IN THE SUPREME COURT OF FLORIDA

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

# REPLY BRIEF AND ANSWER BRIEF ON CROSS PETITION FOR REVIEW

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## NOTE ON THE RECORD

The Florida Bar filed a motion to strike the Respondent's Answer Brief, as it was full of references to matters outside the record and contained exhibits and new testimony never introduced during the trial of this matter. The Bar's motion was denied, as was the Bar's request to respond to these matters, which were dehors the record, by also presenting rebuttal evidence which was outside the record. The Bar accepts the Court's decision as proper, but considers itself somewhat hampered in responding to the Respondent's new allegations. Therefore, the Bar does not want the Court to accept the Bar's silence on certain allegations, especially those alleging prosecutorial misconduct, as acquiescence to those baseless allegations, for the Bar strongly disagrees with these allegations.

## 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 designated 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.

## SUMMARY OF ARGUMENT

i Court has lly held that a lawyer should guard his client trust monies with much greater diligen and caution than l gua s own funds. I fact this Court e even issued a long standing warning to wayward attorney that the Court would not h lt a to disbar an attorney for stealing client ies, even if no client was injured thereby. In the case at hand the Court is directly fac d h such a d y. The t knowingly and intentionally used his l ent ust mon for hi *own* personal obligations.

1 s is a presumption that theft of l **monies** warrants d This pre can be rebutted by certain acts of mitigation. The f e i find two t s but he l found five ting fa The serious nature of the defalcation a not been igh d by the m i i ic found in this case. ccordingly this Court has no choice but to disbar the Respondent.

## ARGUMENT

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

It is undisputed that the Respondent deposited client monies into his trust account. The only real dispute is whether the Respondent later stole these same client funds. The Bar contends, and the Referee agreed, that the Respondent "use(d) client mnies for his awn purposes". RR at 10. However, the Referee ruled that the Bar had failed to meet its burden of proof on the intent issue and therefore, the Referee did not find the Respondent guilty of intentionally stealing client mnies, notwithstanding his finding that the Respondent satisfied his awn personal obligations with client trust money. RR at 3. The Bar, in its Initial Brief at pages 10 through 25, has demonstrated that the Referee's ruling on the theft was clearly erroneous. The Respondent, in his Answer Brief, takes issue with this proposition and presents a tortured argument why this Court should not find him guilty of stealing client monies.

The Respondent's brief at page 18 asserts that: "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." Obviously the Respondent has forgotten that he was called as the Bar's second witness and testified at length about the matters raised in the Bar's complaints. See TT at 142 through 210 and 239 through 251. The Respondent also forgets to inform this Court about Florida Bar Exhibit One, which is the deposition of Ronald Schain, CPA, the Respondent's Certified Public Accountant. Additionally, it should be noted that the parties entered into an extensive Joint Pretrial Stipulation which resolved many of the facts and issues which could have

required other witnesses to testify at trial.

A) THE THEFT OF BARNETT'S MONIES

The Respondent asserts that he did not steal any of Radcliff Bamett's monies.[1] As proof thereof, he explains that his friend Harold Rubalow held the monies in question for him. The Respondent, at page 7 of his Answer Brief, contends that the Bar is in agreement that Rubalow held Barnett's monies. This is a blatant mischaracterization of the Bar's Brief. See the Bar's Initial Brief at pages 15 through 17. The Bar has always contended that the Rubalow transaction is a red herring and not worthy of belief. See the Bar's Closing Argument and Memorandum of Law at page 27 through 28. The Barnett mnies were deposited into the Respondent's trust account on March 5, 1990. RR at 5-6. On the date of the deposit the Barnett monies were used to cover a preexisting trust account shortage in the amount of $8,000.00. By March 9, 1990, over $27,000.00 of Bamett's monies had been converted by the Respondent. RR at 6. The alleged transfer of $35,000.00, in cash, to Rubalow was not made until on or about March 19, 1990 (TT at 182) or somewhere in mid March (TT at 45), depending on who you believe. Thus, at best, the Rubalow cash transaction, if it happened[2], is nothing more than restitution of a completed theft.

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[1] The Respondent points to a letter from the undersigned to his attorney, attached at appendix 2 to his brief, for the proposition that the Bar should not have prosecuted him for theft. The basic premise to this letter was that Rubalow had received the $35,000.00 in cash contemporaneously with the Respondent's deposit of the Barnett mnies. As is explained above, Rubalow allegedly received the $35,000.00 well after the time that the Respondent started to steal the Bamett mnies.

[2] The Bar has argued that there is no real documentation on this transaction. No records were introduced at trial. Rubalow testified that he had no records for his receipt of the cash. TT at 50. The Respondent bragged about the lack of records for this cash transaction. TT at 182-183.

B) THE THEFT IN CASE 77,351

The Respondent claims that he should not be found guilty of intentionally stealing client monies. As grounds therefore, he asserts various defenses and excuses. Each one of these defenses or excuses will be dealt with below, but prior to refuting the same it is important to briefly discuss why the Bar is convinced that the Respondent stole client monies.

This case is not unlike any other theft case. The Bar reviewed the Respondent's trust account and the records pertaining thereto.[3] The Bar's auditor was able to make a comparison between the Respondent's total client liabilities and the reconciled bank balances on given dates and was thereupon in a position to render an expert opinion on the status of the Respondent's trust account.[4] It was the Bar auditor's expert opinion that the Respondent's shortages "were caused by the Respondent's conversion of client funds to his own personal use." TT at 11.

The Respondent's first assault is launched against the Referee's determination concerning the Respondent's client liabilities. RR at 2.

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[3] The Bar's auditor examined cash receipts journals, bank statements, cancelled checks and created other required trust account records which were not maintained by the Respondent. TT at 71-72

[4] The Respondent at page 28 and 29 of his Answer Brief complains that these three concepts (total client liabilities, reconciled bank balance and overage/shortage) have no support in the record. But see the deposition of Schain at pp. 13-16, TFB Exhibit one and Widlansky's testimony at TT 74-75, wherein these definitions are explained. The Respondent also complains that he "should not be held liable for not being familiar with these definitions". Answer Brief at p.29. While ignorance may be bliss, it is certainly no defense, as "every member of The Florida Bar . . . is charged with notice . . . of the standards of ethical and professional conduct prescribed by this Court". Rule 3-4.1, Rules of Discipline.

While the Respondent is correct that the Referee's report is devoid of a specific finding on the various client liabilities that were disputed by the Respondent, all one need do is compare the Pretrial Stipulation with the Report of Referee at page 2 paragraph 2 to see that the Referee ruled in the Bar's favor as to all disputed client liabilities and as to the total shortage on given dates. Each disputed liability is explained below.

1. DAURIA/ACCETURO - $5,000.00 at 3/31/89 and 4/30/89

The Respondent takes issue with the Dauria/Acceturo client liability and claims the money as a fee due and owing to him. TT at 148-149. The Respondent started his trial testimony on this matter by feigning he had no real knowledge on this transaction. TT at 147-148. He did admit, under examination, that the $5000.00 came into his possession in relationship to the purchase of a wharehouse. TT at 148. The money came from Acceturo and was deposited into the trust account. TT at 148. The Bar's auditor testified that the $5,000.00 was later given to Dauria, the Respondent's client. TT at 94. This indicates a client liability in the amount of $5,000.00. The Respondent was unable to present any documentary evidence to support his claim to a fee on this matter. TT at 150.

2. PEIRCE/TRACY - $200.00 at various dates

On some dates, July 31, 1989 and January 31, 1990, the Respondent agrees with the $200.00 client liability. See PTS at Exhibit E and I. On other dates he disagrees with the Bar. The Respondent testified that this was probably a personal injury matter and that he was entitled to a percentage of these monies. TT at 151 - 152. Again the Respondent is unable to provide any documentation or for that matter a concrete

explanation on what percentage he is claiming as a fee.[5] In fact, the Respondent testified that "in this case, I don't know if it was PIP money. I don't know if it was mney due her. I don't know if it was part our fee. I just don't know what it was." TT at 154-155. The disputed $200.00 payments were all subsequently paid to either the Respondent's client or to health care providers, thus establishing the client liability.

3. IRWIN SCHENCK - $36,278.46 on 3/31/89 reduced to a zero balance by 7/31/90

The Respondent testified that he initially received over $50,000.00 from Schenck and that the same were the proceeds of the sale of Mr. Schenck's home. TT at 156. Based upon the foregoing and the lack of any credible testimony contrary to the Bar's position, these monies should be considered a client liability. The Respondent certainly thought he would be giving this mney back to Schenck and therefore the same should be considered trust monies. TT at 161. The Pretrial Stipulation reflects that the mney was paid back to Schenck over a period of several mnths. The Respondent admits as much. TT at 161. However, the Respondent claims that this mney was his, as he alleged Schenck *mad* it to him for monies that he had lent to Schenck. TT at 157. The Respondent, at trial was unable to furnish any real documentation on these "loans". TT at 157-158. If this was his mney, why did he put it in his trust account when he feared that the IRS was going to seize his trust account? The mney in question was returned, in total, to the person who deposited it, Schenck, and therefore the same should be considered a client liability.

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[5] In his Answer Brief at page 24, the Respondent for the first time asserts he was entitled to a one-third fee.

4. ALAN WILHELM - $700.00 at 3/31/89 with a fluctuating balance as high as $1,600.00 until 7/31/90

The Respondent, in the pretrial stipulation, agreed to a client liability for Wilhelm at July 31, 1989, but disagrees as to all other dates mentioned. The Respondent testified that this was a child support matter, wherein Wilhelm was giving the Respondent mney to pay to the mother of the child in question. TT at 163. Wilhelm's money was deposited into the trust account and later disbursed to the child's mother. TT at 163.

5. RADCLIFF BARNETT - $45,000.00 at 3/31/90 through the close of the trust account

The Barnett matter was discussed in detail above. At this juncture it is important to note that the Respondent agrees that he had a liability to Barnett. TT at 174. His only disagreement on this issue is whether he held the Barnett monies in trust.

6. FITZPATRICK/LEPORE - $5,000.00 at 1/31/90 through the close of the trust account

Both parties to this appeal are in agreement that Lepore gave $5,000.00 to the Respondent to hold in trust, as escrow agent, and that the money in question was *owed* to the Fitzpatricks by Lepore. The parties disagreement revolves around whether this liability was satisfied at the time the trust account was closed. The Respondent claims, in his brief at page, 25 that he returned the money to Lepore.[6] While we can speculate about the veracity of the Respondent's claim, it should be noted that as of June 30, 1990 the trust account had a reconciled bank balance of only $863.65 and in subsequent months there were negative reconciled bank balances. See PTS exhibits N and O. The

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6 The Respondent never testified, at trial, that he gave this mney to Lepore so this statement is dehors the record.

Bar is at a loss to understand how the Respondent was able to pay Lepore the $5,000.00 in question if there was less than $5,000.00 in the trust account when it was closed.

The Respondent also takes issue with the Bar's assertion that the Fitzpatricks have filed a complaint with the Bar seeking the $5,000.00 that the Respondent was to be holding for their benefit. In fact the Respondent has the audacity to claim that "(t)here was absolutely no testimony at trial that Fitzpatrick had filed a claim" with the Bar. It seems that the Respondent has forgotten that the Bar's auditor testified about this transaction and specifically stated that "there was a complaint filed with the Bar" by Fitzpatrick. TT at p.104, 1.13. The Respondent also *seems* to forget about six pages of the trial transcript, pages 104 through 110, wherein the parties fought over the introduction of testimony concerning the Fitzpatricks' Bar complaint. The Respondent is also exercising selective memory in disregarding his trial testimony that he had received a copy of the Fitzpatrick complaint. TT at 249-250.

The Respondent's next line of attack concerns the Bar auditor's credentials as an expert, as well as his findings and the methodology used to reach his expert opinion. It is axiomatic that a witness may qualify as an expert witness by his "knowledge, skill, experience, training, or education" in a particular field. Sec. 90.702, Fla. Stat. (1991). The decision to qualify an individual as an expert witness is within the discretion of the trial judge, which decision will not be reversed absent a showing of an abuse of that discretion. Johnson v. State, 393 So.2d 1069 (Fla. 1980). The Respondent, in his Answer Brief, has failed to demonstrate that the Referee abused his discretion in qualifying Mark Widlansky, CPA, as an expert witness. The record

reveals that Widlansky is a licensed CPA in Florida and in Michigan and is employed by The Florida Bar as a staff auditor, wherein his duties require him to be familiar with the Rules Regulating Trust Accounts and the Rules of Professional Conduct, as they relate to trust accounts. TT at 55-69. The Respondent does not explain why the foregoing does not make Widlansky competent to testify as an expert.

Most of the Respondent's argument focuses on Widlansky's methodology in conducting the Bar audit. The term "Bar audit" is a term of art. A "Bar audit" is not a certified audit, wherein an auditor would examine all of the accused attorney's bank accounts, whether they be trust accounts, operating accounts or personal accounts, as well as the accused attorney's other fixed assets, such as computers, office furniture, or real property. TT at 122-123. The sole function of a "Bar audit" is to determine the status of an attorney's trust account. 'IT at 123. In fact, bank records for general office accounts are not even required to be produced absent proof that trust monies have been deposited therein. Rule 5-1.2(e), R. Reg. Trust Accounts.

The basic premise of the Respondent's argument is that the Bar failed to audit all of his bank accounts (trust, operating, and personal) as well as his fixed assets and the cash he was allegedly holding and therefore the Bar's audit of his trust account is flawed. However, the Respondent's argument misses the mark. Trust monies belong in a trust account not in personal or business accounts. 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 client monies in other than a trust

account, commits a conversion of client funds. Id.

The Respondent has overstressed Widlansky's testimony concerning the Respondent's overall audit concept. See Answer Brief at p.20. Widlansky candidly admitted that he had not reviewed other bank accounts or fixed assets and that he was not in a position to state, one way or the other, if the Respondent had cash or other assets with which to cover the shortages in the trust account. TT at 125-130. The Respondent points this Court to one question and answer for the proposition that the Bar auditor testified that he was unable to state whether the Respondent stole client mnies. However, all the predicate questions concerned the Respondent's overall audit concept which, as is explained above, has no bearing on how trust mnies are to be handled. On direct examination, Widlansky was clear and concise in his testimony that the Respondent's trust account shortages "were caused by the Respondent's conversion of client funds to his own personal use". TT at 111.

The Respondent claims that the only thing he did wrong is commingle his mnies with those of his clients[7] and that the Bar failed to understand the impact of commingling on the theft in this case. To the contrary the Bar understands exactly haw the Respondent's commingling affected the Respondent's trust account shortages. Widlansky testified that the commingling helped reduce the shortages in the trust account. TT at 115. The Respondent's argument also ignores the fact that the last deposits of his own money into the trust account occurred in

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[7] Despite the Respondent's protestations to the contrary, the Respondent did not admit to some of the commingling rule violations until the trial. See Respondent's Response to the Bar's Request for Admissions. In fact, at pages four and eight of his brief, the Respondent still contests the applicability of certain rule violations.

February of 1990. PTS at 5. In March of 1990, the Respondent's shortages increased by over $26,000.00. In subsequent months the shortages were further increased by $14,000.00.

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 "exceeded the amount of personal funds commingled in the trust account." The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991). The Respondent did commingle, but he also withdrew funds for personal expenses from his trust account which exceeded his mnies that he had deposited therein.

The Respondent also attempts to assert that he left retained fees in his trust account which he subsequently used to satisfy his personal obligations. The Referee did not buy this argument, as is evidenced by the discussion at page 6 through 9 of this brief, and this Court should not buy it either.[8]

At this stage in his brief, the Respondent finally gets around to discussing the relevant case law and the Bar's argument that evidence of shortages in a trust account should raise a presumption of misuse of client monies. 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. The Respondent admits as much. Answer Brief at 29. It is not unreasonable to presume that there has been a conversion of client monies when a trust account is short, such that on a given date the accused attorney's trust account is unable to

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[8] This is not to say that the Respondent did not occasionally leave fees in his trust account, for he did. However, the fees the Respondent is talking about concern the Dauria/Accetturo, Pierce/Tracy and Wilhelm matters, all of which are discussed above.

meet all of his client liabilities. The Respondent contends that the Bar is wrong in presuming that he stole client monies, as the Bar's audit was not done properly and secondarily the Respondent contends that the Bar did not show client monies were actually in the trust account. Both of these arguments are not credible. First of all, the Respondent has presented no proof, by way of expert testimony or otherwise that the Bar audit was incomplete. The only thing the Respondent has presented on this non-issue is his own naked assertions that the audit was done improperly. As to the Respondent's second contention, it is clear that client mnies were deposited into the trust account. If there were not any client monies in the trust account, why has he admitted to commingling his monies with those of his clients. A clear example of client monies being deposited into the trust account is the Radcliff Barnett matter. In fact, the Respondent stipulated that the Barnett funds were deposited into his trust account. PTS at 7.

The Respondent argues that the shortages in his trust account are mere "paper shortages" and accordingly he should be found not guilty. There is no such thing as a "paper shortage". The shortages in the Respondent's trust account are real and definable. The question presented is not whether the shortages at issue are "paper shortages". Rather, the question presented is whether the shortages equate to the theft of client monies. The Respondent has the arrogance to state, at page 20 of his brief, that "merely writing personal checks from the trust account cannot possibly prove that Mr. Simring misappropriated client funds." (emphasis added) The Respondent acts as if his misuse of the trust account is trivial and minor. It was not. The Respondent spent client monies to satisfy his own personal expenses and to maintain

his life style. These were not his mnies, they were his client mnies. All one need do is look at the mnies he admittedly commingled on a given month and compare that to the shortages and you will conclusively find that client mnies went to satisfy the Respondent's personal obligations.[9]

The Respondent also has the hubris to assert that the Bar's has cited to cases which do not stand for the proposition for which they have been cited."[10] Answer Brief at 33. The Respondent claims that the Bar has misplaced its reliance on The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990), The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991) and The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990). The Bar, in its Initial Brief at pages 10 through 12, went through great lengths to discuss the facts of these four cases and in fact quoted extensively from them. These cases were used to demonstrate what this Court has

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9 For example during June of 1989, the Respondent deposited $19,021.65 of his own monies into the trust account and yet the trust account was still short $38,821.40. In July of 1989, the Respondent pumped, into his trust account, an additional $86,938.39 and the shortage was only reduced to $18,498.03 and in August of 1989 the Respondent deposited $4,094.00 of his *own* money into the trust account and the shortage climbed to $39,776.37.

10 See the Respondent's Brief at pages 31 and 32, wherein he refers this Court to a list of twenty two cases which allegedly stand for the proposition that "paper shortages alone, absent further proof, do not constitute misappropriation". However, five of these cases have nothing to do with trust accounts. The Florida Bar v. Brady, 373 So.2d 359 (Fla. 1979) [neglect]; The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989) [felony]; The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1990) [felony]; The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987) [misrepresentation]; The Florida Bar v. MacPherson, 534 So.2d 1156 (Fla. 1988) [abandonment of practice]. Six of the remaining seventeen cases are not theft cases and do not stand for the proposition for which they are cited. See for example The Florida Bar v. Hero, 513 So.2d 1053 (Fla. 1987) [commingling and record keeping]; and The Florida Bar v. Hosner, 513 So.2d 1057 (Fla. 1987) [commingling and record keeping].

accepted to be evidence of a theft of client monies. The Bar also pointed out that these four cases were factually similar to the theft in the case at hand. The mere fact that the Respondent's in these cases chose not to contest the theft issue does not change the fact that they stole or how the Bar went about proving the theft.

The last argument broached by the Respondent in regards to the theft issue, concerns his analogy to a criminal prosecution for theft. See Answer Brief at 34. The Respondent contends that he should be found not guilty as his "explanations as to each allegation of theft are, at the very least, reasonable hypotheses of innocence." The Respondent supports his position by citing two criminal law cases. State v. Law, 559 So.2d 187 (Fla. 1989) and Davis v. State, 90 So.2d 629 (Fla. 1956). These cases are not relevant in a Bar proceeding for two reasons. First of all Bar proceedings are not criminal or penal in nature, but rather the Bar disciplinary process is remedial and designed to protect the public and the integrity of the courts. DeBock v. State, 512 So.2d 164, 166-167 (Fla. 1987). Secondarily the burden of proof in a criminal case is much higher than the clear and convincing standard used in Bar proceedings. Hooper at 289. But in any event a prosecutor need not disprove every defense to a criminal action, especially when the defendant presented no credible evidence of that defense. Tavalaccio v. State, 59 So.2d 247, 248 (Fla. 1952).

C. THE OTHER MISCONDUCT

There are various other acts of professional misconduct which have been found by the Referee. RR at 3-5 and 8-9. The Respondent, either on the eve of trial (by Pretrial Stipulation) or at trial stipulated to all of the predicate acts to these separate acts of misconduct. TT at

260-264. The Respondent now claims on one hand that he should be found guilty of only two different rule violations. See Answer Brief at 8. On the other hand the Respondent admits to improper trust accounting and states that he is not contesting the Referee's findings on this issue. Answer Brief at 17, footnote 11. While the Bar is unsure just what the Respondent is admitting to at this stage of the game, this Court can be satisfied that the Report of Referee on Counts 11, 111, and IV of case number 77,351 are predicated upon the Respondent's own admissions and the testimony adduced at trial. The Respondent will be unable to prove that the Referee's findings on these matters are not supported by clear and convincing evidence.[11]

D. CONCLUSION

A careful review of the record, the Report of Referee and the parties various briefs will reveal that the Respondent willfully stole client monies to benefit himself and his family at his client's expense.

## II. DISBARMENT IS THE APPROPRIATE SANCTION FOR THE RESPONDENT'S THEFT OF CLIENT MONIES.

Theft of client monies warrants disbarment. The Florida Bar v. Schiller, 537 So.2d 992, 993 (Fla. 1989). The Respondent does not dispute this point. The Respondent's whole argument is that gross mismanagement of a trust account, without a finding of theft, warrants a suspension from the practice of law. Answer Brief at 36-38. While this may be a correct analysis of the law, the Respondent's argument misses the mark for this is a theft case.

The Respondent refers to two cases to support his proposition that

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[11] It should be noted that the Respondent is correct on one small issue relating to Count II and the IOTA violations. The Respondent's violation of the IOTA provisions should be from October 1, 1989 forward and not January 1, 1989 forward.

he should only be suspended for six months. The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985); The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). In Moxley, the attorney used his trust account for both his client trust funds, as well as an independent business venture. Moxley at 815. "On occasion (Moxley) advanced funds from this account to other accounts both for the business and for his law practice before receiving deposits for those expenditures". Id. The Court found Moxley guilty of commingling and of improperly utilizing trust monies. Id. Moxley received a sixty day suspension and was placed on three years probation. Id. at 816. The Court and the referee were impressed with the fact that Moxley fully cooperated with the Bar and even turned himself in to the Bar. Id. at 816. The Respondent has done neither and in fact, since the outset of the audit in this case, the Respondent has been confrontational, evasive, and noncooperative with the Bar. RR at 2; Initial Brief at 29. In addition, the Respondent, in the case at hand, has engaged in conduct far greater than the misconduct in Moxley. Even if we assume the Respondent is right that he did not steal client monies, a point the Bar is not conceding, Moxley only "occasional(y)" used client trust monies for his own purposes and here the Respondent's use of client monies was open and notorious for a period in excess of a year and a half. Id. at 815; RR at 2.

The next case relied upon by the Respondent is Welty. Welty's misconduct was slightly more egregious than Moxley's. Welty's trust account had a deficit balance on numerous occasions over a two year period of time. Welty at 1221-1222. These deficits were caused by the chaotic state of Welty's trust account. Id. Upon being made aware of the trust account shortages, Welty borrowed the funds necessary to cover the shortages. Id. at 1222. Welty was suspended for six months

and was placed on probation for two years. Id. at 1224. While Welty's conduct is serious, the misconduct comes nowhere near the seriousness of the Respondent's ethical defalcations. Welty was only convicted of the misuse of client monies. Id. at 1221-1222. The Respondent stands convicted of the misuse of client monies, commingling, intentionally shoddy record keeping and an IOTA violation. RR at 7-10. The Bar has also proven that the Court should find the Respondent guilty of theft. One could also compare the sheer volume of the shortages (Welty - over $24,000 and Simring almost $70,000.00) to show that the Respondent's misuse far exceeded Welty's.

In the Bar's view, should this Court find that the Respondent's acts were negligent rather than intentional, the Respondent's actions are more like those found in The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988), rather than in Moxley or Welty. In Whigham, the Court found that "gross negligence" in the handling of a trust account warrants *a* three year suspension. Whigham at 874-875. The Referee referred to Simring's actions as "sloppy and intentionally improper" in regards to the trust accounting procedures. This is more than the "gross negligence" found in Whigham, but Whigham's conduct is still more closely related to Simring's than either Moxley's or Welty's.

In Schiller, this Court noted that disbarment is presumed for theft of client funds, but the presumption could be rebutted by certain mitigating factors. Schiller at 993. The Respondent contends that the Referee did not give proper deference to the mitigating factors present in this case. The Report of Referee list two separate mitigating factors. They are the Respondent's lack of a disciplinary record and the Respondent's personal and mental difficulties. RR at 10. The Bar

agrees with the Respondent that, if the impairment is real, it must be considered in mitigation of any sanction meted out by this Court.[12] The only question then, is how much weight to give this impairment. It is the Respondent's belief that this impairment absolves him of any wrongdoing whatsoever. This is not an accurate reading of the relevant case law. In *some* instances the Court has still disbarred attorneys for stealing client monies notwithstanding a real and quantifiable impairment. This Court has noted that:

> "Although we may consider such factors as alcoholism and cooperation in mitigation, we must also determine the extent and weight of such mitigating circumstances when balanced against the seriousness of the misconduct."

The Florida Bar v. Golub, 550 So.2d 455, 456 (Fla. 1989). In a good many cases this Court has balanced the seriousness of theft against an impairment and still disbarred an attorney. Golub at 456 [Alcoholic thief disbarred]; The Florida Bar v. Knowles, 500 So.2d 140, 142 (Fla. 1986) [Alcoholic thief disbarred]; The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991) [Thief disbarred notwithstanding depression over marital and economic problems] and The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) [Disbarment for thief with alcohol and drug addiction]. When one balances the impairment in this instance, while still real and important to the Respondent, the same does not outweigh the seriousness of his acts of theft. This is especially true when you factor in the aggravating factors found by the Referee. RR at 10.

The Respondent also urges this Court to find several mitigating factors not found by the Referee or in the Florida Standards for Imposing Lawyer Sanctions. Some of these alleged mitigating factors

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12 The merits of this alleged impairment are discussed at pages 31 through 35 of the Bar's Initial Brief.

merit discussion. The first factor, disputed by the Bar, concerns the Respondent's absence of a dishonest or selfish motive which directly contradicts the Referee's finding of a selfish motive by the Respondent's use of client monies for his own purposes. RR at 10. The Respondent contends that since no client complained or was allegedly injured by his misconduct he should have his punishment mitigated. While this Court warned in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1986), that it would not be reluctant to disbar an attorney for stealing notwithstanding the fact that no client ccrmplained or was injured, Justice Ehrlich said it more succinctly in Moxley that:

> "The degree of departure from the ethical canons of the profession, not the degree of loss sustained by the client, should determine the appropriate punishment. Otherwise, the philosophy of Bar discipline is reduced to 'what the client doesn't know can't hurt the attorney"

Moxley at 817 (Ehrlich, J., dissenting). The other alleged mitigating factors mentioned by the Respondent are either dealt with by the Bar in it's Initial Brief or are so meritless they are not worthy of further discussion.

An overall examination of the aggravating and mitigating factors found by the Referee and the seriousness of the Respondent's theft of client monies and his other ethical misdeeds leads to the inescapable conclusion that he ought to be disbarred.

**III. THE BAR'S COSTS WERE PROPERLY ASSESSED AGAINST THE RESPONDENT.**

The Respondent complains that the Referee improperly assessed the Bar's costs against him. This Court has decided that the "taxation of costs is a matter within the discretion of the Referee, and should not be reversed absent an abuse of discretion". The Florida Bar v. Carr, 574 So.2d 59 (Fla. 1990). The Respondent raises two arguments for why

he should not be held responsible for the Bar's costs. First, he argues that the Bar reneged on an agreement not to go forward if there was a finding of impairment and secondarily, he claims that since he admitted his ethical defalcations from the start of this case, he should not be responsible for the costs attendant to the Bar's prosecution. Both of these baseless arguments are easily resolved by a review of the pleadings and orders in the underlying litigation.

The "deal" that was allegedly broken concerns a Joint Stipulation executed by the parties on February 19, 1991. This three page document was later ratified by the Referee and by this Court's Order of March 26, 1991. Said stipulation sets forth the parties desire to have the Respondent evaluated[13] and allows for at least a thirty day stay of the proceedings to accomplish this task. The stipulation is devoid of any references to the Bar agreeing to cease any and all prosecution of the Respondent depending on the level of the Respondent's impairment. What is interesting to note is that the Bar had not even started it's investigation of the Barnett matter in February of 1991 and did not file the Bamett complaint until July 9, 1991.

The Respondent has contended that he admitted to commingling at the outset of the Bar's prosecution and therefore he should not have to pay

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13 It *seems* the Respondent is also trying to escape an agreement that he made, which was ratified by the Referee concerning the payment of Dr. Barbara Winter, the court appointed expert. On April 26, 1991 the Respondent filed his Motion for Clarification, which explained the fact that he had uttered two checks totaling, $1,200.00 to Dr. Winters. These checks were worthless. The Motion for Clarification, in essence, sought to have the Bar make the Respondent's checks good. The May 6, 1991 Agreed Order which was entered on the Motion for Clarification was that the Bar would pay Dr. Winter's bill (ie. make *the* Respondent's checks good) and that no matter the outcome of the case the Respondent would be taxed Dr. Winter's costs. Dr. Winter's final bill was in the amount of $1,571.50.

anything for the Bar's prosecution, notwithstanding the fact that the Referee found him guilty of acts other than commingling. However, all one need do is examine the Respondent's Answer to of the Bar's Request for Admissions in both cases to see that the Respondent denied most of the allegations of the Bar's Complaints and denied all of the rule violations pertaining thereto.[14] In fact, the Respondent did not agree to certain rule violations until trial (TT at 260-263) and in his brief, the Respondent asserts that he should be found guilty of only two rule violations. Answer Brief at 8.

It is clear from the foregoing that the Referee did not abuse his discretion in awarding costs to the Bar.

## IV. THE REFEREE DID NOT ERR IN EXCLUDING CERTAIN CHARACTER LETTERS

The Supreme Court has held that letters of recommendation, while accepted by referees in the past, should not be considered by a referee in lieu of live testimony. The Florida Bar v. Hathaway, 184 So.2d 426, 427 (Fla. 1966). Also see The Florida Bar v. Prior, 330 So.2d 697, 703-704 (Fla. 1976) (Overton, C.J. and England, J. specially concurring). The Respondent lists several cases for the proposition that character letters have been accepted in the past and therefore so should his. However, in all of the cases mentioned by the Respondent, the Bar, apparently, did not object to the submission of the character letters and the letters were introduced at trial and not pretrial. See for example The Florida Bar v. Fussell, 179 So.2d 852, 853 (Fla. 1965);

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14 For example, paragraph 65 of the Respondent's Answer to the Bar's Request for Admissions states in pertinent part that: "Since none of client funds (sic) were involved and the monies were kept separate and apart from clients funds, I honestly cannot admit to any unethical conduct of commingling.

The Florida Bar v. Scott, 238 So.2d 634 (Fla. 1970). This Court noted in Prior that "Character letters are not proper evidence in any court proceeding". Prior at 703. It is respectfully contended that character letters are improper evidence as letters are not able to be cross examined, like live witnesses are.

The Referee ruled that the character letters were inadmissible based upon the Prior decision. The Respondent has failed to demonstrate that this decision was in error.

**V. THERE WAS NO UNDUE DELAY IN PERFECTING THIS APPEAL.**

The Report of Referee was rendered on November 22, 1991. Pursuant to Rule 3-7.7 (c) (1), of the Rules of Discipline:

> "Proceedings for review shall be commenced within fifteen (15) days of the termination of the meeting of the board following by ten (10) days the mailing date of a letter from the referee serving a copy of the referee report on the respondent and The Florida Bar . . . ."

The Board of Govenors' meeting which reviewed this matter was held on January 22-24, 1992. There was no December 1991 meeting of the Board . The Board did met in November, November 6 through November 8, 1991, but the Report of Referee had not yet been rendered. Accordingly, the next available Board meeting was the January 1992 Board meting. The Bar's Petition for Review was timely filed on January 27, 1992.

The Respondent refers this Court to the new version of Rule 3-5.1 (g) , of the Rules of Discipline (the emergency suspension rule), for the proposition that the Bar has trod upon his due process rights. However, the record is clear that the new rules were adopted on November 14, 1991 and the Respondent's objections to his emergency suspension were resolved by Court Order dated March 26, 1991. These objections were resolved by joint stipulation. While it is true that the

Respondent has filed numerous pleadings since the rendering of a report of referee in the instant matter to attempt to lift his temporary suspension, the Bar is at a loss to understand how the Respondent's change of mind equates to a violation of due process. In any event, these matters are now before the Court, who will resolve this matter, one way or the other

**CONCLUSION**

The Respondent agrees with the Bar that this Court must take the measure of Ellis Simring, the lawyer and the man, in order to properly resolve this case. It is the Bar's strident belief that the Court, in gauging the full measure of Ellis Simring, will find that he is a thief and that he ought not be allowed the privilege to practice law in this state.

Respectfully submitted by,

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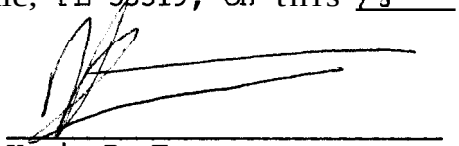
CERTIFICATE OF SERVICE

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 18th day of March, 1992.



Kevin P. Tynan