Filed 4-1-91
M

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Supreme Court
Case No. 76,158

HOWARD NEU,

Respondent.

ANSWER BRIEF OF RESPONDENT
INITIAL BRIEF OF CROSS/COMPLAINANT

Howard M. Neu, Esquire
Fla. Bar No. 108689
12955 Biscayne Boulevard
Suite 400
North Miami, Florida 33818
(305) 895-3880

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES ON REVIEW

Table of Authorities
Continued

Page

CASES ON CROSS-REVIEW

DISCIPLINARY RULES

Page

INTRODUCTION

The Complainant, The Florida Bar, will be referred to as "the Bar", Respondent, Howard Neu, will be referred to as "Neu" or "Respondent.

The following symbols will be used in this brief.

"RR" - Referee Report

"T. Vol I or Vol II" - Transcript of Hearing on October 3, 1990

"Trans" - Transcript of Hearing on October 25, 1990.

"Stip" - Stipulation between the parties.

"A" - Appendix hereto.

STATEMENT OF THE CASE

In July, 1989, Mr. Neu was contacted by phone by Mr. Ruga, the Bar's accountant seeking bank and accounting records for the Guardianship of Selser Bernard McKinney. Mr Neu explained to Mr. Ruga that he no longer was in possession of such documents as they had been turned over in May, 1987 to Glenn Smith, Guardian Ad Litem appointed by the Probate Division of the Circuit Court.

Thereafter, with no further contact with Mr. Neu, Mr. Ruga issued his report of October 12, 1989. Shortly thereafter, Mr. Neu was contacted by phone by Paul A. Gross, Senior Assistant Staff Counsel of the Florida Bar to come to the Bar office to discuss Mr. Ruga's findings which had not yet been made known to Mr. Neu. Neu met with Gross and Ruga on October 30, 1989 where he was apprised of Ruga's findings and asked to explain them. Mr. Neu asked for time to review his records and respond. (T.Vol I, Page 86).

On November 28, 1989, pursuant to subpoena issued by the Bar, Mr. Neu brought what records he could locate to the Bar office and was told that they were not sufficient. (T. Vol I, page 86, 87). He returned approximately two weeks later with almost all the documents requested. (T. Vol I, Page 87).

On January 17, 1990, Mr. Ruga issued his second report, this time concerning Mr. Neu's Trust Account. On April 3, 1990, Mr. Neu stipulated that the Bar had probable cause for disciplinary proceedings, waived a probable cause finding by a

grievance committee, and tendered a consent judgment of discipline based upon agreed facts without the necessity of the Bar's filing a formal complaint.

The Bar's Board of Governors rejected Mr. Neu's proposed consent judgment and filed this Complaint in the Supreme Court of Florida on June 15, 1990.

On July 30, 1990 this Court appointed the Honorable Robert J. Fogan, Judge of the Seventeenth Judicial Circuit of Florida as referee in this matter. Respondent did not contest venue. Judge Fogan received the Complaint and Request for Admissions on August 7, 1990 and informed counsel of his appointment on August 20, 1990. (A-23). On August 23, 1990, Respondent had already executed a Stipulation in lieu of an answer and response to Request for Admissions which was co-signed by counsel for the Bar (A-25).

On September 10, 1990, Hearing on this matter was Noticed for October 3, 1990. (A-34) and that hearing took place as scheduled.

On October 25, 1990, the referee announced his findings (Trans) and the Report of Referee was filed on December 10, 1990. (RR).

On January 22, 1991, the Bar filed its Petition for REview and on January 28, 1991, the Respondent filed his Cross-Petition for Review.

STATEMENT OF THE FACTS

Respondent accepts and adopt the Statement of Facts recited by the Bar in its Initial Brief and as previously stipulated to in this case.

SUMMARY OF THE ARGUMENT ON REVIEW

The referee correctly reviewed the underlying stipulated facts,listened to evidence and testimony in aggravation and mitigation and determined that the Respondent was not guilty of violating DR 1-102(a)(4), DR 1-102(a)(6), DR 9-102(b)(3) and Rule 4-8.4(C). The Bar seeks to show that these findings are clearly erroneous and that the Respondent should have received a three year suspension rather than the 90 day suspension determined by the referee to be appropriate.

However, the referee's findings are well supported by the evidence and testimony and the Bar fails to meet its burden of overturning these decisions. The stipulation entered into by both parties admits the underlying facts, but does not stipulate that the Respondent is guilty of the charges brought by the Bar. Thus, the referee was able to independently determine whether the Respondent was guilty of the charges based upon the stipulation and evidence adduced at trial. As the Bar was a party to that stipulation, it cannot now be heard to complain of its results.

The discipline sought by the Bar is far more extensive than warranted by the Referee's findings on the facts. The cases

cited by the Bar in each instance provided much greater culpability or findings of guilt for conduct involving dishonesty, fraud deceit or misrepresentation and conduct that adversely reflected on each respondent's fitness to practice law.

On the contrary, the matters in mitigation presented by the Respondent at hearing amply demonstrate the Respondent's remorse, rehabilitation and substantial mitigation of the discipline requested by the Bar.

Thus the Bar fails to make a case for discipline more harsh than that recommended by the referee.

ARGUMENT ON REVIEW

I

THE REFEREE DID NOT ERR IN HIS FINDINGS OF FACT THAT HAD BEEN PREVIOUSLY STIPULATED BY THE PARTIES AND APPLYING THE LAW THERETO

The underlying facts concerning actions taken by Mr. Neu which formulate the basis for the Bar's Complaint were stipulated and uncontroverted. The referee correctly studied and reviewed those facts and made the following determinations:

That Mr. Neu was not guilty of violating:

As to Count I:

DR1-102(a)(4): conduct involving dishonesty, fraud, deceit or misrepresentation;

DR1-102(a)(6): conduct that adversely reflect on his fitness to practice law; and

DR 9-102(b)(3): a lawyer shall maintain complete records of all funds, securities and other properties of a client coming into possession of the lawyer and render appropriate accounts to his client regarding them. (RR 6)

As to Count II:

Rule 4-8.4(c) relating to conduct involving dishonesty, fraud deceit or misrepresentation (RR 6)

That Mr. Neu was guilty of violating:

As to Count I:

DR 9-102(A) commingling funds;
Integration Rule 11.02(4); money entrusted to an attor-

> ney for a specific purpose, including advances for costs and expenses as held in trust and must be applied only to that purpose;
>
> Integration Rule 11.02(4)(d): failing to remit interest from interest bearing trust accounts to the Florida Bar Foundation. (RR 6).

As to Count II:

> Rule 5-1.1: money in trust with the attorney for a specific purpose is held in trust and must be applied only to that purpose (RR 6).

The referee then applied the factors in mitigation supplied by Mr. Neu and the factors in aggravation supplied by the Bar and made his recommendations as to disciplinary measures to be applied as to those violations that he had found based on the stipulated facts, recommending 90 day suspension with no probation, but return to practice conditioned upon payment of $6,386.-54 to the Florida Bar Foundation without interest (RR 7).

The Bar seeks to reinterpret the facts to find that Mr. Neu had intent to deprive his clients <u>permanently</u> of their funds. The referee found that such a contention was not supported by the stipulated facts.

In <u>The Florida Bar v. McClure</u>, Supreme Court of Florida, Case No. 64,093, January 17, 1991, (16 FLW S128, 129) (A-35) the court held that:

> "The party seeking review has the burden of showing that the referee's findings are "clearly erroneous or lacking in evidentiary support". <u>The Florida Bar v. Wagner</u>, 212 So 2d 770,772 (Fla. 1968). Unless the burden is met, a referee's findings will be upheld on review. <u>The Florida Bar v. Hirsch</u>, 359 So 2d 856 (Fla. 1978).

The Court also cited The Florida Bar v. Quick, 279 So 2d 4 (Fla 1973) and The Florida Bar v. Rayman, 238 So 2d 594 (Fla 1970) to support its finding that "in Bar discipline proceeding, the evidence of misconduct must be clear and convincing in order for a referee to find the accused lawyer guilty" (ibid p. S129). See also The Florida Bar v. Setien,, 530 So 2d 298, 299 (Fla. 1988) wherein the Court stated:

> "In this case our task is easier in that the referee was dealing with stipulated facts. The only question is whether these fact support the finding of guilt."

In the case at hand, the Bar is seek a review by this Court as to whether the stipulated facts herein support findings of non-guilt where the evidence did not clearly convince the referee of the guilt of the Respondent. The referee specifically states on page 4 of his report:

> "The Bar has produced no evidence that Mr. Neu engaged in conduct which involves dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(a)(4), and I find from the evidence that Mr. Neu's conduct does not constitute a violation of that disciplinary rule because he had no intent to deprive his clients permanently of their funds. Transcript of Hearing at 80, 81; The Florida Bar v. Dougherty, 541 So.2d 610 (Fla. 1989). See also, The Florida Bar v. Lumley, 517 So.2d 13 (Fla. 1987). Nor has the Bar introduced any evidence to support its allegation that Neu's conduct adversely reflects on his fitness to practice law in violation of DR 1-102(a)(6), and I find as a fact that the Bar has failed to prove its allegations in that regard.
>
> I further find that the Bar has introduced insufficient evidence to support its allegation that Mr. Neu failed to maintain complete records of all client funds and to render appropriate account to his client regarding them in violation of DR 9-102(b)(3), and I find as a fact

that allegation was not proved.

. . . .

...The Bar has failed to introduce any evidence, however, to support its allegation that Mr. Neu's use of guardianship property for a payment on his personal taxes constituted dishonesty, fraud, deceit or misrepresentation, and I find as a fact that the Bar has failed to prove its allegation that Mr. Neu violated Rule 5-1.1. The Florida Bar v. Dougherty, supra; The Florida Bar v. Lumley, supra. (RR 5)

See also, The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986 wherein this Court stated:

"In addition, the referee specifically found a lack of competent evidence indicating dishonesty and noted that respondent was "extremely cooperative" and "totally candid in his testimony."

This Court also stated in The Florida Bar v. Colclough, Supreme Court of Florida, Case No. 73,404, June 7, 1990 (15 FLW S338 at 339) (A-37):

"A referee's findings of fact are presumed to be correct."

Thus, the Bar has not met its burden of proof to overcome this judicial presumption and the referee's finding of guilt and non-guilty must stand.

The Bar cites the case of The Florida Bar v. Donald K. McShirley, Supreme Court of Florida, Case No. 74,086, January 10, 1991, (16 FLW S83) for finding that though McShirley returned funds before losses were discovered, the referee (emphasis added) found that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and the Supreme Court of Florida affirmed the Referee's findings. We agree with this procedure and cite this case to support our position that the referee's

findings are presumed to be correct.

The Bar would equate the stipulation of facts entered into by the parties with a guilty plea and consent judgment. However, such a consent judgment was executed by the Respondent 6 months before this Complaint was filed by the Bar; that the Bar's Board of Governor's wanted nothing less than disbarment and rejected that stipulation. The stipulation herein was not an admission of guilt of violation of various rules or regulations of ethical conduct. It was simply an admission that the acts complained of had in fact occurred and that it was up to the Referee to decide whether or not they constituted violations of Florida Bar Disciplinary Rules and determine what discipline, if any, should be applied as to those rules which the Referee determine had been violated. These determinations were finally made in the Referee's Report.

The Referee's citation of The Florida Bar v. Dougherty, 541 So.2d 610 (Fla. 1989) and The Florida Bar v. Lumley, 517 So.2d 13, (Fla. 1987) was appropriate and applicable to this case. In Dougherty, the Court stated at page 612:

> "Dougherty's actions cannot be considered minor misconduct where he invested substantial trust account funds without disclosure in ventures in which he had potentially conflicting interests. The potential for self-dealing is great. Such actions constitute serious misconduct warranting substantial discipline."

Due to Dougherty's extensive personal and legal contributions to the community he was publicly reprimanded and placed on

probation for two years.

The Lumley case is also directly related to the case at bar. The Court at page 14 stated:

> "The referee found that there was no intent on the part of respondent to defraud or deprive his clients of their property. The evidence showed that, although at times there were deficits in account of money held in trust, respondent in every case restored the balance on the account in time to meet his obligations to his clients. No client suffered any loss or delay in the disbursement of funds.
>
> Although the referee found no intent to deprive the clients of their money, the existence of the account "deficits" shown by the evidence established that respondent did use, albeit temporarily, trust funds for personal purposes. There is nothing in the evidence or in the referee's report to refute the inference that such improper use of trust funds was committed knowingly. We therefore find that the evidence and the referee's findings implicitly show that respondent knowingly used entrusted funds for his own purposes." (emphasis added).

The respondent was given a public reprimand by the Court.

The referee properly found the Respondent's actions did not involve dishonesty, deceit, fraud or misrepresentation based on the above cases. He found that Mr. Neu's stipulated actions in no way reflect adversely on his fitness to practice law, and all testimony of record is to the contrary. The Bar has offered no evidence to support its allegation that he maintained incomplete trust accounting records, or that he failed to render appropriate accounts to his clients. In short, the Bar has failed to prove that the Respondent violated DR 1-102(a)(4), 1-102(a)(6), 9-102(b)(3) or Rule 4-8.4(c).

II

A THREE YEAR SUSPENSION IS NOT MORE APPROPRIATE DISCIPLINE THAN THAT RECOMMENDED BY THE REFEREE

The Bar suggests that if the Referee's findings of non-guilt are erroneous, then the discipline meted out should be greater than a 90 day suspension. The leading case on the proper measure of discipline is The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970). Therein, the Court cited three bases for determining the nature of discipline:

> "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 referee allowed both sides to provide testimony and evidence as to aggravating and mitigating factors. Even the Bar admitted that all trust funds utilized by Respondent were paid back, with interest before the Bar even knew that there was a shortage (T.Vol I, page 38) and that the Respondent was always nice and courteous, (T. Vol I, page 58). Mr. Neu testified that he was remorseful, (T. Vol I, page 98), that he had no personal gain from the transactions (T. Vol I, page 79), that he had no intent to deprive the client of any money (T. Vol I, page 80) (which statement was unrebutted); that the monies utilized were intended as either an investment or a loan to be immediately paid

back. (T. Vol I, page 80); that no clients ever complained of any shortages and that monies were always available when needed (T. Vol I, page 81); that he attempted to obtain bank records, but the bank had been seized by the Federal Government and the records were not available (T. Vol I, page 83); that he had difficulty in locating the records requested due to the untidy storage space maintained by his associate at the time (T. Vol I, page 84); that he cooperated fully in the Bar's investigation of his trust account (T. Vol I, page 87); that at the time that his trust account was in an interest-bearing account that he believed that payment of interest earned to the Florida Bar's IOTA program was voluntary and not mandatory (T. Vol I, page 88); that upon learning of the mandatory requirement in 1986, he transferred his trust funds to a non-interest bearing account at a different bank and has been in compliance with trust accounting requirements since that time (T. Vol I, page 89); that due to having held public office, the publicity generated by the Bar investigations herein has damaged him considerably financially, caused him to lose clients and to lose his position as Mayor of the City of North Miami (T. Vol I, pages 93 - 95) (A-40); that he is a sole practitioner (T. Vol I, page 95); that he has been a municipal judge and appointed by the Courts as guardian ad litem and attorney ad litem (T. Vol I, page 96); that he participated extensively in community service for which he received substantial recognition and awards. (T. Vol I, pages 97-100).

Many noted members of the community, public officials, friends and clients testified on the Respondent's behalf. They told of his integrity and honesty (T. Vol II, pages 113, 115, 122, 129, 136, 143, 149, 172, 174 and 191); of his dedication to the public (T. Vol II, pages 118, 125, 129, 149); and reputation in the community (T. Vol II, pages 118, 129, 140 and 172); of the punishment he has received by adverse publicity (T. Vol II, pages 121-125, 128, 132, 139, 143, 148, 150, 153, 154, 173 and 174); of his public service through the media (T. Vol II, pages 137 and 138); of the need for him to be able to continue practicing law (T. Vol II, pages 147, 149, 154, 170, 173, 174 and 178); of his remorse (T. Vol II, pages 150, 154, 185); of his competence as an attorney (T. Vol II, pages 164, 165, 168, 173 and 175).

The referee felt that Mr. Neu was very cooperative (T. Vol II, page 199) and that he is rehabilitated (T. Vol II, page 226). Thus, the record is replete with mitigating circumstances. They include the following:

(1) Cooperation with the Bar: Mr. Neu has cooperated with he Bar since the institution of these proceedings. AT the outset he appeared when requested and brought all records he had available. He admitted the underlying facts which led to the Bar's Complaint, and he eliminated, by waiver, the need for a grievance committee process. He then attempted to resolve the Bar's concerns by offering a consent agreement which would have obviated any referee appointment or proceeding. Only the Bar's

rejection of the proposed consent judgment forced the assignment of a referee and the hearing. Even then, Mr. Neu initiated the stipulation which simplified and expedited the referee's proceeding.

The Florida Supreme Court has recognized as a mitigating factor "the appropriateness of considering the circumstances surrounding the incident, including cooperation...", The Florida Bar v. Hero, 513 So.2d 1053 (Fla. 1987); The Florida Bar v. Pincket, 389 So.2d 802 (Fla. 1981); The Florida Bar v. Welty, 382 So.2d 1220(Fla. 1980).

(2) Acknowledgment of responsibility: Mr. Neu has at all times acknowledged responsibility for his conduct, without any attempt to put the Bar to its proof either in a grievance committee process or by challenge to the fundamental facts in the complaint. The Supreme Court has noted that acknowledgment of responsibility is a mitigating factor to be considered when sanctioning an attorney for misconduct. The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980) (respondent's admission of allegations is a factor to be considered prior to sanctioning).

(3) No prior violations: In more than 22 years of the practice of law, Mr. Neu has not been subject to any prior disciplinary action. The Supreme Court has often stated that a respondent's lack of a prior disciplinary record is a mitigating factor to be considered in disciplining an attorney for misconduct. The Florida Bar v. Colclough, 15 F.L.W. S338, 339 (Fla.

June 7, 1990); The Florida Bar v. Hero, 513 So.2d 1053 (Fla. 1987); The Florida Bar v. Padrino, 500 So.2d 525 (Fla. 1987); The Florida Bar v. Hornbuckle, 347 So.2d 1030 (Fla. 1977) (an attorney's practice for almost 25 years with no prior complaints is a mitigating factor).

(4) Return of trust funds: Mr. Neu voluntarily returned all trust monies with interest in short order, prior to any inquiry by either a client or the Bar. The Florida Supreme Court has recognized that a voluntary return of monies taken, particularly when the return occurs prior to any inquiry by the Bar, is an important mitigating factor. The Florida Bar v. Welty, 382 Sp.2d 1220 (Fla. 1980); The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981); The Florida Bar v. Lumley, 517 So.2d 13 (Fla. 1987); The Florida Bar v. Reese, 247 So.2d 718 (Fla. 1971).

(5) No financial loss to clients: None of Mr. Neu's clients at any time lost money, or any interest on money as a result of the trust account violations. The 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).

(6) Contributions to the community: During 22 years of Mr. Neu's practice, the public and legal community have sig

nificantly benefitted from his participation in community affairs. In The Florida Bar v. Dougherty, 541 So.2d 610 Fla. 1989) the Court took pains to list Mr. Dougherty's contributions to his community, and it considered those contributions as important mitigating factors. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983)

(7) Contributions to the profession through public education: In recent years the Bar has stressed the importance of educating the public about the legal profession. It has gone so far as to collect vast sums from its members to support its own public relations agency, F.L.A.M.E., for that express purpose. Without bally-hoo or reward, Mr. Neu has for several years been contributing to the public's education about the legal profession by providing media time to that goal and by donating his services to actually resolve the legal problems of citizens. His public education activities demonstrate a voluntary commitment to the justice system and to the legal profession which corresponds to the Bar's most important public objective. These activities must be considered as mitigating factors in the imposition of sanctions. The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986).

(8) Respondent's good character: Evidence adduced at the hearing attest to Mr. Neu's good character. It is all unrebutted. That fact, too, must be considered in mitigation of sanctions. See The Florida Bar v. Colclough, 15 F.L.W. S338,

(Fla. June 7, 1990); The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) (considering the respondent's age, years of service to his clients, his community, his bar and his country).

(9) Sole practitioner: Mr. Neu has practiced law as a sole practitioner -- a factor to be considered as mitigating. 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.

(10) Rehabilitation: The one-month use of trust funds for Mr. Neu's income taxes occurred more than three years ago, and the McKinney withdrawals and repayments occurred over five years ago. No subsequent violations have occurred, and none are alleged. The evidence shows an upright, honest and public-spirited attorney since those unfortunate events took place. This un-forced conduct demonstrates that Mr. Neu has already been rehabilitated (if indeed any rehabilitation was needed) over more than 3 years. Rehabilitation is relevant both to mitigating discipline and to eliminate the need for probation. In The Florida Bar v. Lord, 433 So.2d 983, 985 (Fla. 1983) the Supreme Court reasoned that because the misconduct was an isolated event in respondent's life, "the respondent need(ed) no further rehabilitation."

(11) Remorse: Mr. Neu has amply evidenced remorse for his misguided activities, and his unchallenged testimony has been echoed by other witnesses. The Florida Supreme Court has em-

phasized that remorse is an important mitigating factor in disciplinary proceedings. See, e.g., The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989); The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla 1986).

(12) Adverse impact of the proposed discipline on Mr. Neu's clients: Finally, the Florida Supreme Court has held that it is proper to consider the effect that a suspension might have on society, meaning on the attorney's clients. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). There is unchallenged record testimony that even a suspension, let alone disbarment, may affect Mr. Neu's ongoing clients.

In its Initial Brief, the Bar cites The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981) and The Florida Bar v. Setien, 530 So.2d 298, 300 (Fla. 1988) in support of raising the issue of uncharged misconduct. These cases only indicate that these matters may be brought in as aggravating factors and not as proof of the charges brought in the complaint.

Further, the Bar misquotes Respondent and then alleges that the misquote indicates that the music venture was for his benefit and not the ward.

> "By Mr. Gross
>
> Q Did you put the music venture into the minors name?
>
> A There was no title that could be transferred to any body's name.
>
> It was expenditures that were made directly

to a record company or to the musical group.

Q Did you purchase stock in the company?

A No

Q How was it done?

A It was done as either an advance or a loan to the group to be able to cut a record for which they had a contract.

Q Isn't it true this was not done in the name of the ward, it was done in your own name; isn't that correct?

A "No. It was done through the trust account, as you had previously indicated, from the Howard Neu Trust Account." (T. Vol I, pages 70 and 71).

There was thus no indication whatsoever that the music venture was for Mr. Neu's benefit.

The Bar miscites The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979). The statement cited referred to the fact that Vernell had two prior reprimands in disciplinary proceedings and thus was guilty of cumulative misconduct. Further, he had been convicted of a misdemeanor of failure to file his income tax and was therefore given a six month suspension.

While it appears that the Bar is seeking disbarment for the alleged submission of a false accounting to the Court, these accountings were not charged in the complaint and were introduced over objection by Respondent for the purpose of illustrating matters in aggravation by the Bar. Thus, the Bar's citations to Rule 4.1 and 4.11 of Florida's Standards for Imposing Lawyer

Sanctions are misplaced and inappropriate.

It is also interesting to note that in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), cited by the Bar to urge disbarment, a case wherein the referee recommended disbarment because Breed's "Acts evinced moral turpitude" and that he was "dangerous to the public" due to a check-kiting scheme, the Supreme Court only provided a two year suspension.

A two year suspension was also the result, The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981), even though Pincket entered an unconditional guilty plea, had continuing trust account violations even after the Florida Bar investigated and audited his trust account, could not deliver money from his trust accounts to clients when required and funds had to be paid by the Clients Security Fund of the Florida Bar.

In The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), the respondent was suspended for three years because there was a $10,000.00 deficit in this trust account after the Bar investigation and Schiller admitted using the funds for his own purposes. Also, in The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1983), the respondent was suspended for three years even though the referee recommended disbarment and Whitlock failed to pay back trust funds until after the grievance was filed; failed to reconcile trust account which was found to be short $20,000.00; still paid personal expenses from the trust account after notice of audit by Bar and didn't open a new account as he promised

the Bar he would do.

The case of The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) is clearly distinguishable from the case herein. In that case, Shuminer lied to his clients, kept money that was due them and bought a new Jaguar automobile with it and was found guilty by the referee of dishonesty, fraud and misrepresentation.

The Bar further cites The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986) (wherein the respondent converted $197,900 to his own use, was criminally charged with grand theft, converted funds over a four year period and didn't make restitution until after the grievance was filed) and The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986), (wherein the respondent had received prior discipline in a private reprimand, took money from a guardianship for his own purposes and didn't make restitution until after the Bar investigated and was given a one year suspension with two years probation). These cases were cited to compare them with Mr. Neu, who was not impaired by alcohol or drugs as were the above respondents. However, addiction has not been cited by Respondent herein as an item in mitigation.

THe Bar tries to show the alleged similarities between the instant case and The Florida Bar v. McShirley, The Supreme Court of Florida, Case No. 74,086, January 10, 1991 (16 F.L.W. S83, 85) but the two cases are not comparable. In McShirley, where the respondent had declared Bankruptcy; showed trust deficits of $10,000.00 which increased to over $27,000.00 upon audit and kept

no trust account records for two years; the referee found that he "knowingly converted funds for personal use over several years" and repeatedly dipped into his trust account, and found him guilty of violating Disciplinary Rule 1-102(A)(4)engaging in conduct involving dishonesty, fraud deceit or misrepresentation and recommended a three year suspension which was adopted by the Supreme Court.

In view of the foregoing, it is obvious that a three year suspension is not an appropriate discipline in this case.

SUMMARY OF ARGUMENT ON CROSS-REVIEW

The punishment does not fit the crime. The referee found the Respondent guilty of violating DR 9-102(A), Integration Rules 11.02(4) and 11.02(4)(d) and Rule 5-1.1. Violations of these rules in other cases where the matters in mitigation were not nearly as extensive as in this case and in cases where the violations were much more serious, led to public reprimand rather than suspension. Public reprimand is therefor appropriate in this case.

The costs incurred in these proceedings were solely due to the actions of the Bar in seeking disbarment when the underlying facts and mitigating circumstances did not justify such a position. To the contrary, the record shows that the Respondent did everything he could to mitigate the Bar's costs in this proceeding and was extremely cooperative. Thus, the referee abused his discretion by taxing costs to the Respondent.

ARGUMENT ON CROSS REVIEW

I

WHETHER A PUBLIC REPRIMAND IS MORE APPROPRIATE DISCIPLINE THAN THE 90 DAY SUSPENSION RECOMMENDED BY THE REFEREE

The Supreme Court's disciplinary rules authorize penalties ranging from a reprimand to disbarment. The Bar initially sought disbarment in this case and in fact, rejected Respondent's Stipulation for Consent Judgment insisting rather on pushing for disbarment. Now the Bar has reduced its sights seeking a three year suspension based on cases cited in its Initial Brief, all of which have been distinguished herein, and with the hopes that this Court will overturn the findings of non-guilt of the referee, which burden the Bar has not met.

In The Florida Bar v. Hosner, 513 So.2d 1057 (Fla. 1987), the Supreme Court of Florida recognized that a reprimand is the appropriate form of discipline for the types of violations which are the subject of this action. The Hosner court stated:

> Professional 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).

Id. at 1058 (emphasis added). Moreover, the Hosner court analyzed the American Bar Association's Standards for Imposing Lawyer

Sanctions to which the Bar has made reference in its Brief. The Supreme Court concluded that a public reprimand was appropriate in that case in view of the facts, even under the ABA's Standards.

In the Suprina case, ibid, the respondent was found guilty of mishandling trust funds, conduct adversely reflecting on his fitness to practice law, improper advancement of loans to clients, improperly contacting opposing party represented by counsel, commingling personal and trust funds and improper trust account record keeping. He was given a public reprimand.

In Mitchell, ibid, the respondent had previously received a private reprimand, but still didn't comply with trust accounting requirements, commingled personal and trust funds, did not maintain adequate trust account records and made personal payments from his trust account for three years. He was given a public reprimand and two years probation. See also The Florida Bar v. Dougherty, 541 So.2d 610 (Fla. 1989).

...Neither the Bar's new position calling for suspension nor the Court's legitimate desire to perform its public responsibility, warrant the suspension of Mr. Neu. There have been consequences enough in this case, (A-40) and the referee can send a better message to lawyers (1) by identifying the consequences of Mr. Neu's acts which have taken their toll -- professional, political and economic -- and (2) by noting these mitigating features of the case:

1. this was the attorney's first offense in a 22 year legal career;

2. funds that were taken were promptly returned with interest; on the attorney's own initiative and without prompting from a bar investigation or client complaint;

3. the attorney acknowledged, understands and is now remorseful for his lapse of judgment; and

4. there has been a significant period of time - more than 3 years -- since the mistakes occurred, and in that interval the attorney has demonstrated total fidelity to the ethics of the profession and has continued his public service.

In Mr. Neu's case, suspension will serve no purpose whatsoever. Further punishment will only be punitive and vindictive. It's enough that he has fallen on hard times in every way possible, and that his record will be forever smudged by the widespread public revelations of his errors.

The following similar cases all provided for public reprimand. The Florida Bar v. Borja, 554 So.2d 514 (Fla. 1990) where the respondent issued a $10,000.00 trust check without funds, delegated responsibility of maintaining the trust account to his secretary and was not in compliance with trust accounting procedures for two audits; The Florida Bar v. Hero, 513 So.2d 1053

(Fla. 1987) where the respondent entered a consent judgment and guilty plea of commingling funds, improper trust records, no trust reconciliations, improper use of trust money and failure to promptly pay clients funds held in trust; The Florida Bar v. Reese, 247 So.2d 718 (Fla. 1971) and 263 So.2d 794 (Fla. 1972) where the respondent received two public reprimands for commingling funds and paying personal debt to Internal Revenue with trust funds. See also The Florida Bar v. Padrino, 500 So.2d 525 (Fla. 1987); The Florida Bar v. Novack, 313 So.2d 727 (Fla. 1974). Finally, in a case where the respondent was found guilty of conduct involving dishonesty, fraud, deceit or misrepresentation by making unreported expenditures as guardian and repaid the amounts only upon order of the Probate Court, he was given a public reprimand and three years probation. The Florida Bar v. Terry, 333 So.2d 24 (Fla. 1976).

On the other hand, a 90 day suspension was given to a respondent who had substantial shortages in his trust account, kept improper records, issued checks returned for insufficient funds on his trust account and the deficit in the trust continued even after audit. The Florida Bar v. Miller, 548 So.2d 219 (Fla. 1989).

A public reprimand is appropriate in this case as the Respondent was found guilty of violation of DR 9-102(A) commingling funds; integration Rule 11.02(4) money entrusted to an attorney for a specific purpose, including advances for costs and expenses

as held in trust and must be applied only to that purpose; Integration Rule 11.02(4(d) failing to remit interest from interest bearing trust accounts to the Florida Bar Foundation and Rule 5-1.1, money in trust with the attorney for a specific purpose is held in trust and must be applied only to that purpose. Based on these violations and the mitigating factors, nothing more than a public reprimand should be required.

II

WHETHER FLORIDA BAR COSTS OF $3,559.95 ARE PROPERLY CHARGEABLE AGAINST RESPONDENT

Most disciplinary cases contain a directive that the attorney pay costs attributable to the Bar's prosecution. The directives stem from the discretionary authority to assess costs which is contained in Rule 3-7.5(k) of the Rules Regulating The Florida Bar. This is <u>not</u> a case for the imposition of costs on Mr. Neu, however. The Bar's costs in this case are solely the result of arbitrary action taken by The Florida Bar's Board of Governors. Each party in this case should bear it own costs, with transcript costs to be borne by the Bar.

The record is uncontroverted that costs associated with the proceedings of the referee in this case -- indeed, any costs that have been or may be incurred by the Bar after Mr. Neu's consent judgment was tendered -- were unnecessary, and were the direct consequence of the action taken by the Bar's Board of Governors in rejecting a consent judgment in order to seek disbarment. The

record is clear that Mr. Neu cooperated with the Bar in every respect from the date of his first contact by the Bar's accountant, Mr. Ruga, in July, 1989. The record is uncontroverted that Mr. Neu attended every meeting that Bar staff requested, and that he brought with him to every meeting all records that were requested of him and which were either in his possession or reasonably available to him. The record also shows that Mr. Neu made every effort to accommodate the Bar's record-production requests, down to explaining one brief delay in submitting records by writing to explain his legal commitments.

The record shows that Mr. Neu obviated the necessity of convening a grievance committee, by admitting the underlying facts; that he submitted to the Bar's Board of Governors a consent judgment. Had the consent judgment been accepted, this entire proceeding before the referee would have been unnecessary. The record shows that even after the formal complaint was filed by the Bar, Mr. Neu promptly submitted stipulated facts, rather than forcing extended discovery or pleadings.

In short, had the Bar not rejected the proposed consent judgment in order to direct its staff counsel to seek the untenable punishment of disbarment, none of the Bar's costs (and none of Mr. Neu's own expenses and attorney's fees) would have been incurred.

Mr. Neu first learned of the Bar's investigation of alleged

misconduct in July, 1989, and he was first contacted to make his records available in October, 1989. The brevity of the time span from initial contact to the conduct of these proceedings -- which the referee noted was exceptionally short -- bespeaks Mr. Neu's cooperation and willingness to avoid undue costs for the Bar. The Bar has been unable to demonstrate that disbarment, as requested by its Board of Governors, is even remotely appropriate in this case.

In The Florida Bar v. Carr, the Supreme Court of Florida, Case Nos. 72,576 and 72,707, February 12, 1991 (16 F.L.W. S183, 184) the referee found a failure to prove the charges filed against the respondent and found him not-guilty. The only issue before the Court was whether the referee abused his discretion in recommending that each party bear its own costs. The Court found that there was no abuse of discretion because the respondent failed to ask for costs and submitted the proposed report stating that each party shall bear their own costs.

In the instant case, the respondent objected to the payment of costs at the hearing before the referee held on October 25, 1990. (Trans -9).

The imposition of costs is discretionary with the referee. See Rule 3-7.5(k)(5) of the Rules Regulating the Florida Bar. That discretion was abused, however, by the referee in light of the Bar's unreasonable stance and its blame for all that has occurred since its initial contact with Mr. Neu. Where coopera

tion is manifest and where the respondent has done everything possible to accelerate the disciplinary process and eliminate unnecessary expenses, the imposition of costs on the Bar should be appropriate. Mr. Neu has suffered as a result of his misconduct politically, professionally and especially through the loss of existing and potential clientele as a sole practitioner. He has incurred significant and extraordinary costs in his defense of these proceedings in terms of out-of-pocket expenditures, time lost from his practice and attorney's fees. The record does not justify additional financial penalties simply to recompense the Bar for its actions. Thus, the Bar should bear its own costs of these proceedings.

CONCLUSION

The Florida Bar has failed to meet its burden to overturn the findings of the referee. Based on that failure, the discipline to be imposed should certainly not be greater than that recommended by the referee, In identical or substantially similar cases, the Supreme Court has imposed a reprimand.

The Respondent respectfully request this Court to affirm the findings of the Referee, order a public reprimand to the Respondent and tax costs of these proceedings to the Bar.

Respectfully submitted,

Howard M. Neu, Esquire
Fla. Bar No. 108689
12955 Biscayne Boulevard
Suite 400
North Miami, Florida 33818
(305) 895-3880

Arthur J. England, Esquire
Fla. Bar No. 022730
FINE JACOBSON SCHWARTZ NASH
BLOCK & ENGLAND
One CenTrust Financial Center
100 SE 2 Street
Miami, Florida 33131
(305) 577-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Answer Brief of Respondent and Initial Brief of Cross/Complainant was hand delivered to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 the 1st day of April, and that a true and correct copy was mailed to Paul A. Gross, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, Miami, Florida 33131, by Certified Mail, Return Receipt Requested, and a copy was mailed by regular mail to John A. Boggs, Director, Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida 32399-2300 and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300 this 5 day of April, 1991.

HOWARD M. NEU, ESQUIRE

INDEX TO APPENDIX

Page