IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ELLIS S. SIMRING,

Respondent.
_____/

Supreme Court Case
Nos. 77,351 and 78,243

# RESPONDENT'S ANSWER BRIEF

AND

# INITIAL BRIEF ON CROSS-PETITION

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## PRELIMINARY STATEMENT

The Florida Bar will be referred to as "the Bar" or "the Florida Bar." Ellis Simring will be referred to as "Respondent" or "Mr. Simring." The symbol "RR" will be used to designate the report of the Referee and the symbol "TT" to designate the transcript of the final hearing. "Red Book" will designate be used to designate Respondents Reply to Complainant's Response to Respondents's Emergency Motion to Dissolve Emergency Suspension Order, Reply to Complainant's Response to Respondent's Motion for Reconsideration of Respondent's Motion to Consolidate, Respondent's Motion to For Final Determination, and attached Exhibits 1-22. All other documents and exhibits will be referred to by full title or by abbreviation as supplied in the text.

## NOTE ON THE RECORD AND PLEADINGS

The "record" which constitutes this case file is voluminous. The facts and events involved are complex; it is impossible to fully address them within the four corners of a 50-page brief. Any attempt to summarize would equally be an injustice.

Accordingly, it is Mr. Simring's position that the facts of the case and Mr. Simring's situation cannot possibly be understood without reading **ALL** of the Motions filed with this Court, ALL the character reference letters submitted on behalf of Mr. Simring, **ALL** the letters from Mr. Simring to Bar counsel which are on file, and finally, the entire transcript of the final hearing before Judge Stevenson. A full appraisal of all these documents will render Respondent's Brief self-explanatory and will reveal the untenability of the Bar's positions concerning the alleged "theft" and any punishment based upon "theft.

In order for the Court to have easy reference to the documents referred to in this Brief, the Respondent has taken the liberty of attaching those which are of vital importance as Appendices. This does not diminish the importance of the documents contained in the Court file. Respondent has however repeated certain statements and defenses previously made in prior documents in an effort and attempt to have this Brief complete for review.

Mr. Simring calls the Courts attention to two documents in particular which were filed with the Supreme Court and from which the Court can glean a better understanding of the case:

1. Respondent's Motion for Rehearing, Petition to Dissolve Order of the Supreme Court, Petition to Amend Order of the Supreme Court [hereinafter **Motion for Rehearing]** [Exhibit 1 in Red Book and attached as Appendix 1].

2. Respondents Reply to Complainant's Response to Respondents's Emergency Motion to Dissolve Emergency Suspension Order, Reply to Complainant's Response to Respondent's Motion for Reconsideration of Respondent's Motion to Consolidate, Respondent's Motion to For Final Determination [hereinafter **Motion for Final Determination]** [Red Book which is herein incorporated by reference]

## STATEMENT OF THE CASES AND THE FACTS

Mr. Simring has been indefinitely suspended from the practice of law as the result of an Order of Temporary Suspension filed on January 14, 1991, based on a Petition for Temporary Suspension filed by the Florida Bar. One year later, this appeal involves two consolidated cases. Case number 77,351 involves a five-count complaint alleging certain acts of misconduct relating to Mr. Simring's trust account. Case number 78,243 relates to Mr. Simring's handling of settlement proceeds from the representation of Radcliff Barnett on a personal injury action. Both matters were consolidated for trial and were heard before the Honorable W. Matthew Stevenson, Referee, on October 3- 4, 1991. The Referee rendered his report on November 23, 1991. After a two-month delay, the Bar filed its Petition for Review on January 31, 1992.[1]

**Case # 77,351**

The Florida Bar, without conducting an audit, without conducting an investigation, without making any inquiries of the Respondent, the bookkeeper, or other necessary persons concerning

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[1] The incredible delay in prosecuting this case has created a personal and financial nightmare for Mr. Simring. So far, after more than a year, Mr. Simring has been suspended from the practice of law without a final determination of his case. The Supreme Court has recently declared that such delays in temporary suspension cases implicate due process concerns, and has ruled that final hearings shall be heard within 90 days of appointment of a Referee. The Florida Bar Re: Amendments to the Rules Regulating the Florida Bar, 1-3.7; 3-5.1(a); 3-5.2; 14-1.1 and Chapter 15, 16 F.L.W. S743, S743-45 (Fla. Nov. 14, 1991).

the source and ownership of the monies in the trust account, and considering the comingling of $187,000 which was admitted by the Respondent, is attempting to prove a case of theft. They are doing this on the testimony of their only witness, Mark Widlansky, who admitted that he conducted a bank reconciliation, used none of the acceptable guidelines in the industry, and admittedly was unable to reach any conclusion that Respondent was guilty of theft.

At the conclusion of the hearing, the Referee found Mr. Simring guilty on four of six counts as alleged in the Complaint and recommended an 18-month suspension.

As to Count I, the Referee found Mr. Simring not guilty of stealing client funds. However, the Referee found, as Mr. Simring had stipulated, that proper trust account procedures had not been followed. The Referee found Mr. Simring guilty of the following Rule violations:[2] Rules 4-1.15(b) (relating to client

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[2] The Referee found Mr. Simring "guilty" for each Count, except Count IV, of violating **Rule 3-4.2**, **Rule 4-8.4(a),** and **Rule 4-1.15(d).** Rule 3-4.2 states that violating the Rules of Professional Conduct is a cause for discipline. Rule 4-8.4(a) states that a lawyer shall not violated the Rules of Professional Conduct. Rule 4-1.15(d) states that a lawyer shall comply with the rules regulating trust accounts.

Mr. Simring respectfully suggests that these are NOT properly considered as separate Rule violations. To say that it is a separate violation of the Rules to violate the Rules is patently absurd. If it were so, then every violation would in fact be a double violation--one for the substantive offense and another for violating the rule in the first place. To suggest that a lawyer is somehow more guilty for violating the rule that prohibits violating the Rules is simply Doublespeak. Indeed, carried to its logical extreme, any violation results in an

notification of receipt of funds) and 5-1.1 (relating to trust account procedures). However, there was no evidence at trial from which the Referee could find that Mr. Simring failed to promptly notify a client upon receipt of funds and thus there was no violation of Rule 4-1.15(b).

On Count I The Referee found Mr. Simring not guilty of violating Rule 3-4.3 the commission of an act contrary to honesty and justice); Rule 3-4.4 (criminal activity as a cause for discipline); Rule 4-8.4(b) (a lawyer shall not commit a criminal act); and Ru e 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

As to Count 11, the Referee found Mr. Simring guilty of not having an interest bearing trust account in violation of Rules 5-1.1(d). The Referee did not clarify that interest bearing trust accounts were not mandated by law until October 1, 1989. TT at 260. Thus, the Referee failed to account for the effect of Mr. Simring's impairment at this time in taking note of such a rule change. Had Mr. Simring been aware that the Rules had changed, he would have acted accordingly. Surely, Mr. Simring had nothing to gain by not taking such action.

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endless logarithm of violations: a violation of the rule against violating the Rules necessarily entails violating the rule against violating the Rules. And so on.

Accordingly, Mr. Simring will not list the alleged violations of these three rules in his summary of the Counts.

As to Count 111, the Referee found, and the parties stipulated, that Mr. Simring commingled personal funds with that of his clients. The Referee did not cite a specific Rule prohibiting such conduct because there is none.

As to Count IV, the Referee found Mr. Simring guilty of failing to produce trust account records in violation of Rules 5-1.2(b), and 5-1.2(c). The Referee did not find that Mr. Simring failed to keep such records because the testimony at trial was that such records were kept but that they were disposed of when the partnership dissolved on June 30, 1990.

As to Count V, the Referee found Mr. Simring not guilty of any Rule violations with respect to a second bank account.

**Case # 78,243 (Radcliff Barnett)**

As to this case, the Referee found that Mr. Simring violated Rules 4-1.15(a), (b), (c) and Rule 5-1.1. (The facts are discussed below). Mr. Simring contests the finding as to Rule 4-1.15(b) because the testimony at trial was that Barnett was notified when the funds were received. TT at 183. The Bar did not prove otherwise. Mr. Simring also contests the finding as to Rule 4-1.15(c) because that rule speaks only to property, not cash, and there was no property at issue in this case.[3]

[3] Subsection (a) of Rule 4-1.15 speaks specifically to "funds and property." Subsection (c), however, only refers to "property."

Mr. Simring takes exception to the Bar's version of the "facts" relating to this case.[4]

The testimony at trial was that Barnett's personal injury award was not kept in the trust account in order to protect such funds from levy by the I.R.S.. Mr. Simring's practice was rapdily deteriorating at this time and the I.R.S. was owed partnership taxes. The I.R.S. special agent informed Mr. Simring that he was going to levy on the trust account.[5] When Radcliff Barnett's check was received during this period, Mr. Simring deposited the check in the trust account, but placed $35,0000 in cash in escrow with a fellow attorney from New York, Mr. Harold Rubalow. TT at 178-180.[6] This testimony was corroborated by Mr. Rubalow at the final hearing. TT at 43-48.[7]

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[4] The Bar's allegations as to shortages in each client account in Case # 77,351 (which the Referee did not find) are addressed in Part I(b), infra.

[5] The Court may take issue with Mr. Simring's testimony that the I.R.S. had threatened to levy on his trust account. However, the Bar admitted at trial that the I.R.S. does in fact levy on funds in attorney/client trust accounts and actually seizes those funds. TT at 336; Appendix 3. Any practicing attorney or I.R.S. agent will testify that this is true--even though it is not allowed. Mr. Simring did not want Barnett to have to petition the I.R.S. to get his money back so it was placed in escrow.

[6] Mr. Simring testified that this cash was on hand from cash payment in 600 immigration cases being handled by his office. TT at 190.

[7] Mr. Simring also testified that although he was entitled to a 40% fee, plus cost, that he only took a $7,000 fee and used $3,000 to cover costs. TT at 171. (The total settlement on the Barnett case was a structured settlement of approximately $200,000 to be paid to the infant over the course of ten or

The Bar informed Mr. Simring's attorney by letter dated July 2, **1991**, that if Mr. Rubalow were holding the money that Mr. Simring would be cleared of theft charges. Appendix at 2. The Bar received Mr. Rubalow's testimony at trial and did not rebut this testimony. Moreover, the Bar has admitted to this Court that Mr. Simring did have the money, that it was not spent for personal use, and that Barnett did in fact receive the money. Initial Brief at **16**.[8]

Mr. Simring also explained why Barnett was not immediately paid. The uncontroverted testimony was that Mr. Simring was required to obtain Probate Court approval in order to disburse personal injury settlement proceeds to a minor even though the Circuit Court had approved the settlement. TT at **174-175**. The Bar has in its file remittances from the Probate Court showing at least **6** or **7** failed attempts by Mr. Simring to correctly file the necessary papers. TT at **175-176**. When the papers were finally

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fifteen years. Respondent waived all fees on the structured portion of the settlement to expedite the matter and to assure that the infant would be protected. Respondent only took a small portion of the initial $45,000 although entitled to fees in excess of what he accepted.)

[8] The Bar also states on page **16** of its Brief that Mr. Simring was attempting to extort money from his former partner, Bruce Glaskin. The actual testimony was that Bruce had advised that he would repay all personal monies taken from the trust account during this period because the monies were used to repay Bruce's immigration clients. When Bruce failed to make the payments on Barnett, Mr. Simring tried to get Bruce to live up to his obigations--not to extort him. TT at **187-188**.

filed correctly, Mr. Simring made all attempts to expedite payment of the funds to Barnett.

The Bar sets forth a list of disbursements in its Brief allegedly made by Mr. Simring against the Barnett trust money. Mr. Simring has explained that Barnett's money was not in the trust account, it was with Mr. Rubalow. Moreover, the Bar admits these facts in its Brief: TT at 15-16. If $22,000 in disbursements were made against such monies from March 5, 1990 to May 30, 1990, how does the Bar account for its own statement that Barnett's $35,000 was in Mr. Simring's possession in August of 1991? Initial Brief at 15-16.

In trying to win this case at any cost (see discussion below), the Bar overlooks its own admission: **the Barnett money was not in the trust account. Hence, the disbursements from trust never occurred.** The Bar fails to understand Mr. Simring's testimony, as explained infra at Part I(b), that Barnett's name--as well as the names of other clients--was placed on the bottom of checks written out of personal funds for bookkeeping purposes only and did not reflect that the money was taken from client funds. This was because in order to keep track of the monies a client's name had to be listed on the ledger card. See Appendix 4.

In conclusion, the Referee found that the Bar failed to establish theft of client funds, because there was no such theft. At worst, the facts establish a case of money substitution to

protect a client.' Furthermore, the Bar fails to accept that Mr. Simring was suffering severe emotional and physical impairments during the time in question and that none of this would have happened but for such impairments.

Based on the above assessment of the Referee's findings, the only substantive Rule violations found by the Referee that are supported by the record relate to commingling under Chapter 5 (Rules Regulating Trust Accounts) and failing to place client money in trust under Rule 4-1.15(a).

Mr. Simring further objects to the Referee's failure to properly assess and credit the mitigating evidence presented at the final hearing and the admission of evidence from the Bar's sole witness, Mark Widlansky, who testified that he did not perform an audit, TT at 123, that he did not conduct any independent inquiry or investigation, TT at 139, 252, 310, and who admitted that he could not state whether any money was stolen. TT at 130. Mr. Simring directs the Court to Respondent's Cross Petition for Review which sets forth further objections in greater detail.

The Bar's Efforts "To Win At *Any* Cost"

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9 Furthermore, the Bar's allegation in footnote 13, page 22, that Mr. Simring admits to engaging in tax fraud has no foundation in basis or fact. The Bar confirmed that Mr. Simring has paid taxes on all his income.

At the time the initial letter of complaint was received by Mr. Simring, he was interviewed by Mark Widlansky and Linda Amidon. During this initial interview, Mr. Simring admitted co-mingling funds and explained to the Bar's representatives that he was having personal problems during the past few years, that the law practice of Simring & Glaskin, P.A., was dissolved a few months prior thereto, and that although trust account records were meticulously maintained in addition to clients' files, that many of these records were either destroyed or lost.

The full extent of the personal problems experienced by Mr. Simring are fully set forth in the Petition for Rehearing attached as Appendix 1. Sometime after meeting with the Bar's representatives, Mr. Simring subjected himself, pursuant to Stipulation, to a psychological evaluation as more fully discussed herein. In his naivete, Mr. Simring believed that the Bar was attempting to make an earnest effort to resolve the Complaint.

It appears that "the only ethic of the Florida Bar is to win at any cost." These allegations are not made lightly and are being stated reluctantly for the Court to understand that instead of an effort of conciliation, the Bar turned this into a full and complete adversarial contest. In doing so, as far as the Bar was concerned this was a "no holds barred situation." IN ORDER TO WIN AT ANY COST, BECAUSE THE BAR HAS NO FACTUAL OR LEGAL ARGUMENT TO PUT FORTH, THE BAR HAS RESORTED TO UNDERHANDED,

UNCONSCIONABLE, AND INFLAMMATORY CONDUCT AS DEMONSTRATED BY THE FOLLOWING:[10]

A. The Bar does not refer to the fact that during a major portion of this alleged investigation there was a claim that there were funds in the trust account belonging to Sal Autera. After a deposition of Mr. Autera, it became clear to the Bar the mistakes they made in their bookkeeping procedures and they withdrew their claim that there were client funds belonging to Sal Autera in the trust account. This resulted in Mr. Simring's letter to Kevin Tynan of June 27, 1991 which is self-explanatory. Appendix 10 (Exhibit 8 in Red Book).

B. The Bar is attempting to state that Mr. Simring should be disbarred because of an alleged attitude of "omnipotence and self-assurance." It is suggested that a psychological profile has never been a prerequisite for membership in the Florida Bar. Whether such an attitude makes one a better attorney, or not, cannot be a matter of inquiry in these proceedings. To hold otherwise would be to jeopardize the license of most successful trial attorneys. Mr. Simring would rather be as Dr. Winters

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[10] The purpose of these comments is not to demean or embarrass Bar counsel. Kevin Tynan, unfortunately the persecutor in this case, does not have and has not yet obtained the maturity and experiences in life to be empowered with the ability to destroy a person's life. A review of his Brief, which distorts the facts and misuses the psychological evaluation, indicates certain "intellectual dishonesty" and a lack of discernment. In his misplaced and misguided effort "to win at any cost," in Mr. Simring's opinion, Mr. Tynan has broken every moral and ethical violation of human rights "in the book."

described than, as Mark Twain stated. "Deep down in his heart, no man much respects himself."

C. Referring to Appendix 5, the Court in its review can note the uncontrolled and compelling power of the Bar to monitor an attorney's life. Here is a staff attorney with no particular mandated powers that are anywhere recorded who has decided upon himself in one letter not to discipline Mr. Simring and in another to indicate a course of continuous harassment.

D. The Bar's "opposition by rote" of everything Respondent attempted to do to resolve the situation. This is exhibited very clearly in Exhibits 9 and 10 of the Red Book.

**E.** The attempt by Respondent to obtain a qualified psychologist for the independent psychological evaluation (IPE). Appendix 6; Exhibit 7 in the Red Book. In lieu of accepting the recommended psychologist and furthermore with no discussion in an attempt to agree on a psychologist, the Bar requested that Judge Stevenson appoint one. The result was that Dr. Barbara Winter, who conducted the IPE, had no previous experience, knowledge of attorney's problems, or familiarity with trust accounts. This will be discussed further in this Brief.

F. The Bar takes out of context the loan from Rostyslaw Kindratiw and takes issue with the statement made during trial that Mr. Simring told Mr. Kindratiw to "sue me." The transcript reveals significant surrounding circumstances of this loan including the fact that Mr. Kindratiw is still a friend of Mr. Simring's whom he is in contact with very often. TT at 196.

G. The Bar makes issue of the fact that there is no written documentation concerning the Barnett funds given to Harold Rubalow. The trial reflects that there were letters and receipts passed between Mr. Simring and Mr. Rubalow, copies of which Mr. Tynan has in his file to which he referred as being the letter of March 19, 1990. TT at 182. It is disturbing that Mr. Tynan picks, chooses, and selects indiscriminately from certain portions of the trial transcript, out of context, for the purpose of bolstering his case.

H. Kevin Tynan refers in his Brief to the violation of the Order of Temporary Suspension. Again, this cannot be taken out of context and there is insufficient space in this document to reargue this matter. Answering documents were filed with this Court which clearly set forth reasons why the Order was violated, if in fact it was. There was no intent to violate the Order and Mr. Simring had no knowledge that it was being violated because of the acts alleged.

I. Mr. Martin Roth, over the past 15 years, referred numerous cases to Mr. Simring's office. The Florida Bar, for no apparent reason other than to infer impropriety, made point to refer to Mr. Roth as "a disbarred New York attorney." Initial Brief at 15 n.3.

The obligations of a prosecuting attorney for an administrative agency and the Justices of the Supreme Court is to balance the legalities of what is right and what is wrong.

Why is the Bar prosecuting this case with such vigor? The answer is because the Bar, and Kevin Tynan, are using the system unfairly. Kevin Tynan walked into the Referee's courtroom a winner based on the stipulation of commingling by Mr. Simring. He had nothing to lose by trying this case. Mr. Simring was already suspended without a hearing and without judicial review. The Bar knew that the Supreme Court rarely reduces a Referee's recommendation and often increases it. See Appendix 7 (Letter containing Final Argument to Judge Stevenson dated 11-8-91--Exhibit 22 in Red Book.)

Now the Bar has two more advantages in filing its Petition for Review with the Supreme Court. First, they have "a shot" at getting a more severe sanction. And, second, if nothing else, they are able to delay these proceedings for another six months while Mr. Simring remains suspended. Mr. Simring respectfully but firmly submits that the Bar is trying to win this case at any cost to cover-up its own ineptitude and myopia in not properly investigating this case, not taking into condsideration the defenses raised, and by making no effort to resolve this situation.

## SUMMARY OF ARGUMENT

The Referee's findings of rule violations were clearly not erroneous. Mr. Simring has maintained since the first day of investigations that he did not steal client monies but that improper bookkeeping procedures created the misapprehension that there were shortages in the attorney/client trust account. Mr. Simring has explained each and every allegation of "theft" as to each and every client account. The Bar's allegations of "shortages" were compounded by their own faulty "audit" of Mr. Simring's trust account records.

Mr. Simring has admitted, however, from the first, that he commingled personal funds in an attorney/client trust account and that he did not properly manage his trust account.

Disbarment is only appropriate on a finding of intentional conversion of client funds. The Referee expressly found that "the Bar has failed to meet its burden of proof in establishing an intentional theft of client monies." RR at 3. The Supreme Court has repeatedly said that it will not substitute its judgment for that of the Referee unless the Referee's findings are clearly erroneous or lacking in evidentiary support. The Bar has presented absolutely no evidence to show that Mr. Simring stole client monies. The Bar attempts to prove that the Referee's findings are erroneous based on evidence of "paper shortages." The Bar's own "auditor," however, testified that he did not know if client monies were stolen. Disbarment is not warranted by the Referee's findings of commingling, especially in light of the mitigating evidence in this case.

Although the Referee issued a detailed report, the report does not give due consideration to the mitigating evidence presented by Mr. Simring through his own testimony, the testimony--both oral and written--of doctors and psychologists, and the testimony of Mr. Simring's eldest son. The entire thrust of Mr. Simring's case at trial was that during the period in question he was impaired due to the suicide attempts of his youngest son and his own physical ailments, including anemia, low blood count, chronic flu, and Chronic Fatigue Syndrome. Certainly, given the severe nature of this impairment and its effect on Mr. Simring, his punishment should be mitigated accordingly. See Appendix 8.

Finally, Mr. Simring should not be liable for $ 9,000 in costs incurred by the Bar in unnecessarily prosecuting a nonexistent case of theft. As discussed above, Mr. Simring admitted to commingling and inadequate trust account bookkeeping from Day One. Indeed, the Bar and Mr. Simring entered a **Joint Stipulation** in February **1991** with the intent that Mr. Simring was to submit to a psychological evaluation and that if found no longer to be impaired, he would be reinstated. Despite the findings of impairment by the examiner, the Bar incurred ten more months of expenses seeking to prove an allegation of theft which Mr. Simring has always denied, for which there are no victims, and which the Referee determined to be unfounded. Mr. Simring should not have to bear the costs of the Bar's unnecessary persecution and fruitless quest.

## ARGUMENT

### I. THE REFEREE'S FINDINGS ARE NOT CLEARLY ERRONEOUS. MR. SIMRING DID NOT STEAL CLIENT MONIES AND THE EVIDENCE DOES NOT ESTABLISH OTHERWISE.

The Bar has the burden of proving by clear and convincing evidence that a lawyer is guilty of specific rule violations. The Fla. Bar v. Burke, 578 So.2d 1099, 1102 (Fla. 1991); The Fla. Bar v. Hooper, 509 So.2d 289, 290 (Fla. 1987). The Referee's function is to weigh the evidence and determine its sufficiency, and the Court does not substitute its judgment for that of the Referee unless the Referee's findings are clearly erroneous or lacking in evidentiary support. E.g. The Fla. Bar v. Scott, 566 So.2d 765, 767 (Fla. 1990); The Fla. Bar v. Hooper, 509 So.2d 289, 290-91 (Fla. 1987). Thus, the Bar bears the burden of establishing that the Referee's findings are erroneous, unlawful, or unjustified. R. Reg. Fla. Bar 3-7.7(c)(5).

In his report, Judge Stevenson made the following finding regarding the Bar's allegations of theft:

> Although the aforesaid conduct violated several Rules of Professional Conduct and Rules Regulating Trust Accounts . . . the Bar failed to meet its burden of proof in establishing an intentional theft of client monies. . . . Petitioner seeks to raise a presumption of theft by repeated instances of shortages in the trust account over an extended period of time. However, Petitioner's case must fail in that regard, especially where no injured party was presented, no client complained to the Bar, nor was any evidence presented that any client in fact failed to receive any money due.

RR at 3 (emphasis added). In accordance with the above-stated rules, this finding of fact comes clothed with a presumption of correctness that will not be disturbed unless clearly erroneous.

Mr. Simring's position has remained constant from the start of his ordeal with the Florida Bar. Mr. Simring has explained that NO CLIENT FUNDS WERE MISSING FROM THE TRUST ACCOUNT. ALL MONIES SPENT FOR PERSONAL USE WERE EITHER PERSONAL FUNDS OR FEES EARNED. ANY APPARENT "SHORTAGES" WERE CAUSED BY INADEQUATE BOOKKEEPING PROCEDURES ON THE PART OF MR. SIMRING DURING THE PERIOD IN QUESTION, COMPOUNDED BY THE BAR'S OWN FAULTY "AUDIT." See **Motion for Rehearing** (Appendix **1**).[11]

The Bar makes two critical statements in its Brief which are not only patently false and misrepresentative of the evidence adduced at trial, but they are also misleading, inflammatory, and calculated to manipulate the facts of a case "to win at any cost." They are:

> **1. The Bar's auditor was able to formulate certain opinions on the status of Respondent's trust account.** (Initial Brief at 4.)
>
> **2. At trial, the Bar proved that the shortages were caused by Respondent's use of trust monies for personal obligations, rather than the purposes for which they were entrusted. Respondent admitted as much and the referee so found.** (Initial Brief at 8).

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[11] Mr. Simring has acknowledged from the start that his bookeeping procedures did not meet the standards for attorney/client trust accounts as set forth in the Rules Regulating the Florida Bar. In addition, Mr. Simring recognizes that he was in error and that any fees earned from clients should have been placed first in an operating account prior to being spent for personal use. Mr. Simring is not contesting any issues pertaining to these matters with reference to the findings of the Referee.

This section of Respondent's brief will address solely these two points to demonstrate their utter falsity and thus show that the Bar's case must fail here--just as it did before the Referee.

As a preliminary matter, however, it is first incumbent to address the Referee's pejorative reference to Mr. Simring's destruction of his bank records. THESE RECORDS WERE NOT DESTROYED TO INTERFERE WITH THE BAR'S INVESTIGATION AND ANY ASSERTION TO THAT EFFECT IS UNTRUE. Mr. Simring destroyed his bank account records before he had any notice of a Bar investigation. The records were destroyed because Mr. Simring knew that all clients had been paid and he had closed out his trust account.[12]

A. The Bar "auditor" testified that he could not state whether client funds were stolen.

The only evidence presented at trial by the Bar was (1) the testimony of Mark Widlansky, a Bar "auditor" and (2) Mr. Widlansky's reconciliations of Mr. Simring's trust account. The reconciliations are discussed below at Part I(b).

The Bar makes the following statement in its brief: The Bar's auditor was able to formulate certain opinions on the status of Respondent's trust account. (Initial Brief at 4).

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[12] The Bar never inquired as to why Mr. Simring destroyed these records.

Mr. Simring objects to this statement and respectfully suggests that the Referee erred in admitting the testimony of Mr. Widlansky as an expert because by virtue of his own testimony he was not an auditor and thus was not a qualified expert. Mr. Widlansky testified that he did not follow the generally accepted procedures for experts in his field, he did not conduct an "audit" (he did a reconciliation, which he explained was purely a bookkeeping function), and he stated unequivocally that he could not say whether any money had been stolen from Mr. Simring's trust account. TT at **129-130**. Furthermore, Mr. Widlansky did not conduct any investigation to ascertain where the money went. TT at **139**. Mr. Widlansky was not a qualified expert who could testify as to anything relevant to Mr. Simring's trust account. Mr. Garfield made a standing objection at trial to the admission of Mr. Widlansky's testimony, and that objection is reaffirmed here today. The witness was not competent or qualified to testify as to whether there was ever a liability at a particular time regarding any particular account or not.

Mr. Widlansky testified repeatedly that he did not conduct an audit. TT at **67, 122**. Mr. Widlansky testified that his function was that of a "bookkeeper." TT at **123**. When asked on direct examination, over defense counsel's objection, whether he had reached an expert opinion as to the shortages, Mr. Widlansky replied: "The shortages were caused by Respondent's conversion of client funds to his own personal use." TT at **111**. Mr. Widlansky was then asked how he reached that conclusion. His

sole response was: "Because a great many of the checks written out of the account were for the Respondent's personal payroll, his auto insurance for his kids, college tuition for his kids." TT at 112. However, in light of Mr. Widlansky's further testimony that Mr. Simring placed $187,881.27 of his own money, in cash, in his trust account, TT at 114, merely writing personal checks from the trust account cannot possibly prove that Mr. Simring misappropriated client funds.

Even more important, on cross-examination, Mr. Widlansky changed his testimony and admitted that he did not know if client monies were stolen:

> **Q**: . . . . You cannot state with any degree of credibility or surety as to whether or not the monies written out of this account were stolen or not, can you?
>
> A: I only know what they were written to.
>
> Q: Right. You don't know if they were stolen, do you?
>
> A: No.

TT 129-130 (emphasis added).

Incredibly, Mr. Widlansky also revealed that he had no special training or experience or even guidance in the auditing of attorney/client trust accounts. TT at 21-25, 56-59.

The fatal blow to his credibility and competency as an expert was Mr. Widlansky's testimony that he was not familiar with the standards promulgated by the American Institute of Certified Public Accountants, the Financial Accounting Standards Board, or the Department of Professional Regulation in connection

with trust account auditing and that such standards were not utilized in his "audit" of Mr. Simring's account. TT at **63-64.**

In fact, Mr. Widlansky had only been employed by the Florida Bar some **30** to **60** days at the time he performed his bookkeeping reconciliation of the account in question. TT at **67.** Bar counsel attempted to rehabilitate Mr. Widlansky by referring to other audits performed by him in certain settings. However, when Bar counsel asked whether these audits had helped Mr. Widlansky with his relationship to his audits of attorneys, his answer was "not really." TT at **69.**

Mr. Widlansky's "inquiries" concerning the trust account were limited to questioning Mr. Simring over the source of certain deposits involving personal funds. TT at **73, 136.** He also asked "a couple of questions" to Jean Bussman who was the bookkeeper for Mr. Simring who performed all the bookkeeping functions and signed all the checks. TT at **73, 137-138.** He asked no questions of the accountant for the law firm on any issue involving client liability. TT at **73.** When asked why he never asked anybody, including Mr. Simring, about the alleged shortages in the account, his reply was, "I didn't ask," and he conceded that he came to his conclusions without the benefit of asking anyone any questions about the nature of the transactions or the client's who were allegedly defrauded. TT **138-139.**

The period in time included in Mr. Widlansky's work was January **1, 1989,** through September **30, 1990.** TT at **75.** He did not make any inquiries regarding any transaction which took place

in part or in whole prior to January 1, 1989, and probably not before March 1, 1989. TT at 76. His sole method of determining liabilities against the account were by reference to subsequent checks written and presumptions made to him as to the liabilities. TT at 82.

Mr. Widlansky acknowledged that his reconciled bank balances and ultimate decisions as to what constituted client liabilities were at variance with the Respondent's balances. However, he made no effort to reconcile the differences. TT at 99. No effort was made by Mr. Widlansky to inquire about cash on hand, other cash in the bank, certificates of deposit, or other assets which would have offset so-called client liabilities. TT at 127-129. In an ultimate display of willingness to overlook the obvious, the Bar presented the testimony of Mr. Widlansky not as to every period of time of the "audit," but only as to those months in which a shortage appeared as a result of mathematical calculations of Mr. Widlansky. The other months were months in which there were overages in the account! Mr. Widlansky skipped those months. TT at 131-32.

Hence, no overall testimony of proof was offered as to the net effect of the offending transactions on the subject trust account.

In conclusion, Mr. Widlansky's testimony should not have been admitted over defense counsel's objection. The only conclusions that might be drawn about Mr. Simring's trust account from the testimony of the Bar's "bookkeeper" is that it was improperly managed--not that client monies were missing.

B. **The evidence at trial and in the record establishes that Mr. Simring did not steal client funds.**

The Bar states in its Brief that "[a]t trial, the Bar proved that the shortages were caused by Respondent's use of trust monies for personal obligations, rather than the purposes for which they were entrusted. Respondent admitted as much and the Referee so found." Initial Brief at 8 (emphasis added).

Quite to the contrary, Mr. Simring's position has remained constant from the outset that no client funds were ever taken from the trust account. At the final hearing Mr. Simring testified clearly and unequivocally that he did not steal client funds. TT at 241-42. Moreover, each and every allegation of theft was explained by Mr. Simring, either in his deposition[13] or during his trial testimony. Some of those explanations are briefly set forth below as examples not only to show that Mr. Simring did not steal client funds, but also to show that the Bar has proceeded with its prosecution despite these explanations. Moreover, at the end of this section is Mr. Simring's unrebutted explanations of how the Bar's "auditor" mistakenly found shortages where none existed.

A. **Dauria/Accetturo:** As a result of a business transaction, a $5,000 check was placed in the Simring & Glaskin Trust Account as payment to James Dauria. These were not monies

[13] The Bar did not submit Mr. Simring's deposition as evidence.

that were to be held in trust but were actually Mr. Simring's monies. Mr. Dauria, who the firm represented for ten years, always had an open account with a balance owing. Mr. Dauria told the firm to keep the monies toward his bill. TT at 147-150.

B. **Pierce/ Tracy.** Janet Pierce was a client in a dog bite case. Janet Pierce agreed to accept what amounted to installment payments for ten thousand dollars from the owner of the dog. The money came in irregularly over a five-year period. Mr. Simring would take one-third as a fee on each installment that came in. TT at 150-153.

C. **Irwin Schenck:** Mr. Schenck was a friend of Mr. Simring's for ten years. He is on permanent disability, cannot be employed, and his sole income for many years was his disability benefit checks and monies from investments. In 1983 Mr. Schenck ran out of money and between that time and 1989, Mr. Simring loaned him in excess of $100,000. Mr. Simring helped pay his mortgage, utility bills, tuition for his children's college, and gave him money for survival. Mr. Simring also put a downpayment on a car in his name for Mr. Schenck. When Mr. Schenck finally sold his home in lieu of foreclosure, the equity he received was $51,278.46. At the time of the closing, Mr. Schenck told Mr. Simring to keep the money as a return on the earlier loans. However, from March 1989 forward, Mr. Simring actually wound up returning to Mr. Schenck any monies repaid and loaning him an additional $20,000. In short, the Schenck money was not a client liability but was repayment for a loan. TT at 156-162.

**D. Alan Wilhelm:** This was a client who fathered an illegitimate child on the West Coast of Florida. An agreement was worked out to pay the mother a hundred dollars a week support. Although Mr. Wilhelm originally gave a lump sum of 3- to **4,000** to be put in trust as a fee, Mr. Wilhelm came in every week with cash and the check to the woman was made out from the trust account. The cash was kept for petty disbursement. Even though the original money was a fee, it was replaced every week and the mother was sent a check. TT at **162-164.**

**E. Radcliff Barnett:** The facts are explained in detail in the Statement of Facts. See TT at **183-191.**

F. **Fitzpatrick/ Lepore:** The Bar comes forward with Fitzpatrick for the first time on appeal as its "victim." As the Bar is well aware Fitzpatrick was not Mr. Simring's client. The Bar auditor testified as such on direct examination. TT at **104.** Lepore was Mr. Simring's client. Lepore owed the money to Fitzpatrick. Mr. Simring was holding the money in escrow for Lepore. When Mr. Simring closed his account, the money was given back to Lepore. To Mr. Simring's knowledge, the episode had been concluded. To this day, as far as Mr. Simring is aware, Fitzpatrick and Lepore have worked out this problem on their own.[14]

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[14] There was absolutely no testimony at trial that Fitzpatrick had filed a claim. The Bar had an opportunity at trial and deposition to explore this matter. Mr. Simring objects to the Bar's introduction of such allegations on appeal.

The Bar has failed to rebut or to account for (1) Mr. Simring's own explanation of the (mis)management of his trust account; (2) Mr. Simring's testimony that certain monies were his personal funds, fees earned, or loans repaid; and (3) Mr. Simring's attempt to explain Mr. Widlansky's misapprehensions regarding shortages.

Mr. Simring confirmed at trial that Mr. Widlansky failed to inquire of him regarding any alleged liabilities and failed to provide his own worksheets for Mr. Simring's accountant. TT at 138-139, 310. Mr. Simring was unable to explain how the Bar arrived at the alleged deficiencies other than the three basic explanations:

1. Mr. Widlansky's method seemed to be limited to determining if a check was written with a client notation and then retrospectively applying that check as a liability. TT 310-311. However, in personal injury cases, for example, Mr. Simring testified that it was the general practice of the firm to frequently write out all disbursement checks ahead of time and put them in a file, pending clearance of the checks and signing of the settlement statements. In such cases, a deposit would not be shown by the bank but a liability would be shown by Mr. Widlansky's method. **Hence, Mr. Widlansky was arriving at liabilities which were nonexistent.** TT at 312-317.

2. A second and more fundamental error committed by the Bar is in not understanding the operation of a trust account in which over $187,000 in personal funds has been deposited. In

short, Mr. Widlansky assumed that all checks that have the notation of a client were withdrawals of client money. This assumption is clearly untenable in a situation in which a trust account contains personal funds. See Appendix 4.

Mr. Widlansky's method of "auditing" would clearly allow *any* attorney to steal client funds with impunity. That is because any lawyer could write a check from client funds for personal use but simply write a client name on the check and they would be cleared of all wrongdoing. The only way for the Bar to know if client monies were taken in such a case would be to see to whom the check was written and to find out who received the service or product: the lawyer or the client. The Bar's "auditor" testified that he did not do an investigation in this case and thus had no idea whose monies were being applied to what.

3. The third and final explanation that the Bar refuses to accept is that much of the money in the trust account was Mr. Simring's own personal funds that were owed to him by clients. How is the Bar supposed to know this? The Bar simply had to ask the client. To use the Schenck account as an example. After Mr. Schenck sold his house--why would he leave over $50,000 of his money in Mr. Simring's trust account? Nobody on earth would leave that much money in someone else's account for six months to a year without asking for it back. Unless it wasn't their money.

Why did no clients complain to the Bar? Why has the Bar not come forward with any victims of theft? Once again, because as Mr. Simring testified, HE NEVER TOOK ANYONE ELSE'S MONEY ***AND*** ALL CLIENT LIABILITIES WERE PAID.

Consequently, for purposes of Supreme Court review, the evidence at trial establishes that Mr. Simring admitted improper commingling of his money in the trust account, and improper bookkeeping measures, but he explained both the overages and illusionary shortages to which Mr. Widlansky testified. Mr. Simring established that there was no intentional violation of the rules. All this information was available to the Bar on the first day of inquiry but they have prosecuted through trial and now this appeal to prove a case of theft that has been nonexistent since Day One.

C. The cases cited by the Bar are inapposite.

The Bar contests the Referee's finding that Mr. Simring did not intentionally steal client funds because it can "prove" that such monies were stolen based upon bank account reconciliations. Mr. Simring suggests that the Bar's position has no merit with reference to either the facts of this case or Supreme Court precedent.

The Bar admits in its Brief that "shortages in a trust account do not automatically equate to intentional theft." Initial Brief at 18. The Bar contends, however, that such shortages should account to theft. The Bar attempts to prove this point using three "definitions" relating to trust accounts. Initial Brief at 17. Mr. Simring submits that this is a new position the Bar is assuming and that there is no testimony in the record to support this argument.

A number of comments are crucially important here. First, the Bar cites absolutely NO authority for these supposed definitions. If there is such an authority, it is unlikely that it has been made available to lawyers in any regular Bar publication. Thus, Mr. Simring should not be held liable for not being familiar with these definitions.

Second, the Bar admits by these statements that they are not offering *any* further proof of intentional theft before this Court than was offered to Judge Stevenson. Judge Stevenson applied the law to the facts before him to reach his conclusions. Even if the Court adopts the Bar's untenable position that paper shortages equal theft, the Bar is confessing that the presumption does not yet exist. If this presumption were the law, then Mr. Simring would have had to prove a negative. Thus, Mr. Simring should not be held retroactively accountable for such a drastic change in the law that creates a seemingly irrebuttable presumption. The Bar is using this as a test case to change the law, at the expense of unnecessarily prolonging Mr. Simring's temporary suspension.

The charge of misappropriation requires the Bar to prove that Mr. Simring took client funds and used them for his own purposes, as opposed to using his own funds which were commingled in a client account. It is presumed that there are only client funds in the client trust account and that once a lawyer has earned a fee from those funds, the fee is first placed in the lawyer's operating account before being applied to personal

expenses. However, this presumption is not conclusive. It is based on two further presumptions--both of which were mistakenly made by the Bar in this case. The first is that a proper audit of Mr. Simring's account was conducted. The second is that there were client monies in the trust account. Certainly, if a lawyer can show that his or her own personal funds were in the trust account, while this would be a confession to commingling, it would certainly explain and negate a charge of "misappropriating client funds"--because the funds were in fact not client funds.[15]

The Referee in this case found that no client has complained to the Bar and there was no evidence that any client failed to receive money due. RR at 3. If Mr. Simring took money that was not his, why have no clients complained? How can a person be accused of theft if no one was injured? Undoubtedly, almost every misappropriation case handled by the Bar entails an order of restitution to injured parties. There will be no restitution order in this case because Mr. Simring did not take anyone else's money. To this date Mr. Simring's trust account has been closed for almost 2 years, and not one single client has come forward claiming that monies are owed.[16]

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[15] Admittedly, $187,000 of Mr. Simring's money was deposited in the trust account.

[16] As stated previously, Barnett received his money once the Probate Court approved the disbursal.

This fact alone demonstrates the inadequacies of the Bar's "auditing" procedures (i.e., procedures which the Bar's "auditor" admitted did not constitute an "audit").

Bar counsel cannot prove criminal theft or misappropriation of client funds based on alleged bank account shortages alone, especially when each and every allegation has been answered and explained (unrebutted by the Bar) by Mr. Simring. See Part I(b). Although no case expressly holds, every Bar discipline case depends on the particular facts leading to the trust account violations, and no case involving misappropriation in the history of the State of Florida was ever decided solely on paper shortages. In other words, no bar discipline case can be cited for the proposition that accounting imbalances alone constitute misappropriation per se. The Referee and the Court in each case ask whose money was spent, for what purposes, and why the lawyer thought he or she was entitled to spend the money. Mere paper shortages do not constitute "clear and convincing evidence" of anything other than poor accounting procedures.

As authority to support this position, Mr. Simring cites the following cases, as representative of the many hundreds of Bar discipline cases reviewed for this Brief, for the proposition that paper shortages alone, absent further proof, do not constitute misappropriation:

> The Fla. Bar v. McClure, 575 So.2d 176 (Fla. 1991)
> The Fla. Bar v. McShirley, 573 So.2d 807 (Fla. 1991);
> The Fla. Bar v. MacPherson, 534 So.2d 1156 (Fla. 1988);

The Fla. Bar v. Eisenberg, 555 So.2d 353 (Fla. 1990);
The Fla. Bar v. Farbstein, 570 So.2d 933 (Fla. 1990);
The Fla. Bar v. Diamond, 548 So.2d 1107 (Fla. 1989);
The Fla. Bar v. Miller, 548 So.2d 219 (Fla. 1989);
The Fla. Bar v. Schiller, 537 So.2d 992 (Fla. 1989);
The Fla. Bar v. Roman, 526 So.2d 60 (Fla. 1988);
The Fla. Bar v. Anderson, 395 So.2d 551 (Fla. 1981);
The Fla. Bar v. Seldin, 526 So.2d 41 (Fla. 1988);
The Fla. Bar v. Whigman, 525 So.2d 873 (Fla. 1988);
The Fla. Bar v. Hartman, 519 So.2d 606 (Fla. 1988);
The Fla. Bar v. Burke, 517 So.2d 684 (Fla. 1988);
The Fla. Bar v. Hooper, 509 So.2d 289 (Fla. 1987);
The Fla. Bar v. Hero, 513 So.2d 1053 (Fla. 1987);
The Fla. Bar v. Hosner, 513 So.2d 1057 (Fla. 1987);
The Fla. Bar v. Moxley, 462 So.2d 814 (Fla. 1985);
The Fla. Bar v. Welty, 382 So.2d 1220 (Fla. 1980);
The Fla. Bar v. Brady, 373 So.2d 359 (Fla. 1979);
The Fla. Bar v. Hirsch, 342 So.2d 970 (Fla. 1977);
The Fla. Bar v. Pahules, 233 So.2d 130 (Fla. 1970).

The Bar cites a number of Supreme Court cases allegedly to show that paper shortages have been used as evidence to support a finding of theft. Initial Brief at 11. The Bar is correct that the Bar has always attempted to prove theft using paper shortages as its preliminary evidence. **But there is no case where the Supreme Court has found intentional theft of client funds based solely on evidence of paper shortages in contradiction to the Referee's finding that there was no intentional theft.**

In The Fla. Bar v. Farbstein, 570 So.2d 933, 934 (Fla. 1990), the attorney **did not attempt to refute the Referee's finding of misappropriation.** In The Fla. Bar Schiller, 537 So.2d 992, 992 (Fla. 1989), Schiller testified that **he knowingly** used client monies for his own purposes. In The Fla. Bar v. McShirley, 573 So.2d 807, 807 (Fla. 1991), the attorney testified **that he knew of the deficits in client funds** and that he replaced the money he had converted. Finally, in Shuminer v. The Florida

**Bar**, 567 So.2d **430** (Fla. 1990), there is no discussion of paper shortages and the attorney entered an unconditional guilty plea before the Referee. Thus, in all of these cases, the attorneys in question actually admitted taking client funds and did not dispute the Referee's findings to that effect. The more accurate reading of these cases with reference to "paper shortages" is that the Supreme Court used the shortages demonstrated by the bank account records to illustrate how much money was taken--not as conclusive proof that theft had occurred and certainly not to overturn a Referee's finding to the contrary.

Furthermore, not only do these cases not stand for the proposition suggested by the Bar, but even the mere assertion that they do is totally dishonest. If the Bar could satisfy its burden of proof for establishing intentional theft merely by presenting a bank account reconciliation for a lawyer's trust account, then the entire concept of a Referee's hearing would be meaningless. In this case the Bar presented absolutely no evidence of theft other than its reconciliation (and the testimony of the person who performed the reconciliation)--all stipulated to prior to trial; there was no testimony from any client that money entrusted to Mr. Simring had been stolen. Thus, in lieu of a hearing, the Bar would merely have to perform a reconciliation of a lawyer's trust account showing a shortage, mail it to the Supreme Court, and then wait for the Court to summarily disbar the attorney. This is precisely what caused the temporary suspension. This is not a system of just discipline.

Yet, in essence, that is exactly what the Bar is attempting to accomplish by purposes of the present review.

An alternative analogy to explain why the Bar's case must fail comes from the criminal law perspective. Mr. Simring is accused of theft. Theft is a criminal offense where the thief knowingly deprives another of his or her property. See § 812.014, Fla. Stat. (1989). (There is no definition of "theft"-- or "commingling"-- in the Rules Regulating the Florida Bar.) There are no victims and no missing money. As the Supreme Court has stated:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of such evidence applies where a conviction is wholly based on circumstantial evidence. Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.

State v. Law, 559 So.2d 187, 188 (Fla. 1989) (emphasis added) (citations and footnote omitted.)

Mr. Simring has testified, as recounted in subsection (b), that no client money was ever taken. **Thus, Mr. Simring's explanations as to each allegation of theft are, at the very least, reasonable hypotheses of innocence.** And, therefore, as the Court has said, "[i]t is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence

with the force of proof sufficient to convict. . . . . Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence." Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956).

An alternate reading of the Referee's finding as to Count I is that the Bar failed to exclude all reasonable hypotheses of innocence. The burden of proof remains with the Florida Bar and never shifted. Accordingly, because the Bar did not present any evidence at all to rebut Mr. Simring's explanations, their circumstantial case of theft failed. And given the standard of review set forth in Law, by analogy, the case should fail before the Supreme Court as well.

**11. DISBARMENT IS NOT THE APPROPRIATE DISCIPLINE IN THIS CASE.**

In cases without mitigating factors, disbarment has only been found appropriate for knowing or intentional conversion of client funds; gross negligence in the mismanagement of a trust account, where no client suffers financial injury, warrants suspension. E.g. The Fla. Bar v. Weiss, 586 So.2d 1051, 1053-54 (Fla. 1991); The Fla. Bar v. McShirley, 573 So.2d 807 (Fla. 1991); The Fla. Bar v. Whigman, 525 So.2d 873 (Fla. 1988); The Fla. Bar v. Burke, 517 So.2d 684 (Fla. 1988); The Fla. Bar v. Hartman, 519 So.2d 606 (Fla. 1988); The Fla. Bar v. Hosner, 513 So.2d 1057 (Fla. 1987).

For example, in The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988), the Court held that a lawyer's gross negligence in managing a client trust account, absent willful misappropriation of client funds, warrants suspension for three years, but does not warrant disbarment. **This** was so **even though Whigham had previously been reprimanded and placed on probation for one year** for **negligently mismanaging client trust accounts.** Whigham's trust account subsequently was re-audited based on his failure to submit quarterly trust account reconciliations required as a condition of his probation. The audit revealed overdrafts on several occasions, checks returned for insufficient funds, mathematical errors on client ledger cards, and commingling of personal funds in the client trust account. Whigham admitted all the allegations. As in the present case, no client suffered any

financial injury, no client complained to the Bar, and the lawyer fully cooperated with the Florida Bar. See, e.g., Burke, 578 So.2d at 1102 (holding that grossly negligent misappropriation of client funds warrants a ninety-one day suspension); The Florida Bar v. McClure, 575 So.2d 176, 178 (Fla. 1991) (McDonald, J., dissenting) (arguing that disbarment for dishonesty or fraud requires clear and convincing proof of intentional misappropriation); The Florida Bar v. Hosner, 513 So.2d 1057, 1058 (Fla. 1987) (finding that public reprimand and probation are appropriate discipline for negligent trust accounting); see also The Florida Bar v. McShirley, 573 So.2d 807, 808 (Fla. 1991) (holding that the knowing conversion of client funds warranted a three-year suspension in light of mitigating factors).

In lieu of a lengthy discussion of each of these cases, Mr. Simring respectfully submits that the Supreme Court's own review of these cases will yield the conclusions of law stated above. In addition, the Court will find that many cases involving disbarment entail multiple violations of the Rules of Professional Conduct in addition to trust account violations, including neglecting client matters, fraud, and criminal misconduct. Those elements are not present in this case.

The above-cited case, wherein the respondent either admitted guilt, admitted knowingly converting client funds, or admitted criminal behavior, resulted in penalties ranging from suspensions of 90 days to three years. In this case, there is no finding of knowing or intentional conversion of client funds, no

finding of criminality, and in view of the depth and severity of the mitigating circumstances, punishment of a six-month suspension should be warranted.

## III. THE REFEREE FAILED TO GIVE PROPER WEIGHT TO THE MITIGATING EVIDENCE PRESENTED

In the Conclusion portion of its brief, the Bar states that "[i]n reaching a determination on the appropriate level of discipline which should be imposed in this case, this Court needs to take measure of Ellis Simring." Initial Brief at 37.

**The following is the true measure of Mr. Simring:**

Ellis Stewart Simring is 56 years of age, married for 33 years to Joan Harriet Simring, and has three children: Richard, age 26, Matthew, age 23, and Jill, age 21. For Ellis Simring, the true measure of his life has been providing for his family. Mr. Simring is the sole financial provider for his family (except recently for Richard) and has been for 33 years.

Mr. Simring has been actively engaged in the practice of law for 30 years and has an unblemished and successful record as an attorney and litigator during that period of time. Mr. Simring was a partner in the law firm of Simring & Glaskin, P.A. for the past 14 years which partnership was dissolved on June 30, 1990. Until approximately the year 1988, Mr. Simring has had a successful, accomplished, and happy personal and professional life. His son Richard graduated valedictorian from Hollywood Hills High School, graduated magna cum laude from Princeton University, and graduated summa cum laude from George Washington University Law School.

Mr. Simring is also the father of a youngest child, Jill, who is a graduate of Hollywood Hills High School and who is

presently completing her last semester of college at the University of South Florida. Jill is also an excellent student and is awaiting notification on admission to law school.

Mr. Simring is also the father of Matthew, 23 years of age, who since 1986 or 1987 has experienced severe personal problems which, during the years 1988, 1989, 1990, have been a disabling influence on Mr. Simring's personal and professional life.[17] The diagnostic evaluation of Matthew performed in April 1986 indicates that he was suffering from major depression. See **Petition to Dissolve Order of the Supreme Court,** at **5-10** (Appendix 1 and exhibits attached to original). Matthew was probably suffering from this depression since childhood but the ultimate manifestation of this illness did not become apparent until after his 17th birthday.

As a result of the initial diagnostic evaluation, it became obvious that Matthew needed professional treatment in an attempt to resolve his problems. He was seen unsuccessfully by various professionals in 1986 and 1987, and was tested at Jackson Memorial Hospital for a chemical imbalance. The result of those tests were largely inconclusive.

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[17] The information which follows is not being presented for the purpose of obtaining sympathy. It is submitted only to show the severity of the situation as it existed during the period in question and to demonstrate that Mr. Simring was truly facing a crisis of unimagineable proportions as a father and a human being.

Mr. Simring experienced reversals in his personal life caused by emotional stress involving his son Matthew. Matthew has for a number of years prior thereto suffered from a form of depression which was manifested by attempting suicide. The last suicide attempt was made in Tallahassee which resulted in Mr. Simring going to Tallahassee and returning with Matthew to his home in Broward County.

Respondent suggests that it is impossible to weigh on a scale or calculate by the numbers or determine with any degree of exactitude the effect that this would have on an individual's life. It is suggested that each parent would react differently under the same set of circumstances. In this case, Mr. Simring's reaction was complete disorientation and devastation. Mr. Simring devoted the years of 1989 to 1990 to pursuing a course of medical treatment to help his son and to spend as much time with him as possible because he remained a suicide threat. See Appendix 11 (Letters to various doctors and Report of Dr. Marcy Weinberg, documents which were attached to the original **Petition to Dissolve Order *of* the Supreme *Court.)***

During this same period of time, Mr. Simring's own health had been significantly affected. He began loosing a dangerous amount of blood through hemorrhoids and his blood count dropped from a normal range of 14 to a level of 7, causing constant fatigue and general unhealthiness. In addition, Mr. Simring suffered recurring bouts with the flu, severe anemia, and was diagnosed as having Chronic Fatigue Syndrome. TT at *323-25;*

**Letter of Dr. Gerald R.** Safier, at 1-2; Appendix 8. (The letter by Dr. Safier and the laboratory reports were introduced into evidence at the hearing.)

The combination of Mr. Simring's own physical ailments and the emotional and psychological suffering of his son became an unbearable pressure. Essentially, Mr. Simring's life became a "blur." He became "lightheaded" and "disoriented" for the entire two-year period in question. TT at 326. In Mr. Simring's own words:

> Q. Mr. Simring, do you believe you were impaired in some way during 1989 and 1990?
>
> A. Yes.
>
> Q. In what way?
>
> A. I didn't direct the function of the law office [as] it should have been. I could not direct it. I was completely at times incoherent and completely obtuse to the problems of the office. The secretaries used to come to me and ask me questions; I told them to get lost. Jean, who has been with me fifteen years who runs the office, came to me with problems of bookkeeping and whatnot; I told her to get lost. I said, "Handle these problems yourself. I don't care about them," and I didn't. Whatever the problems were, except the legal problems, I handled the clients. I was able to handle clients and I did, except new ones which I wouldn't take on. The old ones I handled.
>
> Whatever favors I promised, whatever pro bono work I was doing, I continued to do, but I could not run the office because I couldn't stay on top of anything and I didn't care. I just didn't care about anything to do with the bookkeeping or the running of the office or the fact that we were losing girls. I walked in at times and there were new girls or old girls, I didn't even know it. I didn't know they were there half the time. I didn't know what their names were. It was a rough office the last two years.

TT at *330* (emphasis added).

Mr. Simring submits that the following thoughts are perfectly and accurately set forth in the following:

> Judge Bazelon rarely went to synagogue, but he was a Jewish judge in every sense. He saw the world through his Jewish background. His humor was frequently in Yiddish. His speeches referred to the rabbinic literature. He described himself as a secular American with a "Jewish soul." If a defendant deserved compassion but no writ of habeas corpus--or other formal legal remedy--was technically available to him, Bazelon would wink at me and order that I find some ground for issuing a "writ of **rachmones.**" **Rachmones is** the Hebrew-Yiddish word for "compassion." Even his non-Jewish clerks had to know what that alien word meant if they were to do Bazelon-style justice.
>
> Bazelon was always an outsider, a questioner, even as one of the most influential jurists or his time. For him, the greatest quality of a judge--indeed of any human being--was **rachmones.** Though quite wealthy and powerful, he always remembered his roots as the youngest of nine children of a poor Chicago family. He had little respect for his Jewish contemporary, Justice Felix Frankfurter, whom he regarded as "all brain, no heart" and who he believed was trying to hide his Jewishness behind a facade of Anglophobia. Bazelon was fond of quoting Shakespeare's Shylock: "The brain may devise laws for the .blood, but a hot temper leaps o'er a cold decree." For Bazelon, the law had to come from the heart as well as the brain and it must understand the hot temper as well as the cold calculation.[18]

The measure of man's life, a judgment equivalent to the penalty of death, and the ruination of a man's family, cannot be

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[18] Alan M. Dershowitz, Chutzpah 58-59 (1991).

imposed for the unintentional keeping of his books which admittedly were mismanaged as a result of the impairments.

As a result of his impairments, and the fact that his son's life was in jeapordy, Mr. Simring lost control of his life and his law practice. In comparison to the awesome task of trying to save the life of his middle child, proper trust account procedures were viewed as a meaningless nuisance--as well they should have been.

After Matthew came home from Tallahassee, Mr. Simring devoted every minute of every day to his son. Fortunately, since that time, with the help of Dr. Levine, and antidepressant medication, Matthew's attitude has completely changed for the better, his depression has improved, and since January **1991** he has been a successful student at Broward Community College.

The Bar has the gall and effrontery to treat the impairment described above and testified to in detail at the final hearing as de minimis.[19] The Bar has demonstrated an incredible degree of insensitivity, lack of tact, and downright ignorance about what life is all about. Life is <u>not</u> about

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[19] The Bar makes the preposterous argument in its brief that "Respondent's personal difficulties do not rise to the level of mental illness . . . and thus does not warrant acceptance of the same as mitgation." Initial Brief at 35. Respondent has failed to uncover any cases which require mitigation to rise to the level of a diagnosable mental illness and suggests that this is yet another example of the Bar's tunnel vision in attempting to prosecute this case "to win at any cost" regardless of the true evidence presented.

bookkeeping. It is about caring for one's family and children. Perhaps Bar counsel cannot comprehend the effect of a son's repeated attempts at suicide on a father--or the proper balancing of one's occupational responsibilities with one's familial obligations. Certainly the Justices of the Supreme Court can.

The Bar's main contention seems to be that none of the expert testimony linked Mr. Simring's impairment to how it effected his work. This is nonsensical. Mr. Simring's own testimony is sufficient without expert appraisal for anyone to appreciate the effect of his personal and family problems on the running of his law practice. Mr. Simring's life was a shambles. He spent every day with his son Matthew. He spent every single night lying awake in his bed waiting, and fearing that at any time he might hear the deadly sound of the click of the hammer of a gun. Nevertheless, to avoid a travesty of justice, the Bar's arguments are addressed fully below.

First, the Bar suggests that Dr. Safier's report is of little value because he was Mr. Simring's family doctor for 15 years.[20] Mr. Simring would suggest the opposite conclusion: a longtime friend and family doctor is in the best possible position to gauge the effect of Mr. Simring's impairment. Dr. Safier's conclusion was that "[i]f Mr. Simring violated the

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[20] The Bar also notes that Dr. Safier's letter testimony was allowed in over the Bar's objection. Initial Brief at 32 n.17. However, the Bar does not take exception to this ruling in its Petition for Review.

Florida canon of ethics or did anything improper, in my opinion these acts were done unintentionally and during a period of time when he was both psychologically and physically impaired." Letter of Dr. Gerald R. Safier, at 3.

Second, the Bar argues that the testimony of Dr. Levine, the only psychologist to ever help Matthew and to get Matthew back on his feet, was inconclusive on the effect of Mr. Simring's impairment. The Bar labels Dr. Levine's testimony as "couched in terms of 'might haves' and 'could have beens.'" Initial Brief at 33. Once again, the record reflects otherwise.

> Q: In terms of him being consumed by the problem, would you say that he was impaired in his performance of his vocational duties?
>
> A: I could see that his condition would affect his work, yes.
>
> Q: How?
>
> A: Besides the time factor that he was preoccupied and together with Matthew as much of the day as he could be, especially during the suicidal crisis period, he seemed distorted the two times I met with him, disoriented, his perceptions were a bit distorted, he would lose his train of thought and his affect was very worried. He seemed anxious and totally preoccupied and consumed with Matthew. The entire time he was talking about Matthew and about his frustrations of trying to get help for Matthew, but not able to see any progress.
>
> Q. What impact -- do you have an opinion as to whether or not there would have been an impact on his ability to concentrate on his business affairs?
>
> A: Yes.
>
> Q: Mentally, I mean.

A: Yes.

Q: What is that?

A: My opinion is that he might have -- he would have difficulty concentrating if what I saw in my office was indicative of his general condition at the time, yes.

Q: Do you believe that what you saw in your office was indicative of his general condition at the time?

A: Yes.

TT at 230-31 (emphasis added).

Similarly, the Bar takes issue with the testimony of Dr. Earls because it does not establish the "degree" of Mr. Simring's impairment.[21] Again, the record reflects otherwise.

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[21] The Bar also objects to the admission of Dr. Earls's testimony on the grounds that he was not disclosed on the original witness list. Once again, this represents the Bar's untenable position of trying to "win at any cost" without any regard for the truth.

Even though Dr. Earls himself was not listed as a witness, the letters to Dr. Earls were listed on the List of Exhibits. The Bar was aware of Dr. Earls from the beginning when copies of these letters from Mr. Simring to Dr. Earls were attached to the first motions filed in this case. Futhermore, the Bar did not depose *any* of the defense mitigation witnesses and it is misleading for the Bar to suggest that they would have taken the deposition of Dr. Earls.

Moreover, the Referee, who was seeking as much information as possible to make his decision, decided that the testimony of Dr. Earls could only help in the decisionmaking process. Mr. Simring suggests that the Supreme Court should also embrace any such helpful information with open arms. In any case, by the Bar's own admission, Dr. Earls' testimony was not all that damaging to their case, see Initial Brief at 33, his testimony was essentially cumulative evidence as to the severity of Mr. Simring's impairment, and therefore any error committed by the Referee was harmless.

> Q: Based upon a reasonable degree of psychological probability, knowing what Matthew Simring was going through and how Ellis Simring had taken care of Matthew, do you have an opinion of what the normal or appropriate reaction would be of a parent in that position?
>
> A: Well, with this degree of severity, usually a parent does have some difficulty in adjusting to it, and I feel that Mr. Simring did have a very difficult time adjusting to it and was, in essence, overwhelmed by the responsibility so that he became totally involved in this, and it did have a very negative effect on his functioning. So I feel that in his case it did show a severe detriment to his ability to perform.

TT at 272-73 (emphasis added).

Finally, the Bar quotes the report of Dr. Barbara Winter, who performed an independent evaluation on behalf of the Referee. Unfortunately, the Bar fails to emphasize Dr. Winter's express finding that "[t]hese symptoms may have significantly detracted from his ability to function occupationally." The report then goes on to say that it does not explain why Mr. Simring "chose" to commingle funds. It is respectfully submitted that the reason Dr. Winter was unable to make that "link" was because she had absolutely no previous knowledge of what a trust account was and in Respondent's view, never grasped the nature of the charges or the purposes of the evaluation.[22] See Appendix 9 (Letters to Dr. Barbara Winter dated 4-9-91 and 5-20-91).

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[22] The Dr. Winter episode represents another attempt by the Bar "to win at any cost." There is no reason why the Bar did not agree to an examination by the expert psychologist familar with such matters who was orignially recommended by the Bar's own

The last argument by the Bar as to why, in its view, Mr. Simring's impairment is not a mitigating factor, is that Mr. Simring "testified that he tried dozens of cases before a jury, at least a dozen nonjury trials and continued to go to court hearings on behalf of clients." Initial Brief at 34. Once again, the Bar takes quotations out-of-context to make its point. The full testimony of Mr. Simring read as follows:

> A: [middle of page 325] The second year the problems got worse with my son. I couldn't handle any of it. What I handled before, because of the physical problems, the blood, the disorientation, I went for iron shots like twice a day--but during that time I stopped practicing law except I had clients, I had a big practice. During that time, some how or other, I tried a dozen jury cases, probably a dozen non-jury cases, made many court appearances, but literally stopped taking on new cases, left the office every day at eleven o'clock with my son. I had to live up to obligations that I had, so I sold whatever assets I had to support my family and maintain a standard of living because I had a lot of guilt feelings.
>
> None of these feelings would lead me to steal a penny from anybody. None of these feelings would let me take a penny from anybody. I don't believe in that. I don't steal. I don't cheat. I don't do those things. But if somebody came to me during that time and says your washing money through your trust account, you shouldn't do it, I would have told themselves to go screw themselves and I wouldn't have listened to them. I just didn't listen to anybody.
>
> For those two years, I practiced law the best I could. I got to the office at seven in the morning. By eleven, my son came and I spent

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consultant. Instead, the Bar fought tooth and nail for the appointment of a doctor with no experience in such cases.

> time with him or I was in trial and he went with me. I never left him alone.
>
> Q: Ellis, tell the Court about the physical problems that you had and how they were effecting you.
>
> A: I was light-headed for two years, completely disoriented, except when I had to try a case, I could try a case. If I had to talk to a client, I could somehow or other talk to a client.

TT at **325-327** (emphasis added).

Mr. Simring submits that the impairment he suffered during the period in question was severe and debilitating and that this conclusion is consistent with the evidence presented in the record and during the final hearing.

The Supreme Court has stated:

> We recognize that mental problems as well as drug and alcohol problems may impair judgment so as to diminish culpability.

The Fla. Bar v. Shanzer, **572** So.2d **1382, 1383** (Fla. **1991).** Nevertheless, the Court has not expressly held that an attorney has not engaged in misappropriation because the attorney was impaired. Even in cases involving long-term polydrug use, the Court seems to find that the attorney is guilty of misappropriation but that the punishment should be reduced accordingly. The Fla. Bar v. Farbstein, **570** So.2d **933, 935** (Fla. **1990).**

Consistent with the statement in Shanzer, however, it would seem that impairment, to some extent, negates the mens rea element of knowing or intentional conduct, or, at the very least,

reduces the lawyer's ability to appreciate the wrongfulness of his conduct.

The case law is clear that impairment is a mitigating factor that must be considered by the Referee in recommending the appropriate punishment. See e.g., The Fla. Bar v. Eisenberg, 555 So.2d 353, 355 (Fla. 1989); The Fla. Bar v. Miller, 548 So.2d 219, 220 (Fla. 1989); The Fla. Bar v. Diamond, 548 So.2d 1107, 1108 (Fla. 1989); The Fla. Bar v. MacPherson, 534 So.2d 1156, 1157 (Fla. 1988); The Fla. Bar v. Hero, 513 So.2d 1053, 1054 (Fla. 1987); The Fla. Bar v. Brady, 373 So.2d 359, 361 (Fla. 1979).

Inexplicably, in light of the fact that the entire emphasis of Mr. Simring's case was centered around presentation of mitigating evidence, as demonstrated from the above exerpts from the trial transcript, Judge Stevenson's report pays little homage to the testimony and evidence adduced at the hearing. Mr. Simring respectfully suggests that Judge Stevenson's report can only be understood in light of all the mitigating evidence presented.

Mr. Simring submits that the following mitigating factors which have been recognized by the Supreme Court are found in this case: (1) Mr. Simring's lack of a prior disciplinary record, see Diamond; (2) the absence of a dishonest or selfish motive, see

MacPherson;[23] (3) Mr. Simring's severe emotional and family hardships, see Brady; Motion for Rehearing, Appendx 1; (4) none of Mr. Simring's clients suffered injury or complained to the Bar, see Miller; (5) Mr. Simring's cooperative attitude towards the Bar and his readiness to admit the wrongfulness of his actions, see id.; (6) Mr. Simring's excellent character and reputation as evidenced by the character reference letters submitted on his behalf, see Diamond; (7) Mr. Simring's emotional, psychological, and mental impairment during the period of the infractions, Report of Dr. Winters; Letter of Dr. Gerald R. Safier; (8) Mr. Simring's sincere remorse for the wrongfulness of his conduct, TT at 318; see Eisenberg; (9) the fact that Mr. Simring was responsible for all of the intricacies of running a law office, see Hero; (10) the fact that Mr. Simring had only one overworked secretary who also acted as bookkeeper during much of the period in question, see id.; (11) Mr. Simring was diagnosed as suffering anemia, Chronic Fatigue Syndrome, and bleeding

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[23] The Bar concedes that the Referee's notation that Mr. Simring had a selfish motive is inconsistent with the Referee's finding on the theft issue. Initial Brief at 28, n. 14. This inconsistency is readily explainable. Because of Mr. Simring's testimony regarding his problems with his law partner and the IRS, it is clear that Mr. Simring made improper, unilateral decisions on when and how to use the client money in the trust account. Because of these problems, Mr. Simring was forced to move client money out of the trust account in order to protect it. This was his so-called "selfish motive.''

The Referee's notation does not say that Mr. Simring used client money to pay personal expenses. The testimony at trial was that he clearly did not. TT at 318.

hemorrhoids during this period, Letter of Dr. Gerald R. Safier; see Farbstein (finding the disease of alcoholism to be a substantial mitigating factor); (12) Mr. Simring received no personal benefit or unjust enrichment, see Eisenberg; (13) Mr. Simring did not intentionally misuse client funds, ~~see id.~~; (14) Mr. Simring did not mishandle any particular client property, ~~see id.~~; (15) Mr. Simring did not fail to disburse client funds when requested, ~~see id.~~; and (16) the fact that there was no delay or inconvenience in disbursing funds in accordance with client instructions, ~~see id.~~

The Bar argues that the Court should take into account five aggravating factors not found by the Referee. To the extent that these arguments have not already been sufficiently refuted, the following comments are relevant.

1. As to dishonest motive, the Referee expressly found that Mr. Simring was not guilty of any rule violations involving dishonesty, fraud, deceit, or misrepresentation with respect to Count I. RR at 8. Nor did the Referee find such a violation with reference to any other count. This finding is entitled to the same presumption of correctness as the finding that there was no intentional theft of client funds. Hooper. With reference to any "loan" from Rusty, that matter is fully explained in the transcript. Specifically, Mr. Simring went above and beyond the duties of a lawyer to a client in the services and accommodations he provided Rusty over a five year period. TT at 195. Although he is a convict, Rusty is also a sophisticated businessman and

investor. If Rusty really believed the money was only a "loan," Rusty would have certainly have made his complaints known to the Bar.

2. As to obstruction of proceeding, Mr. Simring has dutifully explained that his files were destroyed because his practice had closed and Mr. Simring did not wish to pay a storage fee. There is no proof that Mr. Simring destroyed files to hamper the Bar's investigation. The alleged violation of the temporary suspension is the subject of a separate Bar proceeding (Case # 78,898) and is fully explained in the Response to Order to Show Cause contained therein. Surely there is some double jeopardy question were Mr. Simring to receive an enhanced punishment in this case for alleged violations that have not yet been proven or heard in a separate case.

3. As to the alleged "deceptive practices" of stating that his trust account was in compliance with the rules, the Bar's position is untenable and unfair. Is every attorney who is later found to have mismanaged a trust account going to receive a stiffer penalty for signing the Bar's standard trust accounting certificate? This has never before been mentioned as a factor in imposing discipline in a Bar case. (The Bar cites former Justice Ehrlich's dissenting opinion in McShirley for a proposition clearly not adopted by a majority of the Court.) Mr. Simring suggests that if it is a factor to be considered, then it is a factor in every case (all lawyers must sign the certificate) and therefore it is already factored-in in assessing punishment in

every Bar discipline case and therefore cannot be an "aggravating" circumstance.

4. Mr. Simring has denied any allegations of theft. As to refusing to acknowledge other misconduct, the Bar's representation is a flat out lie. Mr. Simring has steadfastly admitted to violating the procedural rules governing the management of trust accounts from the day the Bar's initial inquiry was filed and that is why the Bar and Mr. Simring entered a **Joint Stipulation for Independent Psychological Evaluation** and a **Joint PreTrial Stipulation** regarding these violations. In addition, Mr. Simring testified to the wrongfulness of his conduct at the final hearing. TT at 318.

5. As to "indifference to restitution," the Bar does not cite any authority for this as an aggravating circumstance. In any event, the Bar's allegation is stupefying. No client monies were ever taken. No client has complained. Furthermore, the reason Barnett was not paid until September 1991, as explained above, was because the Probate Court did not allow payment until that time. TT at 175.

In closing, Mr. Simring would also note that the Bar's comparison of his impairment to cases involving drugs or alcohol is sorely misplaced. Those situations involve, at least at the outset, a certain degree of choice. Mr. Simring, however, did not choose a suicidal son, Chronic Fatigue Syndrome, hemorrhoids, anemia, or a failed law partnership.

## IV. MR. SIMRING SHOULD NOT BE LIABLE FOR $ 9,000 IN COSTS UNNECESSARILY INCURRED BY THE BAR

It is ironic that the Bar is seeking over $9,0000 in costs for a case that it won on the first day of inquiry. Every single violation found by the Referee was admitted in substance to the Bar in October and November 1990 and in the **Joint Pretrial Stipulation.** The intent behind the Stipulation was that Mr. Simring would be evaluated by an independent examiner, and if found to be impaired at the time in question, he would be reinstated. Further, if Mr. Simring was found to still be impaired, he would agree to undergo treatment. Despite a finding of impairment, the Bar reneged on this agreement and spent eight months and $9,0000 in an unnecessary investigation to prove a nonexistent case of theft, and an already admitted case of commingling.

Mr. Simring should not have to bear the financial burden of the Bar's fruitless search, especially where the "auditor" agreed that he did not perform an audit (and therefore should not be paid a fee greater than the Bar could have paid a bookkeeper) and the "auditor" did not investigate to whom the money was paid. TT at 139. It would have been less expensive to first ask Mr. Simring about payments and then verify the information, instead of going to trial. By what right does the Bar spend nine thousand dollars researching and prosecuting a case of theft in the absence of any client complaints or missing money? Whatever the answer to this question, Mr. Simring should not have to bear

**the cost, especially because he was unable to work as a result of the temporary suspension and was forced to deplete his assets ~~at~~ the same time that the Bar was running up their bill.**

## CONCLUSION

The ultimate question in every Bar discipline case is deciding the appropriate punishment. Disbarment, as punishment, is not even at issue in this case because the evidence does not indicate that Mr. Simring intentionally misappropriated client funds. The Court has clearly held that disbarment is not warranted in such circumstances. See, e.g., The Fla. Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977) ("Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings."); see also Weiss; Whigham; Burke; Hartman; Hosner; McShirley.

The general rule for weighing the appropriate discipline was set forth in The Fla. Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970):

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not 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.

Applying these general guidelines, the Referee and the Court must see that Mr. Simring has been sufficiently punished. Mr. Simring has been suspended from the practice of law since January, 1991; he has suffered the indignity of notifying his

clients as to the Bar's allegations of misconduct; he has suffered irreparable damage to his reputation; he has lost his entire practice which he had steadily built for the past seventeen years in Florida; he has been evicted from two homes (and a third eviction is pending); and he has been forced to borrow money from friends and relatives to feed his family. Mr. Simring's physical, mental and emotional well-being, as well as the well-being of his family, have already been damaged beyond repair.

The countless letters written on behalf of Mr. Simring demonstrate that his is the finest quality of lawyering, counseloring, and advising. Scores of letters from friends, clients, and judges, and other professional colleagues, present a picture of a man who has dedicated his life to honesty, justice, charity, and kindness and to contributing to mankind, society and the development of the law. Mr. Simring would respectfully suggest that the justices of the Supreme Court cannot possibly obtain a "full measure''of Mr. Simring's life without reading those letters.[24]

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[24] Judge Stevenson found the character reference letters inadmissible on the authority of The Florida Bar v. Prior, 330 So.2d 697 (Fla. 1976), but appended the letters to the record. TT at 305.

Although the literal wording of Prior seems to suggest that character reference letters are never admissible, the holding of Prior should be limited to the facts of that case. Thus, it may be improper for sitting judges and public officials to submit character reference letters, see Canon 2(b), Code of Judicial Conduct, but letters from clients, friends, and professional

Mr. Simring has always conducted his law practice in accordance with the highest standards of professional conduct. The trust account violations in this case were not the tip of the iceberg; they were the iceberg. Mr. Simring is not a bad apple who needs to be tossed aside. He is a conscientious and dedicated lawyer of thirty years' experience whose life momentarily took a turn for the worst but who has been rehabilitated and is presently unimpaired. The community should no longer be deprived of the services of such a qualified and compassionate attorney.

In terms of protecting the public from unethical conduct, that goal has already been served. Mr. Simring has made clear that his professional misconduct stemmed from severe physical, emotional and psychological impairment that reduced his ability to appreciate the wrongfulness of his conduct. The source of

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colleagues should be admissible.

More importantly, the case law and decisions rendered both before and after the Prior case suggest that the receipt of character reference letters by the Referee is not improper. E.g., The Florida Bar v.. Fussell, 179 So.2d 852, 853 (Fla. 1965); The Florida Bar v. Scott, 238 So.2d 634, 634 (Fla. 1970); The Florida Bar, In re Efronson, 403 So.2d 1305, 1305 (Fla. 1980); The Florida Bar In re Pahules, 382 So.2d 650, 651 (Fla. 1980); The Florida Bar v. King, 174 So.2d 398, 401 (Fla. 1965); see The Florida Bar v. Ryder, 540 So.2d 121, 122 (Fla. 1989).

On the basis of this authority, Mr. Simring would submit that not only was the Referee in error in not admitting the letters into evidence, but that a fair determination of this case is impossible without reading such letters. After reading the letters, the Court will see that Bar counsel may be the only person in the State of Florida unwilling to give Mr. Simring the respect and credit he deserves for his life's work.

this impairment has been greatly diminished: his son Matthew has responded favorably to therapy and is now successfully fulfilling the degree requirements for a Bachelor of Arts degree at Nova University; consequently, Mr. Simring's emotional well-being has much improved, as have his related physical ailments. Mr. Simring's life was a shambles during the period of trust account violations. He is now ready to start again and to revive his once profitable and well-respected practice of law without the impairments which have plagued him in the immediate past.

Finally, the most important aspect of this case is that Mr. Simring has willingly admitted the wrongfulness of his conduct. Nevertheless, Bar counsel stubbornly refused to work out a consent judgment because of the semantical distinction between theft, misappropriation and commingling. Bar counsel's stubbornness is inexplicable. Regardless of the label, Mr. Simring admits that his conduct in using his client trust account as a personal operating account was a violation of the rules of professional ethics. At the same time, Mr. Simring has told Bar counsel that no client funds were taken. Precedent clearly suggests that the appropriate discipline in such a case is a brief period of temporary suspension. E.g. The Fla. Bar v. Moxley, 462 So.2d 814, 815-16 (Fla. 1985) (sixty-day suspension and three year probation); The Fla. Bar v. Welty, 382 So.2d 1220, 1221-22, 1224 (Fla. 1980) (six month suspension and two year probation).

Mr. Simring has been candid and honest about his life, his law practice, his family, and his emotional and mental impairments. See, e.g. **Joint Stipulation in Motion for Final Determination; Petition to Dissolve Order of the Supreme Court.** His words have been forceful because he is fighting against what he perceives to be a grave injustice through unnecessary persecution by the Bar. Mr. Simring is not a thief. But he has been fighting for his life against the Bar's false accusations. The actions of the Florida Bar in this case and the true pursuit of justice transcend these proceedings.

The punishment in this case must fit the crime. To Mr. Simring, disbarment is equivalent of capital punishment. To remove an attorney after 30 years of practice from his chosen profession after he has devoted his life to the law, to honesty, and to justice would be equal to a death sentence to both the attorney and all who depend on him.

Mr. Simring has maintained since the first day of his "temporary" (now 12 month) suspension that he is guilty of improper bookkeeping procedures not in accordance with the Rules Regulating the Florida Bar. Mr. Simring has also maintained that if some more serious ethical violation were involved, that is, if client funds were missing, if cases were not handled appropriately, if he broken the law, he would agree that justice would be served by the harshest of penalties. Fortunately, the only violation of the Rules of Professional Responsibility, as serious as it is, is that Mr. Simring commingled his personal

monies in his attorney/client trust account, and failed to properly maintain his trust account, thereby creating the misapprehension through improper reconciliations that there were shortages in client funds. Mr. Simring is aware that client monies placed in an attorney/client trust account must remain inviolate and that misappropriation of such funds is a serious offense. However, in no case were client monies "borrowed," taken and then later "reimbursed," or otherwise taken for personal use.

As to punishment, Mr. Simring submits that the time served (12 months) is excessive punishment in this case. Mr. Simring's ability to practice law has never been questioned; only his ability to supervise a trust account. Should this Court see fit, Mr. Simring is willing to reopen his practice without the privilege of having a trust account, or by having a trust account that is monitored by a secondary attorney.

WHEREFORE, it is respectfully submitted that the Supreme Court of the State of Florida suspend Mr. Simring from the practice of law for six months, **nunc pro tunc** to January 14, 1991, the date of the Respondents temporary suspension,[25] and thereby render a final determination in this cause.

Respectfully submited,

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[25] The Bar also apparently concedes that Mr. Simring should receive credit for "time served" and that punishment should be nunc pro tunc in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 24th day of ~~February~~ March, 1992, to:

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