IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

NEIL A. SHANZER,

Respondent.
_____/

Supreme Court Case
No.74,765

The Florida Bar
Case Nos. 89-70,544)11F)
89-70,702(11F)

RESPONDENT'S INITIAL BRIEF

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INTRODUCTION

Throughout this brief (a) the Respondent will be referred to as "Respondent," and The Florida Bar as the "Bar" or "Complainant;" (b) the letter "T" will be used to designate supporting references to the January 22, 1990 transcript of testimony; (c) the abbreviation "Stip." will be used to designate supporting references to the "Stipulation As To Probable Cause, Unconditional Guilty Plea And Waiver Of Venue," followed by the appropriate paragraph(s) number(s) therein; (d) the word "Complaint" will be used to designate supporting references to the Bar's Complaint, served September 21, 1989, followed by the appropriate paragraph(s) number(s) therein; and, (e) references to the March 20, 1990 "Report of Referee" will be designated by the letters "RR."

STATEMENT OF THE CASE AND FACTS

This disciplinary action was precipitated by a grievance filed in late October 1988 by Thomas Rutter, out-of-state co-counsel in a wrongful death matter tried by Respondent (hereafter referred to as the "Merwine" case), as a result of Respondent's failure to pay him his share of a contingency fee and out-of-pocket costs.(T. 3-4, 26-27; Complainant's Ex. 1.)

In recommending disbarment, the Referee's Report totally ignores many of the mitigating circumstances present including Respondent's full cooperation, unconditional guilty plea, acknowledgement of wrongdoing, substantial restitution and sincere intention to repay all funds remaining due, personal and emotional problems at the time, genuine remorse, and candidacy for rehabilitation.

Respondent fully and voluntarily cooperated with the Bar's investigation and audit. (Stip. 8b.) Before being formally contacted by the Bar, Respondent received a copy of the grievance from the local attorney that had referred the Merwine case to him. (T. 4, 8.) Respondent immediately contacted the Bar, spoke with Bar Counsel and, at her request, voluntarily produced his trust account records, etc., and met with her and the Bar's auditor. (T. 8.) Respondent voluntarily met again with the Bar's auditor on several occasions. (T. 8-9.) Respondent then executed a "Stipulation As To Probable Cause, Unconditional Guilty Plea And Waiver Of Venue" admitting the allegations of the Bar's complaint, waiving his right to hearing before a grievance committee, and reserving only his right to appear before a referee on the question of discipline. (Stip. 3, 4, 6, and 10.) Respondent's "Stipulation ..." was filed simultaneously with the Bar's complaint. (Complaint 3.)

Although the Referee's Report correctly finds that a portion of the restitution made by Respondent was "only made after" Mr. Rutter's grievance was filed with the Bar (RR. Sec. II, para. 11), it ignores the fact that a far greater amount was repaid well **before** the grievance was filed. Indeed, as of July, 1988, approximately three (3) months **before** the subject grievance was filed, all clients that had entrusted funds with Respondent to that time had been repaid, in full.[1] (T.3, 5-7, 9, 33; Resp. Ex. 1; Complainant's Ex. 1; RR. Sec. II, para. 4 through 11). Immediately after Mr. Rutter's grievance was filed with the

[1]This included full restitution to the Merwines of $19,116.91 (damages of $10,923.95, net accumulations of $6,309.91 and an outstanding funeral bill of $1,883.05 (T.5; Resp. Ex. 1.)) (T.3, 5-7, 9, 33; Resp. Ex. 1; Complainant's Ex. 1.), $5,000 to Elizabeth Mintz (RR. Sec. II, para. 6), $5,000 entrusted in connection with a real estate transaction (RR. Sec. II, para. 7) and $5,578.40 to the local attorney that had referred the Merwine case to Respondent representing his share of the contingency fee and out-of-pocket costs. (Complainant's Ex. 1.)

Bar, Respondent borrowed money and paid him in full.[2] (T. 4-6, 33; Resp. Ex. 1.) Thus, by the time the Bar filed the subject complaint, Respondent had made full restitution of all funds misappropriated from his trust account, except for $3,643.76[3] owed to an expert witness in the Merwine case (Stip. 8c.) and $624.48 in interest earned on client funds held in trust due The Florida Bar Foundation, Inc. (RR. Sec. II, para. 5). The Referee's Report also ignores Respondent's intention to make full restitution of the funds remaining due. (T. 33.)

The Referee's Report totally ignores the fact that the misappropriations and unauthorized use of trust funds (RR. Sec. II, paragraphs 1 through 11) occurred during a nine (9) month period (from January 1988 through September 1988) (see Complaint) during which Respondent was engulfed in personal and emotional problems. Respondent explained that he had been having marital difficulties for quite some time which kept snowballing[4] (T. 20-21) and was intimidated by his wife's threats of absconding with their two small children[5]:

> When my wife and I would have fights, she used to threaten that if we broke up, she would take the kids to California, and I would never see them again, and I was not concerned that the court would deny me

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[2]Mr. Rutter's was paid $7,796.76, which represented his full share of the contingency fee and his out-of-pocket costs. (T. 4-6, 33; Resp. Ex. 1.)

[3]In his report the Referee incorrectly found that the amount still due the expert witness was $3,893.76. (Compare RR. 8 & 11 with Stip. 8c.)

[4]Respondent explained that there was no real communication between he and his wife and that no matter what he did or how hard he worked, it never seemed to be enough. (T. 20.) He did not feel appreciated at home and had come to feel like nothing more than a "meal ticket." (T. 20, 29.) He and his wife had become adversaries, not partners in life. (T. 34-35.) As a result, Respondent was very down on himself and had little or no self esteem. (T. 20.)

[5]Respondent's two daughters were 10-1/2 and 6 years old at the time of the hearing. (T. 12, 15.)

> visitation rights, because I am very close to my kids, I have been a good father besides what I have done here, but I know that you can't post a bailiff at every terminal at the airport, and I know it happens, and I was intimidated by that, and it was, you know, I was saying to myself that I have kids left here, I have to stay for that, and for that reason I have to keep it together .... (T. 32.)

In the later part of the summer of 1987, Respondent began to experience "cash flow" problems. (T. 22.) After the Stock Market crash of October 1987 Respondent's cash flow problems severely worsened. (T. 22.) In early 1988 Respondent's financial problems became even more acute. (T. 26-29.) He was not able to borrow money needed for living expenses from a bank. (T. 30.) He became very depressed. (T. 25-26.) Intimidated by his wife's threats regarding the children, Respondent was afraid to let her know of the severity of their financial difficulties; such things always seemed to make the problems at home worse. (T. 32, 34.) Respondent's wife had become his worst bill collector. (T. 34-35.) The financial difficulties exacerbated the marital problems and both situations deteriorated even further. (T. 22-23.)

At about this same time, i.e. in early 1988, Respondent became quite shaken over the death of his secretary's husband, who was just a few years younger than Respondent. (T. 21-22, 24.) He had been suffering with cancer for a little more than a year and during that time Respondent learned how cruelly cancer tortures its victims. (T. 21-24.)

As a result of his secretary's husband's death, Respondent, who had just turned 40 years old, began to appreciate his own mortality. (T. 24, 28-29.) The secretary was "destroyed" and unable to return to work. (T. 24.) Respondent started helping her by sending her books and being someone she could talk

to.[6] (T. 24.) The next thing he knew, Respondent began grieving himself. (T. 24.) Respondent found himself unable to get much work done. (T. 25.) His problems at home worsened and things snowballed even more. (T. 25.) Meanwhile, because of his ability to help his former secretary, Respondent became more and more involved in her problems and ignored his own. (T. 24-26, 29.) Instead of escaping into drugs or alcohol,[7] Respondent escaped into his secretary's problems, which seemed worse to him than his own. (T. 25.) It was against this backdrop that Respondent began misappropriating trust funds as needed for his family's living expenses. (T. 25, 29.)

Other than an incorrect finding as to Respondent's age -- Respondent is 41 years old,[8] not 42 (T. 11; Resp. Ex. 2; RR. V) -- the Referee's Report is virtually silent as to Respondent's background and personal history[9] (RR. V), notwithstanding the evidence introduced in this regard to show that the misconduct involved was an aberration in Respondent's career rather than the norm.

Respondent graduated from the University of Miami Law School in 1973 Cum Laude and in the top 10% of his class, after having made the Dean's list four (4) semesters and won three (3) American Jurisprudence book awards. (T. 11-12; Resp.'s Ex. 2.) He wrote an article that was published in the Miami Law

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[6]The relationship that developed was not a physical one, and there was no sexual contact. (T. 24.)

[7]Respondent does not suffer from alcoholism or drug abuse. (T.9, 26-27.)

[8] Respondent was born December 14, 1948. (T. 11; Resp. Ex. 2.)

[9]The Referee's Report correctly found that Respondent had no prior history of any disciplinary actions and was admitted to The Florida Bar in October 1973. (RR. Sec. V; Stip. 8a.)

Review, which was later re-printed in the "Publishing, Advertising, Entertainment, and Allied Fields Law Quarterly." (T.12-13; Resp. Ex's 2 and 3.) He took both the Florida and Pennsylvania Bar exams back-to-back and passed them both. (T.15-16; Resp. Ex's 2.)

For the first ten (10) or so years of his career Respondent was employed by several different well-known Miami law firms. (T.13 - 15; Resp. Ex. 2.) He had been a partner for three (3) years at the last of these firms, representing several banks and a savings and loan association. (T. 14; Resp. Ex. 2.) That partnership dissolved about a year after the savings and loan association was declared insolvent. (T. 14-15.) Thereafter, Respondent went into sole practice. (Resp. Ex. 2.)

Respondent introduced into evidence a very complimentary letter of "Congratulations" for having done a fine job in the Merwine case from Mr. Rutter seven (7) months before he filed the grievance herein and another letter from his opposing counsel in an unrelated case complimenting him for having done a "fantastic job." (Resp. Ex's 4, 5; T. 17-18.)

The Referee also ignored Respondent's genuine heartfelt remorse. (T. 19-20, 30-31, 33.) Respondent acknowledged and understands that what he did was wrong. (T. 19-20.) He apologized to the Bench and Bar and the people whose money was involved and explained that he has been living in his own personal hell since this episode in his life began, suffering from very deep feelings of guilt and depression. (T. 31, 33.) Respondent explained that a few weeks before the grievance was filed he had received a warning that if Mr. Rutter's fees were not promptly paid a grievance was going to be filed;

Respondent did nothing, he believes, because he wanted to get caught so that this nightmare would end. (T. 30.)

Respondent feels he has let down his profession, himself, and his family. (T. 31-32.) He knows what he should have done and that he went about trying to keep his family together the wrong way. (T. 31-32, 34.)

ISSUE

WHETHER THE REFEREE'S RECOMMENDED SANCTION OF DISBARMENT IS TOO HARSH IN LIGHT OF THE MITIGATING CIRCUMSTANCES PRESENT SUB JUDICE INCLUDING RESPONDENT'S FULL COOPERATION, UNCONDITIONAL GUILTY PLEA, ACKNOWLEDGEMENT OF WRONGDOING, SUBSTANTIAL RESTITUTION AND SINCERE INTENTION TO REPAY ALL FUNDS REMAINING DUE, PERSONAL AND EMOTIONAL PROBLEMS AT THE TIME, GENUINE REMORSE, CLEAR CANDIDACY FOR REHABILITATION, AND LACK OF ANY PRIOR DISCIPLINARY ACTIONS?

SUMMARY OF ARGUMENT

The Referee ignored virtually all of the unrebutted evidence concerning mitigating factors as well as established caselaw holding that the presumption that disbarment is the appropriate punishment in misappropriation cases is rebuttable and can be overcome by evidence of various mitigating circumstances such as cooperation and restitution, both of which are present here. Other factors which are to be considered in mitigation and which, though present sub judice were for the most part totally ignored, include Respondent's

personal or emotional problems, mental state, timely good faith effort to make restitution, character and reputation, and, remorse.

This Court has recognized that (i) disbarment should only be imposed in those rare cases where rehabilitation is highly remote, (ii) each case must be assessed individually and, (iii) in determining punishment consideration should be given to the punishment imposed on other attorneys for similar misconduct, keeping in mind the purposes of attorney discipline. All this was ignored by the Referee in arriving at his recommendation of disbarment. Instead, he only focused upon certain "aggravating factors" -- dishonest or selfish motive, a pattern of misconduct, and multiple offenses -- also present in virtually every misappropriation case cited notwithstanding this court did not impose disbarment because mitigating factors such as those present here were also found to exist.

Clearly, the Referee's recommendation of disbarment, made after ignoring virtually all the mitigating factors present, including Respondent's full cooperation, unconditional guilty plea, acknowledgement of wrongdoing, substantial restitution and sincere intention to repay all funds remaining due, personal and emotional problems at the time, repentative attitude, genuine remorse, and clear candidacy for rehabilitation, is too harsh.

ARGUMENT

THE REFEREE'S RECOMMENDED SANCTION OF DISBARMENT IS TOO HARSH IN LIGHT OF THE MITIGATING CIRCUMSTANCES PRESENT SUB JUDICE INCLUDING RESPONDENT'S FULL COOPERATION, UNCONDITIONAL GUILTY PLEA, ACKNOWLEDGEMENT OF WRONGDOING, SUBSTANTIAL RESTITUTION AND SINCERE INTENTION TO REPAY ALL FUNDS REMAINING DUE, PERSONAL AND EMOTIONAL PROBLEMS AT THE

TIME, GENUINE REMORSE, CLEAR CANDIDACY FOR REHABILITATION, AND LACK OF ANY PRIOR DISCIPLINARY ACTIONS.

The Referee ignored virtually all of the unrebutted evidence concerning mitigating circumstances and both recent and established caselaw holding that the presumption that disbarment is the appropriate punishment in misappropriation cases is rebuttable and can be overcome by evidence of various mitigating circumstances such as cooperation and restitution. See, The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), citing The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981). See also, Rule 4.11, Florida Standards For Imposing Lawyer Sanctions. Other factors which are to be considered in mitigation and which, for the most part, were totally ignored include the absence of a prior disciplinary record; personal or emotional problems; the lawyer's mental state; a timely good faith effort to make restitution; character and reputation; and, remorse. See, Rules 3.0 and 9.32, Florida Standards For Imposing Lawyer Sanctions.

This Court has recognized that the "extreme sanction of disbarment is to be imposed only 'in those rare cases where rehabilitation is highly remote,' " The Florida Bar v. Hartman, 519 So.2d 606, 608 (Fla. 1988), quoting The Florida Bar v. Rosen, 495 So.2d 180, 181-82 (Fla. 1986) (quoting The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978)); that "...each case must be assessed individually and [that] in determining the punishment [the court] should [also] consider the punishment imposed on other attorneys for similar misconduct," The Florida Bar v. Breed, 378 So.2d 783, 785 (Fla. 1979); see also, The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987); keeping in mind the three purposes of attorney discipline, i.e:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. Harris, 400 So.2d 1220, 1222 (Fla.1981), quoting The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). Accord., The Florida Bar v. Harper, 518 So.2d 262 (Fla. 1988); The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987). Again, all this is ignored in the Referee's Report. Instead, the Referee focused upon three "aggravating factors" -- dishonest or selfish motive, a pattern of misconduct, and multiple offenses -- also present in virtually every misappropriation case cited above and below notwithstanding the fact that this court did not impose disbarment in any of them because mitigating factors such as those present here were also found to exist.

In Breed, supra, the respondent had initiated a check-kiting scheme involving more than $70,000. He used clients' trust funds as a source to cover the kite. He also commingled personal funds with those of his clients; converted $7,816 in client trust funds to his own use; and, kept inadequate trust account records. The referee found that Breed was "dangerous to that segment of the public with which he comes into professional contact . . ." and recommended disbarment. This court rejected this recommendation and ordered a two (2) year suspension with proof of proper rehabilitation before readmission. This court also warned members of the Florida bar that it would "...not be reluctant to disbar an attorney for this type of offense even though no client is injured" in the future. Breed, supra at 785.

Two years later, in The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982), this court noted that its warning in Breed had been tempered a year earlier in its decision in The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981). In Pincket the Court found it appropriate to consider the circumstances surrounding the attorney's offense in determining appropriate discipline noting that "[t]he circumstances of Pincket's cooperation in the proceedings convinced [the Court] that a two-year suspension was an appropriate punishment ... [notwithstanding the fact that] Pincket converted nearly $60,000 of his client's money to his own use." Morris, supra at 1275. Of the nearly $60,000 Pincket converted, approximately $21,000 had still not been repaid at the time of Pincket's hearing. Pincket was desirous of making full restitution and of continuing the practice of law. In rejecting the Bar's assertion that mitigating factors should not be considered in determining appropriate discipline, but only upon a petition for reinstatement,[10] this court noted that Pincket had, inter alia, fully cooperated with the Bar, entered an unconditional plea of guilty, and made partial restitution of the funds misappropriated.

The holding in Pincket, supra, was again reiterated in The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986). There this court took into consideration respondent's somewhat coerced restitution made in accordance with a plea agreement in his criminal case,[11] his cooperation with the Bar (the parties stipulated to the facts), his remorse, and the effect of his alcoholism. Although the Court did not agree with the referee's recommendation of a three (3) month suspension with automatic reinstatement followed by two (2) years probation, it

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[10]This very same argument was rejected again in The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1989).

[11]According to Rule 9.4(a), Florida Standards For Imposing Lawyer Sanctions, however, "forced or compelled restitution" should not be considered as a mitigating factor.

did feel that the mitigating circumstances made disbarment inappropriate notwithstanding respondent's misconduct included misappropriating client funds and failure to comply with trust accounting procedures, and his prior disciplinary history (a private reprimand for neglecting a legal matter entrusted to him). Respondent was suspended for one (1) year with proof of rehabilitation and passage of the ethics portion of the Florida Bar examination required for reinstatement. Suspension was ordered followed by two (2) years probation upon certain specified conditions.

More recently, in The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), this court found that the presumption of disbarment as the appropriate punishment for misappropriation of trust funds had been rebutted by evidence of respondent's cooperation and restitution. The respondent admitted, inter alia, that he had knowingly misused and misappropriated in excess of $29,000 in trust funds over a five (5) year period for his own purposes. **After** he was notified of the grievance and the exact deficit in his trust account was determined, he borrowed money and covered the entire shortage. At the time of his hearing before the Referee, however, Schiller had still not completed making restitution. This court noted that no client appeared to have been directly damaged by the misappropriations and that the Referee found that Schiller seemed genuinely remorseful and appeared to be a good candidate for rehabilitation. The Referee had recommended a two (2) year suspension, etc., and the Bar petitioned for review arguing that respondent should br disbared. This court disagreed and suspended the respondent for three (3) years with reinstatement upon proof of rehabilitation and passing the ethics portion of the Florida Bar exam.

The Florida Bar v. Block, 500 So.2d 529 (Fla. 1987), came before this court on Respondent's "Conditional Guilty Plea For Consent Judgment For Public Reprimand and Probation." Respondent's conditional plea was precipitated by a grievance resulting from his having issued a trust account check for $20,000 to a client representing the clients' closing proceeds from the sale of their condominium which was returned for insufficient funds. A Bar audit for the period January 1, 1983 through December 31, 1984, revealed **numerous** "technical and substantive trust accounting improprieties" which Respondent acknowledged. Both the referee and this court approved the conditional plea and, pursuant thereto, Respondent was placed on three (3) years probation, subject to certain specific safeguards and sanctions.

In The Florida Bar v. Roth, 471 So.2d 29 (Fla. 1985), an audit revealed that between November 5, 1973 and April 8, 1974 respondent commingled, misappropriated, and converted to his own use $80,874.15 in insurance proceeds and funds of an estate he was representing; breached his fiduciary duty to the heirs of the estate and engaged in deceitful conduct calculated to maintain the heir's trust in him by, among other things, manipulating bank accounts to inflate the estate account balance prior to being deposed pursuant to an accounting in 1977. Notwithstanding Roth's membership in the Bar since 1934, his performance of significant pro bono work, voluntary services to many charitable causes, restitution, and lack of prior disciplinary record, the referee recommended disbarment. This court disagreed and found that a three (3) year suspension with proof of rehabilitation would be the appropriate discipline.

The Respondent in The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982), admitted to misappropriating the trust funds of several clients to his own use and failing to maintain proper trust accounting records or furnish minimally

required quarterly reconciliations. Because of Respondent's admissions of impropriety, cooperation, voluntarily turning over his books and records to the Bar, restitution to one client (restitution was not made to respondent's other client, his father, who appeared to be willing to forgive the indebtedness), and voluntary withdrawal from the practice of law, this court held that disbarment was too severe. The Court ordered respondent suspended for two (2) years with readmission upon proper proof of rehabilitation.

In The Florida Bar v. Barksdale, 394 So.2d 114 (Fla. 1981), respondent had misappropriated in excess of $25,000 of a client's trust funds. At the time of the hearing, no restitution had been made, however, various other mitigating circumstances, including alcoholism, were found to exist. Respondent received a two (2) year suspension with reinstatement upon proof of rehabilitation and full restitution, with interest, followed by three (3) years probation.

The incident which gave rise to the grievance in The Florida Bar v. Harper, 518 So.2d 262 (Fla. 1988), stemmed from Harper's receipt of $26,109 to be applied towards his client's construction loan. After depositing this money to his trust account, Harper misappropriated $12,100 for personal use. Several weeks later his trust account became overdrawn. Harper sent an unsigned check to the construction lender for $27,008.05 when he only had $39.86 in his trust account. Finally, he borrowed $30,000 to make the client's loan payment. A Bar audit for the period January 1984 through February 1986 revealed grossly inadequate record keeping, additional trust fund misappropriations by Harper for personal use, and additional instances of trust account checks written on insufficient funds. Harper plead guilty. The referee recommended a three (3) month suspension followed by two (2) years of supervised probation. Noting that Harper had made restitution and had no prior history of disciplinary actions

and, after reiterating the criteria to be used in deciding appropriate punishment set forth in The Florida Bar v. Pahules, supra, this court ordered Harper suspended for six (6) months with reinstatement conditioned upon proof of rehabilitation, followed by two (2) years supervised probation with semiannual trust account audits.

In The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981), respondent misappropriated trust funds, failed to keep adequate trust account records, and issued bad checks. She stipulated to her guilt, cooperated with the Bar, made restitution, had no prior disciplinary record, and, apparently, had been experiencing some personal, family and law practice problems. Respondent received a two (2) year suspension with reinstatement upon proof of rehabilitation upon certain specified terms followed by probation.

In suspending the respondent in The Florida Bar v. Dietrich, 469 So.2d 1377 (Fla. 1985), for two years until he successfully completed criminal probation and demonstrated rehabilitation, the Supreme Court considered, inter alia, respondent's lack of prior disciplinary record; marital problems; alcoholism; diminution of income due to neglecting his practice which, in turn, exacerbated the problems just mentioned; full cooperation with the Bar; genuine remorse; and, lack of ill-will towards the organized bar, the Court, and law enforcement officials.

In The Florida Bar v. Willis, 459 So.2d 1026 (Fla. 1984), respondent misappropriated funds entrusted to him by several clients he represented in criminal matters thereby causing each of them to violate the terms of their criminal probation. Respondent also violated various trust accounting records keeping and procedure rules. Respondent was suspended for three (3) years

and placed on probation for two (2) years with reinstatement first being dependent upon proof of rehabilitation.

The Florida Bar v. Collier, 458 So.2d 266 (Fla. 1985), involved the misapplication and mishandling of trust funds and violations of the various rules regarding trust accounting records keeping and procedures. Notwithstanding Respondent's prior disciplinary record, Respondent was suspended for three (3) years with reinstatement being dependent upon proof of rehabilitation, which specifically included making full restitution.

See also, The Florida Bar v. Robbins, 528 So.2d 900 (Fla. 1988) (three (3) year suspension, with proof of restitution to former clients as a prerequisite to reinstatement was appropriate discipline where, inter alia, attorney used trust funds for an unauthorized purpose and violated trust accounting rules); The Florida Bar v. Whigham, 525 So.2d 874 (Fla. 1988) (this court approved the referee's recommendation of of a three (3) year suspension over the Bar's request for disbarment, noting that respondent had plead guilty to the offenses charged and cooperated with The Florida Bar; this court also barred respondent from having a trust account upon reinstatement).

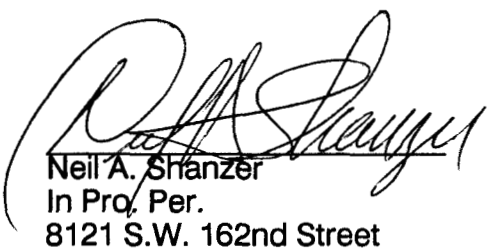
It is respectfully submitted that the reasons for **not** imposing the "extreme sanction of disbarment," i.e. the presence of mitigating circumstances, notwithstanding the existence of dishonest or selfish motives, patterns of misconduct and multiple offenses in the above cited cases, were no more compelling in those cases than they are in the instant one. Clearly, the Referee's recommendation of disbarment, made after ignoring virtually all the mitigating circumstances present, is too harsh.

CONCLUSION

Based upon the foregoing cases and authorities, it is respectfully submitted that in light of the mitigating factors present, including Respondent's full cooperation with the Bar's audit and investigation, his voluntary production of records, unconditional guilty plea, acknowledgement of wrongdoing, substantial restitution and sincere intention to repay all funds remaining due, personal and emotional problems at the time, repentative attitude, genuine remorse, lack of any prior disciplinary actions, and clear candidacy for rehabilitation, that the "extreme sanction of disbarment" is too harsh and would not serve the various purposes applicable to lawyer discipline in this case. Rather, appropriate punishment should consist of the Respondent being suspended from the practice of law for one (1) year and thereafter until he shall prove his rehabilitation, including completion of full restitution. In addition, Respondent should be required to take and pass the ethics portion of The Florida Bar Examination prior to being reinstated. Upon reinstatement, Respondent should either not be allowed to maintain a trust account or be placed on probation for four (4) years upon the following terms and conditions: (a) if he maintains a trust account during the period of probation Respondent should, (i) engage the professional services of a certified public accountant to prepare quarterly reconciliations of both his trust account and trust account bank statements, and, (ii) provide said reconciliations, which should be certified by the C.P.A. as to both accuracy and validity, to Staff Counsel of The Florida Bar (or his designee) within thirty (30) days of the close of each quarter; (b) prior to the termination of probation, Respondent should be required to demonstrate his understanding of and compliance with (if applicable) the trust

accounting procedures required of members of The Florida Bar, and/or (c) such other limitations upon the practice of law as this court deems appropriate.[12]

Respectfully submitted,



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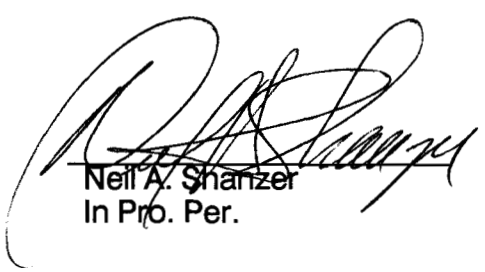
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 16th day of July 1990 to Jacquelyn P. Needelman, Esq., Bar Counsel, The Florida Bar, Miami Office, Suite M-100, Rivergate Plaza, 444 Brickell Ave., Miami, FL. 33131.



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[12]See Rule 2.8, Florida Standards For Imposing Lawyer Sanctions.