

027  
**FILED**

SID J. WHITE

APR 20 1992

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SUSAN M. ROSEN,

Respondent.

Supreme Court Case  
No. 77,345

---

On Petition For Review

---

ANSWER BRIEF OF COMPLAINANT

PA  
BAUL A. GROSS  
Bar Counsel  
TFB #032115  
The Florida Bar  
Suite M-100  
Miami, Florida 33131  
(305) 377-4445

JOHN F. HARKNESS, JR.  
Executive Director  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300  
(904) 561-5600

JOHN T. BERRY  
Staff Counsel  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300  
(904) 561-5600

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii
OTHER AUTHORITIES.....	ii
SYMBOLS AND REFERENCES.....	iii
STATEMENT OF THE FACTS.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3-13
I.    THE FLORIDA BAR'S AUDIT OF RESPONDENT'S TRUST ACCOUNT WAS IN ACCORDANCE WITH THE RULES REGULATING TRUST ACCOUNTS	
11.   THE REFEREE'S FINDINGS OF FACT ARE PROPER AND SHOULD NOT BE OVERTURNED	
III.  THE REFEREE'S CONCLUSIONS OF LAW ARE CORRECT	
IV.  THE REFEREE'S RECOMMENDATION FOR A TWO YEAR SUSPENSION SHOULD BE APPROVED	
CONCLUSION.....	14-15
CERTIFICATE OF SERVICE.....	16
INDEX TO APPENDIX.....	17

TABLE OF CITATIONS

<u>CASES:</u>	<u>PAGE</u>
<u>Benbow v. Benbow</u> 157 So. 512, 519 (Fla. 1934).....	6, 7, 14
<u>The Florida Bar v. Breed</u> 378 So.2d 783, 785 (Fla. 1979).....	12
<u>The Florida Bar v. Carter</u> 410 So.2d 920, 922 (Fla. 1991).....	2, 5, 14
<u>The Florida Bar v. Davis</u> 361 So.2d 159, 162 (Fla. 1979).....	8, 11
<u>The Florida Bar v. Hartman</u> 519 So.2d 606 (Fla. 1988).....	11
<u>The Florida Bar v. Vernell</u> 374 So.2d 473, 476 (Fla. 1979).....	12, 13, 14
<u>The Florida Bar v. Wagner</u> 212 So.2d 770, 772 (Fla. 1968).....	2, 5
<u>STATUTES:</u>	
<u>Par. 832.05, Florida Statutes (1989)</u> .....	13

OTHER AUTHORITIES:

<u>Rules of Discipline</u>	<u>PAGE</u>
3-4.3.....	2, 9, 10
<u>Rules Regulating Trust Accounts</u>	
5-1.1.....	2, 10
5-1.1(f).....	9
5-1.2(d)(7).....	3, 4, 14
<u>Florida Standards For Imposing Lawyer Sanctions:</u>	
Rule 4.12.....	13
Rule 5.12.....	13

SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, the Complainant, will be referred to as either "The Florida Bar" or "the Bar".

Abbreviations in this brief are as follows:

App.Ex denotes - Appendix Exhibit

SUSAN M. ROSEN, The Respondent, will be referred to as "Respondent" or "Ms. Rosen".

"RR" will denote the report of referee, which the referee identified as "Findings of Facts and Recommendations of Referee".

"T" will denote the transcript, followed by page number.

STATEMENT OF FACTS

The facts in this case are stated on pages **2-4** of the **report of referee**, which is identified **as** Findings of Fact and Conclusions of Law. Please see Appendix-Exhibit A. The gist of the facts is that Susan Rosen wrote seven checks on her trust account, all of which were returned due to insufficient funds. In addition, Ms. **Rosen** failed to produce **a receipt and** disbursement journal, client ledger cards, and the bank and client reconciliation records, as requested **by The Florida Bar**.  
(RR 4-App-EX. A).

## SUMMARY OF ARGUMENT

The audit conducted by The Florida Bar was proper, as it was requested by a grievance committee. See Bar Ex. "J" and the transcript, page 31.

The referee's findings of fact should not be overturned unless they are clearly erroneous or without evidentiary support in the record. The Florida Bar v. Carter, 410 So.2d 920, 922 (Fla. 1991). The referee's finding that "The Respondent's probation was violated...." (RR-2 App-Ex. A), was not clearly erroneous and it is not without evidentiary support in the record. Also, the respondent is seeking to overturn the referee's findings of guilt and **she** has not shown that the report is "clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770,772 (Fla. 1968). The referee found the respondent failed to deliver certain trust account records to the Bar, **as** requested. Respondent failed to meet the required burden to overturn the referee's findings.

The Bar contends that there were violations of Rule 5-1.1, Rules Regulating Trust Accounts and Rule 3-4.3, Rules of Discipline, when Respondent wrote seven checks on her trust account, which were returned due to insufficient funds.

The Bar contends that a suspension for **a** period of two years is appropriate in this case, considering the cumulative misconduct.

ARGUMENT

I

**THE FLORIDA BAR'S AUDIT OF  
RESPONDENT'S TRUST ACCOUNT  
WAS IN ACCORDANCE WITH THE  
RULES REGULATING TRUST  
ACCOUNTS**

In point I of Respondent's Initial Brief, pages 13-18, she contends that The Florida Bar's audit was tainted from the onset. She says The Florida Bar did not comply with Rule 5-1.2(d). The Bar disagrees, as Rule 5-1.2(d)(7), Rules Regulating Trust Accounts, states as follows:

Audits. The following shall be cause for The Florida Bar to order an audit of a trust account:

\*\*\*\*\*

(7) When requested by a grievance committee or the board of governors.

Please see Bar Exhibit "J" and Transcript, page 31. The subpoena requesting the trust account records was signed by the **Chair of Grievance Committee "E" of the Eleventh Judicial Circuit**. Accordingly, since the Chair of the grievance committee requested the audit, the audit was in accordance with Rule 5-1.2(d)(7), Rules Regulating Trust Accounts. This is proof that the audit was requested by a grievance committee.

The auditor was auditing the trust account of Anthony Paterna, who ultimately resigned in lieu of disciplinary action. While conducting an audit of Anthony Paterna's trust account, the auditor noticed there was a check from **Susan Rosen**, trust account, to Anthony Paterna for \$10,000, marked

"For Loan From Ileana Tumecelli." (Respondent's Exhibit B). On page 62 of the transcript, the auditor stated: "It didn't look right that a loan was being given from one trust account to another trust account, especially this trust account, which was having all kinds of problems." Based upon the auditor's qualifications (C.P.A.) **and** seven years as an auditor for The Florida Bar, (T.18), **and** the aforementioned check from Respondent's trust account, an audit was justified. The grievance committee authorized the audit. (Florida Bar Exhibit J). It is apparent that the auditor's experience and his feeling that Ms. Rosen's trust account check to Mr. Paterna, "didn't look right," (T.62), led him to discover seven checks from Ms. Rosen's trust account that were dishonored due to insufficient funds. (RR 3). The auditor said it was unusual to make a loan from a trust account. (T.64). Since the audit on Susan Rosen's trust account was requested by the grievance committee, the audit was in accordance with Rule 5-1.2(d)(7), Rules Regulating Trust Accounts. (Bar Exhibit J).



## ARGUMENT

### II

#### THE REFEREE'S FINDINGS OF FACT ARE PROPER AND SHOULD NOT BE OVERTURNED

The referee's findings of fact should not be overturned unless they are clearly erroneous or without evidentiary support in the record. The Florida Bar v. Carter, 410 So.2d 920, 922 (Fla. 1991) and The Florida Bar v. Wagner, 212 So.2d 770,772 (Fla.1968). Despite this, the Complainant contends, in Point II of her Initial Brief, that paragraphs six, thirteen and fourteen of the referee's findings are clearly erroneous. In paragraph 6 of the Report of Referee, under the heading, "Findings of Facts," the referee states as follows:

The Respondent's probation was violated and the rehabilitation contract was extended from February 11, 1991 termination date to a termination date of April 15, 1992.

The Bar's position is that the referee made a finding of fact that Susan Rosen violated her probation. (RR 2-App.Ex.A). In the Report of Referee in the proceedings to show cause, Case No. 75,805, the referee stated, inter alia:

"The respondent entered a recovery contract with Florida Lawyers Assistance. She was not satisfactorily complying with that contract. (Not regularly attending meetings)." Bar Exhibit L, page 2). (Underscoring supplied for emphasis). In Case No. 75,805, the referee made a finding of fact that "she was not satisfactorily complying with the contract." It is the Bar's view that this was a finding that Ms. Rosen's "Probation

was violated." (RR, page 2, paragraph 6-App,Ex,A). It is noted that the referee in Case No. 75,805 and the instant case are one and the same. Therefore, Judge Arthur L. Rothenberg was the referee in both cases, and he determined that Susan Rosen violated her probation. Accordingly, the Bar submits that the referee's findings in paragraph 6 of his report in the case sub judice, was not clearly erroneous. (RR 2-App,Ex,A). The Respondent further contends that the Referee's findings in paragraphs 13 and 14 of his Report of Referee (RR 4-App,Ex,A) are clearly erroneous because she did not willfully fail to **produce** the records requested by The Florida Bar. An attorney who maintains a trust account is in a fiduciary position and can be considered as a trustee. **The** attorney in this position has important responsibilities, as described in Benbow v. Benbow, 157 So. 512 at 519 (Fla. 1934), as follows:

If the trustee fails to keep clear, distinct, and accurate accounts, all presumptions are against him and all obscurities and doubts are to be taken adversely to him. If he loses his accounts, he must bear any resulting damages. The burden of proof is upon him to show that the money expended was a proper disbursement.

In paragraph 3 of the Complaint, it is alleged that "respondent failed to produce a receipt and disbursement journal, client ledger cards, and bank and client reconciliation records, as required." In paragraph 3 of respondent's Answer, **she** says:

Respondent advised the investigator to The Florida Bar that such records were not available to her by virtue of the fact of her relocation of her office. More specifically, Respondent was at the time of the acts alleged, sharing space with Mr. Tony Paterna. Respondent's trust account records were being maintained by Mr. Paterna's secretary. Upon Respondent leaving the

offices of Mr. Paterna, such records were not available to her and she did not have duplicates thereof. Since July of 1989, (the date of departure from Mr. Paterna's office, respondent has relocated her office on four separate occasions).

Ms. Rosen contends that she could not get her records from Mr. Paterna. However, she did not indicate what efforts **she** made to obtain the records. She could have filed a formal complaint; with The Florida Bar, or sought a court order. Although, The Florida Bar realizes that it has the burden of proof, when Ms. Rosen failed to comply with the Bar's subpoena. (**Bar** Exhibit J) and the request for records by the Bar's investigator, the burden of proof should shift to respondent and she should be required to explain why she didn't have the records and what efforts were made to obtain those **records**. This Court stated in Benbow v. Benbow, supra,

If the trustee **fails** to keep clear, distinct and accurate accounts, all presumptions are against him and all obscurities and doubts are to be taken adversely to him. If he loses the accounts, he must bear any resulting damages.

The Bar submits that trust account **records** are extremely important and an attorney who maintains such records has a responsibility to safeguard those records. If another attorney is improperly holding those records, the attorney concerned should file a formal complaint with The Florida Bar, or obtain relief through the courts.

## ARGUMENT

### III

#### THE REFEREE'S CONCLUSIONS OF LAW ARE CORRECT

The Respondent states that some of the referee's conclusions of law were improper. For example, she states that the following conclusion by the referee was improper:

"Indeed there is no difference between the issuance of worthless checks from a trust account and the misuse of client funds." (RR 5-App. Ex A). The Florida Bar contends that it is a misuse of client funds when an attorney writes checks on her trust account, when these checks are returned for insufficient funds. In the case sub judice, "the Respondent issued seven checks against her trust account that were returned due to insufficient funds." (RR 4-App. Ex. A). See Bar Exhibits A through H **and** T-29.

In The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1979), this Court stated:

"The issuance of worthless checks by an attorney constitutes unethical conduct and subjects the attorney to professional discipline." Even if an attorney should issue a worthless check on her personal account, it would be a violation. The Florida Bar v. Davis, *supra*,

The evidence is clear **and** convincing that Ms. Rosen did disburse funds held for clients or on behalf of clients, when said funds were not collected funds. "Collected funds" means

funds deposited, finally settled, and credited to the lawyer's trust account. See Rule 5-1.1 (f), Rules Regulating Trust Accounts. The referee stated that Rule 5-1.1(f) lists six exceptions to that rule. "None of these exceptions fit the Respondent's theories of why worthless checks were not misuse of client's funds." (RR 5-App,Ex,A). See Respondent's explanation for the checks which were returned because of insufficient funds. (See Answer, pages 3-5 and Transcript, pages 80-94).

The Respondent's explanations concerning the returned **checks**, shows dishonesty in the manner in which she handled her trust account. The Respondent states that the referee "erroneously concluded that Respondent's conduct was proscribed by Rule 3-4.3 (Respondent's Initial Brief, page 11). Rule 3-4.3, Rules of Discipline, states, in part: "The commission by a lawyer or any act which is unlawful or contrary to honesty or justice....may constitute a cause for discipline."

The Bar respectfully submits that it is unlawful to write checks when the person writing the checks knows that funds are not on account to cover said checks. [Paragraph 832.05, Fla. Stat. (1989)]. Moreover, the referee believed that the Respondent's conduct was unlawful **and** contrary to honesty or justice. (RR 6-App,Ex,A). If the Respondent issued an isolated check that was returned for insufficient funds, one might conclude that an honest mistake was made. However, in this case, seven bad checks were written from March 1, 1989 to July 22, 1989. (RR 3-App,Ex,A). This clearly and convincingly

shows Ms. Rosen's improper manner of operating her trust account. In addition, it constitutes, in our view, conduct that is unlawful or contrary to honesty or justice. On pages 5 and 6 of Respondent's Initial Brief, she states:

The \$5,000.00 check to Mr. Netti, dated April 17, 1989 was also returned. That check was issued to Mr. Netti on the promise of Anthony Paterna, then a member in good standing of The Florida Bar, that \$5,000.00 cash would be deposited into Respondent's trust account that same day. Mr. Paterna reneged on his promise and the check was returned. T-87. Respondent, although she was under no obligation to do so, reimbursed Mr. Netti for the funds that he lost as a result of Mr. Paterna's conduct. T-88.

The final \$2,500.00 check, dated May 22, 1989, was issued to facilitate the purchase of gems by one of Respondent's clients. Although the check was presented to the bank, the \$2,500.00 cash deposit to be made by her client to Respondent's trust account was not made. Rather, the funds were delivered by her client directly to the payee. T-92, 93.

The two foregoing examples show that the Respondent would write checks on her trust account based upon her belief that third parties would make deposits to cover those checks. This is clearly improper and such conduct, in the Bar's view, violates Rule 3-4.3, Rules of Discipline and Rule 5-1.1, Rules Regulating Trust Accounts.

## ARGUMENT

### IV

#### THE REFEREE'S RECOMMENDATION FOR A TWO YEAR SUSPENSION SHOULD BE APPROVED

In Point IV of Respondent's Initial Brief, she states:

"If Respondent is Found Guilty of Misconduct, The Appropriate Discipline Is A Public Reprimand." The Florida Bar contends that a two year suspension is more appropriate than a public reprimand.

The evidence in this case clearly and convincingly shows that the Respondent issued seven checks on her trust account that were returned due to insufficient funds. (RR 3-App.Ex.A).

Although the checks were apparently made good and no client was injured, it is nevertheless a serious violation to issue worthless checks on a trust account. Even if the checks were **drawn** on a business account, it would be unethical. In The Florida Bar v. Davis 361 So.2d 159 (Fla. 1978) the Supreme Court of Florida stated at Page 162, "We hold that the issuance of a worthless check by an attorney constitutes unethical conduct and subjects the attorney to professional discipline." In the Davis case, supra, the Respondent (Mr. Davis) was suspended for twelve months, for issuing three worthless checks, inter alia. In the case of The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988), the Supreme Court stated that misuse of client funds without intent...warrants suspension from the practice of law for two years. The Bar contends that issuing

worthless checks from a trust account is a misuse of client funds. (Underscoring supplied for emphasis).

In The Florida Bar v. Breed, 378 So.2d 783, 785 (Fla. 1979) the Supreme Court stated:

"...misuse of client's funds is one of the most serious offenses." In addition, the Court said that it will not be reluctant to disbar an attorney for this type of offense, even though no client was injured. (underscoring supplied for emphasis).

In addition to issuing seven worthless checks, the Bar contends that the Respondent failed to produce her trust accounting records, as required. (Bar Exhibit J)

If the Respondent had no prior disciplinary record, The Florida Bar would not have requested a suspension of two years. However, Susan Rosen was suspended from practicing law on April 13, 1984, because of a felony conviction (Bar Exhibit K). On February 11, 1988, she was reinstated. (Bar Exhibit K). When the Respondent was reinstated, she was placed on probation for three years. The probation required her to comply with her contract for recovery with the Florida Lawyer's Assistance Program. (Bar Exhibit K). During October 1990, Judge Arthur L. Rothenberg, the Referee, found that the Respondent was not satisfactorily complying with the contract. Accordingly, the Supreme Court extended her contract to April 15, 1992 (Bar Exhibit L). The Supreme Court stated, "This court deals more severely with cumulative misconduct than with isolated misconduct." The Florida Bar v. Vernell, 374 So.2d 473, 476



(Fla. 1979). In the case at hand, there is cumulative misconduct, i.e., seven worthless checks; felony convictions for grand theft and breaking and entering; (Bar Exhibit K) and violating probation, concerning Respondent's contract with Florida Lawyer's Assistance, Inc.

Florida Standards For Imposing Lawyer Sanction state as follows:

Rule 4-12 - Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. In the instant case the Respondent knew or should have known the manner in which she used her trust account could cause potential injury to her clients.

Rule 5.12 - is applicable in this case as there was a violation of Section 832.05, Florida Statutes (1989). This statute deals with bad checks.

In view of the above, The Florida Bar requests this Court to approve the Report of Referee.

## CONCLUSION

The audit that was conducted by The Florida Bar was requested by the grievance committee (Bar Ex."J") and was in compliance with Rule 5-1.2(d)(7), Rules Regulating Trust Accounts.

The respondent has the burden of proving that the referee's findings were erroneous or without evidentiary support. The Florida Bar v. Carter, 410 So.2d 920, 922 (Fla. 1991). The respondent failed to meet this burden. The evidence is clear and convincing that the respondent wrote seven checks on her trust account, all of which were returned due to insufficient funds. (RR 4-App.Ex.A and Answer). **Also**, respondent's excuses for not complying with the Bar's request for trust accounting records is not a defense to the allegation in the complaint. (RR 4,5 and Benbow v. Benbow, 157 So.512, 519 (1934). **The** discipline recommended by the referee is appropriate, considering the serious nature of the offenses and the cumulative misconduct. (The Florida Bar v. Vernell, supra).

WHEREFORE, THE FLORIDA BAR, requests this Court to approve the Findings of Fact and Conclusions of Law and the Amended Findings of Fact and Conclusions of Law. (App.Ex. A and B).

Respectfully submitted,



PAUL A. GROSS, Bar Counsel  
TFB #032115  
The Florida Bar  
Rivergate Plaza, Suite M-100  
444 Brickell Avenue  
Miami, Florida 33131  
(305) 377-4445

JOHN T. BERRY  
Staff Counsel  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300

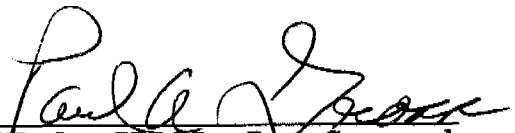
JOHN F. HARKNESS, JR.  
Executive Director  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300

CERTIFICATE OF SERVICE

I **HEREBY** CERTIFY that on **April 16**, 1992 the original and seven copies of the foregoing Answer Brief of the Complainant was served by U.S. Mail to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927 and **that true** and correct copies were mailed to the following:

JACK A. WEISS, Counsel for Respondent  
P.O. Box 1167  
Tallahassee, Florida 32302-1167

JOHN A. BOGGS, Director  
Lawyer Regulation  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300

  
PAUL A. GROSS, Bar Counsel  
TFB #032115  
The Florida Bar  
Rivergate Plaza, Suite M-100  
444 Brickell Avenue  
Miami, Florida 33131  
Tel: (305) 377-4445

INDEX TO APPENDIX

APP. EX.

Findings of Fact and Conclusions of Law.....	A
Amended Findings of Fact and Conclusions of Law...	B