IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

CASE NO. 76,782
(TFB NO. 90,10,587 (12B)

DAVID L. WARD,

Respondent.
_____/

REPLY BRIEF OF RESPONDENT

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SUMMARY OF THE ARGUMENT

The Argument in this brief is no different than the argument in Respondent's Initial Brief. Knowing that the Court does not need an additional repetitious argument, Respondent will stand on the Summary in his Initial Brief.

STATEMENT OF THE CASE AND FACTS

Respondent will stand on the Statement of the Case and Facts in his initial brief.

POINT INVOLVED

Whether disbarment is so unduly harsh as to be punitive and contrary to law.

ARGUMENT

In the Complainant's Summary of the Argument on page 4 of its Brief, it is stated, "Respondent's Initial Brief presents several arguments, alleging that the Referee's recommendations of guilt are erroneous." Nothing could be further from the truth. On page 12 of Respondent's Initial Brief, it is stated, "In this case, admittedly, the conduct of the Respondent was wrongful. It was not and cannot be justified. It is his position that disbarment or any suspension for more than ninety (90) days is not required for the protection of the Bench, the Bar and the Public and to deter other lawyers from engaging in like misconduct." On page 17 of Respondent's Initial Brief, it is stated: "In this case, the Respondent is guilty of serious misconduct. His conduct was unjustifiable and inexcusable and he has made no effort to justify or have it excused." These corrections are important. If, in fact, the Respondent had denied his guilt or had tried to justify his conduct, he would have demonstrated his unfitness to engage in the practice of law and the Referee would have been entirely justified in recommending disbarment.

Respondent admitted everything with which he was charged. He attempted to demonstrate to the Referee and to this Court that he fully understood that what he did was wrong; he was sorry he had done it; he had learned his lesson the hard way; and that no sanction was necessary for the protection of the Bench, the

Bar and the Public -- he would never do it again. On the other hand, he recognized that some sanction had to be imposed so as to deter other lawyers from engaging in like misconduct.

On page 4 of Complainant's Brief, it is stated:

> "The Respondent's argument that he intended to reimburse his law firm for the monies misappropriated is not supported by any evidence and is therefore without any merit."

The unrefuted and unquestioned testimony of the Respondent reflected that when he took the money, he knew that it was wrong and intended to pay it back; immediately by getting a loan, or more likely to pay it from his bonus that would have been paid in December or January 1989. There is no evidence in the record reflecting that Respondent did not intend to repay the law firm for the monies which he misappropriated. The Referee cites as "evidence" that Respondent never intended to repay the money, a portion of Respondent's attorney's closing argument. During the course of the closing argument, the Referee asked Counsel, "How would he pay it back?", "How would he put it back <u>without being discovered</u>?", Counsel responded by advising the Court that Respondent was confronted absolutely with the necessity of putting it back or getting caught one way or another, and Counsel did not know how Respondent would have or could have put it back <u>without getting caught</u>. This misstatement in Complainant's Brief is important. If the evidence supported the finding that Respondent did not intend to pay back the misappropriated funds, his offense was, indeed, more grievous than if he intended to pay the funds

back.

On page 6 of Complainant's Brief, it is stated:

> "Respondent further argues that the Referee 'obviously intended' to preclude Respondent from practicing law for only one (1) year. (Initial Brief p. 9, paragraph 3). If so, the Referee in his Amended Report, would have recommended a one (1) year suspension instead of disbarment. In the Amended Report of Referee it is abundantly clear that the Referee recommended disbarment."

The Complainant filed a Motion for Rehearing from the Referee's Report (Appendix 1) and in its Motion for Rehearing, the Bar stated, "it is obviously the intent of the Referee to terminate Respondent's ability to practice law for a period of one (1) year." Not only did the Respondent so construe the intentions of the Referee but the Complainant did likewise. Counsel suggests that in the original Referee's Report, it is obvious that the Referee intended to preclude Respondent from practicing law for one (1) year. Respondent agrees with the Bar that "it is abundantly clear that the Referee recommended disbarment" as stated in the Complainant's brief. Nothing occurred between the filing of the Original Referee's Report and the Referee's Amended Report except that both parties requested a Rehearing relative to the "one (1) year disbarment." Counsel suggests that it is "abundantly clear" that for reasons unknown, the Referee changed his mind and upped the sanction so as to preclude Respondent from practicing law for

five (5) years.

On page 7 of Complainant's Brief, it is stated, "There is no evidence indicating that Respondent ever planned on replacing the monies. The evidence actually suggests that Respondent would have continued to steal funds if he was not caught." These two (2) statements are not accurate. There is evidence in the record as previously stated that Respondent planned to replace the monies and there is no evidence even suggesting that Respondent would have continued to steal funds if he was not caught.

Complainant criticizes the citation in Respondent's Brief State ex rel vs. Murrell, 74 So.2d 221 (Fla. 1954). This case was not cited by the Respondent as being in point as to the offenses committed. It was cited solely for the purpose of demonstrating the philosophy of the Court relative to disbarment and for no other purpose. Respondent submits that said citation and the portion thereof quoted in Respondent's Initial Brief is an excellent and succinct statement of the Court's philosophy relative to disbarment as it was then and as it is today.

Complainant cites The Florida Bar v. Shanzer, 572 So.2d 1382, 1383 (Fla. 1991) as holding that the Supreme Court disbarred Shanzer for misappropriating trust funds and that the so called mitigating circumstances shown by Shanzer did not mitigate disbarment. The Bar failed to advise the Court that Shanzer was charged with seven (7) counts of violating the disciplinary rules. Count 1 alleged violation of the trust account record keeping requirements. Count 2 alleged that the Respondent retained the interest in his trust accounts for his personal use. Counts 3, 4,

5, 6, and 7 alleged misappropriation of funds and shortages in Respondent's trust account. Shanzer's conduct was a far cry from that of the Respondent.

The Complainant cites The Florida Bar v. Margadonna, 511 So.2d 985 (Fla. 1987) and states "Margadonna was disbarred for using his official position as substitute temporary equity receiver to willfully and knowingly retain and convert approximately $145,000.00 to his own use." Actually, Margadonna had been convicted of a felony involving the theft of approximately $145,000.00 while acting in his capacity as a substitute temporary equity receiver. He was disbarred because of his conviction of a felony.

In his Initial Brief Respondent failed to call to the attention of the Court The Florida Bar v. Childers, 582 So.2d 617 (Fla. 1991). Likewise in its Answer Brief, the Complainant failed to bring said case to the Court's attention although it is directly in point. In that case, Childers received a $950.00 check made out to her but belonging to her law firm and deposited the same in her personal savings account thereby misappropriating said money. After a hearing before a Referee, the Referee acknowledged that diverting a firm's funds is a serious professional violation but in light of the mitigating evidence presented on Complainant's behalf, found a 90-day suspension warranted. The Complainant filed its Petition to Review the Referee's Report arguing that Childers should be suspending for three (3) years. In affirming the Referee's Report, the Court said,

"After studying this record, we agree with

> the Referee's recommendations. Childers acknowledged her error and cooperated fully in these proceedings. This is her first offense, for which she expressed remorse and she presented testimonials from several people who found her action in this instance totally out of character and a one-time unexplainable aberration. Neither her former firm or any of her clients suffered any harm from this incident, and as the Referee pointed out, the only person hurt by her conduct was Childers herself."

There is a slight difference between Childers and the instant case. In the instant case, the Respondent misappropriated the monies in a fashion which of necessity would require that the misappropriated funds be restored to the firm and probably that this misappropriation would be discovered. There is one (1) other difference and that is over a very short period of time the Respondent here committed approximately thirteen (13) acts while Childers committed only one (1).

In Childers, the Court adopted the philosophy relative to disciplinary actions pointed out in Respondent's Initial Brief. The purpose of discipline is not punishment. The purpose is to protect the Bench, the Bar and the Public from misconduct and to deter other lawyers from engaging in similar misconduct. As in Childers, the Bench, the Bar and the Public need no protection from the Respondent here. There must be a sanction solely for the

purpose of deterring other lawyers from similar misconduct. For this purpose, any suspension of more than ninety (90) days is unduly onerous.

The Bar in its Brief cites The Florida Bar v. Gillin, 484 So.2d 1218 (Fla. 1986). In this case, the Court found,

> "that the evidence was sufficiently clear and convincing to support the Referee's conclusion that Gillin stole $25,000.00 from his law firm by depriving the firm of a fee and that Gillin was well aware that he was diverting firm funds behind the backs of his partners."

The Supreme Court agreed with the Referee that the mitigating facts in Gillin warranted a six (6) month suspension." On page 12 of its Brief, the Complainant quotes from a concurring in part and dissenting in part opinion by Justice Ehrlich. In his dissent he dissented as to the discipline imposed. In dissenting, Justice Ehrlich said,

> "It is my opinion that stealing by a lawyer whether from a client, a member of the general public or a member of his law firm is utterly reprehensible, and that by such act, the lawyer has forfeited his position in society as a member of the bar and an officer of the Court, and disbarment is the proper discipline."
>
> (Emphasis Supplied)

The dissent of Justice Ehrlich is the position of The Florida Bar in this case. Such is not the law of the State of Florida. All

of the members of the Court other than Justice Ehrlich concurred and rejected the position of Justice Ehrlich. In citing and quoting from this dissent, the Complainant has demonstrated what the law isn't, not what the law is.

CONCLUSION

Respondent submits that disbarment or suspension for one (1) year under the facts of this case is not required to carry-out all of the purposes of disciplining lawyers and is so harsh that it is punitive in character. The Court should not suspend Respondent for more than ninety (90) days and Respondent submits that a suspension of thirty (30) days would be adequate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Respondent has been sent by U.S. Mail this 7th day of NOVEMBER, 1991 to:

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APPENDIX 1

IN THE SUPREME COURT OF FLORIDA
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v.

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_____/

MOTION FOR REHEARING

COMES NOW The Florida Bar through its Staff Counsel, DAVID R. RISTOFF, and moves the Referee for a rehearing in this cause relative only to the sanctions recommended by the Referee, and shows unto the Referee that:

1. The Referee recommended that the Respondent be disbarred from the practice of law in Florida for one year. Rule 3-5.1(f) provides that:

> A judgment of disbarment terminates the respondent's status as a member of the Bar. A former member who has been disbarred may only be admitted again upon full compliance with the Rules and Regulations Governing Admission to The Bar. Except as might be otherwise provided in these Rules, no application for admission may be entered within five years after the date of disbarment or such longer period as the court might determine in the disbarment order.

It is obviously the intention of the Referee to terminate Respondent's ability to practice law for a period of one year. There is no sanction under the Rules of "disbarment for one year".

Respondent suggests that the word "suspension" should be substituted for the word "disbarment".

2. Under the facts of this case and under the Florida Standards for Imposing Lawyer Sanctions, the suspension of Respondent for one year is an inadequate sanction, and said suspension should be for a substantially longer period of time.

I HEREBY CERTIFY that a copy of the foregoing has been sent by regular U.S. Mail, this day of , 1991, to Richard T. Earle, Jr., EARLE AND EARLE, 150 Second Avenue North, #910, St. Petersburg, Florida 33701.

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