IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

HUGH MACMILLAN, JR.

Respondent.

______________________/

CASE NO. 76,563

REPLY BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. THE OVERALL CIRCUMSTANCES OF THIS CASE DO NOT SUPPORT THE SEVERE SANCTION SOUGHT BY THE BAR, BUT STRONGLY SUGGEST THAT A 91-DAY SUSPENSION WOULD BE A MORE APPROPRIATE PENALTY 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

The Florida Bar v. Burke,
578 So.2d 1099 (Fla. 1991) 3

The Florida Bar v. Davis,
577 So.2d 1314 (Fla. 1991) 3

The Florida Bar v. Hirsch,
359 So.2d 856, 857 (Fla. 1978) 5

The Florida Bar v. McShirley,
573 So.2d 807 (Fla. 1991) 3, 4

The Florida Bar v. Weaver,
356 So.2d 797, 799 (Fla. 1978) 5

I.

THE OVERALL CIRCUMSTANCES OF THIS CASE DO NOT SUPPORT THE SEVERE SANCTION SOUGHT BY THE BAR, BUT STRONGLY SUGGEST THAT A 91-DAY SUSPENSION WOULD BE MORE A APPROPRIATE PENALTY.

The Bar expends much effort in stretching the very thin record in this case in a vain attempt to support its hyperbole and mischaracterization of Mr. MacMillan's admitted mistakes. For example, the Bar attempts to create the false impression that Mr. MacMillan resisted and refused to pay for the three missing pieces of jewelry. What the Bar fails to make clear, however, is that Scott Ellison's guardianship was completely closed in April, 1989, and the issue of the missing pieces of jewelry was not even mentioned. (TR 140-43). The first time that Mrs. Ellison, Scott's mother, brought up the issue of payment for the jewelry was in her letter to Mr. MacMillan of January 10, 1990, which included an appraisal of the missing items. Concurrently, Mrs. Ellison sent a copy of this original request to the Bar. See Resp. Exhibit 1.[1] (TR 42-44). After receiving Mrs. Ellison's letter, Mr. MacMillan promptly resolved the issue.

The Bar also speculates that knowledge of the omission of the two week, in-out transfer from the guardianship report might have moved the probate judge to revoke the letters of guardianship and impose forfeiture of the attorney's fees. Bar's Answer Brief at 20. But the Bar has no basis for such speculation, and indeed had

[1] The Bar utterly mischaracterizes this letter conveying the appraisal and requesting payment as being a "grievance."

the opportunity to examine the very probate judge who handled the Ellison guardianship and who actually approved the guardianship report, Judge Edward Rodgers, when he testified on Mr. MacMillan's behalf. (TR 89-97; 117; Resp. Exhibit 2). Having failed to ask the very probate judge who approved the report what he would have done had he known of the two-week transfer, the Bar is certainly not now entitled to conjecture.

The Bar spends much time discussing charges it could not even prove. The Bar's claim at the hearing that Mr. MacMillan improperly obtained fees was flatly rejected by the Referee, and the Bar's attempt to resurrect this unfounded charge should be discounted. Likewise, its claim at the hearing that Mr. MacMillan intentionally misrepresented a piece of the missing jewelry to Mrs. Ellison was also rejected by the Referee for lack of proof.

In an effort to cultivate a motive for stealing from Scott's guardianship account, the Bar repeatedly asserts, without record support, that Mr. MacMillan was suffering financial stress and strain. The Bar, however, offered no evidence as to Mr. MacMillan's financial condition. The only mention of this issue is Mr. MacMillan's acknowledgement that he "needed the funds" when he made the two-week transfer. But the Bar omits the very next portion of the record on the issue of finances, which flatly refutes the Bar's inference and speculation:

> Q What is the basis for your making installment payments to Mrs. Ellison in payment to Scott for the items of jewelry that were missing? Was the basis of the

installments because you were financially strapped, sir?

A No. It was a better way to manage an additional obligation in a monthly budget. It was an expense that I had not anticipated, and I asked her if it was all right if I spread it over several months and she said fine.

(TR 82) (emphasis added). Thus, the Bar's entire case for establishing an intent to steal is built upon its unsupported inference and exaggeration of the record.

In deprecating Mr. MacMillan's argument concerning the lack of proof of intent to cover-up the two-week transfer as "quibbling pettifoggery," the Bar displays a disturbing indifference to this Court's requirement of a specific finding of knowing or intentional misappropriation to support a violation involving dishonesty. See The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991). Contrary to the Bar's ridicule, this argument is well-supported by the Referee's own ambivalence on this issue when the Referee found that Mr. MacMillan merely "neglected" to include the two-week transfer in the guardianship report. Since so much of the Bar's basis for requesting a severe punishment rests on this inconsistent finding, this Court should seriously weigh this factor in determining the appropriate sanction.

The Bar, in its effort to find support for a lengthy suspension, ignores that this Court has (even after January, 1991) imposed less severe sanctions in cases involving trust account improprieties. See Bar v. Burke; The Florida Bar v. Davis, 577 So.2d 1314 (Fla. 1991). Furthermore, in the case on which the Bar

principally relies, The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991), the Bar's demand for disbarment was rejected by the Court in favor of a suspension even though the attorney admitted repeatedly converting clients' funds for personal use over a six-year period, totaling $27,000. Certainly, Mr. MacMillan's conduct does not approach such behavior and does not warrant nearly so severe a sanction as that imposed in Bar v. McShirley.

The Bar attempts to incorrectly apply its own guidelines on discipline (Florida Standards for Imposing Lawyer Sanctions) by asserting certain aggravating factors which were not established or accepted by the Referee. For example, the Referee never found, nor was there any support for, the Bar's conclusion that Mr. MacMillan refused to acknowledge his mistakes. Indeed, he conscientiously attempted to correct his mistakes. The Bar's insistence that Mr. MacMillan did not acknowledge his omission in the guardian's report is also inaccurate since Mr. MacMillan recognized that the report was incomplete. He merely explained what he was thinking at the time he omitted the two-week transfer, but he does not dispute that a more prudent attorney might well have included this transfer.

Likewise, there was absolutely no proof that Mr. MacMillan was indifferent to making restitution, nor did the Referee make any such finding. Indeed, Mr. MacMillan made complete restitution of the $4,000 transfer in only two weeks, immediately disclosing the transaction to Mrs. Ellison and receiving her approval. Further, after Mrs. Ellison's original request for payment for the lost jewelry and her provision of an appraisal, Mr. MacMillan promptly

settled this matter with her. Therefore, the Bar's assertion that he was not concerned with restitution is an assumption which is without record support.

The Bar also overlooks in mitigation that Mr. MacMillan has effectively been punished through the obviously adverse publicity of this proceeding during his unsuccessful campaign for a circuit court judgeship. The Bar further ignores that Mr. MacMillan has displayed remorse for his mistakes, has paid for the mistakes, and admitted virtually every allegation which the Bar was ultimately successful in proving. These factors, plus his well-established reputation for honesty, his decades of service to the disenfranchised, and his lack of any prior disciplinary problems, all strongly suggest that a penalty of less than a two-year suspension is appropriate in this case.

The Bar also mistakes the applicable standard for review of a referee's findings of fact, which are upheld "unless clearly erroneous <u>or without support in the record</u>." <u>The Florida Bar v. Hirsch</u>, 359 So.2d 856, 857 (Fla. 1978) (emphasis added). In the same vein, the Bar urges that the Referee's recommendation as to penalty carries a presumption of correctness to which this Court must defer. However, this Court has repeatedly made clear that it is the responsibility of the Court to impose a proper penalty, as this Court is "not bound by the Referee's recommendation for discipline." <u>The Florida Bar v. Weaver</u>, 356 So.2d 797, 799 (Fla. 1978). Therefore, this Court, and not the Referee, is ultimately

charged with determining the appropriate sanction in light of all surrounding circumstances.

What the Bar steadfastly refuses to acknowledge is that this case is a highly unusual one. Certainly, the Bar does not often prosecute cases where the attorney who mistakenly transferred trust funds to himself as improper advanced fees promptly recognized his error, returned all the money within two weeks, and then promptly informed his client about the entire affair. The Bar's speculation that the client was placed at financial risk by a financially strapped attorney during the two-week period is seriously undercut by the prompt return of the entire amount in so short a period, and the complete openness displayed by the attorney in dealing with his client. The Bar's insistence on a prolonged and severe punishment will only act to discourage other attorneys from being as candid with their clients when a mistake is made which the attorney sincerely wishes to correct.

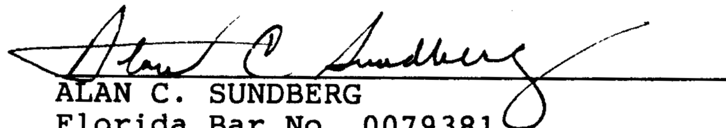
When the unusual nature of this case is examined with cold objectivity, rather than with the Bar's exaggerated rhetoric, the imposition of a suspension for two years appears starkly draconian. Mr. MacMillan's actions unquestionably involved a series of mistakes, but also displayed an honest effort to correct those mistakes.

CONCLUSION

In sum, this case does not concern a calculating attorney who stole from his ward and then tried to conceal his conduct; rather, this is a case of an attorney who made errors in judgment and then forthrightly tried to set matters straight with his client. For his misjudgments, he deserves to be disciplined, not castigated.

Accordingly, based on the overall circumstances, it is respectfully submitted that an appropriate discipline, which is consistent with other cases, would be a suspension for 91 days followed by a period of probation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Mail to **DAVID M. BARNOVITZ**, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309 and **JOHN T. BERRY**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 14th day of August, 1991.

Attorney

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