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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75-670
TFB NO. 88-10,198(20A)

THE FLORIDA BAR,

Complainant,

v.

SYDNEY ADLER,

Respondent.

Respondent Adler's Answer Brief and Cross-Appeal

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Statement of the Case and Facts

This trust account audit relates to events commencing 13 years ago involving two bank accounts. One account has been closed since 1980 and the other since 1984. (Tr. Exhibits 1A and 1B).[1] The audit was the result of a trust account audit regarding another matter in which no probable cause was found for disciplinary action. (Tr. p.33, L.1-21; p.70, 13-25; p.71, 1-6).

In approximately April 1978, Respondent Sidney Adler[2] represented Richard and Sarah Anuszkiewicz in a real estate transaction. It was undisputed, however, that the closing and title work were handled by another attorney. (Tr. p.19, L.17-25; p.20, L.1-2; p.64, L.13-22; p. 76; L.10-12, 21-25). In its complaint, the Bar claimed there were periodic deficiencies in the bank account into which the Anuszkiewicz's trust funds were deposited and that their trust funds were commingled with other monies.

The Adler records on which these allegations were founded were no longer required to be kept by the time the Bar's subpoena was served. (Tr. p.30, L.1-8; p.33, L.22-25; p.34, L.1-6; p.34, L.17-23). Nevertheless, in an effort to provide

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1/ The transcript of the final hearing of September 14, 1990, will be referred to as "Tr." The report of the Referee dated October 1, 1990, will be referred to as "RR." The initial brief submitted by The Bar will be referred to as "TFB's initial brief."

2/ Appellee/Cross-Appellant/Respondent, Sidney Adler, will be referred to as "Respondent" or "Mr. Adler." Appellant, the Florida Bar, will be referred to as "the Bar" or "the Florida Bar."

full disclosure, Mr. Adler voluntarily produced these records with full knowledge that the documents would suggest possible grounds for action by the Bar. (Tr. p.71, L.7-25; p.72, L.1-25; p.73, L.1-7). Indeed, Mr. Adler furnished the Bar with a computer printout summarizing ledger sheets related to these trust accounts. (Tr, p.51, L.11-24; p.72, L.10-20; Exhibits 1A and 1B). The printout was delivered with the documents under the Bar's subpoena. (Tr. p.34, L.24-25; p.35, L.1-6.) This printout was the primary document used by the Bar in its audit of the accounts. (Tr. p.35, L.25-p.36, L.1-7).

At the hearing before the Referee, Mr. Adler conceded that commingling of funds and utilization of client funds for purposes other than those intended had apparently occurred. (RR. pp.1-2). Mr. Adler explained that he had no knowledge at the time that the Anuszkiewicz's funds or any other trust funds were used for purposes other than those for which they were entrusted or that trust funds were not properly segregated. It was not until he saw the records related to the investigation of the Bar grievance that he recognized these inadvertent errors. (Tr. p.72, L.21-25; p.73, L.1-4; p.75, L.24-25; p.76, L.1; p.80, L.23-25; p.81, L.1-2). Mr. Adler never intentionally commingled trust funds or invaded client funds for other purposes. (Tr. p.75, L.16-19).

Mr. Adler's now-deceased accountant, Don Klinger, was a trusted employee who had signature rights on all accounts and wrote checks on Mr. Adler's accounts. All bills and receipts

came to Klinger. (Tr. p.45, L.22-25; p.46, L.1-2, L.15-21; p.74, L.3-21). Klinger, rather than Mr. Adler, examined all bank statements. (Tr. p.81, L.23-25). Mr. Adler relied on Klinger to keep his trust funds segregated. (Tr. p.75, L.3-10). Mr. Adler did not regularly check on Klinger. (Tr. p.75, L.11-15). The checks which created the deficiencies were all signed by Klinger. (Tr. p.37, L.4-17).

When Mr. Klinger first began handling the books, Mr. Adler explained to him how a trust account should be operated and specifically told him that trust funds were to be held for a client for the purpose for which they were intended. (Tr. p.81, L.3-10; L.14-17). He admonished Klinger that loans could not be disbursed without the express consent of a client. (Tr. p.81, L.11-13). The audit, however, disclosed that "overdrafts of the book" were created when Klinger drew checks upon trust funds for other purposes. (Tr. p.37, L.4-17).

This distinction between an actual overdraft with the bank and "overdrafts of the book" was made by the Bar's auditor. His audit of trust accounts "look[ed] mainly at the overdraft of the book." (Tr. p.36, L.8-18). The auditor assumed that the date of a check shown on the printout was the date it was issued. (Tr. p.39, L.25, p.40, L.1-7). He had no way of determining if a check was held for later delivery. (Tr. p.40, L.8-13).

There was no testimony or finding as to any actual bank overdraft. The Bar's initial brief is somewhat misleading on this point, and must be corrected. It poses that activity in the

trust account prior to the time of closing the Anuszkiewicz's real estate transaction led to shortages of up to $46,466.90 on June 23, 1978 (TFB's Initial Brief at p.2). This is not a statement of an actual bank overdraft, but rather a "book" shortage. (Tr. p.36, L.8-18).

As to these moneys, there were three deposits of $45,000, $1,500 and $1,685. (Tr. p.22, L.5-25; p.23, L.1-14; Exhibit "1"), which eliminated the possibility of an actual shortage. There was no claim that a client suffered any actual harm and there was no claim that the settlement check in the amount of $62,480.62 paid to the sellers (or any other check for that matter) was returned by the bank for insufficient funds.

The Bar also charged that Mr. Adler did not produce trust account records for a second account for the period between March, 1983 through January, 1984 and that he did not authorize the bank to notify the Bar in the event checks were refunded for insufficient funds. (Tr. p.28, L.3-20). This account was closed in 1984, years before this audit commenced. (Tr. Exhibit 1). Mr. Adler had moved his office several times and financial records were placed in storage. A diligent search for these trust records was undertaken but to no avail. (Tr. p.47, L.2-25; p.48, L.1-15; p.50, L.2-28; p.51, L.1-10). There was no intentional destruction of records (Tr. p.49, L.15-22), and no such finding was made.

The Referee recommended violations of the rules on commingling (DR 9-102 (A), C.P.R.) and entrustment (Rule

11.02(4), Florida Bar Integration Rules) of funds, preservation of trust account records (Section 11.02(4)(c)2c, 2f, 2g, 3a(i), 3a(ii), Bylaws to the Florida Bar Integration Rules), and Bar notification procedures for trust checks returned for insufficient funds (Sec. 11.02(4)(c) 3d, Bylaws to the Florida Bar Integration Rules). (RR. pp.4-5).

The Referee recommended an 18-month suspension under paragraph 4.12 of Florida's Standards For Imposing Lawyer Sanctions. (RR. p.5). The Referee found the following mitigating factors present: absence of a dishonest or selfish motive, full and free disclosure to the disciplinary board and cooperative attitude toward the proceeding. (RR. p.5). His recommendation was aggravated by Mr. Adler's substantial experience in the practice of law, multiple offenses, and prior disciplinary action. (RR. p.6).

In 1987, this Court suspended Mr. Adler from the practice of law for a period of 90 days because two documents he had prepared were backdated with his knowledge. The Florida Bar v. Adler, 505 So.2d 1334 (Fla. 1987). In addressing that disciplinary action, the Referee expressed his opinion

> that the acts here occurred long before [sic] the acts which were the subject matter of the prior disciplinary action. Had the instant facts been known or prosecuted prior to that action,

> however, the punishment in that case would have undoubtedly been harsher.[3]

(RR. p.6).

The Referee considered that Mr. Adler was admitted to the bar in early 1950 and on April 23, 1987, was convicted of a violation of DR 1-102(A)(4) and Florida Bar Integration Rule 11.02(3)(a) which resulted in a suspension for 90 days. (RR. p.6).

The Board of Governors reviewed the recommendation and voted to seek a three year suspension. Mr. Adler has cross-appealed, maintaining that the recommended 18-month suspension is excessive and contrary to the law and evidence.

3/ The prior act of acquiescence in backdating occurred in approximately 1976 (although the opinion was published much later in 1987). Adler, 505 So.2d at 1335. The present acts of trust account commingling occurred in 1978. The trust account records which Adler could not locate relate to a still later period from March, 1983 through January, 1984. Thus, the Referee's reference as to the sequence of events is unclear. Further, Adler had no knowledge of the instant violations until this Bar proceeding (see text supra), making these violations of a wholly lesser magnitude than those dealt with in 1987.

Summary of Argument

The Referee erroneously used section 4.12 in imposing a 18-month suspension from the practice of law for trust account violations. The correct standards are set forth in sections 4.13 and 4.14 of the Florida Standards for Imposing Lawyer Sanctions. The appropriate discipline for these admitted violations is a reprimand.

These violations were the product of negligence. There was no proof of an intentional violation of any trust accounting rule. Additionally, the Referee failed to consider a number of mitigating factors including interim rehabilitation, lack of client harm and remoteness of these acts which in the main occurred 13 years ago. These violations came to light from documents Mr. Adler was no longer required to keep and which he voluntarily produced knowing they would implicate him.

Mr. Adler was previously disciplined by this court for his acquiescence in the backdating of instruments. The Referee's report implies that he has taken upon himself to punish Mr. Adler once again for the prior violation as if it were a present act of fraud coupled with the instant trust account errors. The Referee's statement that had the instant violations been known at the time of the prior sanction, that sanction would have been more severe is not supported by law under the facts of this case. This is most assuredly an improper application of the cumulative misconduct principle. The latter, in any event, should play no part in this disciplinary action, even if properly identified.

The law supports a reprimand or, at the worst, a 60-day suspension. The Referee failed to consider sanctions imposed in similar cases under the applicable opinions of this Court. The Referee's proposed sanction should be reversed and this court should disregard the Bar's proposal of a 3-year suspension as erroneous, unlawful and unjustified.

Argument (Appeal and Cross-Appeal)[4]

I. **ISSUE: WHETHER THE REFEREE UTILIZED ERRONEOUS STANDARDS IN IMPOSING AN EIGHTEEN (18) MONTH SUSPENSION WHICH IS EXCESSIVE WHERE PREDICATED ON ISOLATED ACTS OF NEGLIGENCE OCCURRING IN PART THIRTEEN (13) YEARS AGO WHICH DID NOT HARM A CLIENT OR MEMBER OF THE GENERAL PUBLIC AND WHERE THERE ARE OTHER MITIGATING FACTORS NOT CONSIDERED BY THE REFEREE.**

A. The appropriate discipline for these admitted violations is reprimand.

The Referee has recommended the imposition of an eighteen month suspension from the practice of law. The Bar seeks a three year suspension. Mr. Adler asserts that both the Referee and the Bar have used and are using erroneous standards for the imposition of sanctions. Based on the record and judicial precedents, Mr. Adler's actions do not warrant more than a reprimand.

In The Florida Bar v. Hosner, 513 So.2d 1057 (Fla. 1987), a trust account audit disclosed shortages and overages. The practitioner acknowledged guilt in failing to follow proper trust accounting procedures, including the failure to prepare periodic reconciliations and the intermingling of personal funds with those held in trust. The Supreme Court reversed the

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[4] This brief has taken the liberty of restating the point on appeal articulated by the Bar. The brief also combines and consolidates the answer and cross-appeal sections in one argument. The disagreement between Mr. Adler and the Bar relates strictly to the appropriate sanction warranted by this circumstance. It would be wholly artificial to divide this brief into a section answering the Bar's demand for enhanced punishment and only then following cross-appeal for a lesser sanction than that recommend by the referee.

Referee's recommended ninety day suspension and imposed a public reprimand. This Court reasoned that:

> [p]rofessional misconduct of the nature and severity shown in the present case - failure to follow trust accounting rules and intermingling personal funds with those held in trust - has been found to warrant a public reprimand in other cases. E.g., The Florida Bar v. Suprina, 468 So.2d 988 (Fla. 1985). Public reprimands have also been imposed in more serious cases where such misconduct has been combined with other additional violations and in second - offense cases. E.g., The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986) (with probation); The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986) (with probation); The Florida Bar v. Staley, 457 So.2d 489 (Fla. 1984) (with probation). [emphasis added]

Id. The Court then analyzed the Standards for Imposing Lawyer Sanctions in response to the Bar's position that a suspension should be imposed. The Bar had identified section 4.12 of the American Bar Association's Standards for Imposing Lawyer Sanctions as the appropriate measure for sanction.[5] This section

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5/ Those standards have since been adopted in an amended form by the Florida Bar and the parallel provision was cited by the Referee in his report relating to Mr. Adler. The pertinent Florida provisions are cited below:

The Florida Standards for Imposing Lawyer Sanctions §C, 4.1 provides:

> 4.1 Failure to Preserve The Client's Property
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:
>
> 4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client

Footnote continued on next page.

provides that "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." The Court's opinion quoted the entirety of Rule 4.1, but Rule 4.13 turned out to be determinative. It provides that:

> 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Footnote continued from previous page.

> property regardless of injury or potential injury.
>
> 4.12 Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> 4.13 Public Reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
>
> 4.14 Admonishment is appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client or where there is a technical violation of trust account rules or where there is an unintentional mishandling of client property.

Florida Standards for Imposing Lawyer Sanctions: Black Letter Rules defines "negligence" as follows:

> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard care that a reasonable lawyer would exercise in the situation.

Hosner, 513 So.2d at 1058.

The Supreme Court stated that the evidence showed and the Referee found negligence and potential client injury. Id. The appropriate sanction was thus found under section 4.13 rather than section 4.12. Accordingly, a public reprimand was the proper sanction under these guidelines. Hosner, 513 So.2d at 1058.

Mr. Adler has been accused of virtual mirror-image trust account violations as those identified in Hosner. Here, as in Hosner, the Referee, under the authority of section 4.12 of the Florida Standards for Imposing Lawyer Sanctions, has sought to impose suspension as the sanction, rather than reprimand. But, the evidence comports with Hosner and the same result should logically follow. As in Hosner, there is potential rather than actual client injury. Consequently, a reprimand is the appropriate sanction under the guidelines and this Court should decline to accept the erroneous, unlawful and unjustified recommendation of the Referee and the Bar for suspension.[6'7] Hosner.

Additionally, in The Florida Bar v. Heston, 501 So.2d 597 (Fla. 1987), the lawyer commingled personal and trust funds,

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[6/] Section C, 4.14, Florida Standards for Imposing Lawyer Sanctions, provides for admonishment for unintentional mishandling of client property and is also applicable.

[7/] Rule 3-7.6 (c)(5), Rules Regulating the Florida Bar, sets forth the applicable burden upon the party seeking review.

poorly maintained books and records, had poor policies and procedures regarding his trust account, failed to make bank or client trust account reconciliations, failed to give written authorization to his bank permitting the bank to notify the Florida Bar of the occurrence of any trust account check dishonored due to insufficient funds, and had trust account shortages which were rectified as soon as the shortage was determined. The Referee found that the majority of the problems in the trust account resulted from "poor supervision and poor record keeping". Heston, 501 So.2d at 598 (emphasis added). The Supreme Court adopted the Referee's recommended discipline of public reprimand and two year probation.

The following cases also reflect comparable or more severe trust account violations (some with prior sanctions) where this court imposed or approved public reprimand: The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986) (lengthy and continuous failure to comply with trust account record keeping despite previous sanctions, coupled with intermingling of personal and trust account funds warrants public reprimand and two year probation); The Florida Bar v. Borja, 554 So.2d 514 (Fla. 1990) (failure to maintain a separate cash receipts and disbursements journal, failure to maintain a separate file or ledger card for each client or matter, failure to follow certain trust accounting procedures including monthly comparisons, failure to use funds held in trust for the specific purpose for which they were intended coupled with non-compliance in prior

audit warranted public reprimand and two year probation); The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986) (commingling funds, failing to keep adequate trust account records, and failing to reduce contingency fee agreement to writing warrants public reprimand and one (1) year probation); The Florida Bar v. Suprina, 468 So.2d 988 (Fla. 1985) (mishandling of trust funds, conduct adversely reflecting on fitness to practice law, improper advance of loans to clients, improper contact with opposing party represented by counsel, commingling of personal funds with trust funds, and improper trust account record keeping where no deficit or overdraft resulted from improper use warrants public reprimand); The Florida Bar v. Armas, 518 So.2d 919 (Fla. 1988) (failure to instruct law office manager concerning regulations governing trust account operations which leads to office manager mishandling trust funds warrants public reprimand and two years probation)[8]; The Florida Bar v. Staley, 457 So.2d 489 (Fla. 1984) (accepting employment in a transaction when personal, financial and business interests were involved, entering into a business transaction with client with differing interests, and improper and inadequate trust account record keeping warrant public reprimand and one year probation); The Florida Bar v. Lumley, 517 So.2d 13 (Fla. 1987) (depositing personal funds in same bank

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[8]/ In Armas, failure to supervise non-lawyer personnel was charged as a separate violation. That separate charge has not been made here. Misconduct not charged may not provide the basis for punishment. The Florida Bar v. Hosner, 513 So.2d 1057, 1058 (Fla. 1987).

account with funds held in trust for clients resulting in deficits to client's funds where there was no client loss coupled with knowingly using entrusted funds for purposes other than those intended by client warrants public reprimand with no probation); The Florida Bar v. Hero, 513 So.2d 1053 (Fla. 1987) (commingling of personal funds and trust funds, failing to maintain proper records for trust funds, failing to make monthly trust account reconciliation, improper use of trust fund money, and failure to properly pay or deliver to a client funds which the client is entitled to receive warrants public reprimand and two year probation); The Florida Bar v. Reese, 247 So.2d 718 (Fla. 1971) (withholding client funds, commingling personal funds and client funds, applying client funds to the payment of a personal obligation to the Internal Revenue warrant public reprimand).

In sum, the appropriate discipline here is reprimand. The standard for discipline in this case is set forth in sections 4.13 and 4.14, Florida Standards for Imposing Lawyer Sanctions, rather than the erroneous and more grievous standard used by the Referee. Hosner, Heston. The substantial body of Supreme Court disciplinary decisions supports this conclusion.

B. The cumulative misconduct principle should not be applied here.

The Referee failed to consider many mitigating factors which are more persuasive than Mr. Adler's prior discipline. The generalized test which the Court applies in Bar disciplinary

proceedings is stated in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970):

> 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 reparation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or attempted to become involved in like violations.

This formulation emphasizes that each case comes down to its unique facts, and discipline in any given case is tailored to the specifics of the attorney and the circumstances.[9]

In 1987, this Court suspended Mr. Adler from the practice of law for a period of 90 days because two documents that he had prepared were backdated with his knowledge. The Florida Bar v. Adler, 505 So.2d 1334 (Fla. 1987). While prior

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9/ See also Florida Standards for Imposing Lawyer Sanctions which provides:

> **Factors To Be Considered In Imposing Sanctions.**
> **3.0 Generally**
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> In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:
>
> (a) the duty violated;
>
> (b) the lawyer's mental state;
>
> (c) the potential or actual injury caused by the lawyer's misconduct; and
>
> (d) the existence of aggravating or mitigating factors.

disciplinary offenses may be considered in aggravation to justify an increase in the degree of discipline, this Court may also consider factors in mitigation to justify a reduction in the degree of discipline to be imposed. See §§ 9.0, 9.1, 9.22, 9.31, 9.32, Florida Standards for Imposing Lawyer Sanctions. The following mitigating factors as set forth in section 9.32 of the Florida Standards are applicable here and many were not considered by the Referee.

(1) Absence of a dishonest or selfish motive.

Here, the Referee expressly found that Mr. Adler did not have a dishonest or selfish motive related to the charges alleged.

(2) Timely good faith effort to make restitution or to rectify consequences of misconduct.

Mr. Adler had no knowledge of any improprieties in his trust account which would permit rectification any earlier than that which occurred by his employee accountant. There was no financial loss to any client. This Court has appropriately reasoned that if clients did not lose money following an attorney's mishandling of trust funds, the Court will mitigate the sanction to be imposed. The Florida Bar v. Lumley, 517 So.2d 13 (Fla. 1987); The Florida Bar v. Suprina, 468 So.2d 988 (Fla. 1985).

(3) Full and free disclosure to disciplinary board or cooperative attitude toward the proceedings.

The Referee expressly found full and free disclosure and a cooperative attitude on the part of Mr. Adler. Moreover, most of the acts complained of came to light with Mr. Adler's voluntary production of documents that were no longer required to be maintained, but were produced to cooperate with the Bar and with the knowledge that they would implicate Mr. Adler by disclosing trust account violations.

This Court has recognized cooperation as a mitigating factor. See The Florida Bar v. Hero, 513 So.2d 1053 (Fla. 1987).

(4) Interim rehabilitation.

The acts complained of commenced approximately thirteen years ago. One of the accounts which is the subject of this Bar grievance was closed eleven years ago. The other was closed six years ago. As set forth above, Mr. Adler has been previously disciplined by this Court. As evidence of his rehabilitation, he voluntarily turned over documents in his possession which he knew would implicate him in trust account violations occurring thirteen years ago. These are not the acts of a deceitful or dishonest person.

(5) Remorse.

Mr. Adler has testified that he had no knowledge of the improprieties alleged and, if he had known of his accountant employee's acts, he would have immediately stopped him. (Tr. p.

75, L. 20-25; p. 76, L. 1). Further, Mr. Adler has testified as to his remorse and contrition. (Tr. p. 78, L. 1-5).

(6) Remoteness of prior offenses.

The acts complained of are isolated acts occurring approximately thirteen years ago when, in 1978, the Anuszkiewiczs sought to purchase real estate. The failure to produce trust account records relates to a period from March of 1983 through January of 1984, some seven to eight years ago. One trust account was closed in 1980. The other account was closed in 1984. The instant Bar allegations resulted from an unrelated Bar grievance in which no probable cause was found. No other improprieties were alleged by the Bar. Mr. Adler was unaware of his employee's acts until this proceeding began. At this late date, some seven to thirteen years after these previously unknown acts occurred, it is inequitable to impose a penalty more severe than reprimand.

(7) Additional mitigating factors.

Case law indicates additional mitigating factors to be considered by this Court including the fact that Mr. Adler is a sole practitioner. See, e.g., The Florida Bar v. Hero, 513 So.2d 1053 (Fla. 1987), where the Court listed as the first mitigating factor that respondent was a sole practitioner.

In consideration of all of the referenced mitigating factors, many of which the Referee did not consider, the cumulative punishment principle should not be applied here. The Florida Standards do not require the imposition of a harsher

punishment because of a prior disciplinary action but merely suggest that the prior action may be considered in aggravation. §9.22, Fla. Standards for Imposing Lawyer Sanctions.

It is readily apparent from the Referee's report that he sought to punish Mr. Adler anew for his prior violation as if it were a present act of fraud coupled with the trust account violations. The Referee complains that had this Court been aware of the instant violations at the time of its 1987 sanction of Mr. Adler, that sanction would have been more severe. (RR p. 6).

This after-the-fact mind reading impulse is wholly improper. The Referee appears to be imposing a sanction as if the initial fraud had not been punished and as if the trust account violations were known prior to the 1987 opinion. There is no basis in law for the Referee's statement or the cumulative (and excessive) sanction he now seeks to impose de novo. The Referee's proposed sanction and that recommended by the Bar are far in excess of that provided in accordance with the Florida Standards and the applicable opinions of this Court.

The Referee departed from appropriate standards even were the cumulative misconduct principle applicable. This Court previously suspended Mr. Adler from the practice of law for a period of 90 days in light of his acquiescence to the backdating of documents. The opinions cited above authorize a reprimand for trust account violations of the nature found here. Even where this Court has applied the cumulative misconduct principle in the absence of the mitigating factors that are present in this case,

an example of a more appropriate discipline can be found in The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986).

There, this Court imposed a 60-day suspension and two year probation for an attorney previously disciplined on two occasions for self-dealing, misrepresentation and neglect of a legal matter. The allegations which brought that lawyer before the Court were trust account violations including the issuance of "NSF" checks, numerous account errors and a failure to supervise the account. Neely, 488 So.2d at 536. The Referee found Neely guilty of gross negligence in the management of the trust account, but found no proof of dishonesty. Id. The Referee also found that the client had suffered no harm. Id. The Referee sought to impose a six month suspension. This court disagreed:

> [a]lthough the discipline for a violation of this kind ordinarily would be a public reprimand and probation with supervision of trust account records, we find that, because respondent had been disciplined on two prior occasions, a more severe discipline is appropriate in this proceeding. Because the Referee found no dishonesty by respondent and no injury to his client, we do not believe the discipline need be as severe as recommended by the Referee. In our opinion, a 60 day suspension and a two year period of probation is the appropriate discipline.

Id.

Mr. Adler, under the facts of this case and in consideration of this Court's opinions and of the mitigating factors set forth above, should be given a reprimand. Should this Court impose a cumulative misconduct standard, a lesser suspension than found in Neely should be provided and should be

made retroactive. See also The Florida Bar v. Welch, 427 So.2d 720 (Fla. 1983) (three prior disciplinary actions coupled with commingling and failure to maintain minimum trust accounting procedures and records warrants three months suspension); The Florida Bar v. Greer, 541 So.2d 1149 (Fla. 1989) (neglecting legal matters, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, engaging in conduct prejudicial to administration of justice, engaging in conduct that adversely reflects on fitness to practice law, and handling legal matter without adequate preparation, after previous public reprimand for engaging in similar conduct, warrants suspension from practice of law for 60 days and two years probation).

Disciplinary goals will not, in any event, be furthered by the imposition of the cumulative misconduct standard. This attorney has already learned from prior experience. In an effort to fully cooperate with the Bar, he voluntarily produced documents which he was no longer required to keep and which he knew would implicate him. That is not the act of a dishonest person. He has been rehabilitated. Under the relevant case law and guidelines, reprimand is appropriate. To punish Mr. Adler any more severely than reprimand would discourage, rather than encourage candor and would send the wrong message to those whom the Bar seeks to deter from such conduct.

C. **The Bar failed to properly support the Referee's recommended or the Bar's proposed increased sanction.**

The cases cited by the Florida Bar in support of a 3-year suspension are inapplicable. In The Florida Bar v. Wigham, 525 So.2d 873 (Fla. 1988), there was a prior trust account disciplinary action for negligent commingling, overdrafts, trust account shortages and incomplete records. Wigham had received a public reprimand for those actions and was placed on probation. As a condition of his probation, he was required to submit quarterly trust account reconciliations which he flagrantly failed to do. A subsequent audit revealed overdrafts, NSF checks, mathematical errors, absence of monthly trust account reconciliations and commingling.

Clearly, Wigham was being sanctioned for willful disobedience of the prior disciplinary sanction. There is no willful disobedience of any prior sanction in this case. Additionally, the trust account violations alleged here are not nearly egregious as those described in Wigham.

Similarly, the Bar asks too much of another of its citations. In The Florida Bar v. Miller, 548 So.2d 219 (Fla. 1989), an attorney received a 90-day suspension where his misconduct related to trust account violations which continued after an initial audit. In that case, the Bar sought a six month suspension period. The Supreme Court refused to impose a penalty of that severity. In Miller, during one audit, Mr. Miller failed to utilize proper record keeping procedures for his trust

account, the trust account had shortages, was insufficient to cover old trust liabilities and he failed to maintain minimum trust accounting records. The second audit disclosed three NSF checks, that Mr. Miller continued to have shortages in his trust account and that he continued to use trust funds for purposes other than those for which the funds were entrusted. Miller, 548 So.2d at 220.

The number and severity of the violations in Miller are in sharp contrast to the minimal shortcomings of Mr. Adler's trust account practices. No client was harmed, the violations occurred from seven to thirteen years ago and Mr. Adler has demonstrated other mitigating factors including interim rehabilitation.

The Bar's reliance on The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980) and The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982) also misses the mark. Although both cases are cited for the proposition that the Court considers prior misconduct in imposing a sanction, the facts in those cases are not analogous to the circumstances here.

Greenspahn involved two incidents of failure to maintain clients' funds in trust accounts and to promptly pay funds over to a client, and, a separate incident, after failing to perform any services on behalf of the client, of failing to return fees and costs advanced until after the hearing before the grievance committee took place. This conduct resulted in a court-imposed six-month suspension.

Greenspahn had been previously publicly reprimanded for a Federal misdemeanor conviction for willful failure to file income tax returns for the years 1968 through 1971. His subsequent conduct was far more egregious than that alleged here. After all, Greenspahn took monies from a client and did not perform any services. He refused to return the funds until after the grievance committee hearing on the matter. He also received funds on behalf of another client, but failed to retain the funds in a trust account and failed to pay the funds to the parties entitled to receive the funds for a period of almost two years. It is noteworthy that even there, the Court imposed only a six-month suspension as compared to the eighteen-month suspension recommended by the referee or the three-year suspension sought by the Bar.

In Bern, the attorney had previously been disciplined on three occasions: once for attempted solicitation (private reprimand), a second time for cashing two checks given to him by a client for fees which he had agreed to hold and did not which resulted in financial penalties to the client (private reprimand), and a third time for disciplinary violations involving solicitation of an individual to invest in a company (public reprimand). The fourth offense violations which brought Bern before this Court included accepting legal employment when his own financial interests were involved; entering into a business transaction with a client when they had differing interests without prior full disclosure; failing to maintain

complete records and render an appropriate accounting of fees being charged, paid and still owing; and, failing to return and adequately account for funds due from proceeds of property sales. Bern, 425 So.2d at 527-528.

The referee recommended a public reprimand coupled with probation for six months to three years. Id. This Court noted that "cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct." Bern, 425 So.2d at 528 (emphasis added). Finding that Bern's fourth violation "involves another instance of business matters with clients," the Court imposed a three month and one day suspension. Id. (emphasis added).

Here, contrary to Bern, there are not numerous violations of a similar nature which would warrant the imposition of a more severe penalty. And, the violations at issue were far less flagrant than the four repetitions found in Bern.

Mr. Bern advised his client who came to him for representation in foreclosure actions that she had the choice of either bankruptcy or entering into a partnership agreement with him. Pursuant to that agreement, Bern and another party would receive title to the subject properties, pay off the judgment creditors and split the profits so that Bern and the third party would receive 33% each with 34% to the client. Bern failed to disclose the conflict of interest, failed to provide an adequate accounting to the client, failed to disclose his finder's fees or attorney's fees, and failed to return funds to the client

representing the sales proceeds. Even in that situation and applying the cumulative misconduct principle, this Court imposed a three month and one day suspension.

Finally, while the Bar has cited The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), as support for its recommended discipline, in that case the Bar sought disbarment for trust account violations and embezzlement of client funds. Pahules, 233 So.2d at 131-132. This court found that sanction too extreme and imposed a six month suspension. Id.

There has been no embezzlement here yet the Referee has recommended an eighteen month supervision and the Bar seeks a three year suspension. There is no basis for either penalty under the facts of this case and the law.

CONCLUSION

There is no basis in fact or law for the imposition of the sanctions sought by the Referee and the Bar. The Referee has made several errors including application of the wrong sanction standard, i.e., failure to apply a negligence standard; failure to consider all of the mitigating factors including interim rehabilitation, lack of client harm and the remoteness of these acts which occurred in the main some thirteen years ago; inappropriate application of the cumulative misconduct principle; and failure to follow applicable law in the imposition of a sanction. Mr. Adler should be reprimanded as required by the Florida Standards and applicable law of this Court.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: Susan V. Bloemendaal, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607 and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300, this 28 day of February, 1991.

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