IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOHNNY F. SMILEY,

Respondent.
_____/

Case Nos. 78,526 and 78,881

COMPLAINANT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant, The Florida Bar, hereby adopts the reference symbols set forth in the Preliminary Statement of Respondent's Initial Brief. Additionally, references to Respondent's Responses to Complainant's Requests for Admissions will be designated Response, followed by the appropriate paragraph letter and Supreme Court case number. Finally, citations to Respondent's Initial Brief will be noted as RB-page number.

STATEMENT OF THE CASE AND FACTS

Subject to the elaborations contained in the body of this Answer Brief, The Florida Bar hereby adopts the Statement of the Case and of the Facts set forth in Respondent's Initial Brief.

SUMMARY OF ARGUMENT

Evidence presented at final hearing clearly and convincingly supports the following findings made by the Referee: Respondent delayed repayment of the $10,000.00 he misappropriated from trust; Respondent's conduct caused the Clarks to lose their home; Respondent miscommunicated the status of the foreclosure to Ms. Webb; Respondent filed his bankruptcy in the Southern District of Florida to evade his creditors; Respondent permitted the Lucases' bankruptcy to be dismissed; Respondent failed to cooperate with The Florida Bar in producing his trust account records; and Respondent has shown an indifference to making restitution. The Referee's findings should therefore be sustained by this court, especially when they are viewed with the presumption of correctness generally accorded such findings.

Additionally, under well-established case law, it was within the authority of the Referee to recommend that Respondent be found guilty of engaging in criminal conduct, even absent a criminal conviction, and to recommend that Respondent be ordered to pay restitution for collecting an excessive fee. The Referee also properly recommended that a lien be imposed against Respondent's earned fees for costs incurred by The Florida Bar in bringing these proceedings.

Finally, the severity of Respondent's undisputed misconduct and the numerous aggravating factors in this case dictate that Respondent be disbarred from the practice of law in accordance with prior holdings of this court.

ARGUMENT

ISSUE I

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE UPHELD.

When the referee's findings of fact in a disciplinary proceeding have been challenged, the Supreme Court of Florida has repeatedly stated that such findings are to be upheld unless clearly erroneous or lacking in evidentiary support. See The Florida Bar v. Lopez, 406 So.2d 1100, 1102 (Fla. 1981); The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978). While the "ultimate judgment remains with this court," the "initial fact-finding responsibility is imposed upon the referee. His findings of fact should be accorded substantial weight." The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968). Indeed, the referee's findings of fact in disciplinary proceedings are entitled to the same presumption of correctness as the judgment of a trier of fact in a civil proceeding. The Florida Bar v. Stillman, 401 So.2d 1306, 1307 (Fla. 1981). As the party challenging the Referee's findings, the burden here is on Respondent to demonstrate that they should be overturned. Rule 3-7.7(c)(5), Rules Regulating The Florida Bar. Respondent has failed to meet his burden of proof, and the Referee's findings of fact should be upheld.

A. THE REFEREE PROPERLY FOUND THAT RESPONDENT DELAYED REPAYMENT OF THE $10,000.00 HE HAD MISAPPROPRIATED FROM TRUST.

In January 1989, Respondent was given $10,000.00 to hold in trust to pay an anticipated IRS assessment against Fellowship Outreach Ministries, Inc. Response D-78,526. Over the next six months, Respondent made several unauthorized withdrawals from the $10,000.00 to pay his operating expenses. T I 62-63, 79-80. By September 1989, the $10,000.00 was entirely depleted. T I 63. None of the misappropriated money was replaced until early 1991, almost two years after it was taken. Response F-78,526; T II 10. When partial replacement did occur in 1991, it was only after involvement by The Florida Bar and repeated inquiries by the seller's representative and by Respondent's own client. TFB Ex. 4-pp. 13-16, 18-20; TFB Ex. 5-pp. 19, 22. Upon receiving a notice of tax levy on Fellowship Outreach Ministries dated December 3, 1990, Respondent made payment to the IRS in February 1991 with the partially replaced money. T II 10-11; Respondent's Ex. 1.

In objecting to the Referee's finding that Respondent "delayed reimbursement of the $10,000.00," Respondent's brief confuses Respondent's partial repayment of the $10,000.00 into trust in early 1991 with his payment to the IRS. While the latter occurred within two months of the first IRS notice, the former did not occur until two years after the money was improperly withdrawn. In other words, the point is not that Respondent paid the money to the IRS when it became due; rather, the point is that

Respondent waited almost two years to repay any of the money he had misappropriated. Thus, the Referee was completely correct in finding that:

> Respondent delayed reimbursement of the $10,000.00 after numerous requests by one of the sellers in the transaction but finally replaced $5,053.01 of the $10,000.00 by paying that amount to the IRS on February 7, 1991, after he received notice of the tax due from the seller and after inquiry was made by the seller's new attorney.

RR-2

It is clear that the Referee found that Respondent failed to replace the trust funds in a timely manner, a finding supported by overwhelming evidence, not that he failed to pay the IRS in a timely manner, as Respondent suggests the Referee's finding to be.

Respondent's Initial Brief raises the possibility that the Referee actually meant, in the above-quoted finding, that the buyer's new attorney made inquiry. RB-15. The Florida Bar would submit that such is indeed the case since no evidence regarding the seller's new attorney was introduced by either party at final hearing.

Finally, Respondent states that, "the unrebutted evidence is that Respondent did not comply with the seller's request for the return of the $10,000.00 because Bishop Kinsey, quite properly so, refused to authorize the return." RB-14. This argument again confuses the issue. Had release of the monies either to the seller

or to the IRS been authorized prior to early 1991, the funds would not have been available from Respondent's trust account. T I 81-82; Response F-78,526. Thus, the issue is not, as Respondent attempts to make it out to be, whether Respondent delayed payment of any obligations covered by the $10,000.00. The issue is that Respondent failed to replace the misappropriated money for a period of almost two years.

B. THE REFEREE PROPERLY FOUND THAT RESPONDENT'S CONDUCT CAUSED THE CLARKS TO LOSE THEIR HOME.

At final hearing, Ms. Mable Clark testified that she and her husband hired Respondent for the sole purpose of filing bankruptcy in order to stay foreclosure proceedings on their home. T I 40, 45, 53. Ms. Clark also testified that her husband is a truck driver, but she is not employed due to heart trouble, diabetes, and high blood pressure. T I 38. Further, Ms. Clark stated that in 1989 she and her husband experienced financial difficulties because:

> We had bought a truck and had some trouble with it. It kept breaking down and it exhausted our finances trying to get the truck fixed, so we got a second mortgage note. So the gentleman that owns the house, I mean the gentleman we were paying the second mortgage to told me he was going to foreclose if I didn't catch up the payments, but I wasn't quiet [sic] two months behind then. By the time I got it together, I was -- by the time I went down to see the lawyer, because I was trying the [sic] get it refinanced by someone and they are the ones that suggested that I go down and get a lawyer to file bankruptcy and that would

> allow me time to save up some money and catch up the mortgage payment.

T I 39

Clearly, the Clarks were relying on Respondent to take the steps necessary to protect their home. However, due to no fault of the Clarks, Respondent failed to file even a bare bankruptcy petition on their behalf until after their home was already sold. TFB Comp. Ex. 2; T II 17, 78-79. When the bankruptcy was finally filed, the bankruptcy court issued an automatic stay. TFB Comp. Ex. 2. However, the plaintiff in the foreclosure action subsequently filed a Motion for Relief from Automatic Stay in Bankruptcy. TFB Comp. Ex. 2. By order dated February 5, 1990, the bankruptcy judge granted the motion for relief and found that:

> the certificate of sale in the State Court foreclosure proceeding was issued on January 5, 1990, and that these proceedings were filed thereafter on January 9, 1990, during the redemption period permitted by state law and prior to issuance of certificate of title. Accordingly the Court finds that the debtors have no right to cure or reinstate movants mortgage. Boromei v. Sun Bank, 92 B.R. 516 (M.D. Fla. 1988); In re: Pitts, 97 B.R. 83 (M.D. Fla. 1989).

TFB Comp. Ex. 2

In the Boromei and Pitts cases, the courts held that a debtor does not have a right to reinstate a mortgage once the sale of the foreclosed property occurs. Accordingly, the Referee properly found that Respondent's conduct caused the Clarks to lose their home. While at the time of final hearing in this matter the

Clarks were still in the house, they were renters not owners. T I 53.

C. THE REFEREE, CHARGED WITH RESOLVING CONFLICTS IN EVIDENCE, PROPERLY FOUND THAT RESPONDENT MISCOMMUNICATED THE STATUS OF THE FORECLOSURE TO MS. WEBB.

The Referee's findings of fact come to this court cloaked in a presumption of correctness and should be upheld absent a showing that the findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Colclough, 561 So.2d 1147, 1150 (Fla. 1990). Further, the Referee, as the finder of fact, is in a unique position to assess the credibility of witnesses and, therefore, to resolve conflicts of evidence. See The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980). In the instant matter, the Referee apparently chose not to give great weight to Respondent's testimony concerning his conversations with Margie Webb and properly found, based on the totality of the evidence, that Respondent misled Ms. Webb about the status of her foreclosure.

Additionally, Respondent was not charged in the Webb case with a violation of Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct of The Florida Bar. The Bar's Complaint cited only Rules 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client) and

4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information) on the Webb count, and the Referee recommended findings of guilt on those rules alone. Thus, the Referee's finding that Respondent gave false assurances to his client has no bearing on Respondent's guilt as to the cited rules. The great weight of the evidence, even apart from the challenged factual finding, supports the Referee's recommendations of guilt in the Webb case. See The Florida Bar v. Hayden, 583 So.2d 1016, 1017 n.5 (Fla. 1991).

D. THE REFEREE PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT RESPONDENT FILED HIS BANKRUPTCY IN THE SOUTHERN DISTRICT OF FLORIDA TO EVADE HIS CREDITORS.

After his temporary suspension from the practice of law, Respondent and his wife filed personal bankruptcy in the Southern District of Florida. T I 88; T II 61. In response to the filing, Respondent's former law partner, a potential creditor in the proceeding, filed a motion to dismiss the bankruptcy for lack of jurisdiction. TFB Ex. 8; T I 88-89. The motion asserted that the debtors had not met the residency requirement for filing in the Southern District in that:

1) the Southern District address given by Respondent was actually a residence owned by Respondent's employer where Respondent had

resided on weekdays for less than a ninety-day period;

2) Respondent commuted to his home in Duval County on the weekends to be with his wife and children;

3) the children were enrolled in Duval County schools; and

4) Respondent maintained office space in Duval County.

As a result of the motion, Respondent's original bankruptcy was dismissed. T I 89; T II 62-63.

Respondent testified that bankruptcy cases comprised a large part of his practice. T I 88. Thus, Respondent knew or should have known the residency requirements for filing bankruptcy, as well as the effect of not filing in the district where creditors would be located. Accordingly, the Referee correctly found as an aggravating factor that Respondent filed his bankruptcy in the Southern District in an attempt to evade his creditors in the Middle District, where his residence and practice were located prior to his suspension from the practice of law.

E. THE REFEREE PROPERLY CONSIDERED AND FOUND IN AGGRAVATION THAT RESPONDENT PERMITTED THE LUCASES' BANKRUPTCY TO BE DISMISSED.

This court has repeatedly held that the strict rules of evidence do not apply in Bar disciplinary proceedings and that

hearsay is admissible. See The Florida Bar v. Dawson, 111 So.2d 427, 431 (Fla. 1959); The Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986). It is also well-established that there is no right to confront witnesses face to face. Vannier at 898. Additionally, in The Florida Bar v. Stillman, supra p.5, this court found that a referee could properly consider evidence of attorney misconduct not charged in the Bar's Complaint.

In Stillman, the accused attorney argued on appeal that the referee, inter alia, improperly took into account an act of forgery by the respondent that was not alleged in the Bar's complaint. In finding that it was proper for the referee to consider such evidence, this court reasoned:

> evidence of unethical conduct not squarely within the scope of the Bar's accusations is admissible, and such unethical conduct, if established by clear and convincing evidence, should be reported because it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed.

Id.

In accordance with the foregoing, The Florida Bar introduced at final hearing a sworn affidavit by Kathy Lucas, one of Respondent's former clients, for the referee's consideration in determining the appropriate discipline. The same affidavit had previously been attached as an exhibit to The Florida Bar's Response to Respondent's Motion for Expedited Appointment of Referee in his temporary suspension case.

In the affidavit, Ms. Lucas states that Respondent, pursuant to Ms. Lucas' and her husband's request, filed a joint petition for bankruptcy on their behalf. TFB Ex. 6. Subsequently, according to the affidavit, Ms. Lucas' husband was deployed to the Persian Gulf and was therefore unable to appear at the Meeting of Creditors in their bankruptcy case. Ms. Lucas states: "Though aware of my husband's inability to attend the meeting of creditors, Mr. Smiley failed to take timely action to have my husband excused from the meeting or dismissed from the bankruptcy." TFB Ex. 6. Respondent himself admitted as much at final hearing:

> But in Ms. Lucas' case, her husband -- after the filing, her husband was sent to the Persian Gulf and he couldn't attend. We had to file a motion to excuse him. In the meantime, we assume this is what happened, that since he didn't appear, couldn't appear because he was in the Persian Gulf, the case was dismissed. (emphasis added)

T II-91

Based on Ms. Lucas' affidavit, Respondent's own testimony, and the absence of any evidence regarding efforts by Respondent to prevent the dismissal, it is clear the Referee properly found that the Lucas bankruptcy was dismissed as a result of Respondent's lack of diligence.

Perhaps more importantly, Respondent, by his own admission, refiled the Lucas' bankruptcy without his clients' knowledge or consent by forging, or acquiescing in the forging of, their signatures on the petition. TFB Ex. 6; T I 85-86. Pursuant to the

court's reasoning in Stillman, the Referee had a duty to take these aggravating factors into account in determining the discipline to be imposed and Respondent's fitness to practice law.

F. THE REFEREE PROPERLY FOUND THAT RESPONDENT FAILED TO COOPERATE WITH THE FLORIDA BAR IN PRODUCING HIS TRUST ACCOUNT RECORDS.

It is undisputed that Respondent's trust account records were in "shambles." T I 69-70. There is dispute, however, over whether Respondent cooperated with the Bar in its efforts to audit the trust account. The Referee properly found that he did not.

At final hearing, Clark Pearson, The Florida Bar's auditor, testified that his initial visit to Respondent's office was in November 1990. T I 60. Mr. Pearson also testified that he was unable to conduct an audit at that time due to lack of records, and that two visits to Respondent's office the following spring were also fruitless because of the continuing lack of compliance with trust accounting procedures. T I 60-62. Respondent himself admitted that he did not begin using ledger cards until February 1991, three months after Mr. Pearson's first visit. T I 79. Thus, Respondent made little or no effort to implement proper trust accounting procedures for current clients much less reconstruct past transactions so that an audit could be performed. In fact, at the time of final hearing in April 1992, more than a year after

Mr. Pearson's first visit to Respondent's office, Respondent had not produced all of the records necessary for a complate audit. T I 65.

While Mr. Pearson acknowledged that Respondent's attitude was cooperative, he also testified that Respondent's actions were not. Following is an exchange between Respondent's counsel and Mr. Pearson at final hearing that provides a basis for the Referee's finding in this regard:

> **Q** And he's never thrown up any unnecessary roadblocks in your examination, has he?
>
> **A** When I was first trying to review files, I would get the incorrect file and point that out and then get the same file the next day or something like this. A fair amount of time I was just sitting, waiting for him to give me records and there were -- there was at least one and maybe two occasions when I got nothing and went back to Tallahassee because I was not getting the files that I needed.

T I 71

In rejecting Respondent's assertion that his failure to produce trust records was due primarily to his inability to retrieve them from storage, the Referee apparently gave greater weight to testimony by the Bar auditor, the import of which seems to be that Respondent's storage problem was a relatively new explanation:

Q I believe you indicated you still have not been able to complete an audit of Mr. Smiley's trust account; is that correct?

A That's correct.

Q Why is that?

A Because I still have not been able to get into his files. I understand now his files are locked up in storage and he doesn't have the money to get them out. (emphasis added)

T I 65

Thus, the Referee's finding regarding Respondent's lack of cooperation is not clearly erroneous or wholly lacking in evidentiary support. The finding, therefore, should not be disturbed on appeal.

G. THE REFEREE PROPERLY FOUND THAT RESPONDENT HAS SHOWN AN INDIFFERENCE TO MAKING RESTITUTION.

Over a period of several months in 1989, Respondent misappropriated $10,000.00 from his trust account. T I 79-80. None of the money was replaced until almost two years later. Response F-78,526; T II 10. In fact, partial replacement occurred in 1991 only after involvement by The Florida Bar and only after demand by the IRS for payment of debts covered by the trust money. T II 10, 11; TFB Ex. 5, p. 19. On this basis alone, Respondent's objection to the above finding is utterly unfounded.

There are additional instances of Respondent's indifference toward making restitution, however. The Bar auditor testified that there was no documentation in one of Respondent's personal injury files to substantiate $698.30 in investigative costs and $72.85 in copying costs charged to Francis Carney, Respondent's client. T I 64. The fact that Respondent agreed to refund that money years later, after Florida Bar involvement, cannot seriously be considered a mitigating factor, as Respondent attempts to argue. RB-24. The Referee therefore properly found the unsubstantiated charges to be an aggravating factor.

Respondent also handled a personal injury matter for a client named Marlow Jones. T I 86-87. Respondent was to disburse a portion of Mr. Jones' settlement proceeds to Carter Chiropractic Center for bills incurred by Mr. Jones. T I 87. However, Respondent closed his trust account without ever disbursing the money to Carter Chiropractic. T I 87. The Referee properly considered such evidence in aggravation. The fact that Respondent may have performed additional services for Mr. Jones at no charge is, of course, irrelevant to the duty owed Carter Chiropractic.

ISSUE II

THE REFEREE PROPERLY FOUND THAT RESPONDENT COLLECTED AN EXCESSIVE FEE AND THAT HE ENGAGED IN CRIMINAL CONDUCT.

A. RESPONDENT'S FEE IN THE CLARK MATTER WAS EXCESSIVE IN LIGHT OF RESPONDENT'S HANDLING OF THE CASE.

In the Clark case, Respondent was hired for the specific purpose of filing bankruptcy to forestall foreclosure proceedings on the Clarks' home. T I 40, 45, 53. Respondent agreed to file the bankruptcy upon receipt of a $300.00 retainer. T I 44. On December 1, 1989, the Clarks paid Respondent $300.00 with the balance of the fee due within 30 days after the bankruptcy was filed. T I 41. On December 12, 1989, a final judgment of foreclosure was entered against the Clarks. TFB Comp. Ex. 2; T I 44. The Clarks notified Respondent's office upon receiving the final judgment and notice of sale. T I 44-46. Respondent did not file the Clark bankruptcy until January 9, 1990, more than a month after he was first retained and four days after the Clarks' home was sold. T II 17; Response M-78,881. On January 8, 1990, the Clarks became aware that the sale had occurred and that Respondent had failed to file the bankruptcy timely when the second mortgage holder asked them to vacate their home. T I 46. Subsequently, Respondent accepted additional fee payments of $150.00 and $140.00 from the Clarks. T I 48-49. He then advised them to discontinue the bankruptcy because their home had already been lost. T I 53.

Based on the foregoing, the Referee recommended that Respondent be found guilty of violating Rule 4-1.5(a) of the Rules of Professional Conduct of The Florida Bar. That rule provides:

> An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when: 1) after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or 2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a non-client party, or any court, as to either entitlement to, or amount of, the fee.

In The Florida Bar v. Grusmark, 544 So.2d 188 (Fla. 1989), this court ruled that a fee that appears fair when paid at the outset of representation can subsequently be deemed excessive if not properly earned. Assuming competent and diligent representation, $590.00 is perhaps a generally reasonable fee for a bankruptcy. Respondent's handling of the Clark matter, however, was neither competent nor diligent. Accordingly, the Referee's recommendation as to the violation of Rule 4-1.5(a) should be upheld.

B. RESPONDENT ENGAGED IN CRIMINAL CONDUCT BY MISAPPROPRIATING TRUST FUNDS.

Respondent has admitted to misappropriating $10,000.00 in client funds. T I 79-80. There can be little doubt, as was argued by the Bar at final hearing, that such conduct falls within the grand theft statute. Accordingly, the Referee recommended that Respondent be found guilty of violating Rule 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) of the Rules of Professional Conduct of The Florida Bar. (Respondent's assertions notwithstanding, there was only one citation to this rule by the Referee in her report. In fact, The Florida Bar alleged a violation of Rule 4-8.4(b) only once in the two complaints filed in this cause.)

Respondent argues that the Referee's recommendation is improper because there is a higher standard of proof in criminal proceedings than in Bar disciplinary proceedings. RB-26. Respondent's argument in this regard, however, is without merit. Finding that an attorney has violated an ethical rule proscribing criminal conduct does not result in criminal penalties. Thus, the distinction between remedial disciplinary proceedings and penal criminal proceedings is preserved.

Moreover, on numerous occasions this court has found violations of Rule 4-8.4(b), or its equivalent under the old Code of Professional Responsibility, without ever mentioning criminal

prosecutions. See The Florida Bar v. Franke, 548 So.2d 1119 (Fla. 1989); The Florida Bar v. McHenry, 17 F.L.W. 598 (Fla. Sept. 24, 1992). In fact, most recently, the court noted a "likelihood" that certain misconduct by the attorney in The Florida Bar v. Stillman, Sup.Ct. Case No. 76,066, Oct. 1, 1992, "violated federal and state laws." Id. at 9. Because this court has not hesitated in attorney discipline cases to find criminal conduct apart from criminal prosecutions, Respondent's objection to the Referee's recommendation regarding Rule 4-8.4(b) should be rejected out-of-hand.

ISSUE III

THE REFEREE PROPERLY RECOMMENDED THAT RESPONDENT PAY RESTITUTION IN THE CLARK AND WEBB CASES.

As discussed in the foregoing section, this court has repeatedly upheld recommendations by referees that an accused attorney in a grievance proceeding be found guilty of engaging in criminal conduct. Just as often, even prior to the adoption of Rule 3-5.1(i), the court has upheld referee recommendations that restitution be made in excessive fee cases. See The Florida Bar v. McAtee, 601 So.2d 1199 (Fla. 1992); The Florida Bar v. Grusmark, supra p.20; The Florida Bar v. Kirtz, 445 So.2d 576 (Fla. 1984). The Florida Bar would therefore submit that the adoption of Rule 3-5.1(i) was merely a codification of a procedure well-established by case law. By contrast, the Allen case cited by Respondent in his Initial Brief involved a Rule of Discipline that enumerated certain taxable costs to the exclusion of others. Respondent's reliance on Allen is therefore misplaced.

The facts upon which the Referee recommended restitution in the Clark case have been recited in section II.A. of this Brief. The facts upon which the Referee recommended restitution in the Webb matter are as egregious. Respondent was hired by Ms. Webb in February 1989 to foreclose on property in Jacksonville. Response HH-78,881. Ms. Webb paid Respondent $400.00 at that time. Response JJ-78,881. In March 1989, Ms. Webb sent Respondent $462.50 for costs, pursuant to Respondent's request. T I 22. In

June 1989, the debtor made a payment on the mortgage in an attempt to forestall the foreclosure proceedings. Response KK-78,881. After no more payments were forthcoming, Ms. Webb instructed Respondent to institute foreclosure proceedings. T I 29-30. Respondent did not file the Complaint in foreclosure until October 30, 1989. Response NN-78,881. Prior to filing the foreclosure, Respondent requested and was paid an additional $300.00 from Ms. Webb. T I 30-31. On April 12, 1990, the presiding judge in the foreclosure action issued a Notice of Proposed Dismissal for Respondent's failure to accomplish service of process on the defendants, including the IRS. Response OO-78,881; T II 29. Respondent subsequently accomplished service of process on the defendants, and the suit was not dismissed. Response PP-78,881. Respondent served many of the more than 20 creditors by separate publication, resulting in a publication bill of over $800.00. T I 93; TFB Comp. Ex. 1. The foreclosure proceedings for which Respondent was hired in February 1989 were not completed until the spring of 1991. Response QQ-78,881. By that time, the debtor had moved away and left the house a "wreck." T I 35. Throughout Respondent's representation of Ms. Webb, Respondent was unresponsive to her and her Georgia attorney. T I 24; TFB Comp. Ex. 1.

Based on the foregoing, it was thus clearly within the authority and discretion of the Referee to order restitution for fees collected by Respondent in both the Clark and Webb cases.

ISSUE IV

THE REFEREE PROPERLY RECOMMENDED THAT A LIEN BE IMPOSED AGAINST RESPONDENT'S EARNED FEES FOR COSTS INCURRED BY THE FLORIDA BAR.

By order dated April 23, 1991, Respondent was temporarily suspended from the practice of law by the Supreme Court of Florida in Case No. 77,731. The order of suspension required Respondent to deposit all incoming monies into a special trust account and to refrain from disbursing any monies from his regular trust account and the special trust account without prior Bar approval. As far as could be determined by the Bar auditor at the time of final hearing, Respondent was holding $12,444.90 in excess of his apparent trust liabilities. The Florida Bar has incurred costs totalling $11,540.02 in bringing these proceedings. Accordingly, The Florida Bar sought, and the Referee recommended the granting of, a lien on Respondent's earned fees for the payment of costs. Obviously, The Florida Bar is not asserting a lien over client trust funds.

Respondent argues that there is a "potential for abuse" in the Bar claiming a lien on Respondent's fees. RB 29. The Bar would submit, however, that there is no more potential for abuse in this situation than in those instances where attorneys are permitted to assert liens for fees and costs on client funds or property. In all cases, the party asserting the lien cannot simply help itself to the money; rather, a judicial determination must be

had as to the extent and validity of the lien. See Dowda and Fields, P.A. v. Cobb, 452 So.2d 1140, 1143 (Fla. 5th DCA 1984).

Additionally, Respondent argues that The Florida Bar is, in essence, seeking a protected creditor status to the exclusion of Respondent's other creditors. Such "protected" status occurs in all attorney lien situations. An attorney who claims a retaining lien on client funds in his possession may, by prosecuting the lien, be granted access to such funds to the exclusion of the client's other creditors. There is therefore no compelling reason to reject the Referee's recommendation that The Florida Bar be granted a lien on Respondent's fees to the extent of its costs.

ISSUE V

THE SEVERITY OF RESPONDENT'S MISCONDUCT WARRANTS DISBARMENT.

A. PRIOR HOLDINGS OF THIS COURT MANDATE DISBARMENT IN THIS CASE.

Disbarment is presumed to be appropriate in cases involving misuse of client funds. The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991). Even in cases where evidence in mitigation exists, this court has not hesitated to disbar attorneys for misappropriating trust funds. Id. at 1383.

In Shanzer, for example, the accused attorney appealed the referee's recommendation of disbarment for procedural trust accounting violations and misappropriation of funds. The attorney argued, much like Respondent here, that marital and economic problems led him to use trust funds for personal purposes. Id. In rejecting the respondent's arguments and upholding the referee's recommendation of disbarment, the court noted that such "problems, unfortunately, are visited upon a great number of lawyers. Clearly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems." Id. at 1383-84.

Additionally, in The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990), the Supreme Court, despite the presence of nine mitigating factors, disbarred an attorney for misappropriating client funds. Included in mitigation was testimony by two judges regarding the attorney's excellent character. Id. at 432.

Similarly, the character testimony presented by Respondent at final hearing is not sufficient to justify a discipline less than disbarment. Not only did Respondent misappropriate $10,000.00 in client funds, he lied under oath to the Referee at a hearing on The Bar's Petition for Temporary Suspension. As this court stated in The Florida Bar v. O'Malley, 534 So.2d 1159, 1162 (Fla. 1988):

> A lawyer may commit no greater professional wrong. 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.

Even if every objection by Respondent to the Referee's findings is upheld by this court, three undisputed facts remain: Respondent misappropriated $10,000.00 in client funds, kept a $10,000.00 fee in violation of this court's order of temporary suspension, and lied under oath to the Referee about the fee. If there was ever a case that warrants disbarment, this is it.

B. DISBARMENT IS APPROPRIATE UNDER THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS IN LIGHT OF THE NUMEROUS AGGRAVATING FACTORS PRESENT IN THIS CASE.

As reflected by the Report of Referee, the numerous aggravating factors in this case clearly outweigh the mitigation cited in Respondent's Initial Brief. These factors, enumerated in

Section 9.2 of the Florida Standards for Imposing Lawyer Sanctions and supported by evidence in the record, are as follows:

Dishonest or Selfish Motive

Respondent used $10,000.00 in client funds to pay operating expenses. T I 79-80. He retained a $10,000.00 fee that should have been deposited into a special trust account pursuant to this court's order of temporary suspension. T I 94-96. He also collected over $700.00 in unsubstantiated costs from Frances Carney, a personal injury client. T I 64. Further, he falsely certified his residency within the jurisdiction of the U.S. District Court for the Southern District of Florida in an effort to evade his creditors. T I 88-89; TFB Ex. 8. Each of these actions reflects a dishonest or selfish motive.

Pattern of Misconduct

The foregoing actions by Respondent, all involving a selfish motive, clearly establish a pattern of misconduct by Respondent. However, those are not the only times Respondent engaged in repeated violations of the same nature. The record is clear as to Respondent's neglect of client cases: he failed to act diligently in the Webb foreclosure (T I 89-98), the Clark bankruptcy (T I 43-47), and the Williams probate matter (Responses R-FF-78,526).

Respondent's conduct also evidences a pattern of deception: he lied to the Referee about the fees he had received after being temporarily suspended by this court (T I 94-96); he, or somebody in

his office with his approval, forged the Lucas' signatures on a bankruptcy petition without their knowledge or consent (T I 85-86); and he filed a false trust accounting certificate with The Florida Bar (T I 78-79).

Multiple Offenses

Respondent has been charged with more than 10 separate rule violations involving three distinct areas: trust accounting procedures, neglect of client matters, and dishonest conduct. Pursuant to Section 9.2(d), Florida Standards, the Referee properly took into account the widespread nature of Respondent's misdeeds when recommending discipline.

Bad Faith, Obstruction of Disciplinary Proceeding

Respondent engaged in "bad faith obstruction of the disciplinary proceeding" by intentionally failing to comply with an order of this court that required him to deposit all incoming fees into a special trust account upon his suspension from the practice of law. T I 94-96. Respondent did not admit to taking the fee until confronted by The Florida Bar. T I 96.

False Statements During Disciplinary Proceeding

Respondent compounded his obstruction of the disciplinary proceedings by lying under oath to the Referee appointed by this court to conduct a hearing on the temporary suspension. T I 94-96. This, too, is an aggravating factor under the Florida Standards.

Indifference to Making Restitution

Respondent misappropriated $10,000.00 from his trust account over a period of several months in 1989. T I 79-80. The money was not even partially replaced until 1991, almost two years after it was first taken. Response F-78,881; T II 10. Respondent also failed to make timely restitution in the Marlow Jones and Frances Carney personal injury matters. T I 64; T I 86-88. In all instances, Respondent took steps to make restitution only after Florida Bar involvement. Accordingly, the Referee properly found that Respondent showed an indifference to making restitution.

Lack of Remorse

At the time of final hearing, almost a year and a half after Respondent was served with a subpoena for his trust account records, he still had not produced enough records for a complete audit of the account to be accomplished. T I 65. Additionally, he lied under oath to the Referee after this court suspended him for misappropriating client funds. T I 94-96. Far from being the conduct of a remorseful attorney, Respondent's actions demonstrate a complete disregard for his clients, The Florida Bar, the Referee, and this court.

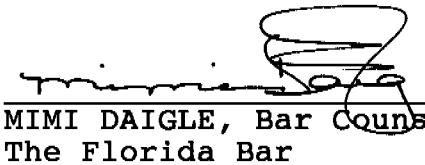
The repeated and widespread nature of Respondent's misconduct belies his assertion on page 35 of the Initial Brief that the charged offenses are "completely out of character." The misappropriation of client money was not a single, isolated event but involved several dips into the trust account over an extended

period of time. T I 80. Additionally, Respondent's misrepresentation to the Referee at the temporary suspension hearing was not corrected by Respondent himself but came to light only after The Florida Bar discovered the unreported fee months later. T I 96. Thus, the Referee, who observed Respondent testify at final hearing, properly found that Respondent lacks credibility and integrity and is not fit to remain a member of this profession.

CONCLUSION

For the reasons cited herein, this court should sustain the Referee's findings of fact, approve the recommendations of guilt, and order that Respondent be disbarred for five years and be required to make restitution to those injured by his actions. Additionally, a lien should be granted against Respondent's earned fees for costs incurred by The Florida Bar in bringing these proceedings.

Respectfully submitted,



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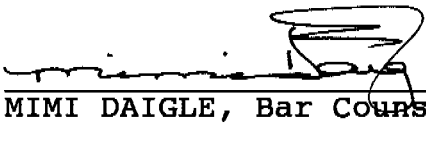
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief regarding Supreme Court Case Nos. 78,526 and 78,881 has been hand-delivered to JOHNNY F. SMILEY, Respondent, c/o JOHN A. WEISS, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32302-1167, this 23rd day of October, 1992.



MIMI DAIGLE, Bar Counsel