IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 76,407

HARVEY L. WEISS,

Respondent.

INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

Appellant, HARVEY L. WEISS, will be referred to as Respondent throughout this Brief. Appellee, THE FLORIDA BAR, will be referred to as such or as the Bar.

References to the Report of Referee will be by the symbol RR followed by the appropriate page number.

References to the transcript of the October 26, 1990 hearing before the referee will be by the symbol TR followed by the appropriate page number. The two exhibits attached to the Bar's Complaint, the Decision and Recommendation of the Disciplinary Review Board and the order of the New Jersey Supreme Court filed May 8, 1990 shall be referred to as CEX A and CEX B respectively.

The Exhibit submitted into evidence at final hearing, the affidavit of Robert J. Prihoda, will be referred to as FHEX A.

STATEMENT OF THE CASE

Respondent, a New Jersey resident and practitioner, was temporarily suspended in Florida by order dated July 27, 1990 pursuant to a petition for temporary suspension filed by The Florida Bar. The Florida Bar v Harvey L. Weiss; Case Number 76,359.

Subsequent to the order of temporary suspension, The Florida Bar filed in this Court on July 30, 1990 its formal complaint and its request for admissions (which exactly tracked the complaint) charging Respondent with misconduct. The sole predicate for the Bar's charges was the May 8, 1990 order of the New Jersey Supreme Court suspending Respondent for six months for various violations of the New Jersey trust accounting rules. Respondent filed an answer to the request for admissions admitting all allegations by the Bar.

Pursuant to notice, final hearing was held on October 26, 1990 before a referee in Tallahassee, Leon County, Florida. Respondent had previously advised the referee and Respondent by letter dated September 14, 1990 that he would not appear at the final hearing.

At final hearing, The Florida Bar presented no witnesses and relied exclusively upon the two documents attached to the Bar's complaint and an affidavit dated August 23, 1985 by a New Jersey staff auditor, Robert J. Prihoda.

The referee issued his report recommending disbarment on November 29, 1990. Respondent retained counsel and timely filed a petition for review in this Court.

STATEMENT OF FACTS

Respondent is a lawyer that practices in Maplewood, New Jersey. He was admitted to the Bar of that state in 1963 and, in the same year, was admitted to The Florida Bar. CEX A and RR5. On May 1, 1990, the Supreme Court of New Jersey issued an order, filed with the Clerk of Court on May 8, 1990, suspending Respondent from the practice of law for six months "for his gross negligence is safeguarding client funds, in violation of DR 9-102,...." CEX A, p. 1.

Predicated entirely upon the aforementioned New Jersey Supreme Court order, The Florida Bar first sought a temporary suspension in Florida, which was obtained on July 27, 1990, and then filed a formal complaint with this Court. The sole basis for disciplinary proceedings is the New Jersey disciplinary order.

Final hearing in this cause was held on October 26, 1990, before the referee duly appointed by this Court. Respondent did not attend. The only evidence submitted to the referee at final hearing were the two exhibits attached to the Bar's complaint, i.e., the Decision and Recommendation of the Disciplinary Review Board (CEX A) and the New Jersey Supreme Court Order of Discipline (CEX B) and an affidavit by a New Jersey Bar auditor dated August 23, 1985 (FHEX A).

Based upon the exhibits submitted to him, the referee disregarded the New Jersey Supreme Court's six-month suspension and recommended that Respondent be disbarred.

These proceedings arose as a result of Respondent's firm being randomly audited by the New Jersey Office of Attorney Ethics (OAE). Respondent's firm consisted of himself and his partner, another New Jersey lawyer, Morris J. Stern. Mr. Stern was admitted to the New Jersey Bar in 1937.

On August 23, 1985, Robert J. Prihoda, a CPA and auditor in the OAE, signed an affidavit setting forth the conclusions of the OAE. FHEX A.

Subsequent to the audit, disciplinary proceedings were commenced in New Jersey. After evidentiary hearings before the appropriate grievance committee, and after consideration of the evidence presented at those hearings, the Disciplinary Review Board (DRB) of the Supreme Court of New Jersey heard arguments on the findings and the discipline to be imposed on May 17, 1989. On February 28, 1990, they issued their Decision and Recommendation. The DRB accepted the committee's factual findings but they rejected the grievance committee's recommendation that Respondent and his partner, Mr. Stern, receive public reprimands. CEX A p.5. They recommended, instead, that Respondent and his partner each receive a six month suspension. CEX A p.13. The Supreme Court of New Jersey adopted the DRB's recommendation. CEX B.

A summary of the February 28, 1990 decision and recommendation by the DRB reveals the following facts. The 1984 random audit of Respondent's trust account covered the period from September 1983 to June 1984. Both Respondent and his partner were charged with six counts of misconduct, including failure to maintain required trust accounts, advancement of legal fees, failure to safeguard client funds, and misappropriation of client funds. CEX A p.2.

The DRB found that:

> For approximately twenty years prior to this ethics matter, respondents had retained a certified public accountant to reconcile their bank statements and to maintain cash receipt and disbursement journals for their partnership, as well as to prepare their tax forms. The accountant's normal procedure was to come to respondents' office one day a month. Upon arrival, he would receive the unopened bank statement from the preceding month and the cash journals, which he would balance. Respondents neither supervised this accountant, nor educated him about the rules concerning attorney trust accounts. Similarly, the accountant never discussed his reconciliations with respondents on a regular basis.
>
> In January, February and April 1984, there were negative balances in the trust account, a fact that the accountant never communicated to respondents. When asked why negative balances were never discussed, the accountant replied he did not view them as significant. (Citations to New Jersey record omitted.) CEX A p.2.

The DRB report indicated that the July 17 and October 10, 1984 audits found shortages in the accounts of three separate clients with identifiable shortages of $39,000.00, $8,000.00 and $45,000.00 respectively. The audit further showed negative

balances on nineteen separate occasions between September 1983 and June 1984 ranging from $2,766.00 to $24,053.00. CEX A p.3.

The DRB found that:

> Respondents did not receive separate notices from the bank concerning these negative balances because the bank provided automatic overdraft coverage at no charge. CEX A p.3.

During the second audit on October 10, 1984, the OEA's auditor discovered a $40,000.00 deposit which had been made into Respondent's trust account on the day after the first audit. That $40,000.00 deposit consisted of Respondent's and Mr. Stern's personal funds. CEX A, p.4.

After trial, the appropriate grievance committee recommended that Respondent and Mr. Stern receive a public reprimand. In so doing, the committee found:

> The facts of this case indicate that (1) no client suffered any actual loss; (2) no client ever filed a complaint regarding the Respondents; and (3) that the Respondents (sic) violation of the Court Rules was not the result of any intentional conduct, but rather was a product of poor record keeping, a lack of comprehension regarding proper accounting procedures, and a misplaced reliance on the depository banks (sic) "overdraft" policy which they perceived would safeguard clients' funds; and (4) a misplaced reliance upon an accountant who was maintaining the trust account records in an improper fashion. CEX A p.5.

The Disciplinary Review Board, after a de novo review of the full record, found that the conclusions of the grievance committee in finding misconduct were fully supported by clear and convincing evidence. In so doing, the DRB made the following observation:

> However, given the inconclusive nature of the evidence, due in part to the absence of appropriate records, the Board cannot find clear and convincing evidence of knowing misappropriation in this instance. CEX A p.6.

While the Board noted that there were "suspicions" that the four invasions of client trust funds that appeared in the record were deliberate, they specifically stated that "suspicions alone, no matter how grave, simply do not meet the necessary standard of proof". CEX A p.7.

The DRB specifically found that Respondent and his partner "abdicated their responsibilities to their clients" in several respects. First, their use of "overdraft protection" on their trust account was improper. Secondly, that overdraft protection did not constitute "loans from the bank to respondents" protecting client funds. CEX A p.9.

The DRB also found misconduct because Respondent and his partner

> further abdicated their responsibilities to their clients by their failure to supervise their accountant's review of their attorney books and records. Apparently, over a period of twenty years, and despite the numerous rule changes governing attorney accounts and recordkeeping, respondents never once insured that their accountant was acting in accordance with the Rules. CEX A p.10.

The Board then found that the two subject New Jersey lawyers were "grossly negligent" in their operation of their trust accounts. CEX A p.11. The DRB also found that it could not

> conclude that respondents <u>deliberately</u> designed an accounting system that would enable them to misappropriate client funds.

> However, the Board does conclude that, contrary to Gallo and James respondents have no one but themselves to blame for their inexcusable derelictions in failing to attend to the maintenance of their attorney's books and records. (Emphasis that of the Board). CEX A p.12.

The Board then specifically found that neither respondent had been the subject of prior discipline and that no client suffered any financial injury as a result of their misconduct. It then unanimously recommended that each New Jersey lawyer be suspended from the practice of law for six months.

Three months after the DRB's order, the Supreme Court of New Jersey issued its order adopting the DRB's finding and suspending Respondent from the practice of law effective May 22, 1990. The Court's order specifically noted that Respondent was suspended for six months "for his gross negligence in safeguarding client funds,...." There are no other grounds for misconduct stated in the Court's order.

SUMMARY OF ARGUMENT

This Court has broad discretion in determining the discipline to be imposed for misconduct by members of The Florida Bar. A referee's recommended discipline, unlike his findings of fact, is subject to broad review. The Florida Bar v McCain, 361 So.2d 700 (Fla. 1978). While this Court is not bound by the discipline imposed by sister states in disciplining lawyers practicing in their jurisdiction, The Florida Bar v Sickmen, 523 So.2d 154 (Fla. 1988) and The Florida Bar v Abrams, 402 So.2d 1150 (Fla. 1981), it stands to reason that disbarring a Florida lawyer for misconduct that occurred in New Jersey, and for which a New Jersey Supreme Court only imposed a six-month suspension, is an improper discipline.

The New Jersey Supreme Court found Respondent guilty of nothing more than "gross negligence in safeguarding client funds,...." CEX B. Although Respondent was charged with misappropriation of trust funds, that allegation fell by the wayside during contested disciplinary proceedings.

Respondent argues that the referee was unduly influenced by the affidavit of the New Jersey Bar's staff auditor, Robert J. Prihoda, that was submitted on August 23, 1985, prior to New Jersey's evidentiary proceedings. FHEX A. Mr. Prihoda's findings and conclusions were obviously drafted for the use of the Office of Attorney Ethics (OAE) for their use in charging the Respondent for misconduct in upcoming disciplinary proceedings.

Mr. Prihoda's conclusions were subsequently rebutted in disciplinary proceedings and did not form the basis for the New Jersey Supreme Court's order of discipline.

Respondent has practiced law in New Jersey for 28 years without mishap. No client was harmed by his misconduct and, although he was guilty of "gross negligence" in his handling of trust funds, he should not be disbarred.

New Jersey has a mandatory disbarment rule for misappropriation of trust funds. In re Wilson, 409 A.2d 1153 (N.J. 1979); In re Noonan, 506 A.2d 722 (N.J. 1986). Had Respondent misappropriated funds, he would have been disbarred in that state. However, after evidentiary proceedings were concluded, neither the New Jersey Disciplinary Review Board nor the New Jersey Supreme Court found misappropriation. Respondent was disciplined solely for gross neglect.

ARGUMENT

THIS COURT SHOULD REJECT THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE DISBARRED BECAUSE IT DISREGARDS THE FACTUAL FINDINGS MADE BY THE NEW JERSEY SUPREME COURT AND IT RESULTS IN A DISCIPLINARY SANCTION IN FLORIDA THAT IS GROSSLY DISPROPORTIONATE TO THE SIX-MONTH SUSPENSION RESPONDENT RECEIVED IN NEW JERSEY.

Respondent asks this Court to reject the Referee's recommendation that Respondent be disbarred for misconduct described as "gross negligence in safeguarding client funds,...." (CEX B), misconduct which occurred in New Jersey in 1984. He asks that he be suspended from the practice of law for six months with proof of rehabilitation before reinstatement. The New Jersey Supreme Court imposed a six month suspension for Respondent's misconduct and, although he recognizes that the Florida Supreme Court is not bound by New Jersey's discipline, Respondent urges this Court to impose an equivalent sanction in Florida.

Respondent is only seeking review of the Referee's recommended discipline. While this Court has consistently found that a referee's findings of fact will not be overturned unless there is no evidence in the record supporting those findings, this Court has not given the same presumption of correctness to a referee's recommended discipline. Any question about the Court's discretion in reviewing recommended disciplinary sanctions was laid to rest in The Florida Bar v McCain, 361 So.2d 700 (Fla. 1978) at page 708. There, Justice Sundberg in his concurring opinion wrote that:

> In the first instance, it should be observed that the discipline appropriate to ethical misconduct is the sole province and responsibility of this Court. While the findings of fact by the Referee in a disciplinary proceeding "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding," (citations omitted) no similar presumption accompanies his recommendation of disciplinary measures to be applied.

See also The Florida Bar v Langston, 540 So.2d 118 (Fla. 1989) at page 120 where the Court stated that:

> Our scope of review on recommendations for discipline is broader than that afforded to a referee's findings of fact. (Citation omitted)

The Supreme Court of New Jersey, in an opinion filed May 8, 1990, adopted the findings and recommendations of its Disciplinary Review Board (DRB) and suspended Respondent for six months "for his gross negligence in safeguarding client funds,...." CEX B. The only misconduct found by the New Jersey Supreme Court was gross negligence. The DRB specifically rejected a finding of "knowing misappropriation" of trust funds. CEX A p.6.

Rule 3-4.6 of the Rules Regulating The Florida Bar states:

> A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

Respondent is not allowed to contest the New Jersey Supreme Court's finding that he is guilty of gross negligence in safeguarding trust funds. That fact is conclusively proven. However, The Florida Bar is also bound by the New Jersey Supreme Court's findings unless it presents competent evidence to prove other violations. No such evidence was submitted in the case at Bar.

The only evidence submitted by The Florida Bar in this action was the DRB's report and recommendations, CEX A, the New Jersey Supreme Court's order suspending Respondent for six months, CEX B, and the August 23, 1985 affidavit of the New Jersey Office of Attorney Ethics (OAE) staff auditor. FHEX A. The latter document was drafted to assist the OAE in prosecuting Respondent for misconduct. However, after disciplinary trial and appellate review, notwithstanding the auditor's allegations, the DRB and the New Jersey Supreme Court found a lack of clear and convincing evidence showing that Respondent knowingly misappropriated trust funds. CEX A p.6.

The Florida Bar has tried to transform this case from one involving gross negligence in maintaining trust accounts to a knowing misappropriation of trust funds without presenting any competent evidence to support their allegations.

Just as Respondent is prohibited from challenging the New Jersey Supreme Court's finding that he is guilty of misconduct, The Florida Bar should be prohibited from enhancing his misconduct if they are basing their entire case on the New Jersey

finding of misconduct.

The referee was obviously greatly influenced by the only exhibit submitted in evidence at final hearing (other than the two exhibits attached to the complaint and request for admissions.) FHEX A. That exhibit consists of an affidavit dated August 23, 1985, almost five years before the Supreme Court of New Jersey disciplined Respondent, and was obviously prepared to assist the OAE in its prosecution of Respondent. That the referee was unduly influenced by this affidavit was made manifest on page three of his report. There, he said:

> The Referee hereby incorporates Florida Bar exhibit "A", Affidavit and Report of New Jersey State Bar Auditor as specific findings of violations of The Florida Bar Rules of Professional Conduct concerning Trust Accounts.
>
> The Audit Report shows a conversion and misappropriation of trust funds belonging to the Respondent's clients. All the overdrafts and all the negative balances represent misappropriation for the personal use of Respondent and his law firm.

The findings of the auditor, and vicariously, the referee, are directly rebutted by one of the exhibits that The Florida Bar attached to its complaint. That exhibit, the Decision and Recommendation of the DRB in New Jersey, and dated February 28, 1990, after evidentiary trial and argument, specifically rejected a finding of "knowing misappropriation in this instance" CEX A, p.6.

At final hearing, The Florida Bar submitted a charging document, without notice that it was going to be presented in

evidence, as "proof" of misconduct that directly contradicts the Bar's exhibits attached to the complaint. Those exhibits, the DRB's report and the New Jersey Supreme Court's order, both contained findings that clearly contradicted Mr. Prihoda's affidavit.

Respondent submits that the "audit report" was nothing more than an affidavit by a biased party, who is an employee of the prosecution wing of the Office of Attorney Ethics, and should not be considered competent evidence of misconduct. Particularly when, as here, his opinions were found lacking after trial.

The New Jersey Supreme Court's order of discipline is conclusive proof of misconduct. It is conclusive proof, however, only of "gross negligence". The Florida Bar cannot have its cake and eat it too. If they are going to stand on a foreign disciplinary order as the sole predicate for their case, then they are bound by the foreign disciplinary findings also.

It cannot be denied that Respondent was hoist on his own petard by his failure to appear at the final hearing. However, the Bar's complaint filed in this cause charged him specifically with "gross negligence in safeguarding client funds". Comp., para. 2. The Bar attached as exhibits, and Respondent admitted that they were proper for evidentiary purposes, the DRB's findings and the New Jersey Supreme Court's order. There is nothing in the record that indicated to the Respondent that The Florida Bar was going to enter into evidence an affidavit by a clearly prejudiced party as the proof for proving misconduct that

was not charged in the complaint and which was not found by the New Jersey Supreme Court.

Where, as here, an affidavit by a prejudiced party, who did not appear at hearing, is directly contradicted by the findings of a court of competent jurisdiction, made after trial, the affidavit should be rejected as competent proof of misconduct.

The Bar based its case on the New Jersey order of discipline. It is limited by the factual findings contained in that order of discipline.

Respondent recognizes that this Court is not bound by the sanction recommended by the foreign jurisdiction. The Florida Bar v Abrams, 402 So.2d 1150 (Fla. 1981); The Florida Bar v Sickmen, 523 So.2d 154 (Fla. 1988). As argued below, Respondent submits that the six month suspension imposed in New Jersey is comparable to sanctions imposed in Florida for similar misconduct.

It is very significant that the New Jersey Supreme Court only found Respondent guilty of gross negligence in maintaining his trust account rather than misappropriation of trust funds. In New Jersey, a finding of knowing misappropriation of trust funds results in a virtually automatic disbarment. In re Wilson, 409 A.2d 1153 (N.J. 1979); In re Noonan, 506 A.2d 722 (N.J. 1986). The fact that New Jersey did not disbar Respondent reinforces the fact that his misconduct did not involve willful intent.

In 1979, New Jersey adopted a policy requiring disbarment in virtually all knowing misappropriation of trust fund cases. That policy was set forth in the Wilson case, supra, wherein Chief Justice Robert N. Wilentz (the same Chief Justice Wilentz that signed Respondent's six month order of discipline) stated at 409 A.2d 1154:

> In this case respondent knowingly used his clients' money as if it were his own. We hold that disbarment is the only appropriate discipline. We also use this occasion to state that generally all such cases shall result in disbarment. We foresee no significant exceptions to this rule and expect the result to be almost invariable.

The Supreme Court of New Jersey has not abandoned the Wilson rule. In 1986 they stated in the Noonan case, supra at page 723 that:

> The misappropriation that will trigger automatic disbarment under In re Wilson (citation omitted), disbarment that is "almost invariable," id. at 453, 409 A.2d 1153, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking.

Notwithstanding their virtually automatic disbarment rule, the local grievance committee that investigated Respondent's case recommended a public reprimand. The committee based its recommendation on the following facts:

> The facts of this case indicate that (1) no client suffered any actual loss; (2) no client ever filed a complaint regarding the Respondents; and (3) that the Respondents (sic) violation of the Court Rules was not the result of any intentional conduct, but rather was a product of poor record keeping, a lack of comprehension regarding proper

> accounting procedures, and a misplaced reliance on the depository banks (sic) "overdraft" policy which they perceived would safeguard clients' funds; and (4) a misplaced reliance upon an accountant who was maintaining the trust account records in an improper fashion. CEX A p.5.

The New Jersey DRB rejected the committee's recommended public reprimand. However, they adopted the committee's findings. The DRB in adopting the committee's report, made the following observation:

> Upon a de novo review of the full record, the Board is satisfied that the conclusions of the committee in finding respondents guilty of unethical conduct are fully supported by clear and convincing evidence.
>
> The Board finds the facts of this case to be disturbing in a number of aspects. In the Quartier matter, for example, respondents appear to have taken a substantial advance fee. However, given the inconclusive nature of the evidence, due in part to the absence of appropriate records, the Board cannot find clear and convincing evidence of knowing misappropriation in this instance. (Citation omitted) CEX A p.6.

After discussing some of the disturbing aspects of the case, the DRB specifically rejected knowing misconduct. It stated:

> These suspicions aside, the Board does not find, by clear and convincing evidence, that any of the four noted invasions of client trust funds were undertaken with a requisite knowledge. Suspicions alone, no matter how grave, simply do not meet the necessary standard of proof. CEX A p.7.

In essence, the New Jersey grievance committee and the Disciplinary Review Board found that the Respondent and his partner engaged in conduct involving the gross disregard of their trust accounting responsibilities. However, they did not steal

any trust funds.

Respondent submits that the referee was unduly influenced by the affidavit of the New Jersey auditor that conducted the random audit of Respondents' trust account in 1984. FHEX A. The auditor, employed by the New Jersey disciplinary authorities, prepared an affidavit that obviously was designed to be submitted into evidence in forthcoming disciplinary proceedings. The content of that 1985 affidavit is belied by the ultimate findings after four years of disciplinary proceedings. As pointed out above, after trial and appellate review it was found that Respondent and his partner did not engage in any knowing violations of the trust accounting rules. They were grossly negligent, perhaps. However, they did not engage in a knowing misappropriation of trust funds.

In rejecting New Jersey's recommendation that Respondent be suspended for six months and enhancing it to disbarment, the referee completely disregarded the three purposes of discipline as set forth in The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970) at page 132. There, the Court stated that:

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. 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.

By recommending disbarment for misconduct involving gross negligence, the referee has improperly converted this case into penal proceedings, i.e., proceedings involving punitive considerations designed to punish the Respondent. In so doing, the referee ignored the fact that

> Bar disciplinary proceedings are remedial and are designed for the protection of the public and the integrity of the courts. DeBock v State, 512 So.2d 164 (Fla. 1987) at 166.

Respondent's misconduct does not warrant the maximum discipline available to this Court. The seriousness of an order of disbarment was described by this Court in The Florida Bar v Hirsch, 342 So.2d 970 (Fla. 1977) at page 971. There the Court stated that:

> Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the Rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the rules of the Society of which they are a part.

In Hirsch, the Court referred to the works of Henry S. Drinker, who for years was the foremost authority on ethics in the United States. Quoting from Mr. Drinker's book Legal Ethics, the Hirsch court at page 971 stated:

> Ordinarily the occasion for disbarment should be the demonstration, by a continued course

> of conduct, of an attitude wholly inconsistent with the recognition of proper professional standards. Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. For isolated acts, censure, private or public, is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror or court official, or the like, should suspension or disbarment be imposed. Even here the lawyer should be given the benefit of every doubt, particularly where he has a professional record and reputation free from offenses like that charged. Similarly, such extreme measures should be invoked only in case of fairly recent offenses, proof in refutation of which would be reasonably available to respondent, except, of course, in cases where he was shown to have actively concealed them. Just as a lawyer who has been habitually dishonest will almost certainly revert to his low professional standards when necessity, temptation, and occasion recur, so one who has been consistently straight and upright can properly be trusted not to repeat an isolated offense unless of such a nature as of itself to demonstrate a basically depraved character.

Respondent has not demonstrated a course of conduct "wholly inconsistent" with professional standards and which clearly indicates that he never should have been a lawyer. The order of disbarment recommended by the referee in this case certainly does not give Respondent "the benefit of every doubt". Respondent has practiced law without difficulty for almost thirty years without prior disciplinary order. CEX A pp. 1, 13. The New Jersey Supreme Court, with its automatic disbarment rule, has recommended a six month suspension. Giving Respondent the benefit of the doubt mandates his not being disbarred in Florida.

Suspending Respondent in Florida for six months will satisfy all three purposes set forth in Pahules. Suspensions of over 91 days require proof of rehabilitation before reinstatement. Rule 3-5.1(e). Proof of rehabilitation proceedings require a new hearing before a referee and put the burden on the lawyer to show that he has rehabilitated himself to the extent necessary to resume the practice of law. The Florida Bar v Dawson, 131 So.2d 472, 472 (Fla. 1961). Such reinstatement proceedings normally take six to nine months. The Florida Bar v Roth, 500 So.2d 117 (Fla. 1986) at 118.

A six month suspension, with proof of rehabilitation before reinstatement, will guarantee protection of the public as required by Pahules.

The second purpose of discipline, a sanction that is fair to the lawyer, is definitely violated by an order of disbarment. Respondent has practiced law for 28 years without mishap. An order of disbarment will mandate his removal from the Bar for at least five years and thereafter until he passes all parts of the Bar examination and satisfies the Board of Bar Examiners character investigation. For all intents and purposes, disbarring Respondent for the misconduct that occurred in 1984 will permanently disbar him in Florida. That goes far beyond a discipline that will "encourage reformation and rehabilitation". Pahules, p. 132.

A six month suspension will remove the Respondent from the practice of law long enough to "punish a breach of ethics" but

gives him the opportunity to be reinstated to practice if he can prove rehabilitation.

The third purpose of Pahules, i.e., deterrence, will also be met by a six month suspension. Closing down one's office for six months and thereafter for the additional six to nine months that it takes to prove rehabilitation is such a severe discipline that no lawyer, who contemplates future misconduct, would risk receiving such a sanction.

The six month suspension imposed in New Jersey is consistent with sanctions imposed in Florida for similar misconduct. For example, in The Florida Bar v Miller, 548 So.2d 219 (Fla. 1989) a lawyer received a 90 day suspension (i.e., one not requiring proof of rehabilitation) for "sloppy accounting and inattention" and for having a deficit in his trust account that at one point totaled approximately $28,000.00. Similarly, in The Florida Bar v Burke, 517 So.2d 684 (Fla. 1988), a lawyer received a 90 day suspension for record keeping violations and for failure to promptly disburse trust funds.

In The Florida Bar v Harper, 518 So.2d 262 (Fla. 1988) a lawyer received a six month suspension for, in part, disbursing to himself four trust account checks totaling $12,100.00 for improper purposes. In disciplining Harper, this Court noted that:

> Apparently, Harper's record keeping in his trust account was so inadequate that the Bar had to reconstruct all the transactions to complete the review. The review revealed that Harper mishandled trust account monies, utilized trust account funds for personal purposes and, on several occasions, wrote

checks against the trust account when there were insufficient funds to cover the checks.

In The Florida Bar v Greenfield, 517 So.2d 16 (Fla. 1987) a lawyer received but a one year suspension for taking at least $20,000.00 out of an estate account for improper purposes. In essence, Mr. Greenfield improperly lent himself money out of an estate account.

Mitigation obviously plays a very important part in determining any discipline to be imposed. In The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986) a lawyer guilty of misappropriating trust funds and bouncing checks was suspended for one year. Despite the fact that he had a prior disciplinary record (a private reprimand) and that he was criminally prosecuted for his theft, the Court did not see fit to disbar Mr. Tunsil. The lawyer's alcoholism, his cooperation with the Bar and his restitution were considered sufficient mitigation to obviate the necessity of disbarment.

As was true in Tunsil, the Respondent at Bar has sufficient mitigation to obviate the necessity of disbarment. Most importantly, there has never been a finding of any willful misconduct. Respondent has practiced law for 28 years without prior disciplinary history and there was no harm to any client as a result of his reprehensible bookkeeping. It was specifically found that Respondent relied on a certified public accountant to take care of his trust accounts, that the accountant never discussed his reconciliations with Respondent and that the accountant did not see fit to bring shortages in the trust

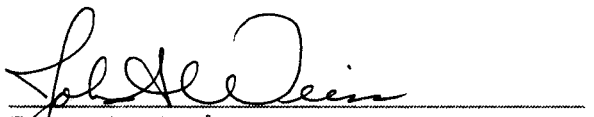
account to Respondent's attention because he did not "view them as significant". CEX A p.2. Most importantly, the day after the initial audit on their trust account, Respondent and his partner deposited $40,000.00 into their escrow account to make up the shortages resulting from their negligence.

Respondent's misconduct occurred in 1984. In the seven years since then, he has conducted himself in a exemplary manner, proving that he is not a threat to the public. Disbarment is simply not warranted in the case at Bar.

CONCLUSION

This Court should reject the referee's recommendation that Respondent be disbarred and substitute a six month suspension as the appropriate sanction to be imposed for Respondent's "gross negligence in safeguarding client funds,...".

Respectfully submitted,



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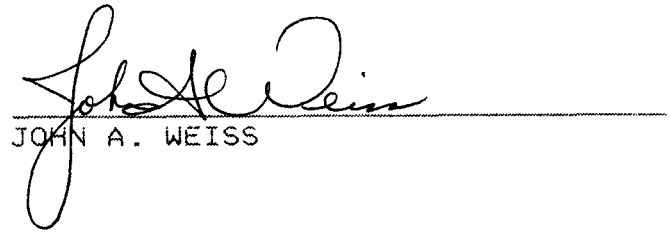
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief was mailed to James N. Watson, Jr., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 30th day of January, 1991.



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