IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 76,407

HARVEY L. WEISS,

Respondent.

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# REPLY BRIEF

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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 argues that he should not be disbarred when a foreign jurisdiction, after a full trial on the merits and all relevant evidence was considered, determined that a six-month suspension was an appropriate discipline for "gross negligence in safeguarding client funds,...." There has been no such full consideration of the evidence in Florida. To the contrary, two of the Bar's three exhibits are orders from New Jersey specifically supporting the six-month suspension for gross negligence. The only other exhibit was a charging document, containing rank hearsay, which obviously was not adopted as gospel by the New Jersey disciplinary proceedings or the Respondent would have been disbarred.

The Bar would have this Court believe that Respondent cannot now attack the nature of the evidence presented at final hearing. This is not so. The nature of the evidence considered by the referee is very relevant in determining the sanction to be applied. For example, in The Florida Bar v Dawson, 318 So.2d 385 (Fla. 1975) the Supreme Court stated on page 386 that:

> Because this finding is based in part on circumstantial evidence, however, we would not be inclined to disbar respondent if this were the only offense with which he had been charged.

Mr. Dawson was, in fact, disbarred. However, the court made plain that circumstantial evidence alone would not have been sufficient to disbar him.

Respondent in the case at Bar argues that a single hearsay document should not be sufficient predicate to disbar him in Florida when a full hearing on the merits resulted in a six-month suspension in New Jersey.

Respondent would emphasize in reply his citation on page 19 of his initial brief to this Court's language in The Florida Bar v Hirsch, 342 So.2d 970 (Fla. 1977) at page 971 to the effect 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.

Similarly, in The Florida Bar v Felder, 425 So.2d 528 (Fla. 1982) the Court stated that disbarment should only be imposed "in those rare cases where rehabilitation is highly improbable". There, Mr. Felder had been a member of the Bar for many, many years and it was his first brush with disciplinary proceedings. The Court noted that there was "no showing" that his rehabilitation was "highly improbable". The same is true with the case at Bar. Respondent was admitted to the New Jersey Bar in 1963 and his 1984 offense is his only brush with disciplinary authorities.

In The Florida Bar v Reed, 299 So.2d 583 (Fla. 1974) the Supreme Court reduced a referee's recommendation that Mr. Reed be disbarred to a one year suspension. In doing so, the Supreme Court observed on page 586 that:

> It is our view that the case made is not sufficiently strong to justify disbarment because there are a number of inconclusive factors and uncertainties in the evidence.

The Court in Reed also observed that the referee "undoubtedly was provoked" by respondent's attitude. There can be no doubt that in the case at Bar, as in Reed, the referee was negatively affected by Respondent's failure to appear at final hearing in Florida.

That the degree of evidence proved at final hearing has a bearing on the sanctions was also made evident in The Florida Bar v Wendel, 254 So.2d 199 (Fla. 1971) at 201. In Wendel, the Court rejected a two year suspension recommended by the referee and imposed a public reprimand with two years probation. In so doing, the Court made the following statement:

> We agree that the findings upon the disputed evidence indicate Wendel should be subject to some disciplinary measures, but we do not feel they should be as severe as those recommended by the Referee and the Board of Governors. The evidence in the record is not as clear and convincing to us of misconduct on Respondent's part to the degree the Referee found it. That is to say, we do not conclude therefrom that Respondent's misbehavior reached proportions warranting the extremely severe punishment recommended by the Referee and the Board of Governors, respectively. Disbarment and suspension should not be imposed lightly....

Dawson, Felder, Reed and Wendel emphasize that the nature of the evidence relied upon by the referee to make his factual findings are relevant in determining the sanctions to be imposed. In the case at Bar, the only evidence refuting the finding by the New Jersey Disciplinary Review Board (DRB) that Respondent did not knowingly misappropriate trust funds is the hearsay affidavit of an auditor hired by the Bar prosecutors to review Respondent's records. It must be assumed that the Respondent sufficiently refuted that auditor's findings in subsequent disciplinary proceedings to convince the New Jersey Supreme Court that their automatic disbarment rule for misappropriation of trust funds should not be imposed. See In re Wilson, 409 A2d 1153 (NJ 1979) and In re Noonan, 506 A2d 722 (NJ 1986).

As previously argued, this Court has wide discretion in imposing disciplinary sanctions. This Court is free to reject the Referee's recommendation of disbarment and to substitute a suspension therefor. The Florida Bar v McCain, 361 So.2d 700 (Fla. 1978).

As argued on pages 22 and 23 of his initial brief, Respondent submits that the case law in Florida supports his receiving a six-month suspension for his New Jersey misconduct. In The Florida Bar v Harper, 518 So.2d 262 (Fla. 1988), Mr. Harper received a six-month suspension for improperly disbursing to himself four trust account checks totaling $12,100.00.

In The Florida Bar v Miller, 548 So.2d 219 (Fla. 1989) and The Florida Bar v Burke, 517 So.2d 684 (Fla. 1988), the accused lawyers received 90 day suspensions for deficits in their trust account and sloppy bookkeeping. That, in essence, is what the Respondent in the case at Bar was found guilty of doing by the New Jersey Supreme Court. The six-month suspension Respondent asks this Court to impose is twice that given in 1989 and 1988 to Messrs. Miller and Burke.

The Florida Bar refers to Respondent using his trust account as an interest free loan account. Respondent submits that the evidence does not support that characterization. There are two references in the DRB's report, CEX A, pages 4 and 9, to the respondents (plural) referring to the automatic overdraft situations as being loans from the bank. However, the Florida record is silent as to which Respondent (Mr. Weiss or his co-defendant and partner, Mr. Stern) made that statement or in what context.

The New Jersey findings unequivocally show no knowing misappropriation by Respondents. As cited in the DRB's findings.

> 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 DRB specifically did not find knowing misappropriation by Respondents. CEX A p. 6.

The Bar correctly points out that the Respondent was extremely lax in supervising his CPA. Respondent is not arguing to the Supreme Court that he is not guilty of "gross negligence" in maintaining his trust account. But there is a wide, wide gulf between negligence and a knowing theft of trust funds. Respondent submits that the appropriate sanction for his offense, i.e., negligence, is a six-month suspension and not disbarment.

The fact that Respondent and his partner (who was equally responsible for the misconduct involved in this case) immediately deposited $40,000.00 of their own funds into their trust account the day after the New Jersey Bar's auditor examined their files is not only a substantially mitigating factor, but it reinforces their claims that they were not aware that their trust account was short. The day after they learned of the shortage, the Respondents were able to restore the missing money.

The evidence showing that Respondent directly benefited from the shortages in his trust account is minimal. The auditor did not state that the money went into Respondent's pocket. He referred to shortages and deficits and alluded to fees that were prematurely disbursed to the firm. He did not state that the money went to Respondent instead of his partner.

A major shortcoming of the auditor's affidavit as opposed to the DRB report, is that he it does not explain the role the

Respondents' CPA had in caring for the books. It is extremely important to note that the CPA, who was in charge of keeping those books, testified that he did not bring the early 1984 shortages to the Respondents' attention because he did not view them as "significant". CEX A p. 2.

The Bar would have this Court ignore the substantial mitigation that appears in this case. However, that mitigation is very important. Respondent has been a lawyer 28 years and this is his only offense. Furthermore, interim rehabilitation is present here. As evidenced by Respondent's CPA's December 10, 1984 letter (attached to the audit report), the firm switched over to a one-write system and completely revamped their record-keeping system. The record shows no violations in the six years since that December 1984 letter.

The evidence showing that Respondent received stolen trust funds is completely lacking. The findings of the New Jersey disciplinary review board and the New Jersey Supreme Court, after full hearing and appeal, were that Respondent was not guilty of misappropriation but that he was only guilty of "gross negligence". Their finding should be given great weight by this Court in determining the appropriate sanction.

The evidence relied upon by the Referee and the Bar in seeking disbarment consists entirely of a hearsay document, prepared by a staff member of the prosecutors office, and which is clearly designed to be a charging type document. It should not be relied upon as the sole basis to enhance six-fold the

findings and recommendations of a sister Court that were made after full hearing.

To disbar Respondent on such flimsy evidence and in direct contravention of a full evidentiary hearing runs afoul of this Court's pronouncements that disbarment should only be imposed in rare circumstances where the proof of misconduct is unequivocal.

## CONCLUSION

This Court should reject the Referee's recommendation that Respondent be disbarred and impose as the appropriate discipline a six-month suspension with proof of rehabilitation before reinstatement.

Respectfully submitted

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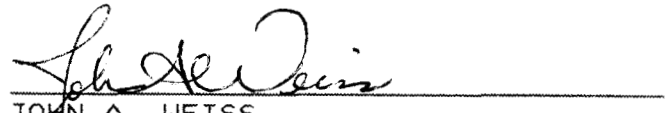
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was mailed to James N. Watson, Jr., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 12th day of ~~February~~ March, 1991.



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