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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Catplainant-Appellant, v. ELLIS S. SIMRING Respondent-Appellee.	Supreme Court Case Nos. 77,351 and 78,243 The Florida Bar File Nos. 90-51,077 (17C) and 91-50,783 (17G)

INITIAL BRIEF OF THE FLORIDA BAR

KEVIN P. TYNAN, #710822
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue
Suite 835
Fort Lauderdale, FL 33309
(305) 772-2245

JOHN T. BERRY, #217395
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5839

JOHN F. HARKNESS, JR., #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

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PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the Bar" or "The Florida Bar." Ellis S. Simring, Appellee, will be referred to as "Respondent" or "Simring." The symbol "RR" will be used to designate the Report of Referee and the symbol "TT" will be used to designate the transcript of the final hearing. The symbol "PTS" will be used to designate the parties' Joint Pretrial Stipulation.

STATEMENT OF THE CASE AND THE FACTS

There are two cases involved in this appeal. Case number 77,351 was filed first and is a five count complaint, involving certain acts of misconduct related to the Respondent's trust account. Case number 78,243 relates to the Respondent's misuse of Radcliff Barnett's settlement proceeds. Both of these matters were consolidated for trial and were heard before the Honorable W. Matthew Stevenson, Referee on October 3 and 4, 1991. The Referee rendered his report on November 23, 1991, which report found the Respondent guilty of serious acts of ethical misconduct and recommended the imposition of an eighteen (18) month suspension from the practice of law.

The Barnett matter, case number 78,243 is extremely egregious and easy to explain. In March of 1990, the Respondent represented Radcliff Barnett, a minor, concerning Barnett's claims for personal injury and on March 5, 1990 the Respondent received $45,000.00 on behalf of Barnett, as a settlement of Barnett's claims. RR at 5-6. The Respondent deposited these monies into his trust account on March 5, 1990. RR at 6. As will be explained below, the Respondent's trust account was unable to meet all of the Respondent's client liabilities and was short by approximately $8,000.00 on March 5, 1990.

Since Barnett was a minor, each and every disbursement related to his settlement proceeds needed prior court approval. RR at 6. The Respondent made numerous disbursements against the monies he held in trust for Barnett. RR at 6-7. Each disbursement was made by trust account check and made reference to the Barnett settlement. RR at 6. Each disbursement was made without court approval. RR at 7. In addition, each disbursement had "no nexus or connection to Barnett's

personal injury case and are solely Respondent's personal obligations." RR at 7.

The following is a list of the disbursements made by the Respondent against Barnett's trust monies:

Date	Payee	Amount
3/5/90	Joan Simring (wife)	$ 1,000.00
3/5/90	Richard Simring (son)	1,000.00
3/5/90	NCNB - Jill's car (daughter)	2,493.57
3/5/90	NCNB - credit card	993.00
3/5/90	Bamett Bank	1,251.46
3/5/90	State Farm Ins., Lincoln	865.71
3/5/90	State Farm Ins., V.W.	883.62
3/5/90	State Farm Ins.	346.42
3/5/90	State Farm Ins., Volvo	132.59
3/5/90	State Farm Ins.	832.54
3/5/90	Lease Am. Vendor (copy machine)	383.05
3/5/90	Volvo Finance N/A	1,392.42
3/6/90	Jean Bussman (wages)	680.00
3/6/90	Joan Simring (wife)	1,200.00
3/6/90	Alex Barak (wages)	1,000.00
3/8/90	Simring, Glaskin	3,000.00
3/9/90	Steve Rasabi (loan)	375.00
3/9/90	Tech Paper	77.06
3/9/90	Richard Young Prod.	40.48
3/9/90	D & S Publications	209.88
3/9/90	Safeguard Bus. Systems	160.74
3/9/90	Lawyers Diary - Manual	102.00
3/9/90	Lawyers Coop.	69.12
3/9/90	AT&T	265.12
3/9/90	Southern Bell	261.30
3/9/90	Federal Express	300.00
4/16/90	Celia Cohen	1,600.00
4/16/90	Marion Klein	400.00
5/30/90	Clerk of Court	120.00
		$21,435.08

In October of 1990, the Respondent closed his trust account and removed the balance of the funds that remained deposited therein. RR at 7. By October of 1990 all of Barnett's monies had been removed from the trust account. The Respondent did not restitute this matter until September 4, 1991, two months after the Bar filed it's complaint and only after a trial date was set for this matter.

The Referee found the Respondent's action violative of Rule 3-4.2 [Violations of the Rules of Professional Conduct is cause for

discipline.] of the Rules of Discipline, and Rules 4-1.15(a) [A lawyer shall hold all client funds in trust.], 4-1.15(b) [A lawyer shall promptly deliver funds to his client.], 4-1.15(c) [Contested funds shall be treated as trust property.], 4-1.15(d) [A lawyer shall comply with the Rules Regulating Trust Accounts.], 4-8.4(a) [A lawyer shall not violate a disciplinary rule.] of the Rules of Professional Conduct and Rule 5-1.1 [Money entrusted for a specific purpose must be used only for that purpose.] of the Rules Regulating Trust Accounts. RR at 9-10. It was the Referee's belief that the Bar had not met it's burden of proof concerning an intentional theft and therefore he did not find the Respondent guilty of Rule 3-4.4 [Criminal misconduct is cause for discipline.] of the Rules of Discipline and Rules 4-8.4(b) [A lawyer shall not commit a criminal act.] and 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.] of the Rules of Professional Conduct. The Bar is appealing the Referee's findings concerning the theft issue and the resulting sanction for the same.

Count I of the bar's complaint in case number 77,351 alleged that the Respondent stole client monies. The Referee noted that:

> "In performing the review of the Respondent's trust account, the accountant for The Florida Bar was required to create individual client ledger cards, bank reconciliations and a client liability list for specific dates because the records were not maintained nor provided by the Respondent. When the accountant for Petitioner requested client files, Respondent replied; "I threw them all away." RR at 2.

Despite all these difficulties, the Bar's auditor was able to formulate certain opinions on the status of the Respondent's trust account. The Referee, after hearing testimony from the Bar's auditor and the Respondent, found that the Respondent's trust account was extremely

short from March of 1989 through September of 1990, except for the mnths of November and December of 1989 when the account had too much money in it. RR at 2. These overages were caused by the Respondent placing huge amounts of personal funds into his trust account in those months. However, the shortages returned in the following mnths and continued until the closure of the trust account in October of 1990. RR at 2. If one was to chart this case graphically, the following would accurately reflect the overall status of the Respondent's trust account:

Date	Bank Balance	Client Liabilities	Shortages
3/31/89	$ 7,006.36	$ 48,866.43	$41,860.07
4/30/89	(1,288.22)	46,770.96	48,059.18
5/31/89	12,827.53	55,902.39	43,074.86
6/30/89	5,319.84	44,141.24	38,821.40
7/31/89	21,349.09	39,647.12	18,298.03
8/31/89	5,610.42	45,186.79	39,576.37
9/30/89	3,317.74	46,675.65	43,357.91
10/31/89	219,839.99	236,121.91	16,281.92
1/31/90	18,078.89	36,792.96	18,714.07
2/28/90	4,788.68	32,438.61	27,649.93
3/31/90	22,062.75	75,118.46	53,655.71
4/30/90	9,763.09	76,524.83	66,761.74
5/31/90	14,086.33	81,813.49	67,727.16
6/30/90	863.65	52,746.00	51,882.35
7/31/90	(5,963.97)	50,196.00	56,159.97
8/31/90	(5,963.97)	50,196.00	56,159.97
9/30/90	(5,963.97)	50,196.00	56,159.97

The Referee found that the foregoing trust account shortages were violative of Rule 3-4.2 [Violation of the Rules of Professional Conduct is cause for Discipline.] of the Rules of Discipline, Rules 4-1.15(b) [A lawyer shall promptly deliver to the client funds which they are entitled to receive and must provide prompt accountings.], 4-1.15(d) [A lawyer shall comply with the Rules Regulating Trust Accounts.], and 4-8.4(a) [A lawyer shall not violate a disciplinary rule.] of the Rules of Professional Conduct and Rule 5-1.1 [Money entrusted for a specific purpose shall only be used for that purpose.] of the Rules Regulating Trust Accounts.

The Referee did not find the Respondent guilty of Rule 3-4.3 [The commission, by a lawyer, of any act contrary to honesty and justice may be cause for discipline.], and 3-4.4 [Criminal activity may be cause for discipline.] of the Rules of Discipline and Rules 4-8.4(b) [A lawyer shall not commit a criminal act.], and 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, deceit, fraud, or misrepresentation.] of the Rules of Professional Conduct. The Referee's not guilty finding is predicated upon the Referee's belief that the Bar failed to meet its burden of proof concerning the issue of theft of client monies. RR at 3. The Bar is appealing the Referee's determination on the theft issue, as well as his recommended sanction for the same.

The Bar is not appealing the Referee's findings as to the other counts of misconduct plead in case number 77,351. However, the Bar will be relying, to some extent, on these other violations to show why the Respondent ought to be disbarred. Therefore, it is imperative for the Court to have a rudimentary understanding of these other counts of misconduct. Count II of the Bar's complaint alleges that the Respondent failed to follow the IOTA Rules, in that he did not maintain an interest bearing trust account. At trial, the Respondent admitted this violation and the Referee found him guilty of the same. The particular rule violations are set forth in the Referees Report at page 8. Count III concerns the Respondent's commingling of client monies with his own personal funds. At trial, the Respondent admitted to the Rule violations concerning commingling and the Referee found him guilty of the same. See RR at 8-9. As to Count IV, the Referee found the Respondent guilty of failing to maintain and keep certain minimum required trust accounting records and further failing to follow certain

minimum required trust accounting procedures. RR at 9. The Referee found the Respondent not guilty of the allegations plead in Count V of the Bar's complaint. The Bar will not be appealing the Referee's findings on this count.

SUMMARY OF ARGUMENT

An attorney's trust account is a sacred thing. It should remain chaste and inviolate. This sanctity has been confirmed by this court on numerous occasions. In fact this Court, in The Florida Bar v. Dancu, 490 So.2d 40 (Fla. 1986), once noted that "(t)he very nature of the practice of law requires that clients place their lives, their mney, and their causes in the hand of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships." It is this reverent attitude towards an attorney's fiduciary relationship to client monies that led to this Court's warning in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), wherein this Court emphatically stated that the court would not be reluctant to disbar an attorney for stealing mney entrusted to him, even if no client was injured thereby. The Breed warning has recently developed into a presumption of disbarment for the theft of client monies by an attorney.

In the case at hand, the Respondent stole client monies and he ought to be disbarred. The Referee did not find the Respondent guilty of theft, as he did not believe that the Bar met it's burden of proof on the intent issue. At trial, the Bar demonstrated that there were massive shortages in the Respondent's trust account for a period of time exceeding one year. The Referee agreed with this proposition. At trial, the Bar proved that the shortages were caused by the Respondent's use of trust monies for personal obligations, rather than the purposes for which they were entrusted. The Respondent admitted as much and the Referee so found. Other evidence adduced at trial on the intent issue included the Respondent's severe cash flow problems, wherein he was selling off his assets, borrowing mney from friends and clients, all in

an effort to pay for a life style, which he admitted was above his financial means, and to satisfy overdue IRS obligations. The Bar's auditor rendered his expert opinion that the Respondent misappropriated client mnies and that the same was an intentional act. The Respondent presented no expert testimony on this issue. The only thing the Bar was unable to extract was a Masonesque admission from the Respondent that he stole client funds. If this admission was the only thing that separated the Bar from a conviction on the theft issue, the Bar was held to too high a burden of proof on the intent issue. In any event, all of the foregoing clearly demonstrates that the Respondent intentionally stole client mnies and used his client's trust mnies to satisfy his own personal obligations.

ARGUMENT

I. THE REFEREE'S FINDING THAT THE RESPONDENT WAS NOT GUILTY OF STEALING CLIENT TRUST MONIES IS CLEARLY ERRONEOUS.

This is a theft case. The Respondent deposited client monies into his trust account and then used the same for his *own* personal use. The Bar considers this to be theft. The Referee disagreed and found that the Bar failed to demonstrate by clear and convincing evidence that the Respondent's actions were intentional and therefore he found the Respondent not guilty of intentionally stealing client monies.[1] In reaching this decision, the Referee noted that:

> "In order to establish a 'theft' or 'misappropriation' case, the Petitioner must establish by clear and convincing evidence that the Respondent intentionally or knowingly converted or misappropriated client funds. Primarily because of Respondent's improper trust accounting techniques (lack of records and documentation) the Petitioner's case amounted to merely establishing 'paper shortages' in the trust account. Respondent cannot be said to have committed theft unless it is proven that he has taken client's property with the intent to deprive the client of the right to the property. The evidence produced by the Petitioner falls short of establishing those requisite elements. The 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 money due." RR at 3.

It is the Bar's position that the Referee held the Bar to too high a standard of proof and that the relevant case law will so indicate.

The Supreme Court of Florida has in the past few years resolved a rash of theft. Same of these cases go into great detail on the theft of

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[1] While the Referee did not find the Respondent guilty of theft, he did find the Respondent guilty of a whole host of trust accounting violations, inclusive of the misuse of client mnies.

client mnies and the type of evidence adduced at trial to support the finding of theft. For example, in The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990), the Court found that:

> "the balance in the trust account at Sun Bank as of May 30, 1988 was $2,400.00; his liability to clients as of this date was $23,528.62, reflecting a shortage in his trust account of $21,128.62. In the following months, Respondent utilized recent deposits to pay obligations incurred in previous months. On July 15, 1988, respondent deposited $8,500.00 from a loan he obtained from his father, which helped in reducing his liability to clients. On August 30, 1988, the balance was $3,703.85 and his client liability was $16,847.29, reflecting a shortage of $13,143.44."

Id. at 934. In The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989) the Court noted that an "audit of (Schiller's) trust account between June 1987 and October 1987 disclosed deficits gradually increasing to over $29,000 on September 21, 1987." In a mre recent case the Court described the facts of the case as follows:

> 'The Florida Bar audited McShirley's trust account records after he declared bankruptcy, discovering several irregularities. Same records were missing, allegedly lost while moving between offices. Others showed that disbursements made to, or on behalf of, McShirley exceeded the amount of personal funds commingled in the trust account, creating a deficit balance. From May 1980 to May 1982, the Bar auditor's reconstructed reconciliations reflected deficits of $10,634.63. No records were available for the period from July 1982 through July 1984. By January 1986 the deficits totaled approximately $27,000.00."

The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991). Also see The Bar v. Shuminer, 567 So.2d 439 (Fla. 1990) [Failure to maintain a balance in the trust account.]

Whether the Court talked in terms of a shortage, a deficit balance or failing to maintain a balance, the Court reached the same conclusion as to Farbstein's, Schiller's, McShirley's and Shuminer's actions. In each case the respondent was found guilty of stealing client monies.

Farbstein at 935; Schiller at 992-993; McShirley at 807-808; Shuminer at 431-432. The Respondent in this case has engaged in these same actions and he too should be found guilty of stealing client monies.

A) THE THEFT IN CASE NUMBER 78,243

In March of 1990, the Respondent settled the personal injury case of Radcliff Bamett, a minor. On March 5, 1990, he received $45,00.00 on Barnett's behalf and deposited the same into his trust account. RR at 6. On the date of this deposit, the trust account was unable to meet all of its obligation and was short by approximately 8,000.00. TT at 119.

The parties pretrial stipulation sets forth in detail how the Bamett settlement proceeds were to be disbursed. PTS page 8. Basically $10,000.00 was to be paid to Bamett, $10,000.00 to the Respondent for fees and costs and the rest of the money was to pay certain health care providers. PTS page 8.

The Respondent chose to convert these monies to his own use. On March 5, 1990, the date the Bamett monies were deposited, the Respondent drew twelve (12) checks for personal matters and the reference on each check was "Barnett." PTS page 8. The checks were made out to his family ($2,000.00), as well as for car payments ($3,885.99), auto insurance ($3,060.88) and credit cards and other personal expenses ($2,627.51). These checks totaled $11,574.38. So on the date the Bamett monies were deposited, the same were dissipated by almost $20,000.00. [The approximate $8,000.00 preexistent trust shortage plus the $11,574.38 of checks.] On the day after the date of deposit, the Respondent drew checks totaling $2,880.00 against the Bamett monies. He gave his wife $1,200.00 in addition to the $1,000.00 he had given her the day before. He paid his secretary/bookkeeper her

weekly wages in the amount of $680.00 and he gave a lawyer employee a check for $1,000.00. On March 8, he took a check for $3,000.00 for himself and paid a personal loan in the amount of $375.00. On March 9, 1990, the Respondent started paying various office expenses totaling $1,485.70 with Barnett's money. By March 9, 1990, the Respondent had taken $19,315.08 of the Bamett monies. Couple this with the preexisting shortage in the account and you have over $27,000.00 of Barnett's original $45,000.00 pilfered within four days of the initial deposit.

At March 31, 1990, if we exclude the Bamett transaction as a liability, the Respondent's trust account has a shortage of $8,655.71. If you include the Bamett matter, you have a shortage of $53,655.71, a sum in excess of Barnett's initial deposit. In fact on March 31, 1990, the account had a reconciled bank balance of only $22,062.75 and client liabilities of over $75,000.00.

In April of 1990, the Respondent drew two more checks against the Bamett settlement which totaled $2,000.00. At the end of April the trust account had a reconciled balance of $9,763.09, and a shortage of $66,761.74.

The last check referring to the Barnett matter was drawn on May 30, 1990 in the amount of $120.00 and on that date the Respondent's trust account was short by $67,727.16

By June 30, 1990, the trust account held less than a thousand dollars and by July 31, 1990, the account had a negative reconciled balance of almost $6,000.00 and client liabilities of just over $50,000.00 with a shortage of $56,159.57. In September of 1990, the Respondent closed his trust account (TT at 341), thus leaving no funds held in trust for Bamett or any other client.

It is easy to see from the foregoing that this was an intentional act. The mney came in and was paid out for the Respondent's personal obligations. The Respondent testified that he took the Barnett mney out of his trust account "probably within days after it went in." TT at 178 L.14.

It is interesting to note that as Bamett was a minor, each and every disbursement of Barnett's settlement proceeds needed prior court approval. The Respondent neither sought nor secured court approval for any of his disbursements prior to using the same for personal expenses. PTS at page 9 para. 7. In any event, each disbursement had no nexus or connection to Barnett's personal injury case. PTS at page 9 para.8.

B) THE DEFENSE TO CASE NUMBER 78,243

The Respondent testified that he gave the Barnett monies to Harold Rubalow to hold in trust for him. TT at 181-182. Rubalow is a retired New York lawyer and a personal friend of the Respondent for over thirty years. TT at 40, L.14-18. Rubalaw testified that he received $35,000.00 (not the full $45,000.00) in cash from the Respondent sometime in mid March of 1990. TT at 45, L.16. The Respondent said the exchange occurred on or about March 19, 1990. TT at 182. By March 19, 1990, the Barnett monies in the trust account had already been reduced by over $27,000.00 and had been so depleted frm as early as March 9, 1990. RR at 6, para. 18.

Rubalow testified that he was instructed by the Respondent to put the mney in a trust account. TT at 45, L2-5. He did not do so, but Rubalaw did testify that he put the mney in a safe deposit box. TT at 45, L.13-14. Rubalow informed the Respondent of this fact (IT at 185, L.3-14.), but the Respondent took no further action to safeguard the

monies he allegedly gave Rubalm. The Respondent did not even know which bank held the money in question. TT at 185, L.17. In fact, had Rubalm, an elder gentleman, passed away, the Respondent had no access to this mney and would have been at the mercy of Rubalow's family. TT at 185, L.15-24.

Both Rubalm and the Respondent testified that there are no records concerning this transaction.[2] There are no receipts, no letter agreements, no written escrm instructions or any other document to protect what is allegedly the ward's mney. The Respondent never even told his client that he had given the settlement proceeds, in cash, to a third party. TT at 183, L.9-15. Instead he asked a third party, Marty Roth[3] to tell her. TT at 183, L.13-15.

On March 12, 1991, the Honorable J. Cail Lee, Circuit Court Judge, entered an order directing that the Bamett monies be deposited into a "restricted account" and requested that certain other steps be taken in regards to the funds in question. See Bar's Exhibit 10 in evidence. The Respondent, although he was aware of the aforesaid order (TT at 177.), chose to disregard the same. TT at 178.

On June 19, 1991, the Honorable Patricia W. Cocalis, Circuit Court Judge, approved the Barnett settlement and instructed that disbursements be made in accordance with her order. See Bar's Exhibit 10 in evidence. Some time around August 6, 7, or 8 of 1991, Rubalow gave the Respondent

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[2] In fact the Respondent testified that "usually when you do a cash transaction there's no documents at all. That's the purpose of it. If you want to leave a paper trail, then don't do a cash transaction." TT at 183, L.3-8.

[3] Roth, a disbarred Mew York attorney (TT at 168.), referred the Bamett case, as well as other cases mentioned in this action, to the Respondent.

$35,000.00 in cash. TT at 52, L.9-14. However, the Respondent ignored this order also and did not distribute monies at that time, but instead kept the cash at his home. TT at 186, L9-18. Why didn't the Respondent disburse upon receipt of the cash? Because he was attempting to extort his former partner into restituting the Bamett matter for him. TT at 187, L.13 to 188, L.16. Why? So he could keep the $35,000.00 in cash for himself.

Another important factor to note is that the Supreme Court's Order of temporary suspension specifically mandated that the Respondent was not to hold client monies.[4] The Respondent knew this but just ignored this order also. The Referee noted that:

> "Assuming that Rubalm did indeed hold the $35,000.00 in cash, the Respondent figuratively 'broke every rule in the book', including court orders, as to how this money was to be held and when it was to be disbursed."

The Ramett liabilities were finally satisfied on or about September 4, 1991. This action was taken only after Bar intervention[5] and over 18 months after the Respondent first started using Bamett monies for his own purposes.

This whole Rubalow transaction is a red herring. Most of the money was missing prior to the alleged transfer of cash from the Respondent to Rubalow.[6] Therefore, at best, Rubalow's alleged receipt of the cash

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[4] The Respondent, by order dated January 14, 1992 in case number 78,898, has been found in contempt of this Court's Order of temporary suspension. A sanction for the same has been withheld pending the outcome of this action.

[5] The Bar's complaint was filed on July 9, 1991 and the Bar's investigation was initiated months prior to that time.

[6] The money was deposited on March 5, 1990. By March 9, 1990, over $27,000 of Barnett's monies had been converted by the Respondent. Rubalow did not receive the $35,000.00 in cash until mid March on or about March 19, 1990.

should be considered as restitution of a completed theft.[7] In any event, the testimony is contradictory to the bank records. For example, why would the Respondent keep drawing checks referenced to the Bamett matter after he allegedly gave the Bamett monies to Rubalow? This just does not make sense. It is unsupported by any documentary evidence and should be disregarded. Therefore, this Court should find that the Respondent intentionally stole Barnett's settlement proceeds.

A) THE THEFT IN CASE NUMBER 77,351

The theft that occurred in case number 77,351 is easy to explain, as long as one understands three basic definitions concerning trust accounts. These definitions are:

> 1. RECONCILED BANK BALANCE - The total funds actually in the trust account and available for client disbursements on a given date.
> 2. TOTAL CLIENT LIABILITIES - The amount of mney that should be in the trust account on a given date to satisfy each and every client liability.
> 3. SHORTAGE OR OVERAGE - The difference between the reconciled bank balance and the total client liabilities on a given date.

When one compares the Respondents reconciled bank balances with the Respondent's total client liabilities on given dates, massive shortages are revealed.[8] These shortages are as high as $67,727.16, no lower than $16,281.92, and average over $41,000.00 a mnth. These shortages could have been more monstrous. If the Respondent had not commingled his monies with those of his clients, he could have been short as much as $105,236.42 at July 31, 1989, for in that month the Respondent deposited

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[7] The Report of Referee is unclear on whether or not the Referee believed the Rubalow cash story. The Report only "assumes" that Rubalow held the cash and does not take a definitive stand one way or the other.

[8] These shortages are detailed at page 5 of this brief.

$86,938.39 of his own monies into his trust account. Even with this deposit he was still short almost $20,000.00.

Shortages in a trust account do not automatically equate to an intentional theft. See for example The Florida Bar v. Weiss, 586 So.2d 1051 (Fla 1991) [Shortages arose through negligence rather than an intentional act.] In the Bar's view however, evidence of shortages in a trust account should raise a presumption of misuse of client monies.[9] This presumption can be rebutted by evidence that the shortages were caused by inadvertence and that the attorney did not financially gain thereby. The only monies that are supposed to be in a trust account are client monies. Therefore, it is not unreasonable to presume that, if there are shortages, client monies have been converted. This is especially true when evidence exists that the shortages were caused by checks or other withdrawals being made to the attorney in question or for the attorney's personal bills.

The Respondent would have this Court believe the shortages in his trust account are mere "paper shortages." He does not define what a "paper shortage" is, but instead tries to assert a no harm no foul defense. The Bar asserts that there is harm and there is more than one foul. In any event, this Court has repeatedly held that an attorney would be disbarred for theft of client monies "even though no client was injured." The Florida Bar v. Breed, 378 So.2d 783, 784 (Fla. 1979).

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9 The Referee noted at page 3 of his report that "The Petitioner seeks to raise a presumption of theft by repeated instances of shortages in the trust account over an extended period of time." This is true. The Bar did attempt to raise a presumption of theft. However, the Bar went further than that. Among other things, the Bar demonstrated, and the Respondent admitted, that he paid personal obligations from his trust account, thus, in the Bar's view, conclusively proving the theft.

Also see Standard 9.4 (f), Standards for Imposing Lawyer Sanctions [Failure of injured client to complain is not mitigation.] There may not be an identifiable victim in each and every trust account case. However, the. real harm comes when the public can no longer trust an attorney to hold his monies safely. See McShirley at 809-810; Breed at 784. As previously stated, this Court once noted that:

> "the very nature of the practice of law requires that clients place their lives, their mney and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships."

The Florida Bar v. Dancu, 490 So.2d 40, 41 (Fla. 1986). Therefore, every time an attorney steals, the public as a whole is harmed and the legal profession's reputation is mre sullied in the public's eye. The Bar would be remiss if it did not note that at least two identifiable individuals were harmed by the Respondent's actions. These individuals are Radcliff Barnett and Dean Fitzpatrick.[10]

There is a reason why the majority of the Respondent's clients have not complained. The Bar would assert that the majority of the Respondent's clients do not know their mney was misused and converted. This case is a classic case of robbing Peter to pay Paul. Luckily there were very few Peters.[11]

The Respondent contends that he can not be found guilty of theft

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10 The Barnett matter is explained above. The Fitzpatrick matter concerns a certain $5,000.00 given to the Respondent by his client, Leopore to hold in trust for the benefit of Fitzpatrick. TT at 103-104. Fitzpatrick never got the mney and has filed a complaint with the Bar concerning the same. TT at 104-105.

11 Barnett, Fitzpatrick and possibly Freeman Cohen are Peters because the trust account was closed prior to satisfying these liabilities. Other potential Peters are the individuals who held outstanding checks at the time the trust account was closed. TT at 340-342.

absent a showing that he intentionally stole client monies. The Bar agrees with this statement of the law and avers that the following discussion clearly indicates intent on the part of the Respondent to convert client monies to his own use.

Of first and foremost consideration on the intent issue is the fact that the Respondent's trust account shortages were caused by the Respondent's payment of personal obligations with client monies held in his trust account. TT at 111-112; PTS 8-9. These personal obligations included:

1. Car payments;
2. Credit card payments;
3. Auto insurance;
4. Loan repayments;
5. Phone bills;
6. Spending mney for family members;
7. Office expenses;
8. College and law school tuition;
9. Office payroll.

The Respondent admits that he paid these personal bills and obligations frm his trust account. TT at 247, L.24 - 248, L.l. The Respondent further admits to very large living expenses. TT at 190.

The Respondent testified to a decline in his practice which caused him to sell off his assets to raise cash. TT at 197-204. Among the assets that he sold was the Mills Jennings stock. TT at 204. The gain fram the sale of this stock was placed in his trust account to help reduce his shortages and to replace the funds he had previously removed. The Respondent admitted to borrowing money frm friends and clients. PTS at 4, paras. 2a & 2b. These "borrowed" funds were likewise deposited into the trust account to help reduce the shortages. Between January of 1989 and February 1990, the Respondent pumped into his trust account $187,881.27 of his own mney fram the sale of assets or

borrowed funds. Even with this large cash infusion the Respondent was unable to completely reduce his shortages.[12]

Adduced at trial was the Respondent's handling of his personal account (which was labeled as a trust account) wherein he had over 40 insufficient fund checks and his account was in a constant overdraft posture. The Respondent's need for cash to fuel his life style also drove him to difficulties with the Internal Revenue Service. TT at 179. At trial, the Respondent testified that the IRS was attempting to collect money frm him that he did not have, and that some of his actions were made to avoid the IRS frm tracking the transaction in question. TT at 179. The following passages of the Respondent's testimony are of interest:

> Q. Again what was your fear about keeping money in the trust account? Why were you afraid of that?
>
> A. The IRS was coming after us. (TT at 192, L.14-17)
>
> and
>
> Q. Any other documents to show other than that letter that you gave this man cash?
>
> A. Usually when you do a cash transaction there's no documents at all. That's the purpose of it. If you want to leave a paper trail, then don't do a cash transaction. (TT at 183, L.3-8)
>
> and
>
> Q. So you were just trying to hide the money frm the IRS?
>
> A. Absolutely . . . . (TT at 179, L.1-3)
>
> and
>
> A. . . . whatever money we made, admittedly, we hid it from the IRS. (TT at 335, L.23-24)

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[12] However, in November and December of 1990 the Respondent's actions caused an overage in the trust account, which overage was eroded in January of 1991 when the shortages returned.

The Bar's auditor reached an expert opinion on the Respondent's shortages. His opinion was predicated upon his review of the trust account, the bank records related thereto, as well as the issues discussed above. It was the Bar auditor's expert opinion that the Respondent misappropriated client funds and that said misappropriation was an intentional act. TT at 111-112. There was no expert opinion presented by the Respondent on this issue.

For all of the foregoing reasons it is clear that the Respondent, by his use of client trust monies to satisfy personal expenses, knowingly and intentionally converted client monies to his own use.

B. THE DEFENSE TO CASE *NUMBER* **77,351**

The Respondent asserts a variety of defenses. Each one is devoid of merit.

The first defense advanced by the Respondent is what can be referred to as a "cash defense." The Respondent testified that he had a large amount of cash from which he was meeting his client liabilities and therefore he could not have had a shortage in his trust account or be accused of being a thief. The Bar has two responses. First and foremost, is the fact that the Respondent is unable to produce any proof of this cash. Under examination, he admitted that he did not have one scintilla of documentary evidence to support this position. TT at 191, L.3-6. When pressed for an explanation, he quipped that the reason he had no documentation is that he did not want the IRS to have access to any, so he did not create any. TT at 179.[13] The Bar's second response concerns the loans the Respondent received and the sale of

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13 In essence, the Respondent admits to potentially engaging in tax fraud to defeat the allegation of theft.

Respondent's assets. The Respondent agreed that he had borrowed funds from clients and employees. PTS at 4. He also testified about the need to sell off his assets, so he could maintain his lifestyle. TT at 190–191. Why would he need to borrow money or sell assets if he was flush with cash? The Respondent's testimony on this area is just beyond belief and is in direct conflict with bank records and reality.

An extension of this cash defense is the Respondent's argument that the Bar failed to get a full picture by not auditing the Respondent's other bank accounts and then assessing what other assets he may have had to meet client liabilities. Ignoring for the moment that this "over all audit" approach is inconsistent with the Rules of Regulating Trust Accounts, one is still able to conclusively state that the Respondent put on no evidence to show that he had other bank accounts with balances or other assets that were sufficient to meet all of his client liabilities on the dates in question. Again, it is a question of proof and the Respondent has failed to provide any. In any event, the Respondent's argument misses the mark. Trust monies belong in a trust account. See Rule 4-1.15(a), R. Prof. Conduct and Rule 5-1.1, R. Reg. Trust Accounts. In fact, monies entrusted for a specific purpose must only be used for the purpose for which they were entrusted and an attorney's failure to follow this precept by placing trust monies in other than a trust account commits a conversion of client funds. Id.

The next line of defense for the Respondent is his allegation that this case is nothing more than a bad case of commingling. While the Bar agrees that this is a bad case of commingling, it also urges this Court to find that the Respondent stole client monies. In a recent case, not unlike the case at bar, the Court found that a lawyer had stolen client

funds when that attorney's disbursements from the trust account "exceeded the amount of personal funds commingled in the trust account". McShirley at 807. The Respondent did commingle, but withdrew funds for personal expenses from his trust account which exceeded his monies that he had deposited therein.

Another way to look at the commingling issue, is that every time the Respondent deposited his own money into the trust account, he was performing an act of restitution, whereby he was restoring, to trust, monies that he had previously converted to his own use. Had the Respondent not commingled his theft could have exceeded $100,000.00.

The Respondent also offered certain medical difficulties and personal difficulties as a defense to his bad acts. The same does not equate to a defense to the charges leveled against the Respondent. The Florida Bar v. Golub, 550 So.2d 455, 456 (Fla. 1989). [Alcoholism may explain theft. It does not excuse it.] These "defenses" will be treated as mitigation and will be discussed below.

The Respondent's last defense is that he relied on others, his bookkeeper and his accountant, Ronald Schain, to make sure he was in compliance with the rules. This was his trust account and was not his employee's or third parties' trust account. He was responsible for the same, not third parties. It is interesting to note that the Respondent testified that Schain audited the Respondent's trust account on a routine basis. TT at 328-329. In fact, the Respondent testified that: "Ronnie Schain came in every three months for a three month audit and audited the account. . . ." TT at 329, L.3-4. Schain, however, testified that he did no such work. Schain's deposition, which is in evidence, reads as follows:

> Q. What type of work, prior to getting into this particular matter with the **Bar,** did you render for *Mr.* Simring? Just a general nature is a good answer for **me.**
>
> A. General nature, would be mostly tax services, personal and corporate.
>
> ***Q.*** Okay. Did you do any work with his trust account?
>
> **A. No.**

Schain deposition at 8, L.4–12. A cursory examination of the aforementioned testimony shows that the Respondent was less than candid in his remarks in this area.

As is noted above, the Respondent has presented no credible defense to his ethical defalcation, while the Bar has proven, by clear and convincing evidence, that the Respondent used his trust monies for personal expenses. Accordingly he should be found guilty of intentionally stealing client monies.

II. DISBARMENT, RATHER THAN THE REFEREE'S RECOMMENDATION OF AN EIGHTEEN MONTH SUSPENSION, IS THE APPROPRIATE SANCTION FOR THE RESPONDENT'S ETHICAL DEFALCATIONS.

Theft of funds by an attorney is one of the most serious breaches of the Rules of Professional conduct that an attorney **can** commit. The Florida Bar. v. Schiller, 537 So.2d 992, 993 (Fla. 1989); The Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla, 1986). The Supreme Court of Florida has noted on more than one occasion that "(i)n the hierarchy of offenses for which lawyers may be disciplined stealing from a client must be among those at the very top of the list". Id.

In Breed the Court cited with approval a Report of Referee which stated that "(t)he willful misappropriation of client funds should be the Bar's equivalent of a capital offense. There should be no excuses." Breed at 784. The major underlying reason for the foregoing is that an attorney's theft of funds entrusted to him evidences a total disregard

of his fiduciary duties. Tunsil at 1231

It is important to note that the Supreme Court has on more than one occasion warned that the Court would "not be reluctant to disbar an attorney for this type of offense, even though no client is injured." Breed at 785; Tunsil at 1231. In fact, the Court has plainly stated that "upon a finding of . . . misappropriation, there is a presumption that disbarment is the appropriate punishment." Schiller at 993. Accordingly, the court has "(i)n the overwhelming number of recent cases disbarred attorneys for misappropriation of **funds** notwithstanding the mitigating evidence presented." The Florida Bar v. Shanzer, 572 So.2d 1382, 1383 (Fla. 1991.) citing to Shuminer;, Golub; The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989); The Florida Bar v. Gillis, 527 So. 2d 818 (Fla. 1988); The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988); The Florida Bar v. Bookman, 502 So.2d 893 (Fla. 1987); The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986); The Florida Bar v. Rodriquez, 489 So.2d 726 (Fla. 1986); The Florida Bar v. Ross, 417 So.2d 985 (Fla. 1982).

The Florida Supreme Court has held that:

> "Discipline for unethical conduct by a member of The Florida Bar must serve three purpose: First, the judgement 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 a penalty. Second, the judgement must be fair to the respondent, king sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgement must be severe enough to deter others who might be prone or tempted to become involved in like violations."

The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). Also see The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). On a prior occasion the Court has noted that "(t)he single mst important concern

of this court is defining and regulating the practice of law for the protection of the public frm incompetent, unethical, and irresponsible representation." Dancu at 41. Thus, the Court has recognized the fact that, of the three purposes of lawyer discipline, the most important purpose is the protection of the public. Id. The only way to protect the public from a lawyer-thief is to disbar that lawyer-thief so he will no longer have access to client monies.

It is the Respondent's argument that his acts were not intentional and, if guilty of anything, he is guilty of negligent handling of his trust account. It is anticipated that the Respondent will rely on The Florida Bar v. Weiss for the proposition that he should be not be disbarred. The Weiss case arose after the New Jersey courts had suspended Weiss for six months. As Weiss was also a Florida attorney, a reciprocal grievance was pursued by the Florida Bar. The New Jersey courts found that Weiss' actions were negligent and not intentional, as Weiss' accountant failed to inform him of any shortages in his trust account and as the shortages were further hidden frm him by the trust account's overdraft protection. Weiss at 1052. In the Bar's view, the Court was completely persuaded by New Jersey's finding of a nonintentional act by Weiss and by certain other acts of mitigation when it meted out only a six month suspension. Id.

This case is completely different than Weiss. Here the Respondent's acts were intentional. Instead of mitigating factors, we have a dearth of aggravating factors. Although the Referee did not find the Respondent guilty of theft, he did not believe the Respondent's actions were negligent. On the contrary, the Referee noted that the Respondent engaged in "sloppy and intentionally improper trust accounting procedures." RR at 11. (emphasis in the original). The

Referee further stated that "(t)he Respondent was well aware of the Rules but simply ignored them, acting as if the law did not apply to him." RR at 11. The Referee certainly did not believe all of the Respondent's actions were unintentional or negligent. This Court should do likewise.

Of particular importance in my case is a discussion of aggravating and mitigating factors that may be present in a case. Florida Standards for Imposing Lawyer Sanctions, Rule 9.1 (hereinafter referred to as the Standards). This is especially true in a theft case as certain acts of mitigation may rebut the presumption of disbarment. Schiller at 993.

A. AGGRAVATION

The Referee found the following aggravating factors present in this case:

> 1. Selfish motive (use of client monies for his own purposes);[14]
> 2. Pattern of misconduct (the unethical acts continued for a period of one year or longer);
> 3. Multiple offenses (The Referee found the Respondent guilty of five counts of unethical conduct.);
> 4. Substantial experience in the practice of law (admitted in 1973);
> 5. Vulnerability of a victim (Barnett is a minor). RR at 10.

The Bar would urge this Court to also consider the following as aggravation of any sanction to be *imposed* by this Court:

1. Dishonest motive

Rule 9.22(b) of the Standards notes that a "dishonest or selfish motive" may be considered as aggravation. As is discussed above, the Referee found a selfish motive behind the Respondent's actions. The Bar

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[14] This finding by the Referee that the Respondent "use(d) client monies for his own purposes" is consistent with the Bar's position that the Respondent intentionally stole client funds. Additionally, the Referee's finding is inconsistent with the Referee's determination that the Bar failed to meet it's burden of proof on the theft issue.

contends that Respondents actions demonstrated his basic dishonesty.

The Respondent's actions in stealing client monies is dishonest and selfish. But of mre interest on the dishonesty question was the Respondent's testimony concerning a certain $15,407.79 "loan"[15] he received from Rusty, a sometime client. This "loan" mney was deposited into his trust account to cover shortages. The Respondent testified that Rusty lent him this mney. TT at 194. He further testified that Rusty wanted his mney back (T at 196, L.18–19) but the Respondent just does not want to give it to him. TT at 196, L.18–22. The Respondent's reply to Rusty's request for the return of his money was "sue me". TT at 196, L.22. Surely this smacks of avarice and basic dishonesty.

2. Obstruction of Proceeding

An attorney's sanction may be increased for failing to comply with the rules and/or orders of the disciplinary agency. Rule 9.22(e) of the Standards. In the case at hand, the Respondent flaunted the Supreme Court's order of temporary suspension by receiving, holding and disbursing client funds while under temporary suspension. Also of some interest in this regards is the fact that the Respondent allegedly "threw out" all but two of the client files that the Bar sought to examine in this case. TT at 72, L.9-11.

3. Deceptive Practices

The Florida Bar Exhibit 11, in evidence, is the Respondent's trust accounting certificates for the years covered by the audit. In each of these. years the Respondent certified that his trust account was in compliance with the Rules Regulating Trust Accounts when, in fact, he

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15 The Respondent also claimed that the "loan" was for $35,000.00. TT at 194, L.20–24.

knew that this was an untrue statement. The fraudulent execution of the trust accounting certificates should be considered as an aggravating factor. See The Florida Bar v. McShirley, 573 So.2d 807, 809-810 (Fla. 1991) (Ehrlich, J. dissenting).

4. Refusal to Acknowledge Misconduct

The Respondent has steadfastly insisted that he has done no wrong. This is incorrect. A Respondent's failure to acknowledge that his conduct was wrongful may be taken as aggravation of any discipline to be imposed. Rule 9.22(g) of the Standards.

5. Indifference to Restitution

The Respondent will argue that he has made restitution to all injured parties. While it is true, all but one person,[16] has been reimbursed, we should not call this restitution. The majority of the Respondent's thefts were satisfied shortly after the funds were converted. Haw were these stolen monies replaced? By new client monies coming into the account. In essence, stolen mney was used to replace stolen mney, except in those months when the Respondent deposited personal funds in his trust account. The only people ultimately injured by this process were the individuals who should have had mney in the trust account when it closed. These individuals were Barnett and Fitzpatrick. In the Barnett matter, the mney was stolen in March of 1990. It took the Respondent until September of 1991, the eve of trial, to restitute Barnett. This "restitution" only came after intervention by the Bar and the Respondent's knowledge that the Bar had charged him

16 This assumes that the Respondent satisfied all outstanding trust account checks, that were outstanding at the time he closed the account, as well as Freeman Cohen's $196.00 which was owed to Cohen at the time the account was closed. PTS, Exhibit "O".

with stealing Barnett's monies. The Fitzpatricks' filed a complaint with The Florida Bar concerning the $5,000.00 they thought they were entitled to. TT at 104-105. This obligation was not satisfied at the time of trial.

The Respondent will attempt to argue restitution as mitigation. The Bar disagrees for the foregoing reasons with the Respondent's position. At the least, the foregoing demonstrates that this so called "restitution" is neither an aggravating factor nor a mitigating factor. Rule 9.4(f) of the Standards (Forced or compelled restitution should not be considered as mitigation or aggravation.).

B. **MITIGATION**

The Bar anticipates the Respondent to argue two areas as mitigation. They are the Respondent's lack of a disciplinary record and his personal and medical difficulties. Each alleged mitigating factor will be discussed separately below.

1. Disciplinary Record

The Bar, the Respondent and the Referee all agree that the Respondent's lack of a disciplinary record should be taken into account as mitigation.

2. Personal and Medical Problems

The Respondent testified about certain personal and medical problems that he was undergoing in the period of time at issue. He also presented testimony from three experts. The Respondent had several minor medical conditions which left him fatigued (ie. an iron deficiency and a recurring flu). Additionally, there was some tragic testimony about his son Matthew's difficulties and attempted suicide. Also of note is the court appointed psychological evaluation of the Respondent

which discusses the Respondent's mental state at the time of the evaluation and at the tine of the incidents in question.

Dr. Gerald Safier's expert opinion was rendered in letter form.[17] Dr. Safier treated the Respondent's medical difficulties and was the Respondent's family doctor and he therefore also treated Respondent's son, Matthew. Dr. Safier's letter stated that the Respondent was "impaired" from early 1989 to October of 1990, but does not explain how severe the "impairment" was, nor does the letter explain how the "impairment" effected his work. Also of note, is Dr. Safier's admission that he was a personal friend of the Respondent for over fifteen years. Therefore, Dr. Safier is not the unbiased expert that this Court should rely upon.

The next expert to testify was Richard Levine, PhD. Dr. Levine testified that he treated Matthew starting in September of 1990, well after the thefts in this case, and that he did not treat the Respondent. TT at 232, L.16-19. Even though he did not treat the Respondent, Dr. Levine rendered an expert opinion on the Respondent's mental state during 1989 and 1990. It was Dr. Levine's testimony that the Respondent was in "crisis" and that this "crisis" could affect his work in that the Respondent would have some difficulty in concentrating. TT at 228-230. Dr. Levine was unable to conclusively state that the Respondent was in "crisis" during the time period at issue in this case. Under direct examination the following exchange was had:

> Q. Do you think Ellis Simring was in crisis for more than a year before you saw him?
> A. I don't know.

TT at 228, L.8-10. Dr. Levine also stated that the Respondent was

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17 This letter testimony was allowed in over the Bar's objection.

"frustrated" at the therapy being received by Matthew. In any event, all of Dr. Levine's testimony was couched in terms of "might haves" and "could have beens". TT at 225-231.

The last expert to testify was John Earls, Phd., a psychologist.[18] Dr. Earls did not treat the Respondent, nor did he review any medical records about the Respondent. TT at 275, L12-13. He did not really treat Matthew either, but he did render saw advice for his treatment. TT at 269-270. Dr. Earls also gave an expert opinion on the Respondent's psyche. He stated that the Respondent suffered from "impaired judgement" and that any parent in this situation would also suffer the same impairment. TT at 271, L.8-12. Dr. Earls did not testify to the extent or the degree of the alleged "impaired judgement."

The best and most reliable testimony on the impairment issue comes fran Barbara Winter, PhD., who performed an independent evaluation on behalf of the Referee. Dr. Winter's report, which was accepted into evidence, discusses in detail the causes of the Respondent's mental state. Of particular importance is the following passage from Dr. Winter's report:

> Regarding his level of impairment at the time of the events, it is possible that Mr. Simring's son's illness caused him to suffer mild impairment. He described chronic fatigue syndrome which is often construed as a manifestation of depression, which fits with his character as he is unlikely to admit to such feelings and experiences. These symptoms may have significantly detracted from his ability to function occupationally but does not explain why he chose to commingle funds, except that he will do what he has to do in order to avoid failure. This coupled with such individual's tendency to bend rules such that the rules that they follow are their own, would explain why he did what he did. He admitted that what he did was not wrong because

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18 Dr. Earls was allowed to testify over the Bar's objection that this expert witness was not disclosed to the Bar prior to trial as was required by the Referee's pretrial order.

> to him it was not. He does know the difference between right and wrong from an intellectual standpoint. Emotionally, he feels justified in creating his *own* rules. (Emphasis supplied.)

The Court appointed evaluation points to mild impairment. The other experts do not necessarily disagree. What is interesting is that none of the experts draws a link between this "impairment" and the Respondent's bad acts. In fact, the above passage plainly refuses to make such a link.

A similar impairment defense is raised in drug and alcohol cases. The Supreme Court has definitively found that "(w)hile alcoholism explains the Respondent's conduct, it does not excuse it." Golub at 456. The Respondent's actions are not even explained by his "impairment."

The alleged depression in this case is not unlike the situation faced by the Supreme Court in Shanzer. In Shanzer the Court noted:

> "Respondent argues that his depression, primarily over his marital and economic problems, led him to use his trust account for personal purposes. These problems, unfortunately are visited upon a great number of lawyers. Clearly, we can not excuse an attorney for dipping into his trust funds as a means of solving personal problems."

Id. at 1383-1384. The Shanzer Court found that certain personal family problems did not explain or excuse theft. Id. This Court should likewise resist the Respondent's attempts to have his conduct excused or explained by his son's tragic acts.

Perhaps the most telling testimony came from the Respondent, when he testified that he continued to work during the time in question. The Respondent testified that he tried a dozen cases before a jury, at least a dozen nonjury trials and continued to go to court hearings on behalf of clients. TT at 325, L.21-23. This indicates a low level of

impairment at the time in question. One could also argue, if the Respondent was able to function for trials and hearings, he was not impaired. See Shuminer [Wherein the Court discussed that the Respondent, despite a drug addiction, continued to work effectively and was disbarred for theft.]

It is true that mental illness may be considered in mitigation of wrongful conduct. The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984). [Attorney found not guilty of criminal charge by reason of insanity still stood trial against Bar charges, but had his lack of mental capacity mitigate his punishment.] Hcwever, the Respondent's personal difficulties do not rise to the level of mental illness, such as that found in Musleh, and thus does warrant acceptance of the same as mitigation.

There is no link between his alleged impairment and his bad acts. This is not a case like a drug addict who steals client monies to feed his drug habit. Here the Respondent stole client funds to maintain his lifestyle and for no other reason and therefore he should be disbarred.

III. THE REFEREE COMMITTED REVERSIBLE ERROR BY ALLOWING AN UNDISCLOSED EXPERT WITNESS TO TESTIFY AT TRIAL ON THE RESPONDENT'S BEHALF.

On July 29, 1991, the Referee entered his Order directing that certain pretrial procedures be followed. Included in said order was a requirement that both parties exchange witness and exhibit lists by a date certain and that any witness or exhibit not listed on the aforementioned lists would be stricken and excluded form the trial. In early September, pursuant to said order the parties did exchange witness and exhibit lists.

On the afternoon of October 1, 1991 a copy of the Respondent's Supplemental Witness list was delivered to the Bar. Said Supplemental

Witness list contained only one name, John Steinart Earls, PhD., and designated him as an expert witness. The addition of an expert witness a day and a half before the trial was patently unfair and prevented the Bar from deposing Dr. Earls or otherwise being prepared to deal with his trial testimony. At trial, the Referee denied the Bar's motion to strike this undisclosed expert witness and allowed Dr. Earls to testify and render expert testimony.

This Court has held that a trial court can exclude at trial the testimony of a witness who was not disclosed pursuant to a pretrial order requiring such a disclosure. Binger v. King Pest Control, 401 So.2d 1310, 1313 (Fla. 1981). The decision to exclude such a witness "should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party." Id. at 1314. The Court went on to define prejudice to include surprise and the inability of the objecting party to cure the problems associated with the nondisclosure. Id.

The Bar was not made aware of Dr. Earls prior to receipt of the Supplemental Witness List. The mere fact that Dr. Earl's name was mentioned in the reams of medical reports provided to the Bar is not sufficient notice to the Bar that he would be testifying and rendering expert opinions. The Bar was unable to adequately prepare for his testimony. Accordingly the Referee committed reversible error, in allowing Dr. Earl's to testify. Id. at 1313-1314.

CONCLUSION

In reaching a determination on the appropriate level of discipline which should be imposed in this case, this Court needs to take the

measure of Ellis Simring. It is the Bar's position that the Respondent ought to be disbarred. This disbannent is not only predicated upon the Respondent's theft of client monies, it is also predicated upon the Respondent's composite bad acts. The Bar is mindful that disbarment is the most extreme penalty in the Bar's arsenal. The Florida Bar v. Turk, 202 So.2d 848, 849 (Fla. 1967). However, "where the composite conduct of a lawyer is gross, disbarment is warranted." The Florida Bar v. Setien, 530 So.2d 298, 300 (Fla. 1988). Of particular interest in this regard is Dr. Winter's opinion that:

> "Mr. Simring harbors an attitude of omnipotence and self-assurance, a feeling that the rules of society do not apply to him . . . He does know the difference between right and wrong from an intellectual standpoint. Emotionally, he feels justified in creating his *own* rules." Winter's report at 6-7.

Lawyers, like all members of society, are governed by certain rules and regulations that have been set down to dictate the conduct that is considered by all to be acceptable. The Respondent thinks that he is above society's norms and rules. If he thought that these norms and rules applied to him, he would have honored the Supreme Court's order of temporary suspension or for that matter any of the rules he violated in this grievance.

This case is also about basic honesty and an extremely easy concept that one should not steal money entrusted to you. The Respondent's conduct has been dishonest and beyond the pale acceptable to other attorneys and society in general.

There are three purposes for imposing discipline on a lawyer. They are: protection of the public; reformation of the wayward attorney; and deterrence. Lord at 986. Disbarment of the Respondent for stealing client monies would certainly protect the public. The Respondent, with

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his attitude that rules do not apply to him, is beyond reformation or rehabilitation. Finally, other attorneys will be deterred from stealing client monies if they know that theft of client monies will equate to disbarment. Theft of client funds warrants disbarment. Schiller. This Court should not recede from this position.

WHEREFORE, The Florida Bar respectfully requests this Court to find the Respondent guilty of intentionally stealing client monies and thereupon disbar the Respondent from the practice of law, nunc pro tunc the date of his temporary suspension, and to pay the Bar's costs in this matter.

Respectfully submitted by,

KEVIN P. TYNAN, #710822
Bar Counsel
The Florida Bar
5900 N. Andrews Ave, Suite 835
Fort Lauderdale, FL 33309
(305) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Neil Garfield, Attorney for the Respondent, at 3500 N. State Road 7, Suite 333, Fort Lauderdale, FL 33319, on this 31st day of January, 1992

KEVIN P. TYNAN