, which even Mr. [redacted] agreed "never made sense". [R. 50].

Conversely, Respondent testified that Mr. Wheeler accepted the lesser amount of $210,825.00, because Mr. Wheeler agreed to loan $23,500.00 to Respondent, so that Respondent could satisfy a loan obligation, and that was why the receipt showed credit for $234,325.00. The loan was from Mr. Wheeler and not from funds of Mr. [redacted] [R. 24, 93, Comp. Ex. 3].

The Referee obviously discarded the sworn testimony of Respondent and accepted Mr. Wheeler's hearsay statements as fact in finding Respondent guilty of conduct involving fraud, deceit and misrepresentation, notwithstanding the obvious inconsistency between Mr. Wheeler's hearsay explanation and the receipt acknowledging the tender of the $234,325.00.

Even more disconcerting is the fact that the Referee accepted Mr. Wheeler's alleged statements as fact despite the fact that Mr. Wheeler bilked Mr. [redacted] out of $210,825.00; despite the fact that Mr. Wheeler is serving 20 years in the Texas Penitentiary for numerous counts of theft in an oil and gas venture; [R. 133], despite the fact that the prosecutor who convicted Mr. Wheeler believed Mr. Wheeler committed perjury during his criminal trial; [Motion Rehearing], despite the fact that two Texas Rangers, an FBI Agent, an ex-Department of Public Safety Intelligence Officer, and an oil field theft investigator with the Texas Railroad Commission all testified at Mr. Wheeler's trial that his reputation for truth and

veracity was so bad that Mr. Wheeler was not worthy of belief; [Motion Rehearing], despite the fact that Samuel S. Duffey a Sarasota lawyer provided a statement under oath that he knew Mr. Wheeler and that Mr. Wheeler's reputation for truth and veracity is "very poor and his general reputation is that of a dishonest, deceitful, fraudulent individual"; [Motion Rehearing], despite the fact that Mr. Duffey further swore that he believes Mr. Wheeler "is vindictive against lawyers in general, and Mr. DeSerio in particular"; [Motion Rehearing], (emphasis added), and despite the fact that Mr. Wheeler refused to sign an affidavit prepared by The Florida Bar which set forth those statements The Florida Bar sought to introduce through the testimony of Mr. Kirstein. [R. 131 - 133].

Respondent acknowledges that Integration Rule 11.06(3)(a) characterizes the proceedings below as "neither civil or criminal but is a quasi-judicial administrative procedure". Moreover, this Honorable Court has previously held that "in disciplinary proceedings, the referee is not bound by technical rules of evidence". State v. Dawson, 111 So.2d 427 (Fla. 1959). More recently, this Court has reiterated that holding in The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). In Vannier, the hearsay evidence admitted was predominantly documents seized by the FBI and the court there found "that the hearsay in question was adequately authenticated and its reliability established. Id. at 898.

Clearly this Court has decided that although hearsay is admissible, the reliability of the hearsay must be weighed carefully. In fact, this Court will dismiss a disciplinary case involving a recommendation of disbarment wherein the hearsay is unreliable. State v. Junkin, 89 So.2d 481. (Fla. 1956).

Although there is a dearth of further case law in attorney disciplinary matters on the subject of the application of the hearsay rules of evidence, reference to other administrative proceedings and the case law relative thereto further supports Respondent's position. First, Section 120.58 of the Florida Statutes is a portion of the Administrative Procedure Act and reads in pertinent part:

> "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Second, the counts of this state have held that, in administrative proceedings, the hearsay rule should not be totally abandoned. In Jones v. City of Hialeah, 294 So.2d 686, 687 (Fla. 3rd D.C.A. 1974), the court opined that "we do not agree with the conclusion that hearsay is strictly admissible in a quasi-judicial administrative hearing called to determine whether or not an individual is entitled to keep his job".

The court further proclaimed that:

> "whether or not hearsay should be permitted at a particular administrative hearing boils down to a question of fundamental fairness. And, while in our state technical rules of evidence clearly do not apply in the same sense before administrative tribunals as they do in courts, we do not think the hearsay rule ought to be totally discarded, particularly in cases when individuals are threatened with serious deprivations, such as loss of job. at 688.

The court in Jones, was according these protections to police officers threatened with the loss of their jobs. Surely, the threatened loss of a livelihood established through 7 years of higher education and sixteen years of practice deserves the same modest protections. [R.78].

The proper rule thus established, this Court should now consider whether the hearsay tendered is sufficiently reliable so as to not violate notions of fundamental fairness. The federal courts have considered, inter alia, the following factors in weighing the reliability of hearsay; the identity of the hearsay declarant, whether he has a motive for untruth or bias, whether the hearsay is corroborated, whether the statements are written, signed and sworn as opposed to being oral, anonymous or unsworn, and the credibility of the witness testifying to the hearsay. Richardson v. Perales, 462 U.S. 389, 91 S.Ct. 1420 (1971), Calhoun v. Bailar, (9th Cir. 1980), 626 F.2d 145, 149.

In the case at bar, the hearsay declarant is a convicted felon who made oral, unsworn statements with, according to the affidavit of Samuel Duffey, Esquire, a motive to be untruthful. Additionally, the statements were totally uncorroborated and the declarant reputation for truth and veracity is beyond horrendous. One would indeed require an uncommonly fertile imagination to dream up a scenario fraught with less reliability. Accordingly, the Referee's findings of fact which are predicated upon the hearsay testimony of D. C. Wheeler cannot be upheld.

THE REFEREE'S FINDING THAT MR. [redacted] DID NOT AUTHORIZE RESPONDENT TO TAKE $23,500.00 ASSUMES A RESPONSIBILITY THAT DID NOT EXIST AND THUS IS NOT A FACTUAL FINDING CONSTITUTING MISCONDUCT.

The Referee below found that "Mr. [redacted] did not authorize Respondent to take $23,500.00 from the $234,500.00 entrusted to Respondent". This finding assumes that Respondent needed Mr. [redacted]'s permission, an assumption not supported by the competent, reliable evidence in the record.

Review of the record reveals that on or about June 26, 1984, Mr. [redacted] Respondent and officials of Metro Mortgage met to close the loan on the mortgage on the Pasco County property. [R. 45, 46, 88, 89, Comp. Ex. 2]. At that time, Mr. Wheeler was called to inform him that $500,000.00 was not available, but only $234,325.00. [R. 47,88]. Because Mr. Wheeler represented that he had already paid the money needed to start the deal, [R. 89], he agreed to accept the lesser sum of $234,325.00.

Within 24 hours, Respondent spoke to Dwight Wheeler again, this time from The Park Bank in Clearwater. [R. 89]. Respondent requested a loan of $23,500.00 from Dwight Wheeler from the money held by Respondent for Mr. Wheeler's benefit. [R. 89]. Mr. Wheeler agreed to loan Respondent the requested sum from the funds Respondent held. At that time, the funds were Mr. Wheeler's to do with as he pleased, so long as Mr.

[redacted] was given proper credit towards the oil deal already funded by Mr. Wheeler. Of course, the receipt reflected, and all involved believed that Mr. [redacted] got this credit. [R. 93].

Accordingly, based upon the foregoing, authorization from Mr. [redacted] was neither necessary nor proper as the funds were reimbursement to Mr. Wheeler for the investment he claimed he had made.

Interestingly, even counsel for The Florida Bar admits that the funds were Mr. Wheeler's to loan in the following exchange with Respondent during cross-examination.

BY MS. MAHON:

Q. Why did you not - if Mr. Wheeler had agreed to loan you twenty-three thousand five hundred dollars, why did you not issue the full check of two hundred and thirty-four thousand three hundred and twenty-five dollars to Mr. Wheeler, and then have Mr. Wheeler issue you the money, whether it be by check or cash?

A. I could have done that, but I asked him if I could do it the other way when I was at the bank. That's exactly what I asked him.

Q. Do you know -

A. He said yes.

Q. Do you know whether that is a proper distribution of client funds?

A. I don't know why it wouldn't be.

It is obvious from the preceding colloquy that Bar Counsel believes that the transaction would have been proper if Respondent had handed Mr. Wheeler the full amount, only to have

Mr. Wheeler hand back $23,500.00. However, for Respondent to, with consent, deduct the $23,500.00 one day prior to delivering the funds, is somehow, improper. Respondent respectfully suggests that this shortsighted approach by Bar Counsel, places form over substance, and is absolutely illogical.

Therefore, the Referee's finding that Mr. [redacted]s permission was necessary is incorrect and Bar Counsel apparently agrees. The finding that Mr. [redacted] did not authorize the deduction is true enough, but irrelevant.

THE REFEREE ERRED IN FINDING THAT RESPONDENT APPLIED $20,000.00 IN CLIENT FUNDS TO HIS OWN PURPOSE, IN THAT SAID FINDING WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND RESPONDENT WAS NOT EVEN CHARGED WITH SUCH MISUSE IN THE COMPLAINT VIOLATING RESPONDENT'S RIGHT TO PROCEDURAL DUE PROCESS.

In his report the Referee finds that based upon Respondent's testimony, "Respondent utilized a minimum of $20,000.00 of client trust monies for his own purpose and not for the purpose in which the money was entrusted to him". This finding is flatly wrong and unsupported by the evidence below.

In reaching the conclusion above the Referee relies upon the testimony of Respondent wherein Respondent explains a check he received from Mr. Wheeler deposited on August 25, 1984 to be applied to a business venture involving "The Phone Book". [R. 61, 99, 100, 118]. Upon receipt of Mr. Wheeler's $20,000.00 check, Respondent disbursed funds in an equal amount to Thomas Jolitz, the same day. [R. 61, 99, 118]. Clearly, the funds were applied to their intended purpose to pay business expenses of "The Phone Book". [R. 100, 118]. Unfortunately, on September 10, 1984 the check of Mr. Wheeler was returned "account closed" and the funds never replaced by Mr. Wheeler. [R. 61].

At worst, Respondent imprudently issued a trust check for the purpose the funds were entrusted, i.e. business expenses of "The Phone Book". Had that check cleared there would have been no problem. In fact, the present Rules Regulating The Florida Bar allow the disbursement of trust funds from certain deposits

of uncollected funds thus, recognizing the need for expeditious disbursement. Rule 5-1.1(3)(f), Rules Regulating Trust Accounts. However, Respondent's error in disbursing trust funds on the uncollected funds of another check does not constitute an after the fact determination that he used such funds for his own purpose when the deposit check is returned.

The Referee's finding that Respondent used $20,000.00 for his own purpose with reference to "The Phone Book" is further objectionable due to the fact that The Florida Bar makes no allegation of such misuse in its complaint. In fact, The Florida Bar's complaint makes no mention of Respondent's participation in the Phone Book venture, Mr. Wheeler's $20,000.00 check, or any other allegation which would put Respondent on notice and afford him a meaningful opportunity to defend such a charge to avoid or refute this factual finding.

The Supreme Court of the United States has recognized that an accused attorney is "entitled to procedural due process, which includes fair notice of the charge". In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968). In Ruffalo, the accused was charged by the Ohio Bar with a twelve count complaint and after hearing the testimony of the accused a 13th charge was added. Ruffalo was found guilty of seven counts including charge number 13. The accused was disbarred in Ohio, and based on that finding, the Court of Appeals ordered his disbarment in federal court as well. In overturning the federal disbarment

the Supreme Court found that the accused had no notice that charge 13 "would be considered a disbarment offense until after he . . . had testified at length on all material facts pertaining to this phase of the case". Id at 500. The Court further declared:

> The charge must be known when the proceedings commence. They become a trap when after they are underway, the charges are amended on the basis of testimony of the accused. at 551.

The case at bar is identical except that after Respondent testified The Florida Bar's "bait and switch" prosecution is even more offensive in that no attempt was made to amend the charge. Instead Bar Counsel argued for a finding of misconduct without amendment. [R. 137, 138].

In the words of Judge Edwards, the dissenting voice in the Ruffalo case in the Court of Appeals, "[S]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation". [Id, at 550]. For the foregoing reasons the Referee's findings with reference to the "Phone Book" venture must be overturned.

THE REFEREE ERRED IN HIS FINDING THAT RESPONDENT FAILED TO PROTECT MR. [redacted]'S INTEREST IN THAT THERE WAS A LACK OF CLEAR AND CONVINCING EVIDENCE AND THE FLORIDA BAR DID NOT SO CHARGE RESPONDENT WITH A DUTY ON MR. [redacted]S BEHALF.

The Referee found that "Respondent was to protect Mr. [redacted]s interest" and failed to do so "in that he did not verify the existence of a contract with Austin Oil". [Report of Referee at 3].

The problem with this finding is twofold. First, Respondent testified at great length as to his efforts to confirm the existence of the oil deal. [R. 93-95]. This included a trip to the oil wells, inspection of the "run" tickets, and prodding of Mr. Wheeler for the signed agreement. [R. 93, 95]. Unfortunately, later developments showed Mr. Wheeler to be a flim-flam man.

Second, The Florida Bar once again did not charge him with the responsibility of protecting Mr. [redacted]s interest, nor do they allege an attorney/client relationship. As discussed in the preceding argument, this is violative of Respondent's procedural due process rights and another example of The Florida Bar charging one violation and proving another.

For the stated reasons, the Referee's finding with respect to Respondent's failure to protect Mr. [redacted]s interest cannot be upheld.

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS INAPPROPRIATE BASED ON THE LACK OF EVIDENCE SHOWING CONVERSION OF CLIENT FUNDS OR MISAPPROPRIATION.

The Referee recommended that Respondent be disbarred from the practice of law in Florida based upon his findings of fact. [Report of Referee at 4]. Because the findings of the Referee cannot be upheld regarding a violation of Disciplinary Rule 1-102(A)(4), and because there was no evidence to support the finding that Respondent converted client funds to his own use as discussed earlier herein, this recommendation cannot be imposed.

Without a finding of conversion or conduct involving "fraud, deceit or misrepresentation, the evidence against Respondent essentially showed inadequate trust records, commingling of client and personal funds, and the issuance of trust checks on uncollected funds. This Court has previously treated similar conduct in a much more lenient and more appropriate fashion, than disbarment.

In The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978), the accused attorney was found to have commingled and used client funds with the client's consent. Moreover, the conduct was found to be without wilful intention to defraud the client or improperly use client funds. Given these facts, the court imposed a public reprimand against Mr. Horner.

In The Florida Bar v. Norton, 510 So.2d 290 (Fla. 1987), the respondent issued a check to the clerk's office which was dishonored for insufficient funds triggering an audit of his trust account. The audit revealed that Norton deposited the client trust funds into the trust account of another attorney; that he issued checks against uncollected funds, that he failed to make required trust reconciliations; that he failed to keep an accurate running balance or maintain accurate ledger cards reflecting receipts and disbursements of trust funds.

The Norton court held that a public reprimand with two years probation was appropriate discipline.

In another very recent case, this court imposed a public reprimand and three years probation on facts similar yet more egregious than the case at bar. In The Florida Bar vs. Block, 500 So.2d 529, (Fla. 1987) the accused attorney took receipt of $20,000.00 in closing proceeds on behalf of a client. Contrary to his instructions to deposit the funds into the client's money market account once cleared, Block transferred the funds into his California account. The check eventually written to his client was dishonored for insufficient funds. A subsequent audit revealed "technical and substantive trust accounting improprieties".

Finally, in another recent case, The Florida Bar vs. Heston, 501 So.2d 597 (Fla. 1987), Heston was found to have commingled personal and trust funds; failed to make any mandated bank or client reconciliations; poor maintenance of trust books and records, and poor policies and procedures with regard to his trust account; failed to give written authorization to his bank to notify The Florida Bar of dishonored (absent bank error) due to insufficient or uncollected funds; and finally had a trust account shortage of $7,305.18.

The court in Heston found that "the majority of the problems resulted from poor supervision and poor record-keeping", and imposed a public reprimand coupled with two years probation, requiring a C.P.A.'s quarterly affidavit reflecting compliance with trust accounting rules and procedures.

The case below is similar to Horner in that commingling client and attorney funds occurred. Moreover, as in Norton, respondent issued checks against uncollected funds, and kept inadequate trust records. However, Respondent respectfully suggests that the facts of Heston are mostly closely aligned to the facts at bar. Both Heston and Respondent commingled funds and kept incomplete trust records. Moreover, the audit conducted by The Florida Bar revealed trust shortages by each, approximately $7,000.00 by Heston and $21,000.00 by Respondent. Although, Heston made restitution immediately upon

completion of the audit, Respondent has been financially unable to do so. [R. 117]. Respondent was and is willing to pay the money borrowed from Mr. Wheeler, to Mr. [redacted] as well as the money held to make interest payments as he becomes able. It would seem unjust that Respondent receive more than a public reprimand because he lacked the immediate ability to replace the funds as in Heston.

This Court's scope of review of recommendation of discipline is broader than its review power of findings of fact. The Florida Bar v. Inglis, So.2d 38 (Fla. 1985). The referee's recommendation was based upon, in large part, unreliable evidence and misapprehension of the facts. Additionally, the Referee improperly considered Respondent's "refusal to acknowledge wrongful nature of conduct". [Report of Referee at 4]. See e.g., The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986).

This Court has stated the purposes of attorney discipline are threefold; protection of the public, maintaining the integrity of the Bar, and insuring fairness to the accused attorney. The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978). In the backdrop of the case at bar, it is clear that the public needed protection only from Dwight Wheeler, as Mr. [redacted] Mr. [redacted] and Respondent now will attest. The integrity of the Bar will not be maintained, nor would it be fair to Respondent to uphold disbarment based upon unreliable evidence and "bait and switch" prosecution techniques which violate fundamental due process notions.

Accordingly, Respondent respectfully suggests that a public reprimand with a term of probation is the most appropriate discipline. Additionally, the Court should require monthly or quarterly affidavits from a Certified Public Accountant stating that Respondent's trust account is in compliance with all requirements of the Rules Regulating The Florida Bar.

CONCLUSION

The reliable evidence below shows the Respondent did not comply with minimum trust account standards as set forth in the Integration Rule of The Florida Bar. In addition, Respondent disbursed trust account checks on uncollected funds, and commingled personal and client funds. The Complainant attempted to prove misappropriation through the hearsay testimony of their "star" witness, D. C. Wheeler, a convicted felon, and thru "hide the ball" prosecution which was violative of Respondent's procedural due process rights. This Court has previously scolded The Florida Bar for unresponsible prosecution of errant attorneys and demanded that The Florida Bar "turn square corners" in attorney disciplinary matters. The Florida Bar v. Rubin, 362 So.2d 12, 16 (Fla. 1978).

This Court should uphold the Referee's findings only insofar as they are supported by "clear and convincing evidence". The Florida Bar v. Wagner 212 So.2d 770 (1968). As delineated above, such misconduct is deserving of a public reprimand and this Court should so rule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 2 day of March, 1988, to: Bonnie Mahon, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607.

SCOTT K. TOZIAN, ESQUIRE