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3-19 FILED
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MAR 6 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Case Nos. 76,406 and 76,819

THE FLORIDA BAR,)
Complainant,)
vs.)
ARTHUR B. STARK,)
Respondent.)

RESPONDENT'S ANSWER BRIEF

PAUL A. LOUIS, ESQ.
EVAN J. LANGBEIN, ESQ.

and

SINCLAIR, LOUIS, HEATH,
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STATEMENT OF THE CASE AND OF THE FACTS

For almost 40 years, Arthur B. Stark, age 65, was a member of the Florida Bar, with an unblemished record of prior discipline (APP I, pg. 10). Twelve of those years, Respondent served the public as an assistant public defender (T 86).

Approximately 30 of these years, Mr. Stark represented Court Reporter Bert Friedman or his court reporting firm (T 107). He handled Mr. Friedman's personal legal affairs, represented him when he bought his home and prepared his will (T 20,107). They socialized, went to football games in Gainesville and once met in Paris (T 20-21).

The relationship was special (T 107). Mr. Stark understood that he was allowed to take advance fees against funds collected for Mr. Friedman (T 107,108). Mr. Stark received one-third of the funds collected as his fee (APP I, pg.2).

Mr. Friedman did not understand that Respondent could take advance fees (T 18-19). But he acknowledged he would have loaned Mr. Stark $10,000 or $15,000 if Respondent made the request (T 24). Mr. Stark never denied he owed Mr. Friedman $8,400 (T 36, 113).

Mr. Friedman's attorney was A. J. Barranco, past president of the Dade County Bar Association and member of the Florida Bar's Board of Governors (T 30). Mr. Barranco advised Friedman he had three alternatives: (a) file a civil lawsuit; (b) take the matter to the State Attorney's Office; or (c)

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[1]The following abbreviations will be used:
IB Initial brief of the Florida Bar
APP The Bar's Appendix to its Brief
T Transcript
All emphasis is supplied unless otherwise indicated.

file with the Florida Bar Client Security Fund (T 27). Mr. Barranco believed the Florida Bar would produce the fastest result (T 32).

Mr. Friedman did not want a criminal proceeding instituted, and "had no idea" a bar grievance would result (T 27). He thought he would obtain his money from the Bar, and the matter would be concluded (T 29). Mr. Barranco testified disbarment was inappropriate (T 36):

> **Q.** Assuming that the Judge finds Arthur has violated various canons and regulations of the Florida Bar for which he has been charged -- my question is, do you have an opinion as to what would be an appropriate penalty?
>
> * * *
>
> THE WITNESS: As I said, Bert is a very close friend of mine and Arthur used to be a very close friend of mine. I still consider him a friend, even though I am testifying against him.
>
> I recognize that there are some extenuating circumstances in this case. I think the first thing that should be done is that he should be ordered to repay the monies to the Client Security Fund.
>
> * * *
>
> I think that for a period of time, he should be suspended. I don't think it should be an extensive period of time. I would not want him to be disbarred. I don't think that is appropriate.

Following Mr. Friedman's complaint, the Florida Bar audited Mr. Stark's trust accounts (APP 1, pg. 3). The Bar thereafter filed a petition for temporary suspension, and an order was entered on April 25, 1990, temporarily suspending

Mr. Stark, effective May 25, 1990, which he did not contest (APP 1, pg. 5; T 52-54, 97). Respondent has been suspended since the Bar commenced its extensive audit of his trust accounts in April 1990 (APP I, pg.5).

During the time of overdrafts in Mr. Stark's trust account, the attorney had a credit arrangement with United National Bank. The bank honored overdrafts on his trust account (T 89-91). This arrangement existed until early 1990 when the bank canceled without notice (APP 1, pg. 4).

Of 16 overdrafts, the bank paid all but four checks (T 77). The Bar's CPA testified that all clients received their trust funds with the exception of Mr. Friedman with whom Respondent believed he had an understanding regarding advance fees (T 77, 107-108).

Other than the money owed to Mr. Friedman, no client lost money deposited in Mr. Stark's trust account, nor were clients aware Respondent made personal use of their trust account funds (T 47, 89-93, 114-15).

Respondent acknowledged remorse for commingling client's funds (T 114-15). He was "chagrined", "embarrassed" and "deeply regretted" any violation of trust account rules ". . . because I was suspended for that, and it impaired my ability to make a living" (T 89-90).[2]

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[2]While offering no excuse and expressing remorse, Mr. Stark also testified that he had "some severe financial problems," resulting in an IRS levy on his regular operating account which closed it (T 88-89).

Eminent Florida lawyers and judges testified to Mr. Stark's character. Each testified disbarment was inappropriate even if Mr. Stark were guilty as charged, and that Respondent was a candidate for rehabilitation. The Referee observed (T 338):

> "In this case, we have had -- it impresses the Court, although I certainly hope I am beyond being superficially impressed -- 11 attorneys, 6 Circuit Judges, 2 DCA Judges, 1 Federal District Judge, 1 Retired County Court Judge, and 1 General Master, who testified [as character witnesses for Mr. Stark]."

(See also APP 1, pg. 10-11).

The following witnesses testified Mr. Stark could be rehabilitated:

1. Richard E. Gerstein, Esq. [T 164-1651:

I believe Arthur Stark is indeed a candidate for rehabilitation. He is certainly redeemable, even if these charges are true.

2. Murray Sams, Esq. [T 171]:

...Arthur would be the most perfect candidat, for rehabilitation.

3. Hugo Black, Esq. [T 175]:

He is an appropriate lawyer for rehabilitation.

* * *

I don't know what happened here, but I know that in my opinion, Arthur is certainly redeemable. He has good character.

4. County Judge Arthur Maginnis [T 181]:

...I think he would be an excellent subject for rehabilitation. He is a very good man.

5. Circuit Judge George Orr [T 184]:

[H]e would be a candidate for rehabi itation an(ought to be permitted to practice law. **(T 184).**

6. Circuit Judge Martin Greenbaum [T 194]:

I am satisfied that even if all the charges are true and correct he would be a prime candidate for rehabilitation because I know this man.

7. Charles R. Stack, Esq. [T 198]:

I believe that Arthur Stark is an excellent candidate for rehabilitation, probably better than anyone I have read about who has faced the kind of problems that he is presently facing.

8. Robert H. Trauriq, Esq. [T 201]:

I think he is an appropriate candidate to resume the practice of law.

9. Milton Morgan Ferrell, Jr., Esq. [T 206]:

That he is [a suitable candidate for rehabilitation].

10. Chief Circuit Judge Gerald Wetherington [T 214-2151:

...[T]his is a very decent man and a very honorable lawyer...if I was making the decision, I certainly would not disbar him.

11. General Master Mitchell M. Goldman [T 219]:

I think he would be an excellent candidate for rehabilitation because I think he is quite a competent attorney and I don't know of any other problems he has ever had other than these.

12. Associate Chief Circuit Judge Herbert Klein [T 226]:

Would I be of the opinion that he should be disbarred? Absolutely not. I believe Arthur is rehabilitatable...he should be admitted back into the practice of law.

13. Former Bankruptcy Judge Joseph A. Gassen [T 229-2301:

I would have no hesitancy whatsoever in thinking that he could be rehabilitated and continue practicing law.

14. U.S. District Judge Edward B. Davis [T 238]:

I believe that one that practices law for almost forty years and has never had a mark against him until the last year or so, should be considered far rehabilitation and not disbarment.

15. Circuit Judge Moie J.L. Tendrich [T 242-243]:

I definitely think so...I think to lose him as a member of the profession would be a terrible thing.

16. Circuit Judge Alphonso Sepe [T 246-47]:

...I deal with rehabilitation issues every day in my career...He doesn't need any rehabilitation...to disbar this man is just being excessive.

17. Third District Court of Appeal Judge Philip Hubbart [T 250]:

...My opinion is that there is no question that Arthur is a fit subject for rehabilitation...

18. Third District Court of Appeal Judge Thomas H. Barkdull. Jr. [T 261]:

...I do not think that disbarment would be appropriate.

19. William Colson. Esq. [T 266]:

I believe that he is an excellent candidate for rehabilitation.

20. Robert Achor, Esq. [T 271-272]:

...I would have to say that he is certainly a person who could be rehabilitated, if the charges are true -- even taking them at the worst.

21. Irwin J. Block. Esq. [T 276-277]:

It is my opinion that Arthur should not be disbarred, that Arthur can be rehabilitated and that he **should** be permitted to continue as an attorney under some kind of strict monetary system during a period of probation and that the monitoring system should include trust accounts and for some short period of time, he should not even be permitted to have any trust accounting funds available.

In my experience from having prosecuted attorneys and having been chairman of a disciplinary committee of the Florida Bar when 1 was on the Board of Governors, the type of offense with which Arthur brings to this Court, in my opinion, entitles him to an opportunity to be rehabilitated.

22. **Aaron Podhurst, Esq.** [T 280]:

Obviously, these are serious charges and I don't in any way demean any of it.

But if anybody deserves to have an opportunity to be rehabilitated and who would be a good candidate for it, it would be someone such as Arthur Stark, who for twenty-five years that I have known him has always been an exemplary member of the Bar.

A more detailed summary of these lawyers and judges who appeared as witnesses is set forth below:

1. **RICHARD E. GERSTEIN. ESQ.**

Admitted ta Florida Bar August 1949. Former State Attorney for Dade County, Florida 21 years. Resigned during his sixth term to go into private practice (T 161).

Mr. Gerstein testified that he has known Arthur Stark for approximately 45 years from the time that they were both undergraduates at the University of Miami. During a 40-year period Mr. Gerstein had a professional relationship with Mr. Stark especially during that period of time when Mr. Gerstein was State Attorney and Mr. Stark served as an assistant public defender in Dade County (T 162-63).

> "...I observed him frequently in court and had the kind of conduct that would be expected between the state attorney and a public defender..."
>
> Q: How would you rate Arthur as a trial lawyer from your observations, both as to ability and integrity?
>
> A: I grade him as an excellent trial lawyer. He is a lawyer of substantial ability, of great competence, someone who has been candid in his professional dealings with me and has a reputatian for

candor and integrity in his dealings; with other members of the Bar. (T 163)

2. MURRAY SAMS, ESQ.

Admitted to Florida Bar March 1949 (T 168). Mr. Sams is an outstanding trial lawyer (T 169). He has known Arthur Stark for 40 years and early in their careers handled several cases together:

> "We became close friends, and there is nobody in this county that I have greater admiration for as a person and as a lawyer than Arthur Stark." (T 170)

3. HUGO BLACK, JR., ESQ.

Admitted to The Florida Bar in 1962 and is an active trial lawyer (T 173). Mr. Black testified he has known Arthur Stark for 20-25 years (T 173) and Arthur has a good reputation among his fellow members of the Bar:

> You don't get a BB (sic) rating in Martindale when you have been practicing 40 years if your fellow attorneys don't speak of you very highly. It involves your professional integrity and the handling of money and all those things. Arthur had that rating when the suspension came.
>
> * * *
>
> In addition, I saw there that somebody thinks that Arthur has been trying to hide the fact that he had a problem with the Bar and that he hasn't been living up to the suspension. I am right in the building and I see him three, four, five times a week and he hasn't made a secret of the fact that he is not practicing law and can't practice law at this time. (T 175-176)

4. JUDGE ARTHUR MAGINNIS.

A county judge in Dade County, Florida for 26 1/2 years now serving in senior status.

Judge Maginnis testified that he has known Arthur Stark for "about 40 years." He has known him as an attorney

and a friend (T 179) and they worked together as assistant public defenders until 1960 (T 178-79).

> Q. Did you form an opinion as to Arthur's professional ability?
> A. Yes. It's excellent. (T 179)

Judge Maginnis testified:

> Q. Would you permit Arthur to practice in your courtroom?
>
> A. Yes sir, I would very definitely. He is a vexy honorable man, in my book.. . [T 180]

* * *

5. JUDGE GEORGE ORR.

A circuit court judge of the Eleventh Judicial Circuit in Dade County for 16 years (T 185). Admitted to practice law in Florida in 1951. (T 182)

He has known Arthur Stark for 40 years (T 182). They knew each other when the judge was an assistant state attorney and Mr. Stark was in the public defender's office (T 183).

> Q. Do you have an opinion as to Arthur Stark's professional ability?
>
> A. Yes sir.
>
> Q. What is that opinion?
>
> A. I think he is one of the finest lawyers in town. (T 183)

6. JUDGE MARTIN GREENBAUM.

Circuit Court Judge in Dade County, Florida since January 1985, and admitted to Florida Bar June 1949 (T 189).

He has known Arthur Stark for 45 years (T 189). They grew up together on Miami Beach (T 189). They tried cases against each other when the judge was an assistant city attorney for the City of Miami Beach and Mr. Stark was an assistant public defender in Dade County. Judge Greenbaum further testified [T 190-91]:

A. As I said, we all grew up together. From the beginning, I had certain areas of expertise and he had certain areas of expertise.

I was an Assistant City Attorney for almost five years with the City of Miami Beach and developed over that period of time, obviously, reasonable expertise in the field of municipal law.

All during this period of time, I was doing considerable trial work.

At that time, Arthur was, I believe, one of the first Assistant Public Defender's. I don't remember the year, but I know it covered somewhere between 1959 and all the way up.

So we actually had cases against each other.

We were friends, but in trial, there was no such thing as friendship. We tried our cases to the best of our ability.

I have never known of anybody, nor have I ever heard even the slightest indicia of anyone questioning his integrity.

Again, separating out our personal relationship, we always maintained the proper decorum and the proper expression in the courtroom, whether we had matrimonial matters against each other or criminal matters or whatever it was.

When we graduated from law school, we didn't have, as you call it, the advantages that a law student has today. They threw us in the pit and said to try the case. We learned the hard way.

I have never heard anybody question Arthur's integrity, and this is a small town. People talk. There has never been any question of his integrity in the handling of any matter. Nobody questioned that he did anything remiss or unprofessional.

I can't say that about a lot of other people we grew up with and I can't say that about a lot of other attorneys. Unless I had a personal relationship with them, I would not comment about it. But I have no reason to question Arthur's integrity, and I say that aside from any personal relationship. I think I can divorce that.

7. CHARLES R. STACK, ESQ.

Trial attorney admitted to Bar in September 1960 (T 196). He has known Arthur Stark since January 1962 (T 195).

...The way I got to know him is that he was in the Dupont Building with Bob Traurig, who is a very prominent lawyer locally, and several other lawyers. I guess we were all pretty yaung at that time.

We were next door to each other, Bob High [former City of Miami mayor and Gubernatorial candidate (T 195)] and I and Judge Davis. We would see Arthur probably every day, at least once.

Over the years, I developed an extreme respect for him as an individual.

I have never been socially identified with Arthur, but I have known him professionally for 30 years. I have always known him to be an extremely fine individual, one who is worthy of what consideration can be given. (T 198)

8. ROBERT H. TRAURIG. ESQ.

Graduated law school in 1950, and began practicing law in 1953 (T 199). Senior partner in Greenberg, Traurig, a law firm that employs approximately 135 lawyers. Mr. Traurig testified that he has known Arthur Stark since 1946, and that from 1954-1967 they shared office space together, in the Dupont Building (T 200).

Mr. Traurig further testified that:

He is a very skilled lawyer, a very competent lawyer... (T 201)

I would like to say that Arthur always exhibited empathy to other people. He was always very helpful to other people. He was helpful to me, as a lawyer in many situations.

I think he has suffered substantially as a result of the incidents that you have described .

1 think that if he began to practice law again, there would never be a repetition of that **course** of conduct and that he would serve the bar faithfully and well. (T 201-202)

9. MILTON MORGAN FERRELL, *JR.*, ESQ.

Admitted to the Bar in Florida and Georgia in 1975. Active trial lawyer. Has known Arthur Stark all of his life. (T 204-205)

Mr. Ferrell testified that as a prosecutor he had cases where Mr. Stark was involved and "He was highly respected." (T 205-206).

I wouldn't presume to tell this Court what to do, but if I could have the opportunity, I would like to share with the **Court** a little of my thought process on it and what I think would be a fair and just result, if your hypothetical is accurate.

I was involved for three years on a Grievance Committee. I was honored to be chairman for a year, or maybe a little more.

I know that the Bar has vexy effective and very fine procedures for monitoring a lawyer's practice, including the trust accounting procedures, which range anywhere from having a lawyer not have signatory power over his trust account, or having the trust account placed with another lawyer having the signatory power, ranging from that great an intrusion to monitoring with great frequency the deposits and disbursements.

As far as in terms of Mr. Stark, I have tremendous respect **for** Mr. **Stark, as**

far as his ability and his integrity. I shall always have that respect for him.

I think that unlike many people that come before the Court, whether it be a situation such as this, to recommend a sanction in a criminal form or in a disciplinary form; oftentimes the Court, in effect, takes a promissory note from a person in terms of giving a sentence of less than what the Court ordinarily might or a sentence of probation.

The promissory note is that, "Although I have dona poorly or make a mistake or committed a crime, I agree to be indebted, to have the rest of my life to make payment and to discharge this obligation."

In this instance, I think if anyone in this world has prepaid, whose life in helping young lawyers, as he often helped me when 1 started practicing, and helping many, many people -- I have known literally tons of people who Arthur has represented for nothing.

I think he has brought tremendous credit an the Bar. I think he is one of the most respected lawyers, and I mean lawyers who have practiced here for quite a time.

If all of that counts for nothing in a proceeding such as this, I think it would be a shame. I think it would set a very poor precedent.

If a man's whole lifetime professionally, having the highest reputation, and deservedly so, counts for nothing in determining the sanction to be applied, why have a good reputation and why live a good life? (T 206-208)

10. JUDGE GERALD WETHERINGTON.

Chief Judge of the Circuit Court of Dade County since December 1974 (T209). Admitted to the Bar in 1963 and testified that he has known Arthur Stark since the late '60's. (T 209-210).

I always felt that Mr. Stark was a very competent trial lawyer both civil and criminal.

I have never known of anyone to question his integrity. He has a good reputation for integrity (T 210).

* * *

Speaking of Mr. Stark specifically, he is a lawyer who has practiced for many, many years in Dade County, to my knowledge in a very honorable way and a very competent way.

He represented a lot of poor people as an Assistant Public Defender at a very low rate of pay, which is what they were paying in those years. So he has helped a lot of people over the years, a lot of poor people as a member of the Bar, and I think that is very important.

1 don't know the circumstances that led to the violations in question. But if I was looking at this case, and it is not a criminal case and I am not suggesting it is. But if I was analyzing a sentencing issue, I always take into consideration in sentencing the total circumstances, including past conduct and contributions of an individual, as well as the severity and whether or not there are other offenses.

If there are no other offenses and we are looking at a first offender situation, that is an extremely favorable factor.

If somebody came before the Court and let's say they were being charged with robbery -- a first offender status is a very favorable factor on the issue of what an appropriate sentence would be.

It would seem to me, and I can't comment on the circumstances of the offense, your Honor, because I just don't know -- but this is, to my knowledge, a very decent man and a very honorable lawyer.

If he did something that was violative of the rules, it would be out of character. Knowing him, there must have been extenuating circumstances in his life. We are seeing these kinds of things happen with lawyers because we are all operating under pressure. That doesn't excuse anything.

But at this point in his career, with all of the good that he has done, if I was making the decision, I certainly would not disbar him. (T 213-15)

11. **MITCHELL M. GOLDMAN**.

General Master in the Circuit Court of Dade County. Admitted to the Bar in 1951 (T 216). He has known Arthur Stark since they attended law school tagether (T 217). Mr. Goldman testified Respondent "is quite a competent attorney and I don't know of any problems he has ever had other than these." (T 219).

Mr. Goldman testified he would believe Mr. Stark under oath, and that he would permit him to practice law in his court (T 221).

12. JUDGE **HERBERT KLEIN**.

Circuit Judge of the Circuit Court of Dade County. Admitted to the Bar on April 23, 1954 (T 222). Presently associate chief judge of the Circuit Court and administrative judge of the General Jurisdiction Division (T 224).

Judge Klein testified that he has known Arthur Stark since 1956 - and for a short period of time served together in the Dade County Public Defender's office (T 223). Judge Klein further testified (T 225-26):

My opinion is that he should absolutely not be disbarred. Arthur is a man of some 40 years experience as a lawyer. He has conducted himself in an exemplary fashion, so far as I know, for 40 years.

I knew Arthur, both personally and on a professional level, very well. He has appeared before me while I have been a judge.

I have appointed him in some complex litigation to represent people who had to be represented.

He has conducted himself in a highly professional and highly dignified manner. I believe he is an honorable man.

I think he made a terrible mistake and he has been paying for that mistake.

would I be of the opinion that he should be disbarred? Absolutely not. I believe Arthur is rehabilitatable. I think Arthur should be punished, obviously, but he should be admitted back into the practice of law.

I think that he has shown a tendency not to be as careful as he should be or he exercised bad judgment in these two or three instances over a 40 year period, that he probably should have some supervision during the period of time that he is coming back into the Bar and rehabilitating himself.

13. JOSEPH A. GASSEN, ESQ.

Admitted to The Florida Bar in 1949, former President of the Dade County Bar Association, and a former United States Bankruptcy Judge for approximately 4 1/2 years, now a partner in Mershon & Sawyer law firm in Miami, Florida (T 227).

Mr. Gassen testified that he has known Arthur Stark over 40 years and Mr. Stark enjoys a good reputation as a practicing lawyer (T 227-28). In the past when Mr. Gassen was away Mr. Stark handled several files for him, and has referred other matters to him from time to time (T 228).

14. JUDGE EDWARD B. DAVIS

United States District Judge of the Southern District of Florida for approximately 12 years, admitted to Florida Bar in 1960 (T 235).

He has known Arthur Stark since 1961 and they had offices next to each other in the Dupont Bldg (T 236). Judge Davis further testified:

Yes, in the years that I have known Arthur, I have never heard a complaint

about him until this recent matter that was brought to my attention sometime in the past.

I have never heard any complaint about Mr. Stark and I am familiar years back about some of the work that he had done.

His skills are good and his reputation is excellent." (T 237)

15. JUDGE MOIE J.L. TENDRICH

Circuit Judge of the Circuit Court of Dade County for 15 years. Admitted to The Florida Bar in February 1949 (T 240).

Judge Tendrich testified that he knew Respondent:

I think from the time I started practicing. I don't know if he graduated before me, after me or about the same time. But it seems like I have always known Arthur.

Judge Tendrich testified Mr. Stark's reputation for truth and veracity was "good" (T 241):

* * *

When I read in the Bar Journal that he had been suspended, my first reaction was to get a hold of Judge Herb Klein, who I know is friends with Bob Koeppel, you know we all travel the same way.

We didn't know what it was about, Judge Klein said in effect, if it had been a question of money, why didn't he come to me.

That was my reaction. I think Arthur is well loved. If he committed wrong, I would hope that he would be given a chance to continue to practice, I think to lose him as a member of the profession would be a terrible thing (T 242-43).

16. JUDGE ALPHONSO SEPE

Judge of the Circuit Court of Dade County. Admitted to the Bar in 1954 (T 244).

Judge Sepe testified he has known Arthur Stark since 1957 when Mr. Stark was an assistant public defender and Judge Sepe was a young prosecutor in the State Attorney's Office (T 244). Judge Sepe described how Mr. Stark practiced law:

> Vigorously. He was a very tough advocate, but very honest. I was with him in front of many judges. Never once was there ever a suggestion, either in the mind of the prosecutor like myself or in the Judge's mind that there was any -- there was never a suggestion of impropriety or deception or anything other than being vigorous and forthright (T 245-46).

17. JUDGE PHILIP HUBBART.

Judge of the Third District Court of Appeal of Florida since 1977. Admitted to The Florida Bar in 1963 (T 247).

He first met Arthur Stark in 1965 when the Judge worked in the Dade County Public Defender's office and Mr. Stark was the Chief Assistant Public Defender (T 248).

Judge Hubbart testified:

> I always considered Arthur to be a fine lawyer, an excellent lawyer. He was a person of the highest integrity. I always thought very highly of Arthur. He was the chief assistant at the time and had been around for a number of years. Occasionally, I would consult him about cases.
>
> Basically I knew him in a professional capacity, and I liked him very much. He was a very personable person (T 249).

18. JUDGE THOMAS H. BARKDULL, *JR.*

Judge of the Third District Court of Appeal of Florida since 1961. Admitted to Florida Bar in 1949 (T 256).

Judge Barkdull is the Senior Appellate Judge and only second in tenure to one judge in the state (T 258). He

is presently serving on the Judicial Qualifications Commission, and has served in that capacity since said commission was formed (T 258).

Judge Barkdull testified that he has known Arthur Stark since the early '50's, and his opinion of his professional capacity (T 259) was:

> A. I thought he was a very competent lawyer and I thought that indigent defendants were very fortunate to have him.

Judge Barkdull testified after he was further advised of the nature of the pending charges filed by The Florida Bar against Mr. Stark (T 261-62):

> A. Then I do not think that disbarment would be appropriate.
>
> * * *
>
> I don't know how it is for young people joining the profession today, but I know at the time Arthur and I came along, if you were to tell us that we couldn't be a lawyer anymore, it would be like cutting your leg off.
>
> I have a feeling that thia is supposed to be a forgiving society. We all make mistakes. If the people that were injured because of the mistakes have been made whole, I think people should be given a second chance.

On cross-examination Judge Barkdull testified (T 263):

> Q. Do you agree that misappropriation of funds is a serious act?
>
> A. Yes ma'am, and I know a number of good lawyers that had that problem and continued to practice after being disciplined, and served this community very well, including my former law partner.[3]

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[3]The partner to whom the judge referred was the late Marion E. Sibley, one of Florida's most esteemed attorneys. See In re Sibley, 151 Fla. 225, 9 So.2d 366 (1942) (T 256-57). The Referee found Judge Barkdull's testimony "very persuasive" (T 342)

19. WILLIAM COLSON. ESQ.

Admitted to practice in 1948 (T 263). Former President of the Association af Trial Lawyers of America. Former member of Board of Governors of Florida Bar (T 264).

Mr. Colson testified that he has known Arthur Stark close to 44 years and is familiar with his reputation as a lawyer, "which is excellent" (T 265).

20. ROBERT ACHOR, ESQ.

Practicing lawyer in Florida since 1947 and former associate professor at the University of Miami Law School (T 268). Testified that he has known Mr. Stark since he was a student at the University of Miami Law School in 1949 (T 270). Mr. Achor observed Mr. Stark in the practice of law for many years and referred him cases and clients (T 270). Respondent was one of his "renowned students". (T 269)

21. IRWIN J. BLOCK, ESQ.

Practicing lawyer, admitted to practice in Florida in June of 1950. Former president of the Dade County Bar Association, former member of the Board of Governors of The Florida Bar, who just received the Learned Hand award and the Dade County Bar Association Justice Award (T 274).

Mr. Block testified that he has known Mr. Stark for about 40 years and his opinion of Mr. Stark both professionally and personally (T 275-76) is:

> A. I think that the quality of legal services rendered by Arthur is excellent. I have never known him to have any personal problems...

22. AARON PODHURST, ESQ.

Practicing lawyer admitted to Florida Bar in 1961 (T 277). Past President of the International Academy of Trial Lawyers and a former member of a grievance committee of The Florida Bar (T 278).

Mr. Podhurst testified that he has known Mr. Stark for approximately 25 years and is familiar with Mr. Stark's reputation as a lawyer (T 279):

> A. It was always excellent. He was one of the contemporaries of mine in the Bar who you could always trust. He is a nice fellow besides being a competent lawyer, a **good** trial lawyer.
>
> * * *
>
> I probably shouldn't get involved in that area, **because** I know so little about how Arthur got into the difficulty he **got** into.
>
> Bert Friedman is also a close friend of mine. I know that Arthur and Bert had a very close relationship. Perhaps because of that relationship, Arthur misunderstood. That might be a mitigating factor.
>
> * * *
>
> **...**I don't in any way condone what occurred, because what occurred occurred and it's very serious. But I know the relationship between them. That's the only thing I could say.
>
> The only thing I can say is that whatever Arthur did, for twenty five years previous to that, he was an exemplary member of the Bar and a person that you could be proud of as a member of the Bar. That's all I can say (T 280-81).

The Referee found as additional mitigating factors:

A. Absence of prior disciplinary record for almost **40** years;

B. Personal or emotional problems ***Mr.*** Starkexperienced due to caring for his elderly mother;

C. Mr. Stark's attempts at rectifying the consequences of his misconduct; and

D. Full disclosure to the Florida Bar and a cooperative attitude by Mr. Stark towards these proceedings (APP 1, pg. **11).**

E. Remorse.

The Referee found Mr. Stark had not been uncooperative for questioning the breadth of the Bar's Subpoena Duces Tecum. He found Respondent had the right to do so (APP 1, pg. 11-12).

The Referee further found that Mr. Stark's continuing representation of a client after the order of April 25 1990 was to assist a client at a summary judgment hearing (T 120-23). Respondent had been handling the case since 1982 (T 99-102; 140; APP 1, pg. 10).

The client, Burt Craven, had a long-time attorney-client relationship with Mr. Stark (Ibid). Mr. Craven was charged no fee, and found Mr. Stark's assistance "outstanding." (T 138-40). Respondent's assistance was an "act of mercy" for a long-time client (T 331).

Respondent had known Mr. Craven for 30 years (T 138). Mr. Carven was 65 years old, and retired (T 137). He was sick and under heavy medication (T 137). No other lawyer was familiar with his case, nor could he afford another lawyer (T 141).

Mr. Craven sought back wages from a long-standing employment dispute with Dade County (T 131). The assistant county attorney handling the Craven case, Joni Armstrong Coffey, acknowledged it involved several appeals and "many, many hours" of prior legal effort (T 126, 130). Mr. Craven remembered that Respondent advised him of problems with the

Bar prior to December 17, 1990, "but it went over my head." (T 141).

Mrs. Coffsy testified Mr. Stark was "consistently courteous," his legal work was adequate and he handled the matter with the fervor one wauld expect of an attorney representing a client (T 126).

The only "advice" Respondent gave to a Bar investigator after the May 25, 1990 suspension was to get another lawyer in Chicago (T 151). He never told the investigator that he was a practicing lawyer (T 151). Mr. Stark's former business office was locked and the lights were off (T 149).

He had moved into another lawyer's office on the same floor (T 105-106; 145). The investigator took a business card as he left (T 104-105). Mr. Stark sought no fee (T 151).

Respondent notified clients of his suspension, received a letter from the Bar indicating compliance with the temporary suspension order (although claiming it was untimely) and the legal community was notified of Mr. Stark's suspension (T 98-100).

The Referee recommended that Mr. Stark should be suspended far a period of two years, nunc pro tunc, to May 25, 1990 and pay reasonable costs associated with this proceeding (APP 1, pg. 9-12). Re-admission following his suspension would be contingent upon approval of rehabilitation and appropriate supervision deemed appropriate by the Bar (APP 1, pg.10).[4]

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[4]The Florida Bar unfairly includes an affidavit as Appendix II prepared the day before its brief was filed. The (continued...)

SUMMARY OF ARGUMENT

The findings of fact of the Referee are supported by the evidence and are not clearly erroneous. The Florida Bar has failed to meet its burden of demonstrating the Referee's report is "erroneous, unlawful or unjustified." Rule Regulating Fla. Bar 3-7.7(c)(5); Fla. Bar v. Weiss, 16 F.L.W. S652, 653 (Fla., Case No. 76,407, opinion filed Oct. 3, 1991); Fla. Bar v. Scott, 566 So.2d 765 (Fla. 1990). The "extreme sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable." Fla. Bar v. Weiss, supra; Fla. Bar v. Hartman, 519 So.2d 606, 608 (Fla. 1988), quoting Fla. Bar v. Rosen, 495 So.2d 180, 181-82 (Fla. 1986) and Fla. Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978). The testimony before the Referee, without contradiction, demonstrates Mr. Stark is a suitable candidate for rehabilitation.

Moreover, favorable recommendations from community leaders is a mitigating factor taken into account by this Court in disciplinary matters. See Fla. Bar v. Seldin, 526 So.2d 41, 44 (Fla. 1988); Fla. Bar v. Anderson, 395 So.2d 551

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[4](...continued)
affidavit states Mr. Stark has not made restitution to the Client's Security Fund. An appellate court considers only matters initially brought to the attention of the lower tribunal. See generally Rosenberg v. Rosenberg, 511 So.2d 593, 595, fn. 3 (Fla. 3d DCA 1987). Even if restitution to the Fund has not been made there is nothing indicating Mr. Stark did not rely upon the Florida Bar's appeal as staying his obligation to make restitution. Moreover, the failure to make complete restitution in misappropriation cases does not call for disbarment. Fla. Bar v. Morris, 415 So.2d 1274, 1275 (Fla. 1982). Mr. Stark did not contest full restitution to the Fund is a condition precedent to reinstatement (T 113).

(Fla. 1981). The Referee was impressed by the assembly of prominent members of the bench and bar who testified an behalf of Mr. Stark (T 338).

In Fla. Bar v. Weiss, supra, this Court reduced a recommended penalty of disbarment to a six-month suspension. Although guilty of gross negligence in handling client trust accounts, the record in Weiss showed ". . . this is the first instance of misconduct in Respondent's twenty-eight years of practice. . ." (16 F.L.W. S653).

This Court cautioned in Fla. Bar v. Breed, 378 So.2d 783, 785 (Fla. 1979) that ". . . each case must be assessed individually . . . in determining the punishment . . ." See also Fla. Bar v. McShirley, 573 So.2d 807 (Fla. 1991); Fla. Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986); Fla. Bar v. Roth, 471 So.2d 29 (Fla. 1985); Fla. Bar v. Morris, sunra; Fla. Bar v. Pincket, 398 So.2d 802 (Fla. 1981); Fla. Bar v. Anderson, supra; Fla. Bar v. Hartman, supra.

The Referee correctly found Mr. Stark fully and freely made disclosures to the Bar, had a cooperative attitude towards the proceedings, and was remorseful. The findings are supported by the record. (See T 89-91; 93-94; 73-74; 81-82.) This Court "cannot reweigh the evidence or substitute its judgment for that of the trier of fact. . . " (See, Fla. Bar v. Weiss, supra; Fla. Bar v. Scott, supra, 566 So.2d 767.) Accordingly, the Bar's challenge to one of the Referee's findings should be rejected.

ARGUMENT

POINT I

THE BAR HAS FAILED TO DEMONSTRATE THAT THE RECOMMENDATION OF A TWO YEAR SUSPENSION FOR A 65 YEAR OLD LAWYER WHO PRACTICED IN A COMMENDABLE MANNER WITHOUT A DISCIPLINARY RECORD FOR ALMOST 40 YEARS LACKS EVIDENTIARY SUPPORT OR IS "ERRONEOUS, UNLAWFUL OR UNJUSTIFIED". RULE REGULATING FLA.BAR 3-7.7(c)(5).

The Referee recognized, and the Bar concedes, that the fundamental question in this case is whether disbarment is too severe a penalty (T 157).

This Court has held that the "extreme sanction of disbarment" rarely is imposed when rehabilitation of an attorney is probable. See, Fla. Bar v. Weiss, supra; Fla. Bar v. Hartman, supra; Fla. Bar v. Rosen, supra; and Fla. Bar v. Davis, supra.

It is unchallenged that Respondent "would be the most perfect candidate for rehabilitation" (T 171). The Bar, however, relying on dicta from Fla. Bar v. Tunsil, supra, and Fla. Bar v. Breed, supra urges the "equivalent of a capital offense". See 503 So.2d 1231.

The extreme penalty of disbarment for a 65-year-old lawyer, under the circumstances of this case, would be tantamount to an unnecessary "execution". Mr. Stark's long career was carried on with distinction and prominence for many years. Disbarment in this case would ill-serve the purpose of attorney discipline enunciated in Fla. Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970):

> First, a 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.

In Florida Bar v. Pahules, supra, this Court reduced the Referee's recommended penalty of disbarment to a six month suspension. The attorney, Mr. Pahules, had commingled over $14,000 from a client's real estate transaction with his own personal funds. Additionally, the Bar reported other instances of commingling, checks returned for "insufficient funds" on the trust account, and Mr. Pahules' failure to appear at the grievance hearing or provide a formal defense or testimony.

This Court noted that Mr. Pahules had been a member of the Bar for 19 years without prior offense, and he supported four minor children. The Court quoted Florida Bar v. Murrell, 74 So.2d 221, 223 (Fla. 1954):

> "[D]isbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the Bar, otherwise suspension is preferable. For isolated acts, censure, public or private is more appropriate. Only for such offenses as embezzlement, bribery of a juror or court official or the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every

> doubt, particularly where he has a professional reputation and record free from offenses like that charged against him. (233 So.2d 131-132).

The testimony of an impressive list of trial and appellate judges and esteemed lawyers in the State of Florida attests to the fact that Mr. Stark throughout a long legal career has been regarded as able, honest, and conscientious. His record was "free from offenses like that charged against him." Mr. Stark deserves "the benefit of every doubt. . ."

Each witness was asked (T 242):

> "Assuming that Arthur is guilty of any or all of these charges, when the Court has to consider what penalty it should recommend to the Board of Governors in the Supreme Court of Florida, do you have an opinion as to whether or not Arthur Stark is a proper subject for rehabilitation, as distinguished from disbarment?

Unanimously, the answer was that Arthur Stark should not be disbarred, that he was a "prime candidate for rehabilitation".

In Fla. Bar v. Tunsil, supra, this Court imposed a one year suspension for a lawyer who pled guilty of grand theft, misappropriation of $10,500 he had been holding in trust for a guardianship. Other recent cases in this Court have sustained disciplinary suspension of lawyers guilty of trust account violations or even more serious dishonest and fraudulent misconduct. See Fla. Bar v. Morse, 587 So.2d 1120 (Fla. 1991); Fla. Bar v. Adler, 589 So.2d 899 (Fla. 1991); Fla. Bar v. McShirley, supra.

In McShirley, the Court approved a three year suspension for an attorney who "knowingly converted client funds for his personal use over a period of several years" (573 So.2d 808). However, the Court took into account mitigating factors present in this case, to wit: "(1) absence of prior disciplinary record; (2) good character or reputation; (3) remorse; (4) timely good faith effort to make restitution, even prior to the initiation to disciplinary proceedings, along with the fact that no client was damaged or harmed; and (5) [McShirley's] cooperative attitude towards the disciplinary proceedings . . ." This Court stated:

> "To disbar McShirley without considering the mitigating factors involved, however, would be tantamount to adopting a rule of automatic disbarment when an attorney misappropriates client funds. Such a rule would ignore the three-fold purpose of attorney discipline set forth in Pahules, fail to take into account any mitigating factors, and do little to further an attorney's incentive to make restitution." (573 So.2d 808-809)[5]

The record demonstrates that none of Mr. Stark's clients were harmed by 16 overdrafts in his trust account only four of which resulted in checks actually being dishonored (APP 1, pg. 3-4).

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[5]See also Fla. Bar v. Self, 589 So.2d 294 (Fla. 1991). In the Florida Bar News of December 1, 1991 at page 26, it was reported that this Court approved a two year suspension for Self's misappropriation of client funds involving use of the client's funds for personal purposes and the return of 74 checks due to insufficient funds as well as borrowing funds from clients and failure to repay a loan. The facts as reported in the Bar News in Self were fax more egregious than in Stark.

The overdrafts occurred due to "severe" financial difficulty, prompting the IRS to close Respondent's operating office account with a lien (T 89). While Mr. Stark made no excuses and expressed deep regret and remorse, the fact remains that no client, other than Mr. Friedman, was harmed or lost money (T 47, 89-93, 114-15).

Mr. Stark did not deny that he owed long-time friend, confidant and client, court reporter Bert Friedman, the money claimed (T 113). It was not paid only because Mr. Stark did not have funds immediately available (T 88).[6] Mr. Friedman acknowledged that if Mr. Stark asked for a $10,000 or $15,000 loan, he (Friedman) would have loaned it (T 24).

There is "plenty of evidence" that Bar "disciplinary officials . . . may have discriminated against certain non-elite lawyers in the past . . ." and that the bulk of Bar disciplinary actions are against sole practitioners or lawyer members of smaller firms. See generally, Wilkins "Who Should Regulate Lawyers?" 105 Harv.L.R. 799, 828, fn. 116 (Feb. 1992).

Professor Wilkins in his 85-page lead article in the February 1992 Harvard Law Review, notes the "paradox" that sophisticated corporate law firms rarely are exposed to Bar disciplinary procedures by their large clients. Ibid, p. 824. The public's remedial actions, if any, against large corporate

[6] Respondent's "severe" financial problems included a foreclosure on his home, and he was "trying to survive" simultaneously caring for his 90-year-old mother (T 31, 118-19, 329, 345).

law firms must be undertaken by other government authorities. See, "U.S. Moves to Freeze Assets of Law Firm for S & L Role," N.Y. Times (March 3, 1992, p. Al).

Respondent is entitled to equal protection of law, and compassionate, fair discipline. He is a sole practitioner, thus more apt to fall victim to the economic uncertainty of maintaining a viable sole practice. Unforseen misfortune can befall any sole practicing lawyer, and may end in unfortunate Bar discipline.

For almost four decades, however, Arthur Stark practiced without a record of misconduct or disciplinary action. He established an outstanding professional reputation, servedthe public as an assistant public defender for 12 years (T 86), and represented clients pro bono who otherwise could not afford legal services.

At age 65, this lawyer does not deserve to die, stigmatized and disgraced as a disbarred lawyer, without so much as the opportunity for redemption, reformation and rehabilitation. See Pahules, supra. The Referee acted compassionately, commendably, and reasonably in making the recommendations he has made to this Court.

The prior unblemished disciplinary history of a Respondent should be accounted for when determining the appropriate punishment for present misconduct. See Fla. Bar v. Weiss, supra [attorney's 28 years without prior misconduct persuaded a reduced penalty from disbarment to a six month suspension); Cf., Fla. Bar v. Shupack, 523 So.2d 1139, 1140 (Fla. 1988).

While Mr. Stark acknowledged he had not complied in a timely fashion with the temporary suspension order, he also indicated regret for not doing so (T 98-99). The client Mr. Stark continued to represent after the suspension order, Bert Craven, was a long-time client who Mr. Stark had represented on the particular case since 1982 (T 99).

It was an "act of mercy." (T 331). Mr. Craven was retired, ill and unable to afford another lawyer (T 137-41). There is no evidence Respondent charged or collected any fee after the temporary suspension order.

In summation, the findings and recommendations of the Referee were fair to society and Mr. Stark, a distinguished member of the Bar most of his life. The Referee's recommendation of a two year suspension nunc pro tunc to May 25, 1990 was severe enough to deter others. See Pahules, supra. This worthy attorney can be rehabilitated and restored as a distinguished member of the legal profession. The discipline recommended should be affirmed.

POINT II

ALL FINDINGS OF FACT OF THE REFEREE ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The Florida Bar, without citing legal authority, devotes the last two pages of its brief (IB 23-24) to a single finding of fact made by the Referee in a 12-page order. Otherwise, the Bar questions none of the Referee's findings. In its recent decision of Fla. Bar v. Weiss, supra, this Court re-

emphasized the standard of review when considering the Referee's findings (16 F.L.W. S653):

> ". . .It is the function af the referee to reweigh the evidence and determine its sufficiency, and we will not substitute our judgment for that of the referee unless it is clearly erroneous or lacking an evidentiary support [the court cited, e.g., Fla. Bar v. Scott, supra].

The Bar requests the Court to reweigh the evidence, redetermine its sufficiency, and to substitute its judgment for the following finding made at page 10 of the Referee's report:

> Mitigating Factors.
>
> (d). Full and free disclosure to the disciplinary board and cooperative attitude toward proceedings. I reject the Florida Bar's argument that Respondent failed to cooperate with the Florida Bar because he failed ta comply with a subpoena duces tecum issued by the Grievance Committee until he was suspended by the Supreme Court of Florida for said failure. I find that the Respondent has the constitutional right to question a subpoena. I find that the Respondent cooperated after he was compelled by the Supreme Court of Florida to turn over his trust account records. (APP I, p.10)

In making his determination that Mr. Stark displayed a cooperative attitude and made a full disclosure, the Referee of course was entitled to weigh conflicting evidence and resolve factual disputes as well as to consider the demeanor and believability of the witness. Mr. Stark testified (T 93-94):

Q. Do you recall that the Florida Bar filed a rule to show cause when you did not bring all of the records required by the subpoena issued by the Grievance Committee?

A. Certainly, and I complied with the rules and gave them whatever else I had.

Initially, I turned over to you all of my checks and Mr. Friedman's ledger account. I didn't turn over the ledger accounts because 1 felt that the subpoena was too broad.

The Supreme Court disagreed with me. I promptly complied and brought to you a receipt of compliance, which you signed.

Q. Yau brought that to me the day you received the order from the Supreme Court suspending you?

A. Yes.

Q. But you didn't bring it previously?

A. No because I was under the impression, and still am under the impression, that the subpoena was too broad, but the Supreme Court said that it wasn't too broad and that I should comply immediately or be suspended.

So I complied immediately, bringing in the balance of the ledges cards.

The Bar's CPA corroborated the Bar's testimony (T 73-74):

Q. You are familiar with a subpoena was issued for Mr. Stark to turn over trust account records?

A. Yes.

Q. Were you the person that was to meet with Mr. Stark when he was to produce the records?

A. Yes, I was there.

> Q. Did the subpoena request records regarding the Friedman transaction, as well as other records regarding the trust account in general?
>
> A. I don't recall exactly at this time what the subpoena requested. I would have to look at it. I don't have a copy of it.
>
> But I was supposed to receive certain records, which were not delivered at that time.
>
> Q. The records were not delivered to you?
>
> A. No. There was only a partial delivery.
>
> Q. Do you recall why they were not fully delivered?
>
> A. At that time, Respondent stated that the subpoena was too broad and he was going to obtain counsel for this matter, at the time he met with me.
>
> Q. You provided an affidavit to me, which was included in the Florida Bar's rule to show cause, requiring that the records be produced in compliance with the subpoena?
>
> A. Yes.

The Bar's CPA acknowledged that Mr. Stark was at no time discourteous or uncooperative (T 81-82). In short, the Referee's finding under "Mitigating Factors" (d) is supported by competent, substantial evidence. That finding plus other mitigating factors determined by the Referee, which the Bar does not and cannot controvert, demonstrates that the report of the Referee in its totality is neither "erroneous, unlawful or unjustified." Rule 3-7.7(c)(5), Rules Regulating Fla. Bar, supra.

CONCLUSION

For the reasons stated herein and based upon the authorities cited, the report of the Referee and its recommendations of discipline should be affirmed and approved in all respects.

Respectfully submitted,

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BY _____
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BY _____
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Of Counsel

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Jacqueline P. Needelman, Esq., Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131; John T. Barry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; Jahn F. Harkneas, Jr., Esq., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 4th day of March 1992.

BY _____
EVAN J. LANGBEIN