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IN THE SUPREME COURT OF FLORIDA

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MAY 4 1992
CLERK, SUPREME COURT
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THE FLORIDA BAR,

Petitioner,

v.

WILLIAM A. BORJA,

Respondent.

_____/

CASE NO. 77,840

TFB NO. 90-11,351(06A)

INITIAL BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the Appellee/Cross-Appellant William A. Borja will be referred to as "the Respondent". The Appellant/Cross-Appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "TR.1" will refer to the transcript of the Final Hearing held on January 8, 1992. "TR.2" will refer to the transcript of the Final Hearing held on January 10, 1992. "TR.3" will refer to the transcript of the Final Hearing held on January 31, 1992. "RR" will refer to the Report of Referee dated February 27, 1992. "R" will refer to the record in this cause.

STATEMENT OF THE FACTS AND OF THE CASE

The testimony and evidence in this case established the following facts:

In June, 1987, The Florida Bar audited the Respondent's trust account, covering the period from January, 1985 through June, 1987. The Respondent's trust account records were not in substantial compliance with The Florida Bar Rules Regulating Trust Accounts. During said audit, the Bar auditor discovered that the Respondent did not have all trust account records required to be maintained; Respondent commingled his funds with client trust funds; and Respondent's trust account had client negative balances which caused a shortage in Respondent's trust account. During the audit, the Bar Auditor advised Respondent of the foregoing. Maggie Clements was Respondent's secretary at the time of the audit. **(TR.l, p.19-21; TR2, p.128, L.4-22;** and **R,** Stipulation of Facts; and R, Bar Exhibit **20).**

In October, 1987, the Respondent hired Carol Stephanik as his secretary. (R, Stipulation of Facts).

In June, 1988, The Florida Bar conducted a follow-up audit on Respondent's trust account to determine if Respondent had properly maintained his trust account records since the conclusion of the first audit. The follow-up audit covered the period from July 1, 1987 through May 31, 1988. The Florida Bar auditor discovered that the Respondent had not prepared reconciliations (comparisons of ledger cards to bank balance) since June 1, 1987 when the first audit was conducted, and that Respondent continued to commingle his funds with client funds. Each month, Respondent would withdraw a portion of his earned

fees from the trust account to pay office expenses. However, Respondent did not pull all earned fees out of his account on a monthly basis. (TR.1, p.23-25; and R, Stipulation of Facts).

When The Florida Bar auditor went to Respondent's office for the follow-up audit, he instructed Carol Stephanick on how to do the reconciliation/comparison and she prepared the same which covered from July, 1987 through May, 1988. The Bar auditor also advised Respondent of the inadequatcies of his trust account records and procedures. (TR.2, p.7, L.14-25, p.8, L.1-24; and R, Bar Exhibit 6).

The Florida Bar filed, with The Supreme Court of Florida, a formal complaint against Respondent with respect to the two (2) audits referred to above. The Bar alleged in said complaint that Respondent violated Rule 4-1.15 (for commingling his funds with client trust funds); Rule 5-1.2(b)(5) (for failing to maintain certain cash receipts and disbursements journals); Rule 5-1.2(b)(6) (for failing to maintain a separate file or ledger card for each client or matter); Rule 5-1.2(c)(1)b (for failing to prepare monthly comparisons); and Rule 5-1.1 (for utilizing client trust funds for a purpose other than the specific purpose for which the funds were entrusted to Respondent). (R, Bar Exhibit 2 and Bar Exhibit 20). The Bar's Complaint was assigned Supreme Court Case No. 72,962 and was forwarded to Judge F. Dennis Alvarez to act as Referee.

On or about July 1, 1988, Carol Stephanik began stealing funds from the Respondent's trust account. From July 1, 1988 thru February 17, 1989, Carol Stephanik issued 23 trust account checks to the order of Carol Busch (aka, Carol Stephanik) which

totaled $31,947.32. (R, Bar Exhibit 17; and TR.2, p.20, L.1-6).

In about September or October, 1988, the Respondent hired Michael Lewis, CPA, to prepare a financial statement for him personally, in regard to a post dissolution of marriage child support matter. Mr. Lewis only did a cursory review of Respondent's trust account to determine the amounts withdrawn from the trust account and deposited to Respondent's operating account. Mr. Lewis was not hired by Respondent to audit or reconcile Respondent's trust account. (TR.l, p.121-123; and R, Stipulation of Facts).

In December 1988, a final hearing on Supreme Court Case No. 72,962 was held before Judge Alvarez in regard to Respondent's trust account violations noted by The Florida Bar audits of June, 1987 and June, 1988. During the final hearing in December, 1988, Respondent and his witness, Michael Lewis, CPA, testified that Respondent's trust records and procedures were in order and that there were no problems with the trust account. Mr. Lewis testified that he had reconciled Respondent's trust account in total and that the same was in compliance with the trust accounting rules. (R, Bar Exhibit 21 & 22).

Based on the testimony of Respondent and Mr. Lewis, the Referee (Judge Alvarez) in the December, 1988 disciplinary proceeding found Respondent not guilty of trust account violations and made the following findings of fact:

1. The Respondent has undertaken remedial measures concerning record keeping and accounting procedures and has instituted procedures to guard against future violations.

2. The court is assured that Borja recognizes his

responsibility to appropriately follow the spirit, as well as the letter, of the accounting procedures mandated by the Bar. (R, Bar Exhibit 2).

The Florida Bar appealed Judge Alvarez' ruling in the disciplinary case (Supreme Court Case No. 72,962) tried on December 15, 1988 wherein he found Respondent not guilty of trust account violations. On January 4, 1990, The Supreme Court reversed Judge Alvarez's decision and found Respondent guilty of the trust violations charged by the Bar. The Respondent received a public reprimand and was placed on probation for 2 years. (R, Bar Exhibit 20).

In December, 1988, February, 1989, and March, 1989, Carol Stepanick also stole funds from the Respondent's Estate account for Caroline Beck, Respondent, as Personal Representative. The total funds stolen from the Estate account amounted to $6,806.00. (R, Bar Exhibit 12).

In January, February, and March, 1989 Carol Stephanick stole funds from the Respondent's guardianship account for Tasis wherein Respondent was the guardian. The total funds stolen amounted to $5,164.89. (R, Bar Exhibit 3).

In late February, 1989, Michael Lewis discovered that funds were missing from Respondent's operating account. On March 9, 1989, Mr. Lewis met with the Respondent to discuss his suspicions that Carol Stephanick may have stolen funds from the Respondent's operating account. About a week later, Mr. Lewis and the Respondent met with Carol Stephanick and asked Ms. Stephanick whether or not she had stolen funds from the Respondent's operating account. During the meeting, Carol Stephanick admitted stealing from Respondent's operating account. When asked if she

stole funds from the Respondent's trust account or estate and guardianship accounts, Carol Stephanick denied the same. (TR.l, p.132-133; and R, Stipulation of Facts). The Respondent did not immediately seek to verify that Ms. Stephanick had not stolen funds from his trust and Estate accounts. (TR.l, p.73-75).

The Respondent did not fire Carol Stephanick at the conclusion of the March, 1989 meeting. In fact, Ms. Stephanick continued to work for the Respondent until late March, 1989. The Respondent permitted Ms. Stephanick to have access to his trust account books and records during the period of time that she worked for the Respondent after the March, 1989 meeting. (TR.l, p.69-71). When Ms. Stephanick left Respondent's employment, she took with her some of Respondent's trust account records. When the foregoing ocurred, the Respondent became suspicious that Ms. Stephanick stole funds from his trust account. Respondent verified his suspicions that Ms. Stephanick stole funds from his trust and Estate accounts no later than May, 1989. (TR.l, p.74-75; and R, Bar Exhibit 3).

The Respondent discovered the thefts from the guardianship account no later than May 9, 1989 when he had the account closed and the remaining funds contained therein transferred to a new account. However, the Respondent did not replace the funds stolen from the guardianship account until almost eight months later on December 29, 1989. (R, Bar Exhibits 3 and 12). On June 9, 1989, the funds stolen from the Beck Estate account were replaced by the bank. The Respondent never replaced the $31,000.00 stolen from his trust account by leaving all of his earned fee in the account over a period of nine (9) months until

the shortage in his trust account decreased to $699.45. In January, 1990, the Respondent did deposit $699.45 in his trust account in order to cover client's negative balances. (R, Bar Exhibit 12).

On or about August 21, 1989, Respondent submitted his 1989 Statement of Annual Bar Dues to The Florida Bar. The Respondent certified as true in said statement that from June, 1988 through June, 1989, he kept all required trust accounting records and procedures and that there were no shortages in his trust account. The Respondent did note on the statement "exceptions for Bar audit/comments" which referred to the May, 1988 follow-up audit. (R, Bar Exhibit 4; and TR.1, p.95, L.10-22).

The Respondent never notified The Florida Bar of the actual thefts from his trust account.

In August, 1989, Respondent hired a secretary by the name of Athena Kampouroglos. (TR.l, p.111, L.2-4). From August 12, 1989 through September 14, 1989, Athena stole $6,047.76 (27 checks) from the Respondent's guardianship account for James Tasis. In addition, in August, 1989 Athena stole $310.00 from the bank account for the Estate of Beck, William A. Borja, Personal Representative. Athena also stole $1,173.47 from Respondent's trust account. (R, Bar Exhibit 12).

In September, 1989 the Respondent became aware of Athena's thefts after being notified of the same by an officer from the Clearwater Police Department. The thefts were discovered when Athena was arrested on an unrelated matter. (TR.l, p.110-111).

The funds stolen by Athena with respect to the Respondent's guardianship account for Tasis and Estate account for Beck were

replaced by the bank on October 21, 1989. (R, Bar Exhibit 12). The bank did not replace the funds stolen by Athena from Respondent's trust account.

In approximately September, 1989, Respondent hired Mr. Doolittle to prepare his trust account records. Mr. Doolittle found the Respondent's existing records to be garbage. In addition, Mr. Doolittle did not see any reconciliations or comparisons from 1988 through the time he began his work in September, 1989 (except possibly bank statement reconciliations for May and/or June, 1989). (TR.2, p.90, **94-95**).

The Respondent did not report Carol Stephanick's thefts to law enforcement authorities until October, 1989. (R, Stipulation of Facts).

In May, 1990, The Florida Bar served Respondent with a subpoena which required Respondent to produce his trust account records for the period starting June 1, 1988 through April, 1990. The subpoena also requested all bank records for the Guardianship of James Tasis and the Estate of Caroline Beck. The Respondent failed to produce for the April, 1990 audit, a cash receipts journal from June, 1988 to January, 1989; a cash disbursements journal for July, 1988, for September, 1988 to January, 1989 and for July, 1989; and monthly bank reconciliations, monthly comparisons **and** annual listings for June, 1988 through July, 1989. (R, Bar Exhibit 12).

On April 30, 1991, The Florida Bar filed with The Supreme Court of Florida **,** a formal complaint against Respondent in this case.

On January 8, 1992, January 10, 1992 and January 31, 1992 a

Final Hearing was held in this case before the Honorable Debra K. Behnke, Referee.

On February 18, 1992 a disciplinary hearing was held wherein the Referee recommended that the Respondent be found guilty of violating Rule 4-1.15, Rules of Professional Conduct (a lawyer shall not commingle his funds with client trust funds, and shall maintain his trust account records for six (6) years); Rule 4-8.4(c), Rules of Professional Conduct (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); Rule 5-1.1 (money entrusted to an attorney for a specific purpose must be held in trust and applied only to that purpose); Rule 5-1.2(b)(5) (an attorney shall maintain cash receipts and disbursement journals); Rule 5-1.2(b)(6) (an attorney shall maintain separate client ledger cards showing all individual receipts, disbursements, or transfers and any unexpended balance); Rule 5-1.2(c)(1)a. (a lawyer shall cause to be made monthly, trust account bank reconciliations); Rule 5-1.2(c)(1)b. (a lawyer shall cause to be made monthly, comparisons between all trust account bank reconciled balances and the total of the trust ledger cards); Rule 5-1.2(c)(2) (a lawyer shall prepare at least annually, a detailed listing identifying the balance of the unexpended trust money for each client or matter); and Rule 5-1.2(c)(3) (reconciliations, comparisons, and listings shall be retained for at least six (6) years). (RR, Section 111).

In addition, the Referee recommended that the Respondent be found not guilty of violating Rule 4-8.1(a), Rules of Professional Conduct (a lawyer, in connection with a Bar

disciplinary matter, shall not knowingly make a false statement of material fact); and Rule 4-8.1(b), Rules of Professional Conduct (a lawyer in connection with a disciplinary matter shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter). (RR, Section 111).

The Bar filed a Petition for Review on April 6, 1992. In this appeal, the Bar is challenging the Referee's finding that "the Respondent was so out of touch and unfamiliar with the Bar rules and procedures, that he did not KNOWINGLY provide false testimony during the December, 1988 disciplinary proceeding before Judge Alvarez. The Bar is also challenging the Referee's recommendation that the Respondent be found not guilty of violating Rule 4-8.1(a) and (b), Rules of Professional Conduct. Further, the Bar is challenging the Referee's recommended discipline of a ninety (90) day suspension for Respondent's misconduct in this case. This Initial Brief is filed in support of the Bar's Petition for Review.

SUMMARY OF THE ARGUMENT

The Bar challenges the Referee's finding that "the Respondent was so out of touch and unfamiliar with the Bar rules and procedures, that he did not KNOWINGLY provide false testimony during the December, 1988 disciplinary proceeding before Judge Alvarez. This finding by the Referee is clearly erroneous, in that it is contrary to Respondent's testimony and the evidence in this case. Even if the Respondent was out of touch and unfamiliar with the Bar rules and procedures, the same would not have a bearing on the issue of whether or not Respondent knowingly provided false testimony to Judge Alvarez.

The evidence presented by the Bar established that prior to the audit involved in this case, (April, 1990) the Respondent's trust account was audited on two prior occasions, once in June, 1987 and again in June, 1988. The evidence showed that on three (3) occasions prior to a December, 1988 disciplinary proceeding before Judge Alvarez, the Respondent was advised by the Bar Auditor of the deficiencies in his trust account records and procedures, and that he was instructed as to the steps he needed to take to be in compliance with the trust accounting rules. The evidence clearly showed that subsequent to June, 1988, notwithstanding the Bar auditor's instructions and advise, the Respondent knowingly continued to violate the same trust accounting rules and procedures as those found violated during the June, 1987 and June, 1988 audits of Respondent's trust account.

Based on the finding of fact challenged by the Bar, the Referee recommended that the Respondent be found not guilty of violating Rule 4-8.1(a) and (b). Since the Referee's finding of fact is clearly erroneous and contrary to the evidence, the foregoing recommendation is also erroneous. The Bar established by clear and convincing evidence that the Respondent violated Rule 4-8.1(a) and (b) by providing false testimony during the disciplinary proceeding before Judge Alvarez.

The Bar also challenges the Referee's recommended discipline of a ninety (90) day suspension. It is the Bar's position that disbarment is appropriate for Respondent's misconduct in this case.

The evidence in the instant case established that from June 1, 1988 through April, 1990, the Respondent failed to maintain on a monthly basis, all required trust account records; that he failed to follow all required trust accounting procedures; that he continued to commingle his earned fees with client funds; that he continued to advance costs from the trust account for his clients who did not have funds in the trust account; that he totally failed to supervise his secretaries with respect to his trust account records and procedures, which resulted in substantial thefts of his clients' trust funds and estate funds; that he knowingly and intentionally submitted a false 1989 statement of annual Bar dues to The Florida Bar; that he knowingly provided false testimony during the December 1988 disciplinary proceeding before Judge Alvarez; and that he knowingly provided false testimony in the case sub judice.

In addition to the foregoing, the Respondent has an extensive prior disciplinary record (1 private reprimand and 3 public reprimands) evidencing Respondent's total lack of respect for ethics and the rules promulgated by this Court.

Recent case law **and** The Florida Standards for Imposing Lawyer Sanctions support the Bar's contention that disbarment is appropriate for Respondent's misconduct.

Therefore, The Florida Bar respectfully requests this Court, to reject the finding of the Referee challenged by the Bar; to reject the Referee's recommendation that Respondent be found not guilty of violating Rule 4-8.1(a) and (b); and reject the Referee's recommended discipline of a ninety **(90)** day suspension. The Bar further requests that this Court disbar the Respondent from the practice of law in this State.

ARGUMENT

ISSUE I

WHETHER THE REFEREE'S FINDING OF FACT AND CONCLUSIONS OF LAW IN REGARD, TO THE RESPONDENT'S AND/OR HIS WITNESSES TESTIMONY DURING THE DISCIPLINARY HEARING BEFORE JUDGE ALVAREZ IN SUPREME COURT CASE NO. 72,962, ARE CONTRARY TO THE EVIDENCE AND CLEARLY ERRONEOUS.

The Bar is challenging a portion of the Referee's findings of fact and conclusions of law. A Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support, since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility, The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986).

The Florida Bar alleged in the instant case that during the Final Hearing before Judge Alvarez in the disciplinary case styled The Florida Bar v. Borja, Case No. 72,962, the Respondent and one of his witnesses provided false and/or misleading testimony; that Respondent had knowledge of the same; and that the false and/or misleading testimony caused Judge Alvarez to make an erroneous ruling that the Respondent was not guilty of trust account violations. (RR, Section 11; and R, Complaint). The Referee in the instant case found that the Respondent was so out of touch and unfamiliar with the Bar rules and procedures that he did not KNOWINGLY provide false testimony during the December, 1988 disciplinary proceeding before Judge Alvarez (RR, Section II). Based on this finding of fact the Referee

recommended that the Respondent be found not guilty of violating Rule 4-8.1(a) and Rule 4-8.1(b). (RR, Section 111). This finding and recommendation of guilt by the Referee is contrary to the evidence, contrary to the Florida Bar Rules of Discipline and is clearly erroneous.

First, Rule **3-4.1**, Rules of Discipline provides, in part, as follows:

> "Every member of The Florida Bar... is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court." (Rule 3-4.1, Rules of Professional Conduct).

In addition, the Respondent testified during the final hearing in this cause that, as an attorney in the State of Florida for at least twenty (20) years, he was familiar with The **Florida** Bar Rules Regulating Trust Accounts. (TR.1 p.19, L.2-7).

Further, the evidence in the record clearly establishes that the Respondent was not out of touch and unfamiliar with the Bar rules and procedures regarding trust accounts. The evidence in this case established that in **1987** and **1988**, the Respondent was involved in a disciplinary case (Supreme Court Case No. **72,962)** which involved the same trust account violations as alleged in the instant case. (R, Bar Exhibit **2** and 20). The evidence showed that in June, **1987**, The Florida Bar audited the Respondent's trust account, covering the period from January, **1985** through June, 1987. (R, Stipulation of Facts). At the conclusion of the audit in September, **1987**, Pedro **Pizarro, The** Florida Bar Auditor, rendered an opinion that the Respondent was not in substantial compliance with the Rules Regulating Trust Accounts. Mr.

Pizarro's opinion was based on the fact that certain required trust account records were missing, the Respondent had commingled his fee funds with client trust funds, there were negative client balances in the trust account, and there were shortages in the trust account. (TR.2, **p.126, L.6-22).** During the course of the June, 1987 audit, Mr. Pizarro discussed with the Respondent, the inadequacies of the Respondent's trust account records and procedures. Mr. Pizarro specifically advised the Respondent that client negative balances were caused by the Respondent's disbursal of funds from his trust account for clients who did not have funds therein. Mr. Pizarro also advised Respondent that he could not commingle his fee funds with client trust funds and he discussed with Respondent the time frame for disbursing from the trust account, client funds which he earned as a fee. Mr. Pizarro also discussed with Respondent the required trust records which were missing. **(TR.1,** p. **19, L.8-25,** p.20, **L.1-25).**

Even though the Respondent had been made aware of the inadequacies of his trust account records and procedures since sometime between June, **1987** and September, **1987,** he continued to ignore the Florida **Bar** trust accounting rules. That fact became apparent as a result of a follow-up audit that occurred in June, **1988.** The follow-up audit covered the period from July 1, 1987 through May 31, 1988. The purpose of the follow-up audit was to determine whether or not, since the end of the previous audit, the Respondent had perfected his trust records and put them in compliance with the trust accounting rules. (TR.2, p.127, **L.17-20).** At the conclusion of the follow-up Mr. Pizarro rendered an opinion that the Respondent's trust account records

were still not in substantial compliance with the Bar's trust accounting rules. (R, Bar Exhibit 20). Mr. Pizarro found that there continued to be client negative balances caused by the advancing of costs for clients who did not have funds in the trust account; that Respondent continued to commingle his fee funds with client trust funds; and that Respondent had failed to prepare, on a monthly basis, comparisons for the period covering from July 1, 1987 (the time of the first audit) through May, 1988. Mr. Pizarro advised Respondent of the deficiencies set forth above not only during the time the audit was conducted (June 10-24, 1988) but also during the grievance committee hearing held on the matter on June 28, 1988. (TR.1, p.24, L.2-25, p.25, L.1-9; TR.2, p.127, L.8-25, p.128, L.1-13).

As of June 28, 1988, the Respondent had been audited twice and he had been notified by Mr. Pizarro on three (3) occasions (the first audit, the follow-up audit and the grievance committee hearing) of the deficiencies in his trust account records and procedures.

The foregoing clearly establishes that by June 28, 1988, the Respondent was familiar with the trust records he needed to make and maintain and the trust accounting procedures he was required to follow in order to be in substantial compliance with The Florida Bar trust accounting rules.

Even if Mr. Borja was out of touch and unfamiliar with The Florida Bar's trust accounting rules, the same would not have a bearing on the Bar's allegation that the Respondent knowingly provided false testimony during the Final Hearing before Judge Alvarez in Supreme Court Case No. 72,962.

The evidence in this case clearly establishes that the Respondent knowingly provided false testimony during the disciplinary Final Hearing before Judge Alvarez in Supreme Court Case No. 72,962. During the Final Hearing before Judge Alvarez in Supreme Court Case No. 72,962, the Respondent was asked the following questions and provided the following responses:

> Q. "At the present time is there any problem with your auditing of your account, sir, or the CPA's that are now keeping your balances, Sir?"
>
> A. "None whatsoever"...
>
> Q. "Are you willing to do anything that they say to keep this account in proper order?"
>
> A. "Well, certainly I want to do that...I do not have as good a knowledge as maybe certainly an accountant would have. I understand basically in theory all of this. The day-in and out workings of it, I do not have, if you will, the time and the knowledge to really do it properly. Relying on secretaries, the present secretary that I have, I think that basically she can do a pretty good job, but I think as a safety precaution because I never want to *go* through this again, Mr. Lewis has been hired, and if for whatever reason he would quit or want to do something else, then 1 have somebody else to do this on a monthly basis...
>
> Q. "You testified that you take your fees out of the account every thirty days?"
>
> A. "Yes".
>
> Q. "You still do it that way?
>
> A. "Yes".
> (Bar Exhibit 21).

Contrary to the foregoing testimony by the Respondent during the Final Hearing before Judge Alvarez, there were serious problems with the auditing of the Respondent's trust account records in December, **1988** which Respondent was aware of; no CPA's were keeping his trust account balances and Respondent was aware of the same; Respondent had not hired Michael Lewis, **CPA**, to prepare and maintain his trust account records; nor had he hired anyone else to do the same; and the Respondent was not withdrawing all of his earned fees from his trust account every thirty (30) days.

At the time of the Final Hearing on Supreme Court Case No. **72,962,** before Judge Alvarez in December, **1988,** the Respondent had serious problems with his trust account records and procedures. Shortly after the Bar's follow-up audit in June, **1988,** Carol Stephanik, Respondent's secretary, started stealing funds from the Respondent's trust account. Ms. Stephanik accomplished the thefts by issuing trust account checks to the order of Carol Busch (Ms. Stephanik's maiden name) and forging Respondent's signature. Between July **1, 1988** and February **17, 1989, Ms.** Stephanik stole **$31,947.32** from Respondent's trust account. The **checks** issued and forged by Ms. Stephanik are as follows:

DATE	DESCRIPTION	CHECK NO.	AMOUNT OF CHECK
7-01-88	Carol Busch (Estate Settlement)	**3277**	$ **2,000.00**
7-08-88	Carol Busch (Final Estate Settlement)	**3290**	**3,000.00**
7-21-88	Carol Busch (Proceeds Car Sale)	**3302**	**2,975.31**
8-01-88	Carol Busch (Estate Trust)	**3311**	**2,400.00**
8-22-88	Carol Busch (Estate close)	**3327**	**1,223.21**

9-9-88	Carol Busch (monthly trust)	3330	2,219.00
9-12-88	Carol Busch (Estate Trust)	3329	2,359.00
10-6-88	Carol Busch (Trust)	3301	2,259.00
10-29-88	Carol Busch (Behind in A/C)	3343	2,005.00
11-11-88	Carol Busch (Trust)	3310	2,000.00
11-18-88	Carol Busch (Trust)	3326	1,000.00
11-28-88	Carol Busch (Final Trust Payment)	3353	500.00
12-6-88	Carol Busch (Final Trust)	3356	1,001.72
12-9-88	Carol Busch (Estate)	3360	540.00
12-14-88	Carol Busch (Return Deposit)	3364	1,129.37
12-21-88	Carol Busch (Deposit Estate)	3365	540.00
12-27-88	Carol Busch (Tax Refund)	3366	507.00
12-29-88	Carol Busch (Refund house deposit)	3361	962.00
1-09-89	Carol Busch (Balance to close estate)	3362	632.29
1-20-89	Carol Busch (Reimburse 6)	3371	630.00
1-25-89	Carol Busch (Sale of Car Estate)	3373	917.42
2-6-89	Carol Busch	3384	429.00
2-17-89	Carol Busch	3379	718.00

(R, Bar Exhibit 17).

The Bar concedes that the Respondent was unaware of the thefts by Ms. Stephanik at the time of the Final Hearing before Judge Alvarez. The evidence in the instant case established that the Respondent was unaware of the thefts due to his failure to properly supervise the trust account and due to his blatant failure to prepare the records which are required by the Rules Regulating Trust Accounts.

The Respondent testified during the Final Hearing in this cause that from June, 1988 through April, 1990, he had his

secretaries, not Mr. Lewis, prepare all required trust account records. He testified that on a monthly basis he would ask his secretary whether bank reconciliations and comparisons were done but never physically reviewed the documents. The Respondent however, did testify that he physically reviewed his bank statements and cancelled checks on a monthly basis. (TR.l, **p.55-59).**

The foregoing testimony by the Respondent was clearly false. The Respondent's trust account activity was minimal during the period covering from June, **1988** through April, **1990.** Mr. Pizarro's audit analysis of the receipts and disbursements from the Respondent's trust account, from June, **1988** through December, **1988** (R, Bar Exhibit **11)** indicates that an average of about ten (10) trust account check were issued each month. One or two checks were issued each month to the Respondent's general account **as** earned fees. A minimum of two checks each month from July, 1988 through December, **1988** (except August, **1988)** were issued to the order of Carol Busch. Most of the trust disbursements were for small sums of money except for the transfers to the general account and the moneys stolen by Carol Stephanick. (R, Bar Exhibit **11).** If between, July, **1988** and December, **1988,** the Respondent had looked at the trust account cancelled checks or bank statements, (R, Bar Exhibit **26)** he would have known that Carol Stephanick **was** stealing funds **from** the trust account due to the following: **(1)** the Respondent did not have a client by the name of Carol Busch; **(2)** the Respondent's signature was forged; and **(3)** most of the checks to Carol Busch were for large sums of money. It is the Bar's position that the Respondent did not know

Ms. Stephanick was stealing from his trust account because he never looked at the trust records and because he didn't prepared monthly reconciliations, comparisons, and cash receipts and disbursements journals for July, **1988** through December, **1988** and thereafter.

The Respondent testified that on a monthly basis, from June 1988 through the spring **of** 1989, Robert Bennett reviewed the Respondent's trust account records prepared by Carol Stephanick. (TR.l, p.43, L.24-25, p.44 & **45).** The Respondent's testimony was impeached by evidence presented by the Bar and by several of The Florida Bar's witnesses in this case.

The Florida Bar submitted into evidence an affidavit executed by Robert Bennett which states, in part:

> That **as** of May, 1988, I have not seen or reviewed Mr. Borja's trust account records nor have I attempted to reconcile Mr. Borja's trust account records, in any respect. That from May, **1988** through the present date Mr. Borja has not even requested that I perform any accounting services either with respect to Mr. Borja's trust accounts or personal records. (Bar Exhibit **19).**

Obviously, the Respondent lied in the instant proceeding (with respect to Mr. Bennett's review of his trust account records from June, **1988** through the spring of 1989) in an effort to bolster or confirm his testimony that all required monthly trust account records were prepared and reviewed on a monthly basis.

Carol Stephanick testified that from July, **1988** through November or December, 1988 **(and** thereafter through March 1989 when she was fired or quit working for Respondent) she did not prepare on a monthly basis, the required trust account reconciliations, comparisons, or cash receipts journals. She

testified that in November ar December, **1988** when the attorney for Respondent's wife sought to review Respondent's trust account records, she attempted to prepare a journal, but could not balance the same due to her thefts. (TR.2, p.23-24). She **also** testified that **she** did not prepare reconciliation/comparisons from June, **1988** through March, **1989.** (TR.2, **p.39). Ms.** Stephanick testified further that the Respondent never made inquiries of her with respect to the preparations of the monthly trust account reconciliations or comparisons, and that he never reviewed the trust account cancelled checks or bank statements. **(TR.2,** p.24).

Mr. Pizarro's testimony **(TR.2,** p.134-135) and his **1990** audit report **(R,** Bar Exhibit **12)** establish that the Respondent did not produce for inspection a cash receipts journal covering the period from June, **1988** through January, **1989; a** cash disbursements journal **for** July, **1988,** for September, **1988** through January, **1989,** nor for July, **1989;** nor monthly bank reconciliations, monthly comparisons, and annual listings for the period of June, **1988** through July, **1989.**

Mr. Doolittle, Respondent's current CPA, testified during his deposition on September 30, **1991** that in September or October, **1989** when he attempted to prepare the Respondent's trust account records, he did not see any trust account reconciliations or comparisons for the period covering from the middle of **1988** through October, **1989.** However, during the Final Hearing in this **case,** Mr. Doolittle testified different than his deposition four **(4)** months earlier by stating that he *may* have seen bank reconciliations for May and/or June, **1989.** (TR.2, p.94-96).

During the Final Hearing in this cause, the Respondent testified that the trust account records which he failed to produce for Mr. Pizarro's 1990 audit had been properly made on a monthly basis, but that the same were stolen by Ms. Stephanick when she left his employment. (TR.1, p.54-61, p.70; and R, Bar Exhibit 12). It is undisputed that Carol Stephanick took some of the Respondent's trust account cancelled checks. Ms. Stephanick admitted taking the trust account cancelled checks made out to "Carol Busch" and she admitted that said checks were turned over to law enforcement after she was arrested for the thefts from the Respondent. Ms. Stephanick also testified that she initially took trust account ledger cards, trust account check stubs, some correspondence, trust account cancelled checks and trust account bank statements. Ms. Stephanick also testified that she eventually returned all of the records, with the exception of the trust account cancelled checks. In addition, Ms. Stephanick testified that after she returned the records to the Respondent, he verified their receipt by phone. (TR.2, p.42-44). Ms. Stephanick's testimony with respect to returning the records she took (except for cancelled checks) is supported by the fact that the Respondent produced for the Bar's April, 1990 audit, his **1987, 1988** and **1989** ledger cards, trust account check stubs for 1988, and **1989** bank statements. (R, Bar Exhibits 12, 13, 25 and **28).**

Ms. Stephanick also testified that the trust account records she took home, did not include reconciliations or comparisons. (TR.2, p.42-43). The records which Ms. Stephanick initially took home with her could not have included comparisons because Ms.

Stephanick had not prepared the same for the period covering from June, **1988** through March, **1989.** Further Ms. Stephanick could not have stolen Respondent's missing trust account records from the end of March, 1989 through September, **1989** since she did not work for Respondent after March, 1989. (TR.l, **p.72-73).**

Mr. Pizarro's testimony (TR.3, p.24-26) and **1990** audit report **(R,** Bar Exhibit 12) also established that the Respondent's client trust account ledger cards for 1988 and **1989** contained postings for both operating account and trust account transactions without proper segregation and that they failed to contain all of the information required by the trust account rules.

The Respondent testified that he <u>believes</u> that Carol Stephanick prepared two **(2)** sets of ledger cards for each client. He testified that he <u>believes</u> one set of cards was correctly prepared and the second set was incorrectly prepared. The Respondent concluded that Ms. Stephanick must have stolen the correct ledger cards, (TR.l, p.114). Carol Stephanick's testimony was contrary to the Respondent's testimony. Ms. Stephanick testified that there were not two **(2)** sets of **ledger** cards and that the ledger cards that she prepared were returned to the Respondent when she returned his trust records. (TR.2, p.40,42). Ms. Stephanick also testified that subsequent to June, **1988,** the Respondent continued to leave his earned fees in the trust account on a monthly basis and that the Respondent continued to advance, from the trust account, costs on behalf of clients for whom no funds were in the trust account. (TR.2, p.13-14 and **17-18).**

Mr. Pizarro's testimony, 1990 audit report (R, Bar Exhibit 12) and working papers (R, Bar Exhibits 8,9,10,11,14,15,16), support the foregoing testimony by Ms. Stephanick. The 1990 audit report (R, Bar Exhibit 12) establishes that, on June 30, 1988, the Respondent had $2,244.39 of his funds in the trust account and that said sum increased each month up through January, 1990, when his earned fees left in the trust account totaled $27,920.70. All of Respondent's fees were stolen by Ms. Stephanick and Ms. Kampouroglos. (R, Bar Exhibit 12).

The Respondent testified during the Final Hearing in this cause that he withdrew all earned fees from his trust account at the end of each month. The Respondent testified that, at the end of each month, his secretary, Carol Stephanick, would advise him of the fees he earned and that, thereafter, a check would be written for said amount. The Respondent took the position that, if he did not withdraw all earned fees from the trust account, each month, it was because Carol Stephanick lied to him as to the sum in the account which he had earned. (TR.l, p.86-89). The Respondent was the attorney in the office, not Carol Stephanick. He did the work each month; thus, he knew the fees earned for each client each month. The Respondent's excuse simply does not work. If, as the Respondent testified, he didn't leave his earned fees in the trust account (commingling), then he used other client funds when he advanced costs on behalf of clients for whom no funds were in the trust account. Either way, the Respondent violated the trust account rules and he was aware of the same at the time of the Final Hearing before Judge Alvarez. Furthermore, the Respondent's testimony in this case,

with respect to his withdrawal of all earned fees from the trust account each month, is contrary to his deposition testimony of September 30, 1991.

During the Respondent's deposition on September 30, 1991, Respondent testified as follows in response to questions propounded by Bar counsel:

> Q. So your ledger cards had both general and trust account entries on them?
>
> A. No, because everything was going through the trust account.
>
> Q. So let's say that you were dealing with a client on an hourly basis, and you determined you had done ten hours, let's say, at $135 an hour. Okay. So at this point in time, they owe you $1,350. You'd send them a letter and say you owe me this much money. What would you do with the money when you got the money in?
>
> A. Put it in the trust account.
>
> Q. Even though it was an earned fee?
>
> A. Well, the trust account was a, I guess, what I understood from an accounting point of view, that everything should go through one account to -- I don't know what the word is -- properly account for all the money.
>
> Q. But that money was your money,
>
> A. I understand that. But the idea was to have it go through one place so we would know where all the money came and where all the money went. And then, of course, at some point after that, the money would be taken out as fees were earned.
>
> Q. But they are earned at the time that you put them in the account.

A. Well, I hope I have a better understanding now, and, in fact, I don't do that any longer because it's just caused obviously too many problems."
(TR.3, p.191-192).

The foregoing supports the testimony of Carol Stephanik; it supports the assumptions made by Pedro Pizarro in preparing an analysis of the Respondent's trust account status for June, 1988 through May 10, 1990 (R, Bar Exhibit 14) and his 1990 audit report (R, Bar Exhibit 12); and it supports the Bar's position that the Respondent's testimony is unworthy of belief.

During the Final Hearing in this cause Respondent's counsel attempted to attack the credibility of Mr. Pizarro's analysis of the Respondent's trust account status and his 1990 audit report. All of Mr. Pizarro's working papers (R, Bar Exhibits 11, 14, 15, 16, and 17) and his 1990 audit report (R, Bas Exhibit 12) were prepared from trust account records produced by the Respondent for the 1990 audit. Mr. Pizarro testified that he made certain assumptions with respect to when the Respondent earned certain client funds, since the Respondent's records failed to indicate the same. Mr. Pizarro's assumptions were consistent with the Respondent's prior history, but regardless of this fact, the assumptions were also consistent with the Respondent's testimony during his September, 1991 deposition. Furthermore, Mr. Pizarro's opinions, contained in his 1990 audit report (R, Bar Exhibit 12) were unaffected when an amended analysis of Respondent's trust account status (R, Bar Exhibit 23) and an Amended Charges and Credits to Borja (R, Bar Exhibit 24) were prepared to conform with the Respondent's testimony in the

instant case that all earned fees were withdrawn each month.

In summary, the evidence in this case showed that between June, **1988** and December, **1988** (and thereafter) the Respondent failed to prepare monthly reconciliation/comparisons; he failed to prepare a cash receipts and disbursements journals; he continued to commingle his funds with client trust funds by leaving his earned fees in the trust account and by depositing earned fees in said account (R, Bar Exhibit 12 & **18); he** had client negative balances in his trust account due to the fact that he continued to advance funds from the trust account on behalf of clients for whom no monies were in said account (R, Bar Exhibit 15); and he failed to prepare his client ledges cards (R, Bar Exhibit 13) in accordance with the trust accounting rules. (R, Bar Exhibit 12).

The Respondent's testimony before Judge Alvarez (R, Bar Exhibit **21)** indicates that at the time of the Final Hearing in December, 1988, the Respondent had already hired a CPA (Michael Lewis) to prepare his trust account records and keep his trust account balances. If a CPA had been preparing the Respondent's trust account records and had balanced the account (reconciliations and comparisons), then Carol Stephanick's thefts would have been discovered, as they were when Mr. Lewis audited or reviewed the Respondent's operating account records. No CPA or bookkeeper ever discovered Ms. Stephanick's thefts from the trust account. The Respondent made that discovery a month or **two** after he became aware of the fact that Carol Stephanick stole from his operating account. (TR.1, p.74-75).

During the Final Hearing before Judge Alvarez, Michael Lewis

was called as a witness to testify on behalf of the Respondent and was asked the following question and provided the following response:

> Q. All right. And so, for the years '86, '87, and part of '88, you have looked at those trust account records to try to reconcile them?
>
> A. Yes sir, in total. (TR.l, p.127-128).

Mr. Lewis's testimony before Judge Alvarez was **false** or at the minimum misleading to the Referee and the Respondent was aware of the same.

During the Final Hearing in this cause, Bar Counsel asked the Respondent the following questions and received the following responses:

> Q. Now I asked you when you hired Mr. Lewis what he did for you in regard to your trust account.
>
> A. Yes.
>
> Q. And you said you hired him to make sure your trust account records would comply with the **Rules** Regulating The Florida Bar?
>
> A. Correct.
>
> Q. But you never hired him to do your reconciliations and your comparisons or your balances or your ledger cards or anything else, is that correct?
>
> A. That would be correct.
>
> Q. Mr. Borja, I want you to turn to your transcript, the transcript of December **15th,** 1988, before Judge Alvarez, and I ask you to turn to page **88.** I want you to **start** from line 18 through **25** wherein you start saying, "What I have done is, I asked Mr. Lewis. He knows all about the problems that I have here, whether it's too much responsibility for the secretary or what. I do not have as good **a**

knowledge as maybe certainly, an accountant would have. I understand basically, in theory, all of it. The day in and day out workings of it I do not have, if you will, the time and the knowledge to really do it properly.

"Relying on the secretary, the present secretary that I have, I think that basically she can do a pretty good job, but I think as a safety precaution, because I never want to go through this again, Mr. Lewis has been hired, and if for whatever reason he would quit or want to do something else, then I would have somebody else do this on a monthly basis."

That was false, wasn't it, Mr. Borja?

A. No, because Mr. Bennett was helping me to do it on a review basis, to come in and assist...

Q. Did he (referring to Mr. Lewis) work on your trust account?

A. 1 don't know that he's ever done any reconciliations, anything specifically like that, but he has been there to provide advice and assistance if need be throughout the last three years.

Q. But you never hired him to do your trust account records on a monthly basis as of December 15, 1988 or thereafter, until January of 1990 when you were placed on probation, is that right?

A. That's the only time that he's had, I think the specific assignment was review of the other accountant's efforts. (TR.l, p.40-43).

The foregoing testimony by the Respondent clearly establishes that Respondent and his witness, Mr. Lewis provided false testimony to Judge Alvarez. The Respondent attempted to explain away his false testimony by stating in this case that although Mr. Lewis was not reviewing and preparing his trust account records on a monthly basis before and after the Final

Hearing before Judge Alvarez, that Mr. Bennett had reviewed his trust records prepared by Ms. Stephanick to make sure they were prepared properly for the period covering from June, 1988 through the spring of 1989. (TR.l, p.41 and 45). As previously established, Mr. Bennett did not provide any services to the Respondent with respect to the Respondent's trust account, or otherwise, subsequent to May, 1988. (R, Bar Exhibit #19, Affidavit of Robert Bennett). Clearly, the Respondent provided blatantly false testimony in the instant case just as he did in the disciplinary proceeding before Judge Alvarez.

Mr. Lewis testified in the instant case that he was engaged by the Respondent or Respondent's divorce attorney to assist the Respondent in his divorce litigation. He testified that he was hired to verify that all funds issued to the Respondent as fees from the trust account actually went into the Respondent's operating account. He testified that he was never hired to conduct an audit of the Respondent's trust account. He also testified that he did not review all of the Respondent's trust account records and that he did not reconcile the Respondent's trust account. Mr. Lewis did testify 'that he *may* have reconciled some bank statements but never reconciled the bank balance with the ledger cards (comparisons). (TR.l, p.122-125 and 128).

The Report of Referee (R, Bar Exhibit **2)** in the Respondent's prior disciplinary case clearly indicates that Judge Alvarez relied on the false testimony of the Respondent and the false or misleading testimony of Mr. Lewis in finding the Respondent not guilty of the charges alleged by The Florida Bar in said case. (R, Bar Exhibit **2)**.

Based on the foregoing facts, the Bar established by a clear and convincing standard that Respondent knowingly provided false testimony during the disciplinary proceeding before Judge Alvarez. Such misconduct constitutes a violation of the following Rules of Professional Conduct:

> **Rule** 4-8.1(a) (a lawyer, in connection with a bar disciplinary matter, shall not knowingly make **a** false statement of material fact); and
>
> Rule **4-8.1(b)** (a lawyer, in connection with a disciplinary matter, shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter).

By reason of the foregoing, the Bar respectfully requests this Court to reject the Referee's finding of fact that the Respondent was so out of touch and unfamiliar with the Bar rules and procedures, that he did not KNOWINGLY provide false testimony during the December, 1988 disciplinary proceeding before Judge Alvarez and find Respondent guilty of violating Rule **4-8.1(a)** and **(b).**

ISSUE II

WHETHER A NINETY (90) DAY SUSPENSION, PLUS TWO (2) YEARS PROBATION, IS A SUFFICIENT DISCIPLINARY SANCTION FOR AN ATTORNEY WHO INTENTIONALLY MISREPRESENTS TO THE FLORIDA BAR, THE STATUS OF HIS TRUST ACCOUNT RECORDS AND PROCEDURES IN HIS 1989 STATEMENT OF ANNUAL BAR DUES; INTENTIONALLY PROVIDES FALSE TESTIMONY TO A REFEREE IN A PRIOR DISCIPLINARY PROCEEDING; CONTINUES TO VIOLATE TRUST ACCOUNTING RULES; AND HAS AN EXTENSIVE PRIOR DISCIPLINARY RECORD.

The Referee found that from June 1, 1988 through Apr l, 1990, the Respondent failed to maintain on a monthly basis, all required trust account records; follow all required trust accounting procedures; and continued to commingle his earned fees with client funds. The Referee also found that the Respondent misrepresented to The Florida Bar, the status of his trust account in his 1989 Statement of Annual Bar dues. In addition, the Referee found that the Respondent was so out of touch and unfamiliar with the Bar rules and procedure, that he did not KNOWINGLY provide false testimony during a December, 1988 disciplinary proceeding before Judge Alvarez. (RR, Section 11).

The Referee recommended that the Respondent be found guilty of violating Rules 4-1.15(a), 4-8.4(c), 5-1.1, 5-1.2(b)(5), 5-1.2(b)(6), 5-1.2(c)(1), 5-1.2(c)(2) and 5-1.2(c)(3). The Referee also recommended that the Respondent be found not guilty of violating Rules 4-8.1(a) and 4-8.1(b). (RR, Section III). Further, the Referee recommended to this Court that the Respondent be disciplined by a ninety (90) day suspension followed by a two (2) year probation. (RR, Section IV).

A ninety (90) day suspension followed by two (2) years probation is an insufficient disciplinary sanction for

Respondent's misconduct, regardless of this Court's ruling on the Bar's argument as to Issue I above. It is the Bar's position that disbarment is the appropriate discipline for Respondent's misconduct. The Bar's position is supported by case law and by Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as The Standards) approved by The Florida Bar's Board of Governors in November, 1986.

In The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982), Mr. Whitlock was suspended from the practice of law for three (3) years based on the following facts:

1. Mr. Whitlock handled a real estate closing in May, 1987 wherein the purchaser sent Mr. Whitlock a check for $2,996.47. Mr. Whitlock was instructed to disburse $2,787.04 of said funds to Innisbrook, the seller. On May 31, 1977, Mr. Whitlock disbursed $287.04 to Innisbrook. Mr. Whitlock claimed that he also sent a $2,500.00 check to the real estate agent handling the sale and that the real estate agent failed to deliver the check to Innisbrook.

2. On July 31, 1978 the Bar caused Mr. Whitlock's trust account to be audited. The audit revealed the following: a) Mr. Whitlock's trust account had never been reconciled; b) the trust account checks were issued for Mr. Whitlock's personal and office expenses; c) Mr. Whitlock's trust account had a shortage of approximately $20,000.00; and d) overdrafts were created due to real estate closing statements that were incorrectly prepared.

3. A second audit of Mr. Whitlock's trust account and an audit of his general account was conducted by the Bar on February 15, 1979. This audit revealed the fallowing: a) there was an

additional shortage in the trust account of at least $1,437.92 which may have existed in whole or in part at the time of the first audit; b) at the time of the first audit, Mr. Whitlock had agreed to use a new trust account but failed to do so; c) he commingled his funds with client funds; and d) Mr. Whitlock's records of deposit were inadequate to show the source of deposits.

4. Mr. Whitlock allowed his non-lawyer employee to manage and control his trust and general accounts without adequate supervision or control during the period covering from July 21, 1987 through February 15, 1989.

The Referee in Whitlock recommended disbarment. This Court held that a three (3) year suspension was appropriate in light of the punishment imposed on other attorneys for similar misconduct and due to the following facts in mitigation: a) the shortages in the trust account were promptly reimbursed; b) the misconduct caused no economic loss to anyone other than Mr. Whitlock; and c) Mr. Whitlock cooperated fully with The Florida Bar in its investigation and audit of his accounts and made his books and records available.

The facts of the case sub judice are substantially similar to, yet more serious than, Whitlock. As in Whitlock, the Respondent has been audited on more than one occasion. The Florida Bar v. Borja, Supreme Court Case No. 72,962, dealt with the first audit of Respondent's trust account in June, 1987 and the second audit of his trust account in June, 1988. (R, Bar Exhibits 2 and 20). The third audit of Respondent's trust account occurred in April, 1990 (R, Bar Exhibit 12). All three

audits established the following: a) the Respondent had not made on a monthly basis, or maintained, all required trust account records; b) the Respondent had not followed all required trust account procedures; c) the Respondent commingled his fee funds with client trust funds; d) the Respondent advanced costs from his trust account on behalf of clients who did not have funds in said account (client negative balances); and e) there were shortages in the trust account. (R, Bar Exhibit 20; RR, Section II and 111).

During the first and second audit of Respondent's trust account and also during a grievance committee hearing in June, 1988, the Bar auditor advised Respondent of the deficiencies in his trust account records and procedures. (TR.1, p.19-21; TR.2, p.128, L.11-13). Regardless of the foregoing, the Respondent continued to ignore The Florida Bar's trust accounting rules subsequent to June, 1988 as evidenced by the Bar's audit of April, 1990 (R, Bar Exhibit 12).

As in Whitlock, the Respondent allowed a non-lawyer employee to manage and controlled his trust account, operating account, and several estate accounts without any supervision or control. (TR.l, p.55-61). Such was the case even though during the Final Hearing on December 15, 1988 in The Florida Bar v. Borja, Supreme Court Case No. 72,962, Respondent advised Judge Alvarez (Referee) that even though he thought his secretary could handle his trust account books and records he had hired Michael Lewis, a CPA, to handle the account. Respondent also stated that if Mr. Lewis quit for any reason, he knew of another bookkeeper who would assume Mr. Lewis' responsibilities. (R, Bar Exhibit 21). The

Respondent never hired Mr. Lewis to prepare the required trust account records on a monthly basis. (TR.1, p.34, L.3-24). In the instant case, the Respondent testified that his secretaries have always been assigned the duty of preparing his trust account records, including subsequent to December, 1988. (TR.l, p.112).

As a result of Respondent's total lack of management and control over his trust account, operating account and estate account records and procedures, his secretary, Carol Stephanick stole in excess of $30,000.00 from said accounts. When the Respondent discovered Ms. Stephanick's thefts from his operating account, he did not immediately fire her, (TR.l, p.70) he did not confiscate his trust account records, including his trust and estate account checkbooks (TR.1, p.70-71); and he did not even take steps necessary to prevent future secretaries from stealing from his trust account nor from his estate clients, as evidenced by Athena Kampouroglos' thefts in August, 1989. (TR.1, p.110).

The evidence in this case established that the Respondent discovered the thefts from his trust and estate accounts no later than May, 1989. (R, Bar Exhibit 1 and 3; TR.1, p.74-76). When the Respondent discovered the thefts from his trust and estate accounts he did not immediately replace the funds (TR.l, p.83-84) as did Attorney Whitlock. Instead, the Respondent waited for his bank to replace or refuse to replace the funds. When his bank refused to replace the majority of the funds stolen, the Respondent still did not immediately replace the stolen funds; instead he left his earned fees in the trust account until the fees covered all the funds stolen by his secretaries except for $699.45. It was not until February, 1990 that Respondent covered

the shortage in his trust account of **$699.45.** (R, Bar Exhibit **12).**

In May, **1989,** the Respondent knew that Ms. Stephanick stole **$5,164.89** from his estate account for James Tasis, yet those funds were not replaced by Respondent until December **29, 1989.** (R, Bar Exhibit **3** and **12).**

Another distinguishing factor between Whitlock and the instant case is that the Respondent intentionally lied to The Florida Bar in his **1989** Statement of Annual Bar dues. (R, Bar Exhibit **4).** The Respondent certified as true on his **1989** Statement of Annual Bar Dues, which he submitted to The Florida Bar in August, **1989,** that,

> "During the last fiscal year I or the law firm which I am associated had a trust account, kept all required trust records and followed all required trust accounting procedures and there were no shortages in any individual account or the overall trust account.'' (R, Bar Exhibit **4).**

The Respondent noted on the statement "Exceptions for Bar/Audit Comments". (R, Bar Exhibit **4).**

The Respondent's Certification, as set forth above, was blatantly false. Respondent claimed that his certification was true due to the notation that he placed on the statement. The Respondent's position is without merit since his notation refers to an audit conducted by Mr. Pizarro prior to the period covered by the **1989** Statement of Annual Bar Dues. (R, Bar Exhibit **4).**

The Respondent did not submit his **1989** Statement of Annual Bar Dues to The Florida Bar until **August 21, 1989. (R,** Bar Exhibit **4).** At the time the Respondent submitted his Statement of Annual Bar Dues, he knew there were shortages in his trust

account due to Ms. Stephanick's thefts. (R, Bar Exhibit 1). In addition, when the Respondent submitted his 1989 Statement of Annual Bar Dues, he knew there was a shortage in his trust account because he had not replaced the $30,000.00 that Carol Stephanick had stolen. (TR.1, p.84-85). In addition, since the Respondent testified in this case that he took all of his earned fees out of the trust account each month, he must have thought, in August, 1989, that $30,000.00 of client funds was missing. Yet, the Respondent did not immediately replace those funds with his funds, nor did he borrow funds from a bank to replace the missing $30,000.00. Instead, the Respondent, in essence, borrowed the funds from his clients until he had earned enough of his clients' funds to reduce the shortage in his trust account to $699.45, which represented client negative balances. (TR.1, p.84-85).

The Respondent's Statement of Annual Bar Dues was also false with respect to his trust account records and procedures for the period from July 1, 1988 through June 30, 1989. The facts, testimony, and arguments set forth in the argument relating to Issue I clearly supports this position. The Bar will not reargue those matters.

A third distinguishing factor between Whitlock and the instant case is that the Respondent, as argued in Issue I above, personally provided false testimony and permitted a witness to provide false and/or misleading testimony to Judge Alvarez in his prior trust account disciplinary case styled The Florida Bar v. Borja, Case No. 72,962. This Court has held that "our system of justice depends for its existence on the truthfulness of its

officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment." The Florida Bar v. O'Malley, 534 So.2d 1159 (Fla. 1988); The Florida Bar v. Manspeaker, 428 So.2d 241 (Fla. 1983).

The Respondent's conduct of providing a false certification to The Florida Bar in his 1989 Statement of Annual Bar dues and providing false testimony during the December, 1988 disciplinary proceeding before Judge Alvarez alone warrants disbarment.

In The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988), the Referee found that in a previous Bar discipline case, Mr. Newhouse attempted to obtain this Court's consideration of an untimely petition for review by claiming that his attorney had agreed to represent him in the appellate proceeding but had failed to timely file the Petition for Review. The Referee found that Mr. Newhouse's statements to this Court in his petition were false and were made with knowledge of their falsity. After considering The Standards, Rule 6.11 and 9.11 the Referee found that disbarment was the appropriate discipline for Mr. Newhouse's misconduct. This Court upheld the Referee's recommended discipline of disbarment. The Respondent, in the instant case, should be disbarred from the practice of law as was Mr. Newhouse for knowingly submitting a blatantly false statement of annual Bar dues to The Florida Bar and for knowingly providing false testimony to Judge Alvarez in Supreme Court Case No. 72,962.

The Standards, Rule 6.11 provides that absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer: a) with the intent to deceive the court, knowingly makes

a false statement or submits a false document; or b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant adverse effect on the legal proceeding. This rule applies to the Respondent's misconduct during the Final Hearing before Judge Alvarez in Supreme Court Case No. 72,962. The Respondent's misconduct in said case caused the Referee to find the Respondent not guilty of trust account violations and to make the following findings of fact:

1. The Respondent has undertaken remedial measures concerning record keeping and accounting procedures and has instituted procedures to guard against future violations.

2. The court is assured that Borja recognizes his responsibility to appropriately follow the spirit, as well as the letter, of the accounting procedures mandated by the Bar. (R, Bar Exhibit 2).

The Standards, Rule 4.11, provides that absent aggravating and mitigating circumstances, disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury. This rule applies to the Respondent's intentional use of client trust funds for other clients who did not have funds in his trust account. In addition, the Respondent knowingly converted client property to his own use when he failed to immediately replace the client funds stolen by Ms. Stephanik.

The Standards, Rule 9.22 sets forth factors which may be considered in aggravation. It is the Bar's position that the following aggravating factors, from The Standards, Rule 9.22 exist in this case:

1. prior disciplinary offenses;
2. dishonest or selfish motive;
3. a pattern of misconduct;
4. multiple offenses;
5. submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
6. refusal to acknowledge wrongful nature of conduct;
7. substantial experience in the practice of law;
8. indifference to making restitution.

The Respondent has an extensive prior disciplinary record which is as follows:

1. On March 17, 1988, in The Florida Bar v. Borja, Supreme Court Case No. 69,933, the Respondent received a reprimand for Minor Professional Misconduct for engaging in conduct prejudicial to the administration of justice (DR 1-102(A)(5) and for failing to seek the lawful objectives of his client (DR 7-101(A)(1)). In the foregoing case, the Respondent represented Mrs. Banores in a lawsuit brought by Clearwater Community Hospital. The suit resulted in a judgment against Mrs. Banores and her husand in the amount of $2,125.23. On January 3, 1985, Mrs. Banores delivered a check to Respondent in the amount of $2, 125.23 with the understanding and intent that said check would be used to satisfy the hospital's judgment. The Respondent did not promptly pay the judgment and as a result thereof Respondent's client was subjected to a Motion for Indirect Contempt due to her failure to appear at a deposition in aid of execution.

2. On January 4, 1990, in The Florida Bar v. Borja, Supreme Court Case No. 72,962, the Respondent received a public reprimand and two (2) years probation for violating Rule 5-1.2(b)(5) (for failing to maintain a separate file or ledger card for each client or matter); Rule 5-1.2(c)(1)(b) (for failing to make

monthly comparisons and reconciliations) and Rule 5-1.1 (for utilizing client trust funds for a purpose other than for the purpose in which the funds were entrusted to Respondent).

3. On June 14, 1990, in The Florida Bar v. Borja, Supreme Court Case No. 74,758, the Respondent received a public reprimand and two (2) years probation, consecutive to the January 4, 1990 probation, far charging his client a clearly excessive fee by means of an intentional misrepresentation as to either entitlement to, or the amount of, the fee (Rule 4-1.5(A) and Rule 4-1.5(A)(2)).

4. On January 24, 1991, in The Florida Bar v. Borja, Supreme Court Case No. 75,912, the Respondent received a public reprimand for disobeying an obligation under the rules of a tribunal (Rule 4-3.4(a) and (c)) and for incompetence (Rule 4-1.1). In the foregoing case, the Respondent failed to appear for a hearing before Judge Blackwood. As a result of the foregoing, an Order to Show Cause was issued to Respondent. Thereafter, the Respondent contacted Judge Blackwood and apologized for missing the hearing. Consequently, the Order to Show Cause was dismissed. Thereafter, Respondent failed to appear for a pre-trial conference before Judge Blackwood. As a result thereof, another Order to Show Cause was issued against Respondent by Judge Blackwood. Judge Blackwood held a hearing on the matter and found Respondent guilty of indirect contempt of court and fined Respondent $75.00.

The Respondent's extensive disciplinary record over the past two years establishes the Respondent's total lack of respect for the Rules of Professional Conduct promulgated by this Court.

The Respondent had a dishonest or selfish motive when he provided false testimony during the Final Hearing before Judge Alvarez in Supreme Court Case No. 72,962; when he submitted to The Florida Bar a false 1989 statement of annual Bar dues; and when he failed to immediately replace the funds stolen by Ms. Stephanik and Ms. Kampauroglos.

In addition, a pattern of misconduct by Respondent was established in the instant case, The evidence in this case established that the Respondent attempts to blame others for his misconduct and that he has a propensity to lie in an effort to cover his intentional misconduct. The evidence in this case showed that immediately prior to the first audit of Respondent's trust account in June, 1987, the Respondent hired Bob Bennett, a bookkeeper, to prepare far the audit, two (2) years worth of records which Respondent was required to make and maintain on a monthly basis. (R, Bar Exhibit 19). In addition Carol Stephanik testified that from the time she was hired in October, 1987 until April, 1988, she was unaware that she was supposed to prepare the Respondent's trust account records. She testified that in April, 1988, Maggie Clements, Respondent's former secretary, came to the Respondent's office to prepare the Respondent's trust account records for the Bar's May, 1988 follow-up audit. She testified that Ms. Clements could not balance the trust account records, and thus comparisons were not prepared for the audit. (TR 2 p. 5-8). This testimony of Ms. Stephanik was corroborated by Mr. Bennett. (R, Bar Exhibit 19). The evidence showed that the Respondent failed to produce for the April, 1990 audit, numerous trust account records required by The Florida Bar Rules

Regulating Trust Accounts. (R, Bas Exhibit 12). The Respondent testified that all required trust account records were prepared on a monthly basis. The Respondent claimed that Ms. Stephanik stole his records when she left his employment. The Respondent attempted to bolster his testimony that the records were made and maintained on a monthly basis by testifying that Bob Bennett reviewed the required records on a monthly basis from May, **1988** through the Spring of **1989**. The Bar produced an affidavit by Bob Bennett (R, Bar Exhibit 19) that totally contradicted Respondent's testimony. The Respondent's false testimony tends to support the Bar's position that the Respondent failed to prepare and maintain the required trust account records for the period covered by the April, 1990 audit, just **as** he failed to do prior to the June, **1987** and June, **1988** audits. Further, the evidence showed that the Respondent failed to prepare the required trust account records from March, **1989** (when **Ms.** Stephanik left his employment) through September, **1989.**

Multiple offenses were clearly involved in this case. In addition, **as** set forth above, the Respondent made false statements during the Final Hearing in this case. The Respondent refused to acknowledge the wrongful nature of his conduct. The Respondent **also** has substantial experience in the practice of law. Further, the Respondent was indifferent to promptly making restitution to those clients whose funds were stolen by Ms. Stephanik and Ms. Kampouroglos.

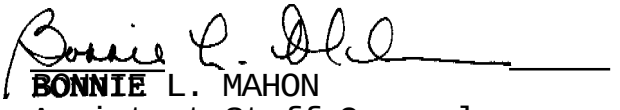
THEREFORE, the Bar respectfully requests this court to reject the Referee's recommended discipline of **a** ninety (90) day suspension and disbar the Respondent from the practice of law in this State.

CONCLUSION

The evidence presented by the Bar in this case clearly established that the Respondent does not respect the ethical Rules promulgated by this Court. The evidence in this case also established that the Respondent has a propensity to lie as established by his false certification to the Bar in his 1989 Statement of Annual Bar Dues, his false testimony to Judge Alvarez **and** his false testimony in the instant case. Such an individual should not be permitted to practice law in this State.

WHEREFORE, The Florida Bar respectfully requests this court to reject the Referee's finding of fact challenged by the Bar; reject the Referee's recommendation that the Respondent be found not guilty of violating Rule 4-8.1(a) and (b); find the Respondent guilty of violating Rule 4-8.1(a) and (b); reject the Referee's recommended discipline of **a ninety (90) day suspension;** and disbar the Respondent from the practice of law in this State.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original of the foregoing Initial Brief has been furnished by Airborne Express No. 729658226 to Sid J. White, Clerk of the Supreme Court, 500 Duval Street, Tallahassee, FL 32399-1926; a copy by U.S. Regular Mail to David A. Maney, Counsel for Respondent at 606 East Madison Street, P.O. Box 172009. Tampa, FL 33672-0009; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 1st day of May, 1992.

Bonnie L. Mahon