IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NO. 78,526
CASE NO. 78,881

JOHNNY F. SMILEY,

Respondent.

_____/

RESPONDENT'S INITIAL BRIEF

John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, Florida 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, JOHNNY F. SMILEY, the Appellant in these proceedings will be referred to as Respondent or as Mr. Smiley. Complainant/Appellee will be referred to as The Florida Bar or the Bar.

References to the transcript of the first day of final hearing on April 6, 1992 will be by the symbol TI followed by the appropriate page number. References to the transcript of the second day of final hearing on April 7, 1992 will be by the symbol TII. References to the exhibits will be by the symbol EX followed by the number in which it was received into evidence.

All references to the Report of Referee will be by the symbol RR followed by the relevant page number and, if appropriate, the paragraph.

STATEMENT OF THE CASE AND OF THE FACTS

This is a matter of original jurisdiction before the Supreme Court of Florida pursuant to Article V, Section 15 of the Constitution of the State of Florida.

Upon motion for temporary suspension filed by The Florida Bar, Respondent was temporarily suspended from the practice of law by the Supreme Court of Florida effective May 23, 1991 in case number 77,731. Respondent subsequently asked the Supreme Court to lift the freeze order on sums received from his past practice of law. A hearing on that request was held before the referee on June 27, 1991 (EX 11). Respondent was denied relief.

Subsequently, The Florida Bar filed two formal complaints in the Supreme Court alleging Respondent was guilty of five counts of misconduct. The first complaint, case number 78,526, charged Respondent with misappropriating $10,000.00 in trust funds from Fellowship Outreach Ministries, Inc. That organization was run by Bishop Calvin Kinsey. The second count of that complaint charged Respondent with failure to maintain proper trust account procedures.

The second complaint filed against Respondent, case number 78,881, basically charged Respondent with three counts of neglecting his clients' matters. Count I pertained to Mr. and Mrs. Earnest Clark; Count II to the estate of Charles Williams; and Count III to a foreclosure matter for Ms. Margie Webb.

In essence, Respondent admitted both counts of the first complaint and Count II of the second complaint. Counts I and III

of the second complaint were almost entirely admitted.

A. Fellowship Outreach Ministries

In January 1989, as found by the referee, Respondent represented the Greater Holy Temple of God in Christ Church, led by Bishop Calvin Kinsey, in its purchase of Fellowship Outreach Ministries, Inc. (Fellowship) from the First Coast Baptist Church. The sole asset of Fellowship was real estate in Jacksonville. Closing on the sale occurred on January 26, 1989 and on January 27, 1989 Respondent received $10,000.00 in trust for the benefit of Bishop Kinsey and his organization. TR I, 62.

The $10,000.00 entrusted to Respondent was to cover anticipated tax liabilities owed by First Coast that were incurred prior to the sale of Fellowship. Ultimately, it was determined that First Coast had over $15,000 in tax liabilities assumed by Bishop Kinsey's organization. TR I, 112-113. If the $10,000 was not entirely used for the payment of Fellowship's taxes, Respondent was to refund the difference to First Coast.

Respondent, a sole practitioner, was experiencing extreme financial difficulties in early 1989, due in part to his activities as president of the Perkins Bar Association and his representation of one of twenty-two co-defendants in federal criminal proceedings dubbed the Miami Boys case. That case resulted in a six-week criminal trial in spring 1989. As a result of Respondent's problems, he withdrew the money held in trust for Bishop Kinsey from his trust account over several months to cover rent and telephone bills.

In early December 1990, Bishop Kinsey received a tax notice dated December 3, 1990 for delinquencies owed by Fellowship for taxable year 1987 amounting to $5,000.00 plus $53.01 in penalties. Bishop Kinsey does not remember if he gave that notice to Respondent or to Ms. Huey, a CPA hired by Bishop Kinsey (at Respondent's recommendation) to handle the tax matters. EX 5, 16,17. Respondent testified that the December 3rd notice that he saw in late December 1990 was the first tax notice that he received regarding the Fellowship's tax liability. TII, 9,10. Everett Williams, the lawyer that replaced Respondent in the representation of Bishop Kinsey, testified that the first notice that he saw was a similar notice dated December 30, 1990. TI, 113.

Upon receipt of the $5,053.01 tax delinquency notice, Respondent immediately borrowed funds from a fellow lawyer and on February 7, 1991 wrote out a check to the IRS in that amount for the benefit of Bishop Kinsey. TII, 8,10. That same day Everett Williams called and asked Respondent to keep the check until Mr. Williams determined if the funds were, in fact, owed. TI, 103,104; TII, 11. Subsequently, Mr. Williams and Respondent met and Respondent advised Mr. Williams of the purpose of the $5,000.00. TI, 105; TII, 12-13.

After his meeting with Mr. Williams, Respondent disbursed the $5,053.01 to the IRS. His check cleared on March 11, 1991. TII, 9.

Mr. Williams' inquiry on February 7, 1991 was the first time that Respondent had been contacted by that individual regarding

paying the $5,000.00. TII, 11,12.

When Respondent was contacted by The Florida Bar regarding the $10,000.00, he immediately went to Bishop Kinsey (who had not filed a grievance) and apprised him that all of the Fellowship's funds were not in trust. EX 5, 19. When Bishop Kinsey asked Respondent what he should say should he be contacted about the matter, Respondent told him to tell the truth. EX 5, 21,36,37.

Ultimately, the Fellowship paid an additional $10,000.00 in taxes owed prior to Bishop Kinsey buying that entity. The 1987 taxes were not included in that figure. Had it not been for Respondent's payment of the $5,053.01, $15,000.00 would have been levied from Bishop Kinsey's accounts instead of $10,000.00. TI, 112-113.

At the time of the $10,000.00 levy, Respondent had approximately $4,950.00 in trust funds that he was willing to disburse to Bishop Kinsey. However, the freeze order on his trust account prevented him from disbursing the funds. TII, 14.

B. Record Keeping Violations

Based primarily on Respondent's admissions, the referee found that Respondent's trust account record keeping procedures did not comply with the Rules Regulating The Florida Bar. The referee found that Respondent did not maintain client ledger cards, monthly trust comparisons and case receipts and disbursement journals. Several of his bank statements were missing and his deposit slips did not fully identify the source of the funds received or the purpose for which they were deposited. Respondent also, on

occasion, disbursed money from trust against uncollected funds. In at least one instance, a $5,000.00 deposit into his trust account bounced after he disbursed against those funds. EX 11 45.

The Florida Bar's auditor agreed on cross examination that Respondent's trust account records were in shambles. TI, 69,70.

The Bar's auditor also testified that Respondent was "cooperative", never barred access to records, allowed employees to openly discuss matters with him and that Respondent himself was accessible. TI, 74.

Records requested by The Florida Bar's auditors were, in some cases, not available because the storage company maintaining those records would not release them to Respondent because of past-due amounts owed. TII, 46.

Respondent testified that nobody ever taught him trust account procedures in either law school and after he became a sole practitioner upon admission to The Florida Bar. TII, 38.

C. The Clark Bankruptcy Proceedings

On or about December 1, 1989, Mrs. Clark retained Respondent to file bankruptcy proceedings on behalf of her and her husband. At that time she paid him $300.00. The only asset the Clarks were seeking to protect was their house. TI, 53.

After retaining Respondent, but before he filed, a final judgment of foreclosure was entered against the Clarks in Circuit Court. When Ms. Clark received notice of the judgment and learned that a foreclosure sale was set for January 5, 1990, she called Respondent's office and spoke with his secretary, Charlotte. TI,

44,45. Unfortunately, Charlotte never told Respondent about the judgment of foreclosure and the impending sale. TI, 47; TII, 18. On January 5, 1990, Ms. Clark's house was sold at public sale. She advised Respondent of that development on January 8th and the next day, Respondent filed her bankruptcy proceedings. TII, 17,18; TI, 42.

Respondent testified that his filing of bankruptcy proceedings was within the ten day grace period afforded homeowners after public sale. After filing the bankruptcy, Respondent worked out an agreement with the lawyer representing the creditor to the effect that if Ms. Clark caught up on her arrearages within 30 days, her mortgage would be reinstated. Unfortunately, Ms. Clark was unable to satisfy the work-out agreement. TII, 18,19; TI, 50.

Respondent testified that even under bankruptcy proceedings, Ms. Clark's new mortgage payments would have been more than her old payments had been. The testimony was uncontroverted that Ms. Clark had been unable to make her past payments, let alone the new increased payments. TII, 20; TI, 55.

Ms. Clark was never actually evicted from her premises. She currently lives there as a tenant. TI, 52.

D. Williams Estate

Count II of the second complaint filed pertained to Respondent's being retained to probate the estate of Hugh James Williams by his son, Charles, in Duval County. On August 4, 1988, Respondent filed a petition for administration. After filing the oath of personal representative and designation of resident agent

on December 12, 1988, Respondent took no significant action on the estate resulting in it being dismissed on January 9, 1991.

Respondent testified that the only asset in the Williams estate was a Cadillac that Charles Williams wanted. Unfortunately, neither the son or the Williams family could maintain the car payments on the Cadillac, so it was repossessed. TII, 21. Subsequently, Respondent lost contact with his client.

E. Margie Webb

Count III of the second complaint charged Respondent with neglecting a foreclosure matter on behalf of Margie Webb.

On February 8, 1989, Ms. Webb retained Respondent to foreclose on a house on which she held a mortgage given by Clarence Mims. Ms. Webb ultimately paid Respondent $1,162.50 towards fees and costs for the foreclosure. Of that sum, $462.50 was received by Respondent to cover enumerated anticipated costs ($67.50 filing fee, $120.00 service of process, $200.00 publication, $75.00 injunctive fee). Those funds were delivered to Mr. Smiley under cover of letter dated March 21, 1989. TI, 21,22.

In June 1989, through Respondent's efforts, an agreement was reached between Mr. Mims and Ms. Webb wherein he would reinstate his mortgage by making payments of $440.00 per month. After making an initial payment in the amount of either $400.00 or $440.00, Mr. Mims reneged on the deal. (The referee found that Respondent received $440.00 from Mr. Mims and only forwarded $400.00 of those funds to Ms. Webb. RR 6, par. 7.C. Respondent testified that he only received $400.00 from Mr. Mims and that he forwarded that sum

to Ms. Webb. TII, 26,27. The referee included the $40.00 in her recommendation that restitution be given to Ms. Webb).

On October 27, 1989, Respondent met with Ms. Webb to discuss the foreclosure. On that date she delivered to him an additional $300.00 in fees and costs. Three days later, Respondent filed the foreclosure action. TI, 29-32. In the spring of 1991, foreclosure was completed and Ms. Webb received her certificate of title. TII, 31.

Respondent testified that one of the major problems with the Webb foreclosure was effecting service on the ten or eleven lienholders. Included amongst those lienholders was the Internal Revenue Service. Also, once Mr. Mims moved, Respondent had difficulty obtaining service on him. Ultimately, service was obtained by publication at an approximate cost of $800.00. TI, 91-93; TII, 25,29.

There was no showing of any prejudice to Ms. Webb.

On page six of her report, in paragraph 7.E, the referee found during their October 27, 1989 meeting, Respondent assured Ms. Webb that he had filed the foreclosure action when, in fact, it was not filed until three days later. There is no evidence supporting that statement. Ms. Webb testified that

> He told me he was going to file or had filed. I don't remember. But it supposedly had been filed before this. TI, 30.

Ms. Webb did not specifically remember whether Mr. Smiley stated that he had already filed the foreclosure action when they met on October 27, 1989. Unfortunately, Respondent was precluded

from cross-examining Ms. Webb on this point because she became ill during testimony and Respondent's counsel waived cross-examination.

Respondent was adamant in his testimony that he never told Ms. Webb that he filed her action before it was actually filed. TII, 28.

F. Post-Order Proceedings

By order of this Court dated April 23, 1991, Respondent was temporarily suspended from the practice of law effective May 23, 1991. The order required Respondent to deposit into a special trust account all sums that he received from the practice of law. Respondent asked for a modification of the order and it was assigned to a referee for hearing.

On June 27, 1991, a hearing was held on modification proceedings. During that hearing, Respondent testified that he had approximately $14,800.00 in his regular trust account and his special trust account and that those funds were sufficient to cover all trust liabilities. Included in those funds were two fee payments amounting to $5,300.00. EX 11, 20-22. Respondent improperly testified that all funds received from the practice of law since his order of suspension had been deposited into his special trust account. In fact, Respondent had received approximately $10,000.00 from the Federal Government as payment for past representation in a court-appointed matter. Those funds were deposited into a personal account set up by Respondent on May 6, 1991. TI, 95,96. Respondent candidly acknowledged the impropriety of his conduct before the referee. TII, 96.

Both before and after the $10,000.00 deposit mentioned above, Respondent deposited all other receipts into the special trust account unless The Florida Bar waived that requirement. Included within the deposits were a $46,000.00 check received in July, 1991 which was immediately deposited into his special trust account. Ultimately, the Bar approved Respondent disbursing $23,000.00 of those funds to himself.

At final hearing, Respondent had approximately $26,000.00 in his two trust accounts. TII, 47. In addition to the $46,000.00 previously discussed, Respondent also deposited approximately $5,000.00 in his special trust account in September 1991. TII, 49. The Bar has also authorized him to receive funds in the amount of approximately $246.00 and $375.00. TII, 50. There is no evidence that other than the $10,000.00 check, Respondent has not properly complied with the Supreme Court's order of suspension.

SUMMARY OF ARGUMENT

In drafting her report, the referee in these proceedings drafted a report that was extremely one-sided. She either ignored or glossed over substantial mitigation and emphasized unduly the aggravating factors present.

In Point I of his argument, Respondent has pointed out numerous instances where the referee made findings, either pertaining to the specific allegations or as aggravation, that were clearly erroneous or were wholly unsupported by any evidence whatsoever. These findings give an erroneous impression of the extent of Respondent's misconduct and they should not be adopted

by the Court.

In her recommendations as to whether Respondent should be found guilty or not, the referee found that Respondent charged an illegal or clearly excessive fee to the Clarks and that he engaged in criminal misconduct. Both recommendations should be rejected.

Respondent earned the $590.00 paid to him by Mr. and Mrs. Clark despite the fact that they lost their home. In fact, some of those funds were filing fees that Respondent expended on their behalf. There was no testimony in the record that Respondent's fees were clearly excessive. In fact, the record is undisputed that Respondent did, in fact, file the Clarks' bankruptcy and that he succeeded in obtaining a redemption period during which they could have reinstituted their mortgage. Their financial inability to make up the arrearages on their mortgage resulted in their being foreclosed upon.

Respondent has never been convicted of criminal misconduct. In fact, he has never even been charged with such. Accordingly, the referee's recommendation that he be found guilty of engaging in a criminal act should not be accepted.

In Point III of his brief, Respondent objects to the referee recommending that Respondent pay restitution to the Clarks and to Ms. Webb. In fact, Respondent earned any fees that he gleaned from both cases. In Ms. Webb's case, Respondent expended over $860.00 of the $1,160.00 that he received on out-of-pocket costs. The remaining $200.00 that he earned in obtaining her certificate of title for her should not be refunded.

The Rules Regulating The Florida Bar in effect at the time of final hearing did not give the referee authority to order restitution. Furthermore, there was no evidence before the referee that the fees received on the Clark and Webb matters were improper, let alone clearly excessive.

In Point IV, Respondent asks the Court to reject the referee's imposition of a lien against the proceeds in Respondent's trust accounts over and above that required to protect his clients' interests. Temporary and emergency suspension freeze orders should be limited exclusively to protecting clients' welfare. It should not be used to give The Florida Bar priority over Respondent's other creditors.

Finally, Respondent objects to the referee's recommendation that he be disbarred. A two year suspension, followed by three years probation is the appropriate discipline to be imposed when all mitigating factors are taken into consideration. Among those factors are Respondent's exemplary history of hard work and community involvement; the character testimony by his fellow practitioners, his past clients and his pastor; and the circumstances under which Respondent found himself at the time he took Bishop Kinsey's money.

In the spring of 1989, Respondent was a sole practitioner who had taken on more work and community activities than he could handle. His presidency of the Perkins Bar Association, his being co-counsel in a complicated federal criminal case, ultimately resulting in a six-week trial, and his taking on myriad clients

with little or no funds, resulted in his having virtually no funds to pay his rent, telephone bills and other expenses. Respondent had no recourse to lending institutions and was unable to borrow funds. While Respondent recognizes the propriety of discipline, his prior good works and his character are such that a long-term suspension rather than disbarment is the appropriate penalty to impose.

ARGUMENT

POINT I

PORTIONS OF THE REFEREE'S FINDINGS OF FACT ARE WHOLLY WITHOUT EVIDENTIARY SUPPORT AND SHOULD BE DISREGARDED BY THIS COURT.

The Florida Bar is required to prove misconduct by clear and convincing evidence The Florida Bar v Rayman, 238 So.2d 594 (Fla. 1970). Generally, The Florida Bar's burden in this case was made easy by Respondent's wholesale admissions to most of the allegations against him. In many instances, however, the referee made factual findings that had no support in the Bar's evidence or Respondent's admissions or testimony. Respondent submits that those findings of fact, challenged below, are wholly without support in the evidence and should be rejected. The Florida Bar v Wagner, 212 So.2d 770 (Fla. 1968).

A. THE REFEREE IMPROPERLY FOUND THAT RESPONDENT DELAYED REIMBURSEMENT OF BISHOP KINSEY'S FUNDS.

The referee improperly found the Respondent delayed reimbursement of Bishop Kinsey's funds.

On page two of her report at paragraph II.3.D the referee

gives the impression that Respondent delayed the payment of the $5,053.01 assessed against the Fellowship in December 1990. The referee refers to "numerous requests" by one of the sellers for the return of the $10,000.00 and states that Respondent "finally replaced $5,053.01" on February 7, 1991 "after inquiry was made by the seller's new attorney". 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. TI, 22; TII, 15.

Reverend Baker, representing the First Coast Baptist Church, did ask for a return of the $10,000.00. EX 4, 31. In fact, it would have been grossly improper for Respondent to have refunded that $10,000.00 to Reverend Baker or to the First Coast Baptist Church. Ultimately, the Fellowship ended up paying $15,000.00 for taxes accrued prior to the First Coast Baptist's sale in January 1989. TI, 112,113.

The referee's use of the word "finally" in that paragraph regarding the payment of the $5,053.01 to the IRS is a clearly misleading adjective. Mr. Smiley testified that the first notice that he got of the IRS levy was the December 3, 1990 notice for $5,053.01 that was delivered to him in late December 1990. TII, 9,10. Before he received any request from any lawyer, he cut a check to the IRS for that amount. Respondent was in the process of mailing the check on February 7, 1991, when Everett Williams, the Fellowship's new lawyer, called and asked Respondent not to mail the check. TI, 103. 103,104; TII, 11. Mr. Williams

admittedly did not understand the purpose of the $10,000.00 at the time he requested the check to be held.

Ultimately, Respondent convinced Mr. Williams that the funds should be immediately disbursed to the IRS and Respondent then paid the $5,053.01 assessment. His check cleared on March 11, 1991. TII, 11-13; TI, 105.

The referee is clearly erroneous when she found that Respondent did not send the money to the IRS until after inquiry was made by the "seller's new attorney". Respondent was never contacted by a lawyer for the seller. Even if the referee meant to say the buyer's (Bishop Kinsey) new attorney, the money was on its way to the IRS before Mr. Williams called. And then, the call was not to inquire as to whether or not Respondent had paid the money, but to keep him from mailing it.

As is consistent throughout her findings, the wording of the aforementioned paragraph is designed to give this Court the impression that Respondent was repeatedly asked to return the $10,000.00 when, in fact, that is contrary to the evidence. The use of the word "finally" gives the impression that Respondent delayed the payment of the $5,053.01 when, in fact, such is not the case. Finally, the referee gives this Court the impression that the money was paid only after inquiry was made by the seller's new attorney when the money would have been sent without any such inquiry.

There is no evidence that, other than the seller's numerous improper attempts to get the $10,000.00 back, that Respondent has

ever delayed the payment of any obligations covered by the $10,000.00. Within five weeks of the receipt of the December 3, 1990 levy, Respondent was prepared to pay $5,053.01 to the IRS on behalf of the Fellowship. That payment was delayed for several weeks only the request of Bishop Kinsey's new lawyer.

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

The referee's findings that Respondent's actions caused the Clarks to lose their home is clearly erroneous. RR 4, par. II 5.G.

Simply stated, the Clarks lost their house because they were constantly behind on making their mortgage payments and because they could not make up the arrearages in the 30 day work-out period arranged by Respondent with the lawyer holding the Clarks' mortgage. Even had bankruptcy proceedings forestalled the foreclosure, the Clarks payments would have increased while they made up the arrearages. In light of the fact that they had been unable to make the lesser payments in the past, there is nothing in the record to indicate they could have made the new payments.

The Clarks lost their house because they could not afford it. They did not lose it because of any action or inaction by Respondent.

Foreclosure proceedings were brought against Ms. Clark on November 2, 1989. Notwithstanding the seriousness of the matter, she did not meet with Mr. Smiley until late November or early December 1989. After retaining Respondent, but before he filed her petition in bankruptcy, Ms. Clark received a judgment of

foreclosure dated December 12, 1989 and indicating a public sale of her house was set for January 5, 1990. TI, 40,44,45. Ms. Clark called Respondent's secretary and advised her of the new turn of events. TI, 46.

After the public sale of her house, Ms. Clark called Respondent and learned that he did not know of her prior message. TI, 47; TII, 17,18. The next day, January 9, 1990, Respondent filed bankruptcy proceedings on behalf of the Clarks. His actions were within the ten day grace period allowing redemption after a public sale. TII, 18,19.

Respondent worked out an agreement with the mortgage holder's lawyer to the effect that Ms. Clark had 30 days to catch up on her arrearages. TII, 19; TI, 50. Unfortunately, she was unable to come up with the money.

Ms. Clark has never been evicted from the premises. TI, 53.

The order lifting Ms. Clark's stay due to bankruptcy proceedings was entered on February 5, 1990 and was not filed in Circuit Court until February 14, 1990. TI, 51. Accordingly, she had in excess of 30 days to redeem her mortgage. She acknowledged that she had frequently been behind in the payments on her house in the past. TI, 55.

Respondent testified that even had her house been protected in bankruptcy, Ms. Clark's new mortgage payments would have been higher than the old payments with which she had been unable to keep up. TII, 20.

The referee's findings that Mr. Smiley's failure to

"communicate clearly" with Mr. and Mrs. Clark "caused them to lose their home" is clearly erroneous.

C. THE REFEREE IMPROPERLY FOUND THAT RESPONDENT ASSURED MS. WEBB THAT HER FORECLOSURE HAD BEEN FILED BEFORE HE, IN FACT, FILED IT.

Other than a bare allegation in the Bar's complaint, there is nothing in the record before this Court supporting the referee's finding on page six, paragraph II 7.E that "at their October 27, 1989 meeting, Mr. Smiley 'assured' Ms. Webb that he had already filed her foreclosure action". While all parties agree that the foreclosure was filed on October 30, 1989, nobody testified that Respondent assured Ms. Webb that it was already filed when they met on October 27th.

Ms. Webb's testimony is, at best, inconclusive. She testified before the referee at final hearing that she visited Respondent at his office on October 27, 1989 because of her difficulty reaching him on the phone. Her testimony was as follows:

> A. I just wanted to find out when it was going to end or what, and he told me he was going to file or had filed. I don't remember, but it supposedly had been filed before this.
>
> Q. Do you recall at that meeting on October 27, 1989 whether he indicated to you it had been filed.
>
> A. I think he sent me some papers that I have at the house that he had sent me that he filed, but there was no number, no number from the courthouse and I didn't know.
>
> Q. Do you recall when you received those documents in the mail?
>
> A. Not really, not a specific time.

Q. Would it have been before or after the meeting?

A. This was after that I was here with this.

Q. Did you receive the documents before your meeting in October?

A. After.

Q. You received the documents in the mail after your meeting of October 27, 1989?

A. Yes. TI, 30,31.

At best, Ms. Webb does not remember if Respondent had told her that he had filed foreclosure proceedings before their meeting on October 27, 1989. A lack of recollection does not fulfill the Bar's burden of proving misconduct by clear and convincing evidence. Rayman, Supra. Her initial confusion is clarified by her subsequent testimony that she received the foreclosure papers after their meeting on October 27, 1989. TII, 30,31.

Respondent's testimony is unequivocal. He testified that he never told her he had filed her foreclosure proceedings before he had, in fact, filed them. TII, 28.

There is no record testimony that Respondent "assured" his client that he had filed her foreclosure action before he actually did so.

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

This finding is nothing more than an assumption by the referee. RR 11. In so finding, the referee ignored the testimony before her and relied exclusively upon a single, unverified motion

filed in Respondent's bankruptcy case. EX 8. That motion was not even backed up by bringing its author in to testify.

The evidence is unrebutted that Respondent was actually residing in the Southern District, Florida when he filed his bankruptcy. TII, 61. Accordingly, the referee's finding that he "falsely certified" his residency in the Southern District is false.

Respondent testified that he filed his bankruptcy in the Southern District, Florida before he had lived there 90 days upon the advice of a Jacksonville referee in bankruptcy. TII, 61. Although he had not yet met the 90 day venue requirement, the referee advised him that if no one challenged the venue, it would have been an acceptable filing. TII, 61,62. Venue can be waived.

There is absolutely no evidence in the record whatsoever that Respondent did not duly notify all of his creditors of his bankruptcy petition. The referee has leaped to an incredible assumption in her finding that Respondent filed in the Southern District, Florida in an attempt to "evade" his creditors. If there is any single finding by the referee that shows her lack of impartiality and evenhandedness, it is this finding.

The mere fact that one of Respondent's creditors did, in fact, object to the filing shows that Respondent notified them of the filing.

After the 90 day period had elapsed, Respondent did, in fact, refile his petition in the Southern District, Florida. TII, 63. That filing was perfectly proper.

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

At final hearing, over repeated objection, the referee accepted into evidence an affidavit from the Lucases alleging misconduct on Respondent's part. Because that grievance was still pending before the grievance committee, Respondent objected to its admission into evidence. An additional objection was the fact that, in the case of other witnesses who were unavailable for trial, telephone depositions were taken. In the case of the Lucases, without any warning to adverse counsel, the Bar submitted their unsubstantiated affidavit as proof of misconduct. TI, 83-85.

Respondent respectfully suggests that to the extent that Respondent's testimony contradicts that given in the Lucases' affidavit, his testimony, which was subject to cross-examination, should prevail.

At page twelve of her report, the referee specifically pointed to Respondent's conduct in the Lucas case as an aggravating factor. As was done in every instance throughout the case, the referee completely disregarded Respondent's testimony and accepted Ms. Lucases' affidavit as gospel. The referee even disregarded the Bar's own position when she determined that Respondent "permitted the bankruptcy action to be dismissed." In fact, as acknowledged by the Bar, the Lucas petition was dismissed by the trustee for Mr. Lucases' failure to appear at a 341 meeting of creditors. TI, 85; TII, 86.

By using the word "permitted" the referee would have this Court believe that impropriety on Respondent's part resulted in the first Lucas petition being dismissed. In fact, it was dismissed through no fault of Respondent's. Mr. Lucas was called up for duty in the Persian Gulf; that was the reason for the dismissal.

The referee completely disregarded Respondent's testimony that, as a result of his efforts, a creditor who had repossessed the Lucases' car was ordered to return the car together with compensation to the Lucases for their having to lease a rental car. TII, 33,34.

The referee also totally disregarded Respondent's explanation for his refiling the Lucases petition, without cost to them, after it was dismissed for Mr. Lucas' failure to appear. Respondent testified that he refiled the petition promptly in an effort to insure that the creditor that had previously repossessed the Lucases' car would not do so again. TII, 34. There was no improper motive in Respondent's conduct. He was merely protecting his clients' position.

While, technically, Respondent improperly signed his client's name on a pleading, it certainly does not constitute an aggravating factor or show a lack of integrity. In fact, Respondent acted promptly and for his clients' benefit when he refiled their petition after a questionable dismissal of the Lucas petition.

F. THE REFEREE IMPROPERLY FOUND THAT RESPONDENT HAS SHOWN A LACK OF COOPERATION WITH THE FLORIDA BAR BY FAILING TO PRODUCE HIS TRUST ACCOUNT RECORDS.

The referee found that Respondent failed to cooperate with The

Florida Bar despite the fact that such a finding contradicted the Bar's auditor's testimony.

Clark Pearson, the Bar's auditor who spent 70 hours reviewing Respondent's files, characterized Respondent's attitude as "cooperative". TI, 74. Respondent never hindered Mr. Pearson's access to Respondent's office or staff. Respondent was accessible to Mr. Pearson during the audit procedure. TI, 74.

The referee specified that Respondent showed a lack of cooperation by failing to produce trust account records. In so doing, she blithely ignored Respondent's testimony that he was physically unable to get his records. The individuals owning the storage facility in which Respondent's files are stored will not release the files until he pays back rent owed. TII, 46.

Rather than finding that Respondent was unable to produce his records because of an inability to do so, the referee has mischaracterized the testimony of both the Bar's auditor and Respondent by finding that he failed to cooperate. She then considered this an aggravating factor.

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

The referee on page thirteen stated that Respondent "has shown an indifference to making restitution." In fact, nothing could be farther from the truth. The referee points to two instances of accounting errors as proof of indifference to making restitution and ignored the dozen other instances where Respondent either promptly made restitution or had the funds available had The

Florida Bar permitted him to disburse them. Bishop Kinsey's $5,053.01 was paid promptly when Respondent received a tax bill. The remaining $4,947.00 has been available for disbursal since spring, 1991. Respondent has worked closely with The Florida Bar in insuring payment of restitution, undisbursed trust funds or refund of fees throughout disciplinary proceedings. Yet, the referee chose to ignore all of those factors and focus in on the Jones and the Carney matter.

Rather than showing an indifference to restitution, the referee should point out as a mitigating factor that Respondent stipulated with The Florida Bar to disburse to Ms. Carney $968.41 as unsubstantiated costs. Notwithstanding the fact that there is no proof that those costs were improper other than the Bar's auditors statement that his review of the old, closed file revealed no justification for them. The referee found they were clearly excessive costs. The Respondent's willingness to refund the costs as a gesture of good faith backfired on him.

In the Marlow Jones case, the referee completely ignored Respondent's testimony that he performed numerous services for Marlow Jones in criminal matters after the personal injury case for no fee.

POINT II

THE REFEREE IMPROPERLY RECOMMENDED THAT RESPONDENT BE FOUND GUILTY OF CHARGING AN ILLEGAL OR CLEARLY EXCESSIVE FEE AND THAT HE ENGAGED IN CRIMINAL MISCONDUCT ALTHOUGH CRIMINAL CHARGES HAVE NEVER BEEN FILED.

A. The Clark Clearly Excessive Fee

On page nine of her report, as to Count I of the second complaint, the referee recommended that Respondent be found guilty of entering into an agreement for, charging or collecting an illegal, prohibited or clearly excessive fee in his representation of the Clarks. Her recommendation is not supported by the evidence.

The referee found that the Clarks paid Respondent $590.00 and ordered restitution of that fee. RR 4. In so doing, she completely ignored the fact that Respondent paid the filing fee for the Clarks' bankruptcy (either $90.00 or $120.00) and that, as a result of his services, a work-out arrangement was reached with the creditor's lawyer. TI, 50; TII, 19. Respondent's filing of the Clark bankruptcy petition during the ten day grace period gave them the potential for redeeming their house. They were unable to do so, not because of any of Respondent's actions, but because they simply could not afford to come up with arrearages on their mortgage.

There was no evidence submitted by The Florida Bar showing that Respondent's $500.00 or so in fees were clearly excessive. No expert so testified. Absent such a showing of proof, The Florida Bar has not met its burden by clear and convincing evidence, Rayman, Supra, and the referee's recommendation on this point should not be accepted.

B. Criminal Misconduct

The referee in several instances has recommended that Respondent be disciplined for engaging in conduct involving a

criminal act contrary to Rule 4-8.4(b). Respondent urges this Court to reject all such findings. Respondent has never been charged with a crime nor has he been found to have engaged in criminal conduct. Before an individual can be considered guilty of a criminal act, he or she must first have either pled to it or the state must prove criminal conduct beyond and to the exclusion of a reasonable doubt. That standard is higher than the clear and convincing standard in Florida Bar disciplinary proceedings.

Absent a conviction or a plea to criminal misconduct, Respondent respectfully suggests that a finding that a respondent has committed a criminal act is inappropriate. Any other holding runs afoul of the spirit of this Court's ruling in DeBock v State, 512 So.2d 164 (Fla. 1987). There, this Court emphasized that lawyers could not invoke the fifth amendment privilege in disciplinary proceedings because Bar proceedings were remedial rather than penal.

Allowing referees to find that criminal conduct has occurred in civil disciplinary proceedings comes dangerously close to blurring the distinction between penal, criminal proceedings and remedial disciplinary proceedings. If rights afforded the criminal accused, such as claiming the Fifth Amendment, the exclusionary privilege for illegally seized material and completely relaxed evidentiary rules, are to be denied lawyers in grievance cases, this Court must be diligent in keeping a clear line between criminal and Bar disciplinary proceedings.

Allowing a referee to recommend that a lawyer has engaged in

criminal misconduct without it first being admitted or proved in criminal proceedings is a dangerous step with severe due process implications.

POINT III

THE REFEREE IMPROPERLY RECOMMENDED THAT RESPONDENT PAY RESTITUTION TO THE CLARKS AND TO MRS. WEBB.

With the exception of a casual aside at the conclusion of closing argument, the Bar never asked for restitution. TII, 104. Notwithstanding the fact that there was no evidence before the Court indicating that restitution was appropriate, the referee recommended that Respondent refund all funds received from Ms. Webb, i.e., $1,202.50 (including $40.00 that Respondent allegedly "short-changed" her), RR 7 and from the Clarks, ($590.00), RR 4.

As argued above in Point II, Respondent earned the $590.00 in fees and costs that he received from the Clarks. He paid their filing, he obtained for them a grace period under bankruptcy protection and he arranged a work-out agreement for them to redeem their mortgage. The fact that they were unable to do so does not warrant the refund of Respondent's fees and his out-of-pocket costs.

Ordering restitution to Ms. Webb is basically the referee's opinion that Respondent should have done all work for Ms. Webb for free. Despite the fact that the case did not proceed as quickly as one would have hoped, Ms. Webb did, in fact, get her property. TII, 31. Furthermore, Respondent had to expend approximately $800.00 on publication costs in addition to a $62.50 filing fee to

complete the foreclosure.

There is simply no basis for ordering a refund to Ms. Webb of her funds. In fact, Respondent netted less than $200.00 in fees for getting her certificate of title.

Respondent would point out to the Court that, prior to July 23, 1992, there was no provision in the Rules Regulating The Florida Bar for a referee to order restitution of fees. In re The Florida Bar, Case No. 79,288 (July 23, 1992). On that date, this Court adopted a new Rule 3-5.1(i), captioned Restitution. That rule for the first time authorizes a referee to order restitution after a finding that a respondent has received "a clearly excessive, illegal or prohibited fee...." Furthermore, the rule only allows restitution to the extent that the fee is clearly excessive.

There is no testimony in the record from any lawyer or other individual that Respondent's charges to the Clarks or to Ms. Webb was improper.

Without the authority of new Rule 3-5.1(i) the referee was without authority to order restitution to Ms. Clark or to Ms. Webb. The Florida Bar v Allen, 537 So.2d 105 (Fla. 1989).

Respondent would point out that new Rule 3-5.1(i) is not effective until January 1, 1993.

POINT IV

THE REFEREE IMPROPERLY RECOMMENDED THAT A LIEN BE IMPOSED AGAINST RESPONDENT'S TRUST FUNDS.

In what may be a case of first impression, the referee has ordered that a lien be placed against Respondent's trust account

and his special trust account to insure payment of the Bar's costs. The undersigned is aware of no precedent for the ruling and there is nothing in the Rules Regulating The Florida Bar authorizing such an action. If for no other reason, a failure of the Rules Regulating The Florida Bar to authorize the referee to freeze Respondent's trust accounts for the benefit of The Florida Bar is improper. Allen, Supra.

Emergency suspensions, or temporary suspensions as they were known when Respondent was first suspended without hearing, are special proceedings that should be used only when there is an apparent great risk to the public. While Respondent will not concede that a temporary suspension was appropriate in his case, it is not his purpose to challenge that ruling now. However, the temporary suspension did require Respondent to deposit his earnings into a special trust account for the benefit of any trust obligations that he may have to his clients. Towards that end, Respondent has deposited in excess of $35,000.00 of his earned legal fees into a special trust account. It now appears that there is, as Respondent has claimed throughout, a surplus in his trust account. The Florida Bar has seized upon that surplus and claims it for its own. The Bar's actions constitute a potential for abuse, is without authority, and should be rejected by the Court.

Orders freezing a lawyer's income and requiring it to be deposited into a special trust account for the benefit of unknown clients, is properly grounded on protection of the public. Respondent does not deny that such action is correct. However, to

extend that concept to protecting The Florida Bar's costs is inappropriate. First, the temporary suspension freeze order probably violated due process as written in 1991. The amendment to the rule that resulted in the new emergency suspension rule 3-5.2 probably has cured those deficiencies by allowing for prompt hearing afterwards. No such protection was available in Mr. Smiley's case. While he asked the referee to dissolve the freeze order, she chose not to do so.

There is no doubt that there is an excess in Respondent's trust account as a result of his contributions. Those deposits were earned prior to the suspension but disbursed to him after the suspension. Any such deposits should be for clients' benefit or for Respondent's use.

In essence, The Florida Bar is asking this Court to give them a protected creditor status to the exclusion of other creditors of Respondent's. In other words, the Bar is asking that its status be superior to that of the public at large. This is contrary to the whole concept of protection of the public.

Absent specific authority in the Rules Regulating The Florida Bar for the referee's actions, her placement of a lien on Respondent's special trust account proceeds should be rejected.

POINT V

A TWO YEAR SUSPENSION, TO BE FOLLOWED BY THREE YEARS PROBATION, IS THE APPROPRIATE DISCIPLINE TO BE IMPOSED IN THIS CASE WHEN ALL MITIGATING FACTORS ARE TAKEN INTO CONSIDERATION.

Respondent submits that the referee ignored or glossed over substantial mitigation in the case at bar in recommending that he

be disbarred and in giving him no credit for the one year that he has already been suspended from practice. To support her recommendation the referee has overemphasized the legitimately aggravating factors present and then has added unwarranted aggravating factors to make the situation seem even worse. Examples of the latter are the referee's improper finding that Respondent falsely certified his residency in an effort to evade his creditors in bankruptcy proceedings (RR 11); his permitting the Lucases bankruptcy to be entered (RR 12); and his lack of cooperation with the Bar (RR 13).

The referee virtually ignored 65 pages of character testimony by eight reputable witnesses. Included among those witnesses were lawyers (including past and present presidents of the Perkins Bar), clients and a clergyman.

Respondent's background, community works and standing in the community and his cooperative attitude towards these proceedings, all of which is supported by the evidence, is completely inconsistent with the lawyer portrayed by the referee in her report.

Respondent was admitted to The Florida Bar in 1983 and has no prior disciplinary history. RR 10. At the time of final hearing, he had been married nine years and had three children aged eight, seven and five. TII, 59.

Respondent's background is that of a lawyer who has worked hard all of his life. Upon graduation from high school, he entered the Air Force and served in Viet Nam. He was honorably discharged

in 1968 after four years of service. During that time, he earned one and one-half years worth of college credits. In 1969, Respondent entered Jacksonville University and in 1971 received his bachelor's degree from that institution. TII, 65,66.

From graduation from college until his entry into the Franklin Pierce Law School in Concorde, New Hampshire in 1979, Respondent worked as a state, and then a federal, probation officer. He received his JD in 1982. TII, 66.

Respondent has been an active member of the community since his graduation from law He was a member of the Northwest Council of the Chamber of Commerce; he was active in the Ritz Theater district, working on the renovation of an old theater in the black community in Jacksonville; and he coached little league baseball and football. TII, 66,67.

Respondent has been very active in his church. He is currently on the board of trustees and he serves as an outreach worker. He and his wife are currently vice-president and president respectively in the district activities of their church. TII, 67,68.

Ironically, it was in-part Respondent's dedication to his Bar Association, the Perkins Bar Association of Jacksonville, that placed him in the dilemma where he took Bishop Kinsey's funds. Respondent was elected president-elect of the Perkins Bar Association for 1988. In 1989, he became president of that organization. During his two year term as president-elect and president, extensive demands were made upon Respondent's time and

resources. TII, 39,41,42. Mr. Smiley's responsibility during that term including attending the national convention of the National Bar Association (of which the Perkins Bar was an adjunct), putting on the scholarship banquet for the organization, including bringing in a national speaker and speaking engagements at high schools, prison farms and other institutions. Respondent's work load dramatically increased during black history month. TII, 41,43. In addition to the special duties as president of the Perkins Bar, Respondent had to prepare for the monthly meetings of the organization and the semi-monthly meetings of its officers. He had to attend various political functions as a representation of the black Bar. Finally, he had to coordinate activities with the Jacksonville Bar Association. TII, 43.

Respondent was obviously held in high esteem by his fellow practitioners. Otherwise, he would not have been elected president of his Bar Association.

Respondent has been a sole practitioner throughout his career. TII, 36. Unfortunately, that status, when coupled with his duties as president-elect and president of the Perkins Bar, proved to be disastrous for his practice when Respondent was appointed defense counsel for one of 22 defendants in a drug-conspiracy case brought in Federal Court. Those proceedings, dubbed the Miami Boys case, resulted in a six week trial in the spring of 1989. Between attending trial and working on the discovery, Respondent's practice was basically relegated to being a one-client law office. TII, 39. Respondent was forced to turn away some clients and lost other good

clients (such as the Jacksonville Brotherhood of Firefighters) as a result of the Miami Boys case. TII, 39,41. Respondent testified that he spent in excess of 100 hours in trial preparation alone. TII, 41.

Respondent candidly admitted that "looking back, I probably should not have taken...." his appointment as defense counsel in the Miami Boys trial. TII, 39.

This Court should note that Respondent's problems, both financially and with time management, began in 1989.

Simply put, Respondent bit off more than he could chew. That is not an unusual situation for a new, and particularly a sole, practitioner. Respondent admitted that he took in a lot of cases where people simply would not pay him or where they could not pay the full fee. But Respondent testified that he "would take the case anyway because they needed help." TII, 39. In many instances, these clients had been to other lawyers who had rejected them. As Respondent put it "really, I had too many cases like that in the office." TII, 39. Respondent was unable to turn away cases simply because his clients couldn't afford to pay him. As he put it, "it's hard to turn people away." TII, 44. That included taking cases that other lawyer's had refused to accept. TII, 43.

In the spring of 1989, Respondent's practice was on the verge of being shut down because he could not meet his financial obligations. His telephone had been shut off "a couple of times" and he was having trouble making his rent payments. TII, 70. He was not in a position where he could give up his sole practice and

simply go to work for somebody else. TII, 70. If he simply left the practice of law, many of his clients would have been unable to find new lawyers because, as previously testified, many of them had been rejected by lawyers before Respondent took the case or because the cases were of marginal or little value. TII, 70,71.

Respondent was not in a position in 1989 where he could simply walk into a commercial institution and borrow funds. His line of credit had been cut off. TII, 71. It was in this atmosphere that Respondent, out of desperation "borrowed" from the $10,000.00 in his trust account that he had received for the benefit of Bishop Kinsey. For that reason, Respondent should be disciplined. He has never denied that.

Respondent asks this Court to understand that Respondent's conduct in the spring of 1989 was completely "out of character" for Respondent. TII, 68. He has never been in trouble before. Even as a child when he was growing up, in a neighborhood where other children would steal things, he did not engage in such conduct.

Respondent was desperate, and he had no place to turn. (Perhaps, The Florida Bar should take steps to set up some sort of assistance program to help struggling, new sole practitioners who are having trouble meeting their obligations. Sending in LOMAS at a charge to the practitioner is simply not the answer to the problem. This is particularly true with individuals coming out of the lower economic strata who do not have the financial support structures available to more affluent lawyers). Respondent's options in the spring of 1989 were limited. If he didn't pay his

phone bill and his rent payments, his practice would be destroyed. His clients, many of whom were impoverished and had been rejected by other lawyers, would be left dangling (which is, to some extent, exactly what happened when the temporary suspension was imposed on Respondent). He could not simply walk in to the Barnett Bank and borrow money. Respondent chose, improperly, to borrow from Bishop Kinsey's funds.

Despite the picture portrayed of Respondent by the referee in her report, Respondent did, to his credit, immediately pay Bishop Kinsey's first tax payment when he received notice of the intention of the IRS to levy $5,000.00 in late December 1990. On February 7, 1991, Respondent was prepared to pay the IRS levy but held off for several weeks at the request of Everett Williams. Ultimately, the payment was made. Respondent would emphasize to this Court that there has been no prejudice to Bishop Kinsey as a result of Respondent's conduct in regard to his trust funds. The $5,053.00 was promptly paid. The additional $4,947.00 that Respondent held in trust for Bishop Kinsey has been held in trust by Respondent since before the temporary suspension order came down in April, 1991.

Respondent obviously has not complied with The Florida Bar's record keeping provisions. Respondent submits that that is part of the problem with his entire practice. He was never taught trust accounting procedures in law school and, as a sole practitioner (albeit at times sharing office space) nobody ever taught him trust account procedures. TII, 38. The Bar's auditor acknowledged that

Respondent's trust account records were non-existent. TI, 69,70.

Respondent submits that his trust account record keeping problems standing alone, would warrant a public reprimand The Florida Bar v Lumley, 517 So.2d 13 (Fla. 1983).

While the Respondent's handling of the Clark bankruptcy, the Williams estate and the Webb foreclosure left a lot to be desired, with the exception of the Clarks it cannot even be argued that his clients were prejudiced. (Respondent continues to object to any consideration of the Lucas matter as aggravation. First, neither Mr. nor Ms. Lucas has ever testified in any proceeding regarding this case; second, Respondent's testimony is unrebutted to the extent that their bankruptcy was dismissed through no fault of his; finally Respondent's efforts resulted in their repossessed car being returned to them together with reimbursement for their rental fees). The Williams estate was administratively closed after the only asset in the estate, a Cadillac, was repossessed because the decedent's son and his family could not afford to keep up the payments on the car. Once the asset was removed, the son lost interest in the estate and Respondent lost touch with the son.

Ms. Webb's foreclosure turned out to be more complex than Respondent initially thought. Although he initially arranged a redemption payment schedule by the homeowner, that individual reneged on the agreement after making one payment. Thereafter, Respondent initiated the foreclosure (albeit it was not handled as promptly as it should have been). The end result, however, is what counted. Ms. Webb got her certificate of title. TII, 31.

As argued in Point II above, the Clarks were not prejudiced by Respondent's representation. They lost their house because they could not afford it. They did not lose it because of Respondent's actions.

Respondent submits that his conduct as to the three cases in the Bar's second complaint would amount to, at most, a reprimand. See, for example, The Florida Bar v Price, 569 So.2d 1261 (Fla. 1990).

Respondent argues to this Court that the referee gave undue weight to actual aggravating circumstances and exaggerated other instances to turn them into aggravating factors. Concomitant with that, the referee basically ignored the substantial mitigation in the record. Among that mitigation, as discussed above, were the circumstances under which Respondent found himself in the financial dilemma that resulted in Respondent taking Bishop Kinsey's funds. Respondent's good works in the community were ignored by the referee.

Perhaps, most surprising is the referee's brushing off the substantial character testimony given by Respondent's eight character witnesses at final hearing. Among them were Ed W. Dawkins (misspelled in Volume I of the transcript) a sole practitioner who was admitted to The Florida Bar in 1972 and a past president of the D. W. Perkins Bar Association. Paul D. Mark Lucas, an associate with Willie Gary's firm, with whom Respondent had been employed as an investigator, also testified. Assistant

State Attorney Richard Daniel Smith, who has been adverse counsel to Respondent and is currently president of the D. W. Perkins Bar Association and Richard Calvin Rivers, admitted in 1978 both testified on Respondent's behalf. Larry Locke, Chairman of the Eartha White Foundation (a nursing home) and one of Respondent's past clients spoke well of Respondent. Mr. Locke's testimony was very significant in that the Bar has accused Respondent of owing trust funds to that Foundation when, according to Mr. Locke, no such obligations are due. TI, 152,153.

Al Barlow, another Jacksonville lawyer, admitted in 1986, attested to Respondent's good character together with former client Alvin Blount, a retired naval officer. Finally, Respondent's pastor, the Reverend Tom Diamond attested to Respondent's dedication to the church.

Respondent's fellow practitioners, past clients and his pastor all attested to Respondent's integrity and good character. These are factors that should be taken into substantial consideration, not brushed aside, in determining the sanction to be imposed for misconduct.

Several of the aggravating factors relied upon by the referee to determine discipline have been discussed above and those discussions will not be repeated here. Among those factors are the referee's finding, without any evidentiary support, that Respondent told Ms. Webb he had filed her suit before he did so (Point I, C); that Respondent filed his bankruptcy in Southern District, Florida to evade his creditors (Point I, D); that Respondent "permitted"

the Lucases bankruptcy to be dismissed (Point I, E); that Respondent did not cooperate with the Bar, which was directly rebutted by the Bar's own witness (Point I, F); and that Respondent was indifferent to making restitution, when, in fact, restitution has been diligently accomplished (Point I, G). Respondent recognizes that his lack of candor before the referee on June 27, 1991 (EX 11) is an aggravating factor in both senses of the word. As Respondent acknowledged at final hearing, on May 6, 1991 he "used poor judgment" in depositing a $10,400.00 check from the Federal Government, for services rendered prior to his suspension, into a personal savings account on May 6, 1991. TI, 96. As Respondent acknowledged to the referee, he had already deposited $5,300.00 of earned fees into his special trust account (which gave him a total in trust in excess of $14,800.00 -- a sum that to this date has been sufficient to cover all of his trust obligations) TI, 94,95, and all other earned fees have been either deposited into the special trust account or were kept with the express permission of The Florida Bar.

At the time of final hearing, there was $26,000.00 in trust. That sum is so far above Respondent's trust obligations that the Bar is claiming that $11,000.00 or $12,000.00 of those funds should be frozen to cover their costs. TII, 47,48.

Clearly, despite the fact that the Supreme Court's April 23, 1991 order of suspension was not yet final when Respondent deposited the $10,400.00 into his savings account on May 6th, he should have apprised the referee on June 27th of his receipt of the

funds. However, the reality of an automatic suspension should be taken into consideration when considering the degree of aggravation that emanates from this conduct. Respondent testified that he was "devastated and went in a state of shock and a state of disbelief" when he learned of the temporary suspension. TII, 72. In light of the fact that he had almost $15,000.00 in trust at the time, including $5,300.00 in past fees immediately and properly deposited, Respondent had sufficient funds to cover his trust obligations. It would be less than human for anyone to think that a lawyer in Respondent's shoes, with a wife and three children to feed, would not be desperate as a result of a freeze on his income. Shutting off an individual's only means of livelihood, including fees properly earned but not yet disbursed, has a devastating impact on the financial situation in an individual's family. This is particularly true where, as here, the amount being sought to stay in trust exceeded the amount of trust obligations.

The referee paints a picture of Respondent as being a person of no credibility. In addition to being contrary to the testimony of Respondent's eight character witnesses, who know Respondent better than the referee, it contradicts the testimony in the record. Respondent has never denied his culpability in taking Bishop Kinsey's funds. He, not the Bar, (Bishop Kinsey did not file a complaint), advised Bishop Kinsey of the missing funds. He emphasized to Bishop Kinsey, that, when talking to Bar personnel, he should tell nothing but the truth. EX 5 21,36,37.

Respondent's admissions to the allegations of the Bar's

complaint, rather than forcing them to prove up their charges by clear and convincing evidence, shows an individual who does not obstruct the administration of justice.

In essence, Respondent is a good person who did a bad thing. He improperly misappropriated, over a period of time, $10,000.00 belonging to Bishop Kinsey. His misconduct, however, is offset to some degree by his prompt disbursal of $5,053.01 of that sum when the obligation became due.

The appropriate discipline for Respondent's misconduct is a two year suspension. In recommending that discipline, Respondent takes into account the aggravating circumstances of his failure to deposit the $10,400.00. Were it not for that, Respondent would ask this Court to impose a one year suspension. See The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986) (theft of trust funds from an estate resulting in a one year suspension).

At most, Respondent's discipline should be a three year suspension as imposed in The Florida Bar v Robbins, 528 So.2d 900 (Fla. 1988). Mr. Robbins was suspended for three years after being found guilty of five counts of misconduct. Among those counts was filing a notarized petition with an altered date, handling of assets of a guardianship in an indiscriminate manner and an attempt to extract an excessive fee for respondent's services, charging a clearly excessive fee and failing to act competently on another estate, overvaluing the real estate in another estate in an attempt to increase respondent's fee (conduct involving dishonesty) and neglect and failure to follow trust accounting rules resulting in

shortages, use of funds for an unauthorized purpose and improper labeling of the trust account. As to the latter count, the referee also found respondent's failure to comply with periodic trust account reconciliation requirements. Notwithstanding his numerous counts of misconduct, Mr. Robbins received but a three year suspension. See also, The Florida Bar v Farbstein, 570 So.2d 933 (Fla. 1990).

In The Florida Bar v Adler, 589 So.2d 164 (Fla. 1991) a lawyer was suspended for eighteen months after it was found that he commingled trust funds with his own business entities and that he totally failed to keep Florida Bar trust accounting records. It was specifically found that Mr. Adler utilized client trust funds for purposes different than that for which they were entrusted to him. Aggravating factors in existence were prior disciplinary history, multiple offenses and substantial experience in practice. Mr. Adler's conduct is not so far removed from Respondent's that he should receive an 18 month suspension while Respondent is disbarred.

Disbarment should be reserved for that class of lawyers "unworthy to practice law in this State". The Florida Bar v Hirsch, 342 So.2d 970,971 (Fla. 1977). Respondent does not fall within that category of individuals. In deciding Hirsch, the Court went on to state that

> Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rule provides, for those who should not be permitted to associate

> with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part.

Disbarment of Respondent is contrary to the spirit of the preceding quotation. A long-term suspension, to be followed by proof of rehabilitation before reinstatement and three years probation, will reclaim Respondent while simultaneously punishing him. Such a discipline will meet the three purposes enunciated in The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970). Those purposes are protection of the public, redemption of the lawyer and deterrence.

Finally, in light of the fact that Respondent was temporarily suspended without hearing, any order of discipline should be effective nunc pro tunc May 23, 1991, the date on which his temporary suspension began.

CONCLUSION

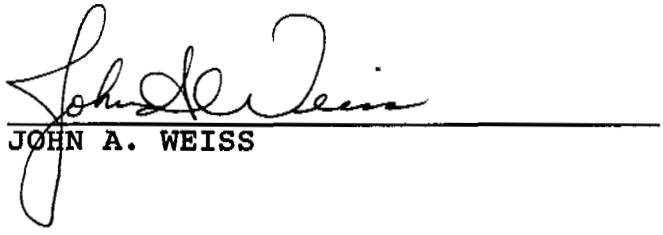
Respondent asks that this Court reject various listed findings of fact by the referee, that her recommendations as to guilty findings be overturned in part and that this Court reject the referee's recommended discipline and impose therefore a two year suspension nunc pro tunc May 23, 1991.

Respectfully submitted,

John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, Florida 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief was mailed to Alisa M. Smith, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 1st day of September, 1992.



JOHN A. WEISS