IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NUMBER 77,345

SUSAN M. ROSEN,

Respondent.

_____/

RESPONDENT'S INITIAL BRIEF

John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, Florida 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS AND OTHER AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES PAGE

The Rules of Discipline

Florida Standards For Imposing Lawyer Sanctions

PRELIMINARY STATEMENT

Respondent, SUSAN M. ROSEN, the Appellant in these proceedings, will be referred to as Respondent or by her name. Complainant/Appellee will be referred to as The Florida Bar or the Bas.

References to the transcript of the final hearing on June 5, 1991 will be by the symbol TR followed by the appropriate page number. References *to* the Exhibits of the party will be by BEX for Bar exhibits and REX for Respondent's exhibits.

References to the report of referee will be by the symbol RR followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

This case is a matter of original jurisdiction before the Supreme Court of Florida pursuant to Article V, Section 15 of the Constitution of the State of Florida.

The final hearing in these proceedings was held on June 5, 1991. The referee's report was duly filed in this Court and Respondent timely filed her petition for review.

The facts in this case awe relatively uncontested. The Florida Bar initiated these disciplinary proceedings without complaint of any individual. They directly stemmed from the Bar's investigation of one Anthony Paterna, a lawyer who ultimately resigned from The Florida Bar in lieu of discipline for various trust account improprieties. RR 2, TR 128.

While auditing Mr. Paterna's trust account, the Bar's auditor, Carlos Ruga, came across a check drawn on Respondent's trust account in the amount of $10,000.00 marked "loan from Ileana Tomaselli" and dated February 7, 1989. REX B. That check did not bounce, there were no improprieties surrounding it whatsoever and The Florida Bar did not charge Respondent with any misconduct as a result of that transaction. TR 59, 62.

Based upon Mr. Ruga's feelings that Respondent's check to Mr. Paterna "didn't loak right", an audit was initiated into her trust account. TR 62, 63, 19, 34. Mr. Ruga's gut-feelings turned out to be without basis. In fact, the Bar was in possession at that time of a check from Mr. Paterna to Ms. Tomaselli in the amount of $10,000.00 and dated May 18, 1988. REX A. That check was a

predecessor transaction to check numbered 2049.

Were it not for the Paterna investigation, there would have been no audit of Respondent's trust account. TR 63, 19, 34, 56, 57.

There is no evidence in the record to suggest that the Bar's audit was pursuant to the enumerated prerequisites set forth in Rule 5-1.2(d) of the Rules of Discipline. There was no failure to file a trust account certificate; the Bar was not then aware of any trust account checks being returned for insufficient funds; there was no petition for creditor relief filed by the Respandent; there were no felony charges filed against Respondent; Respondent had not been adjudged insane or mentally incompetent; there had been no claim filed with the Clients' Security Fund; neither the grievance committee nor the Board of Governors initiated an audit; and there was no Court order authorizing the audit.

Subsequently, the Bar audited Respondent's trust account records for the period January 1st through September 14th, 1989. That audit revealed that during a period beginning in March 1989 and ending in July 1989, Respondent issued seven checks drawn on her trust account that were subsequently dishonored for insufficient funds. RR 3. There was an eighth check, dated April 24, 1989 in the amount of $539.09 that was dishonored. However, that check was a forgery. RR 3.

All of the checks were immediately made good and the referee specifically found that no client has filed any complaint against the Respandent and that no client was "financially or legally

injured by her actions...." RR 4.

Five of the checks issued by Respondent that were returned were for small amounts of money ranging from $70.00 to $192.15. The other three checks were for $10,000.00, $5,000.00 and $2,500.00 respectively. RR 3.

The only witnesses called to testify at final hearing were the Bar's auditor, Mr. Ruga, and Respondent herself. Respondent admitted the return of the checks for insufficient funds and gave an explanation for their return. The Florida Bar presented no evidence rebutting any of Respondent's testimony or showing that Respondent acted wilfully or with wrongful motive.

The five smaller checks returned on Respondent's trust account were all advances for costs that were below the $200.00 minimum that Respondent kept in her trust account. TR 69. It was Respondent's policy to advance small sums of costs, below her initial deposit, if the client promised to immediately reimburse her for those costs. TR 69. Unfortunately, Respondent's sharing office space with Mr. Paterna, and using his secretary, resulted in deposits not being made and other irregularities regarding her trust account. TR 81, 82. When apprised of the checks being returned, Respondent always made them up immediately.

The Bar's auditor specifically opined that it was not improper to open a trust account with limited funds. TR 60, 63, 64.

The biggest returned check was that for $10,000.00 made payable to Very Important Babies and dated March 1, 1989. Respondent testified that she made that check out to her client,

Ileana Tomaselli (the president and sole owner of Very Important Babies), for $10,000.00 in anticipation of closing the sale of that entity that afternoon. It was anticipated that a cashier's check for $113,000.00 would be deposited into Respondent's trust account that afternoon. TR 84. Due to clerical errors made by the closing agent (not Respondent) the closing was not held until very late on the afternoon of Friday, March 3, 1989. Therefore, the $113,000.00 in sale proceeds were not deposited into Respondent's trust account until March 6, 1989. TR 84; REX D, E.

Ms. Tornaselli knew full well that Respondent's trust account check would not clear until the closing was conducted. TR 82, 84. For reasons not brought out in the record, Ms. Tomaselli deposited the check anyway. As indicated by Respondent's bank statement for March, on the date that she issued the check to Ms. Tomaselli, she did not have anywhere near $10,000.00 in her trust account. BEX I. The $10,000.00 check to Ms. Tomaselli, when presented after the deposit of the proceeds from the closing, was honored.

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. TR 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. TR 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. TR 92, 93.

There is no evidence in the record indicating that any of Respondent's client's trust funds were used to satisfy any obligations of other clients. No deposit for any client's benefit was used for any purpose other than for that client's benefit.

The referee also found Respondent guilty of failing to turn over some of her trust account records (receipt and disbursement journal, client ledger cards, bank and client reconciliation records). In so finding, the referee totally ignored Respondent's unrebutted testimony that she kept those records in compliance with the Bar rules, TR 95, that she had had no prior trust account problems, TR 96, and the reason that she could not produce the records was because they had been locked up by Mr. Paterna and she could not get to them. TR 86.

While, in hindsight, it is easy to condemn Respondent for having dealings with a lawyer who has now been found guilty of trust account violations, in the summer of 1989 his misconduct was not evident. Respondent testified that Mr. Paterna had given her work during her period of suspension and then had subleased space to her. TR 102. She relied on his secretary to make her deposits. TR 81, 82.

The referee also alluded to Respondent's prior disciplinary

action. On April 13, 1984, Respondent was suspended from practice as a result of her felony conviction for grand theft and breaking and entering. RR 2. Respondent's criminal offenses were directly related to her chemical dependency. TR 68.

On February 11, 1988, after proving rehabilitation Respondent was reinstated to practice. A condition of her reinstatement was probation under the aegis of The Florida Lawyer's Assistance program (FLA).

Solely as a result of her failure to regularly attend FLA meetings, subsequent proceedings were brought against Respondent which resulted in an extension of her rehabilitation contract and probation from February 11, 1991 until April 15, 1992. RR 2; BEX L.

Respondent testified that she has been free from all illicit drug use since 1984, and that she is in good standing with FLA. TR 68.

SUMMARY OF ARGUMENT

POINT I

The audit of Respondent's trust account was predicated upon nothing more than a feeling by the Bar's auditor that a perfectly valid transaction "didn't look right.. .." TR 62. The Florida Bar then ordered an audit even though none of the eight requirements listed by this Court in the Rules of Discipline were present. Those requirements, set forth in Rule 5-1.2(d) lists the following requirements as cause for audit.

> (1) Failure to file the trust account certificate required by Rule 5-1.2(c)(5);
>
> (2) A trust account check is returned for insufficient funds or for uncollected funds, absent bank error;
>
> (3) A petition for creditor relief is filed on behalf of an attorney;
>
> (4) Felony charges are filed against an attorney;
>
> (5) An attorney is adjudged insane or mentally incompetent or is hospitalized under the Florida Mental Health Act;
>
> (6) A claim against the attorney is filed against with the Clients' Security Fund;
>
> (7) When requested by the grievance committee or the board of governors; or
>
> (8) Upon court order.

There is no evidence in the record suggesting that any of the above eight requirements were met at the time The Florida Bar initiated its audit.

Audits of a lawyer's trust account are particularly intrusive, and, therefore, if unjustified are particularly offensive.

Disciplinary proceedings are now completely public, Rule 3-7.1. The most confidential financial recordn of a lawyer's client, therefore, can be exposed to public scrutiny as a result of a Bar audit. This threat to a client's rights should be exercised by the Bar only where it is clearly authorized. Furthermore, a lawyer undergoing an audit is subjected to great expenae and time away from the office, not to mention experiencing the "agonizing ordeal" of disciplinary proceedings.

It is to protect the client's most fundamental confidences, and to protect a lawyer from unwarranted "fishing expeditions" that this Court has specified in Rule 5-1.2(d) the conditions precedent to an audit. None of those conditions were in existence at the time the audit was initiated in the case at Bar. If the Bar had not been auditing Mr. Paterna, Respondent's trust account would not have been audited. TR 63.

In The Florida Bar v Rubin, 362 So.2d 12 (Fla. 1978), this Court dismissed two guilty findings against a lawyer by two different referees because The Florida Bar had violated its own rules, Likewise, dismissal is appropriate in the case at Bar. Allowing these proceedings to be prosecuted after improper conduct by the Bar will not deter future misconduct by the Bar; it will encourage it.

POINT II

Paragraphs six, thirteen and fourteen of the referee's finding of fact are improper.

Paragraph six of the referee's report improperly states that

her "probation was violated.. .." In fact, an examination of the referee's report in case number 75,808 (the probation proceedings) does not support the referee's finding that Respondent's probation was actually violated. There was no such adjudication. While the referee found that Respondent "was not satisfactorily complying" with her rehabilitation contract with FLA, he specifically found that there was "no history of Respondent using drugs during her probation." BEX L, page 2. The referee then went on, under his recommendations section, to point out that the parties agreed to the extension of her rehabilitation contract from February 11, 1991 to April 15, 1992.

In paragraphs thirteen and fourteen, the referee found that Respondent failed to produce some of her trust account records and that, even to the date of the final hearing, such production had not been made. However, the referee totally ignored Respondent's unrebutted evidence that the reason for her failure to produce those records was that she did not have access to them. Mr. Paterna locked her out of his office thereby denying her access to her records. TR 86. The Rules of Discipline do not require a lawyer to maintain duplicate copies of the lawyer's trust account. The referee also ignored Respondent's unrebutted testimony that she kept her records in accord with Bar regulations and that she had had no prior trust account problems. TR 95, 96.

POINT III

This Court has broad discretion in its review of a referee's legal conclusions. The Florida Bar in re Inglis, 471 So.2d 38

(Fla. 1985) at 41. Several of his conclusions are unwarranted and should not be adopted by this Court.

The referee concluded that the mere issuance of a worthless check (and it is not conceded that any of Respondent's checks can be so categorized) is the same as misuse of client funds. In the case at Bar, that statement is not true. There is no instance in the record supporting a conclusion that any of Respondent's trust funds were improperly used. No client's funds were used to pay the expenses of anybody else. None of her clients' funds were used to cover checks written for another client's purposes.

The referee also erroneously concluded that Respondent's conduct was proscribed by Rule 3-4.3. That rule does not prohibit any conduct. It merely sets forth the jurisdictional limits of the Bar's disciplinary authority.

Even if Rule 3-4.3 can be interpreted as containing prohibitions on conduct, there is no finding by the referee of any conduct that was illegal or dishonest. Absent such a finding, there can be no conclusion that Rule 3-4.3 was violated.

POINT IV

Finally, the referee's recommendation that Respondent be suspended for two years completely ignores precedent and allows "caprice to substitute fox reasoned consideration of the proper discipline." The Florida Bar v Breed, 378 So.2d 783 (Fla. 1979) at 785. None of the cases cited by the Bar and by the referee as support for a two year suspension contained fact situations even remotely similar to the case at Bar. Cases involving factual

situations similar to Respondent's have resulted in public reprimands. The Florida Bar v Lumley, 517 So.2d 13 (Fla. 1987); The Florida Bar v Pino, 526 So.2d 67 (Fla. 1988) and The Florida Bar v Borja, 554 So.2d 514 (Fla. 1990).

ARGUMENT

POINT I

THE BASIS FOR THE FLORIDA BAR'S AUDIT OF RESPONDENT'S TRUST ACCOUNT WAS NOT IN ACCORDANCE WITH THE RULES OF DISCIPLINE AND, THEREFORE, THESE PROCEEDINGS WERE TAINTED FROM THE ONSET AND SHOULD BE DISMISSED.

In essence, The Florida Bar's initiation of an audit into Respondent's trust account was based on nothing more than the feelings of the Bar's auditor that a perfectly valid transaction involving a $10,000.00 check just "didn't look right... ." TR 62. The check in question, made payable to Anthony Paterna for $10,000.00 and marked "loan from Ileana Tomaselli" was a perfectly valid transaction that did not involve insufficient funds. REX B, TR 62. In fact, as the Bar's auditor testified, it would be fair to say that had The Florida Bar not initiated proceedings against Mr. Paterna, the $10,000.00 check would never have been brought up and there would have been no audit. TR 63.

Respondent is before this Court today not because there was any client complaint, not because there was any misappropriation of trust funds, but because The Florida Bar was investigating the trust account of another lawyer (who ultimately resigned in lieu of discipline due to gross misconduct), TR 19, 34, 56, 57, 62 and 63.

The fact that something "didn't look right" is not one of the eight conditions precedent set forth by this Court prior to the initiation of an intrusive and burdensome audit. Those reasons,

set forth in Rule 5-1.2(d) of the Rules of Discipline are:

> (1) Failure to file the trust account certificate required by Rule 5-1.2(c)(5);
>
> (2) A trust account check is returned for insufficient funds or for uncollected funds, absent bank error;
>
> (3) A petition for creditor relief is filed on behalf of an attorney;
>
> (4) Felony charges are filed against an attorney;
>
> (5) An attorney is adjudged insane or mentally incompetent or is hospitalized under the Florida Mental Health Act;
>
> (6) A claim against the attorney is filed against with the Clients' Security Fund;
>
> (7) When requested by the grievance committee or the board of governors; or
>
> (8) Upon court order.

None of those conditions was evident to the Bar when an audit was ordered. In essence, The Florida Bar engaged in a "fishing expedition". The Florida Bar should not now be allowed to retroactively justify its failure to abide by the Rules because it subsequently found eight instances of returned checks (one of which was a forgery). This is particularly so when there is no client complaint, no client harm and when there is absolutely no misappropriation of trust funds whatsoever.

In fact, the original transaction questioned by the Bar did not even form the basis for any disciplinary proceedings. TR 106.

The magnitude of The Florida Bar's misconduct in the case at Bar is even more evident today than it was two years ago. This Court's adoption of new Rule 3-7.1 of the Rules of Discipline,

captioned Confidentiality, in essence strips all grievance proceedings of confidentiality and subjects them to public scrutiny. Most importantly, it enables the media or the public at large to examine the contents of a lawyer's trust account records. Generally, those records will contain information that a lawyer's clients will not want revealed to the public, The damage that could occur to a lawyer's client as the result of The Florida Bas's audit needs no elaboration. Suffice it to say that a client's financial transactions, as handled through a lawyer's trust account, are sacred and should not be revealed to the public except under the most compelling of circumstances. Those compelling circumstances are listed in Rule 5-1.2(d).

No compelling circumstances existed in the case at Bar at the time the audit was ordered. For all practical purposes, the Bar's auditor had a "hunch". A hunch is not one of the listed reasons for an audit.

Whether a violation of the Bar's Rules is of sufficient import that it justifies dismissal of charges

> depends we believe upon the purpose for our procedural requirements, the severity of their breach, and the gravity of the consequences for the accused attorney whose rights are thereby abridged.

The Florida Bar v Rubin, 362 So.2d 12 (Fla. 1978) at 15.

In Rubin, this Court dismissed two guilty findings by two separate referees in disciplinary proceedings against Mr. Rubin because the Bar violated various precepts of the Integration Rule (the predecessor to the current Rules of Discipline). The Bar's

violation of the Integration Rule was two-fold: It issued a press release that was not allowed under the Integration Rule and it "saved" one referee's report so that it could be combined with another's anticipated report, thereby making Rubin's offenses look more egregious.

Interestingly, the Court noted on page 15 of Rubin that grievance proceedings

> inflicted upon Rubin the "agonizing ordeal" [citation omitted] of having to live under a cloud of uncertainties, suspicions, and accusations....

The Bar's audit of a lawyer's trust account is not only grossly intrusive upon the affairs of the lawyer's clients, but it subjects that lawyer to the "agonizing ordeal" of the Bar's vast grievance machinery. To prevent The Florida Bar from initiating audits willy-nilly, on a hunch or for other invalid reason, this Court promulgated eight specific reasons for initiating an audit. Respondent respectfully submits that should the Bar initiate an audit for reasons other than the eight enumerated ones, that the entire proceedings are void ab initio and that the charges should be dismissed. This, notwithstanding the fact that in retrospect The Florida Bar may have found reasons that would have fit under the enumerated categories.

Just as an illegal search warrant cannot be justified because it turns up incriminating evidence, an illegal audit cannot be justified if it turns up improprieties.

The Florida Bas is not omnipotent. Its power must be circumscribed by this Court to avoid abuses, even in good faith,

of the remarkable power it already possesses. The only way to curb the Bar's power is to, at times, invalidate its actions as a firm warning that willful violations of this Court's rules will not be tolerated. This Court did so in Rubin even though the accused lawyer had engaged in misconduct. Nothing less is called for in the case at Bar.

The penultimate paragraph of the Court's decision in Rubin applies equally well today as it did back in 1978. There, the Supreme Court stated that

> The power to render ultimate judgment in attorney disciplinary proceedings rests solely with this Court and we have often stated that the exercise of that power should achieve a result which, in light of the circumstances of each case, will best protect the interests of the public, maintain the integrity of the Bar, and ensure fairness to the accused attorney. The totality of circumstances in this case preponderates in favor of granting the relief sought by Rubin. (citations omitted) 362 So.2d 12 at 17.

Dismissing these proceedings, under the peculiar facts of this case, will not violate the primary purpose of disciplinary proceedings, i.e., the protection of the public. Quite the contrary, the strong public policy favoring protection of clients' confidences and rights of privacy requires such dismissal. In the case at Bar, there is no evidence of any misappropriation by the Respondent and the Bar readily conceded that nobody lost any money. TR 27. The referee specifically found that no client was "financially or legally injured." RR 4. Dismissing these proceedings will not result in a lawyer being allowed to practice who is a threat to the public.

Just as importantly, however, as the protection of the public is the protection of Florida lawyers from the unfettered power of The Florida Bar. Dismissing this case will be a clear pronouncement by this Court to Bar leaders that its actions must strictly comport with the Rules of Discipline. Exposing a client's financial affairs to public scrutiny, as well as subjecting a lawyer to the anguish, not to mention the expense, of disciplinary proceedings is an exercise that should be made only when specifically permitted.

In the instant case, The Florida Bar's initiation of audit proceedings because something "didn't look right" is improper. This case should be dismissed.

POINT II

PORTIONS OF THE REFEREE'S FINDINGS OF FACTS ARE IMPROPER AND SHOULD BE OVERTURNED.

Respondent is aware that a referee's findings of fact will 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). However, in the case at Bar some of the referee's findings are so misleading as to be clearly erroneous. Accordingly, Respondent asks this Court to overturn those findings by the Referee that are discussed below.

A. Respondent's probation was not violated.

The referee found that Respondent failed to live up to her rehabilitation contract with Florida Lawyer's Assistance Inc. (FLA) by not complying with the requirement of regularly attending

meetings. Respondent acknowledges that contempt proceedings were initiated solely for that reason (there is no evidence indicating the resumption of the use of the drugs that led to her original felony conviction as found in paragraph five.)

Paragraph six of the referee's report, however, is technically incorrect in that it states that the Respondent's "probation was violated.. .." In fact, no judgment of a violation of probation was ever made. The referee's report in the pertinent proceedings, dated October 26, 1990, was entered into evidence as BEX L. A close reading of that report shows that in fact there was no adjudication, or even a finding, that Respondent has violated her probation. The matter was settled by an agreement by the Bar and Respondent's counsel that her rehabilitation contract would be extended until April 15, 1992 from the original expiration of February 11, 1991.

The agreed upon disposition of contempt proceedings also stated that should The Florida Bar "determine that the Respondent is in violation of her rehabilitation contract,...." that the Supreme Court would be notified and that she would be automatically suspended.

Because Respondent's original offense stemmed from impairment as the result of dependency upon drugs, the major precept of her probation was abstinence from those drugs. The referee specifically found that

> there is no history of Respondent using drugs during her probation. BEX L, p. 2.

Respondent's FLA contract was extended for her technical

deviation from its administrative terms by her failure to regularly attend meetings. While attendance at FLA meetings is important, it is an aid to the primary purpose of the probation, i.e., abstinence from drugs.

Respondent did not violate her probation and no such finding was made.

B. Ressondent's Failure to Produce Records.

One reading paragraphs thirteen and fourteen of the referee's report cannot help but come to the conclusion that Respondent completely failed to comply with the request of The Florida Bar's investigator for the production of various records and that she has totally failed to cooperate with the Bar in its investigation. In fact, as attested to by the Bar's investigator, Respondent has cooperated with The Florida Bar in its investigation. TR 60, 61.

Respondent met with Bar personnel at least twice and communicated with them on other occasions to discuss her trust account records. TR 32. She produced what she possessed. The records listed in the referee's report that were not produced are limited to a disbursement journal, client ledger cards, and the bank and client reconciliation records.

Respondent had a plausible explanation for her failure to produce the records. She could not obtain them. TR 86, 87. That explanation was totally ignored by the Bar in bringing its charges and by the referee in the drafting of his findings of fact.

Respondent was not able to produce all of her trust account records because they were deliberately (and perhaps maliciously)

being held from her access by Anthony Paterna, the lawyer whose trust account violations led to Respondent's audit and whose misconduct led to his resignation from The Florida Bar in lieu of discipline. TR 86.

Respondent's failure to produce those records listed by the Bar was not willful. In fact, it was not within her power to do so.

Respondent testified, without rebuttal, that she had kept her records in compliance with the Bar's regulations. TR 95.

A lawyer should not be disciplined for failure to produce records when she is powerless to present them. Nor should a lawyer be disciplined for failure to maintain duplicate records which are lost, destroyed or otherwise are inaccessible.

POINT III

THE REFEREE'S CONCLUSIONS OF LAW ARE, IN PART, INAPPROPRIATE AND SHOULD BE OVERTURNED.

This Court's review of a referee's legal conclusions (as well as his recommendations of discipline) is broader than its review of its findings of fact. The Florida Bar in Re Inglis, 471 So.2d 38 (Fla. 1985) at 41. In the case at Bar, the referee leaped to conclusions of law that are not supported by this Court's holdings.

The first paragraph of the referee's conclusions of law, as set forth on page four of his report, is clearly accurate. Respondent did issue seven checks against her trust account that were returned due to insufficient funds. An eighth check was forged and it too was properly returned for insufficient funds. Finally, all checks were made good and no client was injured. In

the second paragraph of his report, the referee elaborated on his conclusion that no client was injured by pointing out that those clients were neither financially nor legally injured by Respondent's actions.

The referee's conclusion, however, that there is

> no difference between the issuance of worthless checks from a trust account and the misuse of client funds

is an unwarranted conclusion.

The misuse of client funds generally falls into two categories: (1) misappropriate by the lawyer; and (2) use of one client's trust funds for the benefit of a third party. Neither circumstances exists in the case at Bar.

There is no allegation and absolutely no evidence showing that Respondent has misappropriated any trust funds. Her conduct was not motivated by greed or personal gain. She has not benefited in any way (in fact she has suffered grievously) from the circumstances that led to the checks that were returned.

At first blush, it may appear that Respondent used trust funds for the benefit of a third party. Closer examination, however, shows that such is not the case. There were simply no client funds in her trust account at the time the seven checks were originally presented and subsequently returned. That is why the checks were returned. No testimony to the contrary was presented.

Respondent testified that she opened up her trust account with $200.00 of her own money and kept those funds in there for the purpose of covering service charges and, most notably, to cover any

small advances for costs that Respondent might make predicated upon a client's promise of immediate deposit of those funds. TR 69. Furthermore, Respondent at times would deposit checks which contained both trust funds and earned fees into her trust account. TR 94. Such conduct is, according to the Bar's auditor, clearly proper. TR 60, 63, 64.

There is no testimony or other evidence showing that Respondent used anybody's trust funds for anybody else's purposes. Four of Respondent's checks were made out in amounts under $192.15 (No. 2074 for $150.00; No. 2087 for $70.00; No. 2077 for $140.00; and No. 2503 for $192.15). All of those checks should have been covered by Respondent's $200.00 held in her trust account. All of those checks were issued upon a client's promise to immediately disburse the funds into her trust account and there is no allegation that any of the expenditures were for anything but proper purposes. TR 69.

The $539.09 check constituting the eighth instance of insufficient funds was specifically found by the referee to be a forgery and the check was properly dishonored. RR 3.

None of the remaining three checks from the eight that were listed in the Bar's complaint were improper transactions and none of them resulted in the use of clients funds for any other purpose.

The largest returned check, dated March 1, 1989 and made payable to the order of Very Important Babies in the amount of $10,000.00 did not involve the misuse of funds. The most important fact to keep in mind when viewing the $10,000.00 check to Ms.

Tomaselli, the owner of Very Important Babies, was that both Respandent and the payee knew full well that the check would not be good until the closing an the sale of the business. TR 83-84. Respondent did not even have close to $10,000.00 in her trust account at the time that check was written. BEX I.

Ms. Tomaselli's $10,000.00 check was to be paid from the anticipated receipt of $113,000.00 in sale proceeds that afternoon. TR 84. The transaction ended up being postponed (through no fault of Respondent's). The $10,000.00 check was, however, honored when it was presented after the closing.

Perhaps, Respondent used poor judgment when she issued the $10,000.00 check. There was no risk, however, of anybody's funds being improperly used. Respondent had less than $100.00 in her trust account at the time of the check (BEX I) and it was clearly apparent that until closing occurred on the Very Important Baby transaction the check simply would not be covered. In fact, closing took place in the late afternoon on March 3, 1992 (a Friday), several days later than it was anticipated. Due to the lateness of the hour, the $113,000.00 in proceeds was not deposited into Respondent's trust account until Monday morning. TR 84. Those proceeds were received for Ms.Tomaselli's benefit.

In summation, none of Respondent's other clients funds were used to cover the $10,000.00. In fact, there weren't any clients' funds in trust at the time. So, there could be no misuse of trust funds.

As was true with Ms. Tomaselli's check, Respondent's issuance

of check 2083 in the amount of $5,000.00 to Joseph Netti was predicated upon a promise of immediate deposit of a like sum into her trust account by attorney Anthony Paterna. In retrospect, relying upon the promise of Anthony Paterna to deposit trust funds into her trust account was a serious lapse in judgment. At the time the promise was made, on April 17, 1989, Respondent had no reason to doubt Mr. Paterna's veracity or trustworthiness. He was, after all, a member of the Bar in good standing at that time.

Once again, none of Respondent's clients funds were used to cover the $5,000.00 check to Mr. Netti because there were insufficient funds for the check to clear.

Finally, the $2,500.00 check dated May 22, 1989, made payable to Diagem, Inc. resulted in no harm to any of Respondent's clients. The check was returned NSF not because Respondent used a deposit from her client for wrongful purposes but because the deposit was never made. Rather than presenting the $2,500.00 to Respondent, her client paid cash for the transaction. TR 93.

In each of the last three instances, Respondent issued trust account checks upon justifiable assurances that funds covering the checks would be immediately deposited into her trust account. In no instance were the funds of any of her other clients jeopardized because the checks simply would not be good if the deposits were not made. These are not instances where the deposits were received and used for other purposes before the checks cleared.

The Bar has presented no evidence showing that any client's funds were misused.

The facts of this case illustrate conclusively the flaw in the referee's erroneous conclusion that there is no difference in issuing NSF checks from a trust account and the misuse of client funds.

The logical extension of the referee's conclusion is that if a lawyer has no funds in trust far any clients, and the lawyer issues a trust account check on uncollected funds, clearly for the purpose the funds were intended to be used for, the lawyer would be guilty of the misuse of client funds. This is not so.

There is no record evidence to show that Respondent has violated Rule 5-1.1. All money or other property entrusted to Respondent for a specific purpose, including advances for costs, has been held in trust and has been applied only to the purpose for which it was received. There is no evidence to the contrary.

There is no evidence showing that Respondent has not kept the minimum trust account records required by Rule 5-1.2 (b) or that she has not complied with the appropriate trust account procedures. As elaborated on earlier, Respondent's records that would disprove these charges were deliberately withheld from her by a lawyer found guilty of trust account violations, i.e., Anthony Paterna.

The only evidence before the court was that Respondent did not produce some of her records when they were requested, not that they were not kept. And, Respondent could not produce those records because they were locked up. TR 86, 95. The absence of a finding that Respondent "willfully" failed to produce records is fatal to the Bar's case.

The referee's conclusion that Rule 3-4.3 was violated beggars the imagination. That rule cannot be violated. It is merely a jurisdictional statement. It does not proscribe conduct.

Even if that rule prohibits certain conduct, there was clearly no act by the Respondent which was "unlawful". There were no criminal proceedings ever brought. None of her actions can be deemed contrary to honesty and justice. The cases relied upon The Florida Bar, and subsequently relied upon by the referee, clearly show such to be the case.

In The Florida Bar v Davis, 361 So.2d 159 (Fla. 1978) this Court specifically found that the issuance of four worthless checks with knowledge that there was insufficient funds to cover them was not illegal conduct involving moral turpitude. There, Mr. Davis was convicted of the misdemeanor of uttering a worthless check.

There has been no finding that Respondent has engaged in any illegal conduct. Therefore the finding that she violated Rule 3-4.3 as to unlawful acts is without basis.

Likewise, Respondent has not violated that portion of Rule 3-4.3 relating to conduct contrary to honesty and justice. First, The Florida Bar has not charged Respondent with a violation of Rule 4-8.4(c) of the Rules of Discipline. That Rule proscribes a lawyer engaging in conduct that involves dishonesty, fraud, deceit or misrepresentation. In light of the fact that The Florida Bar added Rule 3-4.3 as an afterthought, it surely had time to reflect upon the wisdom of charging a violation of Rule 4-8.4(c). It chose not to do so. The reason is patently clear: The Bar could not sustain

its allegations.

Respondent submits that the conduct at Bar, without more, does not show dishonest conduct. The referee made no such finding, and, therefore, these can be no conclusion that Rule 3-4.3 was violated.

POINT IV

IF RESPONDENT IS FOUND GUILTY OF MISCONDUCT, THE APPROPRIATE DISCIPLINE IS A PUBLIC REPRIMAND.

There is no basis for suspending Respondent fromthe practice of law for two years for issuing seven NSF checks over a four month period in the spring and early summer of 1989. The cases cited by the Bar and the referee involve conduct far more egregious than that at Bar. Yet, none of those lawyers received more than a two year suspension.

Respondent submits that her misconduct more closely falls into the category of poor record keeping than it does misuse of client funds. Accordingly, her discipline should be a public reprimand.

The important factors to be considered when determining the appropriate discipline in this case are that: (1) there was no misappropriation; (2) no clients were legally *ox* financially injured; (3) there was no client complaint; (4) there was no intent to engage in misconduct; (5) Respondent did not personally benefit from her misconduct; and (6) the misconduct alleged to have occurred happened three years ago. The Court should also be mindful of the fact that no clients funds were misused and that Respondent's predicament was the result of being associated with

a lawyer who misappropriated trust funds and whose secretary (also Respondent's) would, at times, fail to make deposits into Respondent's trust account.

The imposition of a discipline is exclusively the province of this Court. While a referee makes findings of fact, he only recommends the discipline to be imposed. Accordingly, this Court's discretion in imposing discipline is unimpeded by the referee's recommendations. The Florida Bar v McCain, 361 So.2d 700, 708 (Fla. 1978); The Florida Bar in Re Inglis, 471 So.2d 38, 41 (Fla. 1985). Respondent submits that the referee's recommended discipline in this case is completely inappropriate for the circumstances at Bar.

The referee correctly points out that the polestar in determining discipline is The Florida Bar v Pahules, 233 So.2d 130, 132 (Fla. 1970). There, the Supreme Court stated the three purposes of discipline as follows:

> First, the judgment must be fair to society, both in terms of protecting the public from 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.

The referee ignored all three precepts in recommending a two year discipline in this case. First, there has been no showing that the protection of the public requires any suspension of Respondent; let alone a two year suspension. There were no client

complaints, no client harm and there was no misappropriation or misuse of clients' funds. Respondent's conduct was not motivated by greed or self-benefit.

The public will not be placed at risk if Respondent is allowed to continue practicing.

Even the Respondent's past disciplinary sanction, theft and breaking and entering, were not offenses that jeopardized her clients' welfare in any way, shape or manner. Respondent's past offense was completely outside the practice of law and was in part due to her chemical dependency. TR 68. That dependency is now completely under control and there is no evidence indicating that during the last eight years she has misused drugs in any way. TR 68, BEX L, p. 2.

Respondent would ask this Court to impose a discipline that encourages reformation and rehabilitation rather than one that is purely punitive in nature.

Disciplinary proceedings are solely remedial; they are not penal in nature. They exist "to protect the public, and not to 'punish' the lawyer." DeBock v State, 512 So. 2d 164, 167 (Fla. 1987)).

Respondent's conduct in the case at Bar more closely parallels that in The Florida Bar v Lumley, 517 So.2d 13 (Fla. 1987) rather than any of the cases cited by the Bar.

In Lumlev, this Court publicly reprimanded a lawyer (thereby rejecting a referee's recommendation that a private reprimand be imposed) for actual misuse of client funds. In Lumlev, the referee

found that the accused lawyer (1) commingled personal funds with trust funds and (2) Mr. Lumley's "commingling" of "personal funds resulted in deficits to the clients' funds". Id., p. 14.

In summarizing the referee's findings, this Court noted that

> The referee found that there was no intent on the part of respondent to defraud or deprive his clients of their property. The evidence showed that, although at times there were deficits in the accounts of money held in trust, respondent in every case restored the balance in the account in time to meet his obligations to his clients. No client suffered any loss or delay in the disbursement of funds. Id. p. 14.

In spite of the referee's findings and opinions, this Court found that the facts of the case

> Implicitly show that respondent knowingly used entrusted funds for his own purposes. Id. p. 14.

Notwithstanding the fact that the Court found an implicit showing that Mr. Lumley knowingly used entrusted funds for his own purposes, this Court concluded that, in light of the referee's finding that respondent's misconduct was not committed with wrongful intent, that a public reprimand was the appropriate discipline. The Court also observed that

> no purpose would be served by probation in this case and so we decline to impose a term of probation. Id. 14.

Respondent submits that she had no wrongful intent in the case at Bar either. Unlike Lumley, there is no basis for any finding that Respondent knowingly or otherwise used entrusted funds for any purpose other than as intended. Certainly, there was no personal benefit to be gained from any of her acts.

Pahules dictates that a discipline should be fair to the lawyer. Suspending Respondent is the antitheses of that requirement.

The Florida Bar's seeking a two year suspension in the case at Bar directly contradicts its failure to contest the public reprimand recommended in The Florida Bar v Pino, 526 So.2d 67 (Fla. 1988). In Pino, the accused lawyer was found guilty of two counts of misconduct. The first one involved his misusing his trust account as to the receipt of $22,600.00. Mr. Pino did not invest the funds in the manner in which he was supposed to do so and then he issued bogus shares which misrepresented the actual disbursal of the funds. The referee, on count one, found the respondent guilty of misuse of his trust account, business transactions with clients (basically, a conflict of interest) and failure to promptly deliver trust funds to which a client is entitled.

On count two of the Pino case, the referee found that respondent himself organized a corporation and received investment funds from numerous investors. When the corporation was subsequently liquidated, respondent distributed its assets preferentially. The referee also found that Mr. Pino failed to properly account to the cash investors in violation of various disciplinary rules.

As is true in the case at Bar, the referee's findings in Pino was based almost entirely upon documentary evidence and the respondent's admissions. As is also true in the case at Bar, there was no criminal or wilful misconduct involved. The referee

recommended that Mr. Pino receive a public reprimand, The Florida Bar did not contest, and the Supreme Court entered such an order.

Respondent's conduct in the case at Bar is certainly no more egregious than Mr. Pino's misuse of trust funds, conflict of interest and preferential treatment. To say that Respondent should receive a two year suspension for her conduct, even allowing for her past, unrelated misconduct, is simply preposterous.

The most glaring cases of the inconsistency by The Florida Bar as applied to the instant case, and perhaps showing an instance of improper "selective prosecution" (see The Florida Bar v Johnson, 313 So.2d 33, 35 (Fla. 1975)) is the comparison of Respondent's case with that of the two cases involving James C. Burke, a legislator. In the first disciplinary case against Mr. Burke, he received a 90 day suspension for failing to maintain complete records of his clients' funds and for his failure to disburse over $6,000.00 for ten months. The referee also found that Mr. Burke was guilty of violating the rules relating to trust account records for failure to even attempt reconciliations, for keeping inadequate records, for failing to identify the client for whom funds were received. The referee's finding was that Mr. Burke's "entire accounting procedures were a shamble." The Florida Bar v Burke, 517 So.2d 684 (Fla. 1988), hereafter referred to as Burke I.

In Burke I, the lawyer's misconduct clearly harmed his clients, by depriving them of $6,000.00 for over ten months and his trust accounting procedures were nonexistent. Yet, he received but a 90 day suspension.

Three years later this Court again disciplined Mr. Burke for gross negligence in the handling of his clients funds. This time, despite his previously being disciplined for similar misconduct, and for engaging in repeated and gross misconduct, Mr. Burke received but a 91 day suspension. The Florida Bar v Burke, 578 So.2d 1099 (Fla. 1991).

In Burke 11, respondent was found guilty of depositing $150,000.00 in trust proceeds directly into his personal account; in disobeying orders of the court in regard to distribution of estate funds; and in appropriating to himself over $9,900.00 in fees above that awarded by the court.

In suspending Mr. Burke for 91 days, the Court noted that the Bar had not proved that his misconduct was intentional and therefore a finding of guilt of engaging in misconduct for dishonesty, fraud, deceit or misrepresentation was inappropriate. The Court also noted that Mr. Burke's misconduct arose during the same time frame as that in Burke I. The Court observed that had both cases arisen simultaneously, Mr. Burke would have received a six month suspension.

Mr. Burke's misconduct in either case is far more serious than that at Bar. Yet, he received a 90 day suspension in Burke I and, the Court noted that had both cases been consolidated, he would have received at most a six month suspension. Both disciplines are a vast departure from the two years suspension The Florida Bar recommends.

Respondent did not withhold clients funds for ten months

before disbursing them. Respondent did not disobey court arders. Respondent did not appropriate to herself (i.e., steal) $9,900.00 in extra fees. Respondent did not deposit $150,000.00 in trust funds into her personal account. Yet, the Bar would have this Court suspend Respondent for two years when a lawyer caught in engaging in the misconduct listed above received but a 90 and a 91 day suspension.

By ignoring past disciplinary sanctions, the Bar is asking this Court to "allow caprice to substitute for reasoned consideration of the proper discipline." The Florida Bar v Breed, 378 So.2d 783, 785 (Fla. 1980).

As mentioned above, this Court specifically rejected in the Burke cases a finding that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. There is also no finding that he engaged in unlawful conduct or in conduct contrary to honesty and justice. Yet, the latter was found in the case at Bar.

As was true in Burke 11, The Florida Bar has presented no evidence of intentional wrongdoing and, accordingly, any rule violations that inherently contain such a finding must be thrown out. Rule 3-4.3 is exactly such a rule.

Even assuming there is a basis in the record for a finding of improper or incomplete record keeping (a point not conceded by Respondent) the appropriate discipline for such conduct is a public reprimand. See, for example, The Florida Bar v Borja, 554 So.2d 514 (Fla. 1990). Mr. Borja received his public reprimand for

issuing a $10,000.00 check from a trust account to pay an estate's taxes when there were no funds in the account for that purpose. Mr. Borja's trust account was audited in June 1987 and it was found that he was not in substantial compliance with trust accounting procedures. A followup audit was conducted in June 1988, and again it was found that respondent was not in compliance. Mr. Borja was found guilty of various violations of Rule 5-1.1 and 5-1.2.

There was no finding that Mr. Borja engaged in a violation of Rule 3-4.3.

As was true in the case at Bar, Mr. Borja was guilty of "technical violations" and no party was injured by the violations. Notwithstanding his failure to straighten out his trust account during the one year interim between his June 1987 audit and his June 1988 audit this Court issued an order of public reprimand. No suspension was imposed.

The cases relied upon by the Bar, and subsequently by the referee, involve factual situations so far removed from the instant case as to make them virtually meaningless. The most glaring example is the Florida Bar's reliance on The Florida Bar v Breed, 378 So.2d 783 (Fla. 1979). Mr. Breed received a two year suspension after being found guilty of engaging in a $70,000.00 check-kiting scheme, commingling, misuse and misappropriation of clients' funds in the amount of $7,816.00, and inadequate record keeping. With the possible exception of the latter element, Respondent has engaged in none of the offenses involved in the Breed decision. Yet, the Bar would have her receive a similar

discipline.

The most glaring distinction between the Breed case and the one at hand is the referee's finding that Mr. Breed was

> dangerous to that segment of the public with which he comes into professional contact.... Id., 784.

There is no such finding in the instant case. How, then, can the Bar argue that Ms. Rosen should receive the same "punishment" as Mr. Breed.

The Florida Bar also relies on The Florida Bar v Hartman, 519 So.2d 606 (Fla. 1988) as support for a two year suspension. Mr. Hartman was found guilty of four counts of misconduct. Among them were his receipt in July 1984 of $2,500.00 as payment for child support. Mr. Hartman neither deposited the money into his trust account nor delivered it to his client, the child's mother. There were also seven instances in paternity actions in which putative fathers advanced coats to Mr. Hartman for blood tests, all of which was to be placed into trust. Mr. Hartman did not deposit those funds into his trust account and did not disburse them to pay for blood tests.

When Mr. Hartman's contract with HRS ended in November 1984, an examination of his records showed that he had failed to forward to his clients approximately $3,600.00 that he had collected in trust. In other words, he misused the funds. In fact, an audit of his trust account records from March 1, 1979 through April 1, 1985, a six year period, indicated that he had failed to promptly deliver trust funds in excess of $9,700.00.

Count II involved Mr. Hartman's receipt of $7,000.00 in closing proceeds and his failure to disburse the money to his client.

The third count of the first complaint filed against Mr. Hartman involved his keeping almost $500.00 of money entrusted to him to pay off a debt as payment of contested fees.

The second complaint filed against Mr. Hartman involved his participating in a loan from one client to another which involved an 80% interest rate, Clearly, that rate was usurious and illegal.

Mr. Hartman, primarily due to his emotional instability and his drug and alcohol addiction, received but a two year suspension.

The Bar would now have Susan Rosen suspended for two years for misconduct that does not even approach that of Mr. Hartman's. She did not steal any money; her misconduct did not occur over a one and one-half year period; she did not participate in an illegal transaction between two clients; and these were not numerous instances in which she received funds in trust and did not disburse them.

Finally, The Florida Bar relies on The Florida Bar v Davis, 361 So.2d 159 (Fla. 1978) as support for its position. The inapplicability of the Davis case to the case at Bar is readily apparent: He was convicted of the misdemeanor of uttering a worthless check. That, and that alone is a major distinction from the case at Bas. Furthermore, he was specifically found guilty of conduct involving dishonesty, fraud, deceit or misrepresentation; another factor not involved in the case at Bar. Despite his being

found guilty of four counts of misconduct, Mr. Davis was suspended for only twelve months. That is one half the time imposed in the case at Bar.

Other than the conviction of a crime, the major distinction between the Davis case and the one at Bar is that he did not immediately make good any checks that were returned by the bank for insufficient funds. In fact, he forced the payees to obtain judgments against him.

Respondent issued seven checks that were immediately made good upon their return. The checks were not worthless, there was no harm to any clients and there were extenuating circumstances behind the issuance of the three larger checks. It is simply ridiculous to say that Respondent should be suspended for two years when Roger Davis only received a one year suspension.

The Florida Bar argues that Respondent's conduct is cumulative and, therefore, she should receive an enhanced discipline. Her conduct is certainly less "cumulative" than that engaged in by Messrs. Breed, Hartman and Davis. All of them engaged in repeated instances of misconduct extending over a period of many, many months. Respondent's misconduct was confined to a four month period, involved minimal amounts of money and was totally devoid of any improper motive.

In fact, Ms. Rosen's lapses occurred over a far shorter period of time than did the accused lawyer in the Boria case. Yet, he only received a public reprimand.

Respondent submits that the referee improperly enhanced her

discipline due to her prior misconduct. At the outset, it should be emphasized that Respondent's rehabilitation contract with FLA was extended not because she resumed the use of drugs or alcohol in violation of that contract. The contract was extended because she was not regularly attending her meetings. The most important facet of her rehabilitation contract, abstinence, has been met. There is no dispute as to that fact.

Respondent's conviction and subsequent suspension in 1984 for the felonies of theft and breaking and entering (which occurred in 1981) are so remote in time and subject matter to the case at Bar that there should be no enhancement for recidivistic purposes. The Florida Standards For Imposing Lawyer Sanctions specifically so state. Rule 9.32(m) states that prior offenses can be mitigated due to remoteness.

Perhaps, the reason for the referee's Draconian recommended discipline is his failure to consider those standards while deliberating on the sanction that he was to recommend. Rule 9.32 of the Standards lists the factors that should be considered in mitigation of discipline. Other than the remoteness of prior offenses, mentioned above, there are at least five other factors listed as mitigation in Rule 9.32(m) present in the case at Bar. They are: (b) absence of a dishonest or selfish motive; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) cooperative attitude; (j) interim rehabilitation; (1) remorse.

There is no showing whatsoever that Respondent's motives in

these cases was motivated by any dishonest of selfish purposes. She had nothing to gain in any of the transactions. The Bar has presented no evidence indicating otherwise.

The Bar itself has admitted that all checks were made good and the referee so found.

The Bar's auditor himself, contradicting the Bar's position that she failed to produce records, acknowledged her cooperative attitude. TR 60, 61.

Respondent has had no problems with her trust account in the three years since her issuance of the checks at issue. In other words, she has rehabilitated herself from the flaws that led to these disciplinary proceedings (basically, by ending her association with Mr. Paterna).

Finally, Respondent accepted blame for her misconduct and, inherent within her testimony, regrets that it happened and promises that it will not be repeated.

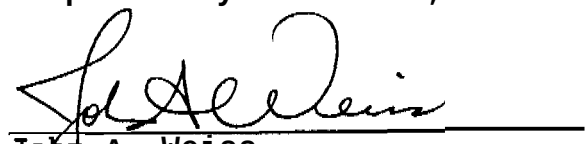
CONCLUSION

The Bar violated its own rules by initiating the audit in this case. Such conduct cannot be tolerated by this Court. The requirements for the initiation of an audit are specifically set forth in the Rules of Discipline and a failure to abide by them can only result in the dismissal of the Bar's case. Failure to dismiss this case sends a clear message to The Florida Bar that they are free to ignore those rules of discipline that are inconvenient to them.

Should this Court decide that discipline is appropriate in the

case at Bar, it should impose, at most, a public reprimand for failure to keep proper records. Such a sanction is appropriate when, as here, there was no intent to engage in misconduct, there was no motive for self gain and there was immediate restitution.

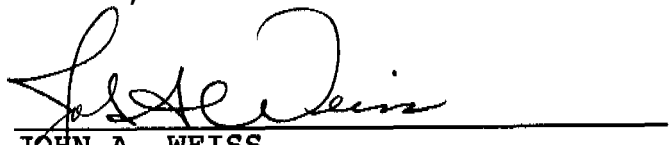
Respectfully submitted,



John A. Weiss
Attornay Number 0185229
P. O. Box 1167
Tallahassee, Florida 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

CERTIFICATE OF

I HEREBY CERTIF tha a c of the foregoing Respondent's Initial Brief w mailed to Pau A. Gross, Bar el, I orida Suite I 0 , vergate Plaza, 144 Avenue, Miami, Florida 33131 this 18th day of March, 1992.



JOHN A. WEISS