IN THE SUPREME COURT OF FLORIDA

12/21

THE FLORIDA BAR, Complainant-Appellant, v. RONALD T. SPANN, Respondent-Appellee.	Supreme Court Case Nos. 79,345; 81,631; and 83,455 The Florida Bar File Nos: 89-52,306(17D), 90-50,701(17D), 93-50,112(17B), 93-50,228(17B), and 94-50,282(17B)

Amended

RESPONDENT'S REPLY TO THE FLORIDA BAR'S INITIAL BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REVIEW

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RESPONDENT'S STATEMENT OF THE CASE AND FACTS

Respondent submits his opposition and answer to the bar's brief on the referee sanction recommendation. The referee's report covers three cases, none of which were stayed at the respondent's request as the bar improperly states. Nothing is of record to support any such averment by the bar. Respondent also suggests that laches and excessive delay permeates this case to respondent's detriment. The referee decided this case was "minor and technical," yet, given the 6 year delay, respondent's right to a speedy resolution of charges is questioned, inasmuch as respondent's witnesses were by then unavailable. See The Florida Bar v. Wincor, 257 So. 2d 247 (1971), as to reducing any sanction accordingly.

Respondent has also filed his petition for review of the findings and report and sanction recommendations of the referee. Under Rules and Regulations of the Florida Bar, 3-7.7(c)(5), respondent suggests that the referee report is erroneous and unjustified and should not be upheld and that the Bar position is without merit as to enhanced sanctions.

Because the bar's brief principally relates to the two so-called "serious grievances" (that is No. 79,345 from Steven Amburgey and No. 81,631 from Leonard Champagne,) the respondent will reply in similar seriatim fashion. In addition, the bar in the latter case number also discusses respondent's professional relationship with one Craig Reese. Furthermore, the bar takes issue only with sanction recommendations rather than with the referee's finding of "not guilty" in certain counts.

As to the Champagne grievance with which the bar deals with first, the representation by respondent's law firm commenced in 1988. Attorney Robin Kozin signed the law firm's standard contract with Mr. Champagne and accepted a non-refundable engagement fee: this was clearly for contingent representation. In the event of any gross monetary recovery for and on behalf of Mr. Champagne this called for payment of a 40% fee of the "gross" proceeds (in addition to the engagement retainer.) The respondent's involvement with Mr. Champagne began the next year when Ms. Kozin left the firm and Mr. Champagne could not be found any longer.

However, settlement discussions had been held by respondent with Southern Bell and settlement demands and offers were exchanged. The record reflects at R 6&7 that respondent and the law graduate Norman Ganz, (Florida Bar admission pending at that time), researched independently. Respondent also thereafter consulted the Ethics Hot Line with Lilly Quintilliani, Esq. of the Florida Bar when seeking assistance in dealing with the unusual "missing client" problem. The respondent then elected to seek court review and filed what was called a "PETITION TO DEPOSIT INTO THE COURT REGISTRY" in the Broward Circuit Court; the Judge assigned was the Honorable Dale Ross.

Two court hearings were held with Judge Ross: the only evidence of record is that of Norman Ganz and legal assistant Vivian Keller and respondent who each testified that the court took the law firm's entire file, and its own court file, under advisement for several days. By that time, respondent had included

two proposed versions of the signature of Norman Ganz for and on behalf of Leonard Champagne on a proposed, notarized, general release. The only evidence of record to the referee is that of the testimony of these three individuals involved, which the referee believed and accepted at RR 6, (although Judge Ross could not recall specifically, and Southern Bell's chief counsel did not testify).

However, no clear and convincing evidence supported the referee's surprising findings and either his or the Bar's sanction recommendations. That is, based upon the record, a contrary result should properly have been reached at least on the issue of candor with the tribunal. See RR 8 and PTS J. Again, the only evidence of record is uncontested on these issues: opposing counsel was notified of each document by respondent and was corresponded with Southern Bell's Atlanta-based counsel never opposed and de facto, supported the respondent's application to deposit the entirety of the settlement funds to the Court Registry.

This was done to preserve and protect the rights of both Mr. Champagne and Southern Bell. Simply stated, the competent and substantial evidence of record is that respondent acted only to obtain the bar's guidance and the trial court's instructions, and respondent proceeded in accordance with the Florida statute on missing property which he and the court believed had been invoked. The referee erred in reaching unwarranted conclusions inasmuch as the respondent clearly lacked prior experience and specific knowledge as to how to properly deal with the unusual Amburgey and

Champagne problems. Cf. The Florida Bar v. Miller, 548 So. 2d 215 (1989) (where a 90 day suspension for unauthorized trust account funds was involved and the attorney, while responsible, had not been fully aware, as here).

The only testimony of record in Champagne is that of Mr. Ganz and of the respondent: both said that the notarization that took place was that of Norman Ganz, for Leonard Champagne, and that this was done by a representative(s) of the law firm which had been specifically authorized to accept, for the long-missing Mr. Champagne, the "final" and time-limited offer from Southern Bell. That this client had authorized the same was the uncontroverted testimony of Vivian Keller, legal assistant and of the newly admitted Florida lawyer, Norman Ganz.

Where a misunderstanding occurs for an attorney, as happened to the respondent here, the lawyer should not then be found guilty of any intentional misconduct. See The Florida Bar v. Aaron, 529 So. 2d 685 (1988) and The Florida Bar v. Day, 520 So. 2d 5811 where reprimands resulted from numerous errors deemed rule violations. Here, respondent clearly operated with a mistaken, but a well researched and well-intentioned belief that the activity was proper to protect Champagne's interest and that the court, having deliberated and reviewed the law firm and court files and proffered research, specifically ordered and permitted same. Only thereafter were the two releases tendered to Southern Bell's counsel. Compare The Florida Bar v. Fatolitis, 546 So. 2d 1054 (1989) as to the public reprimand for the attorney signing another's name (with

mistaken authorization) to the severe sanctions improperly requested here.

The bar is also in error (RR 7-8) when stating that respondent was found to have "pled guilty" to a misdemeanor notary violation. A "Nolo" contendere is of record instead. The referee errs in so stating that this was a "guilty" plea. Also, under Chapter 91-291, the general assembly addressed F.S.c. 117.09(1) on reasonable proof of the person whose signature was being notarized; this is the law with which respondent was charged, and it had been repealed three years before respondent's "nolo contendere" plea.

Respondent maintained his notary license throughout, as he does today, and respondent told the Circuit Court of his charitable donation and of Leonard Champagne's name being witnessed by him either alone with Ganz initials or with Ganz having specifically written out his name for Champagne on the notarized release.

Again, the only competent evidence of record to the referee continued to be that respondent notarized the signature of Norman Ganz, and no one else, albeit, in two different fashions for Champagne. The referee's record failure to allow respondent to explain the totality of the circumstances in the nolo plea to a repealed misdemeanor statute and to present his entire file, (as respondent had requested, both on and off the record) in order to contest the referee's improper inference, is clear error. Compare The Florida Bar v. Marks, 492 So. 2d 1327 (1986) and The Florida Bar v. Lipman, 497 So. 2d 1165 (1986) on the impropriety of the

referee's refusal to allow and to consider respondent's explanation that his plea was one of convenience.

No "judgment of guilt" of the offense charged was ever pronounced by the Broward Circuit Court so that under Rule 3-7.2 of the Rules and Regulations of the Florida Bar, the referee erred when assuming such guilt and then recommending discipline thereafter as to this respondent. No guilt representation having been made of record by respondent in either the 8/23/93 Broward Circuit Court misdemeanor proceeding or at the referee hearings on 12/3/94 and 5/6/94, should give this court pause. Thus, the bar and referee err in making improper inferences to the respondent's nolo plea of convenience, to a long repealed statute. Compare The Florida Bar v. Lancaster, 448 So. 2d 1019 (1984) and Rule 3-7.2 (i)(3), of the Rules and regulations of the Florida Bar.

Respondent notes, also, that the entire Champagne client files and the court file had been taken under advisement by trial Judge Ross. The Orders eventually entered by Judge Ross specifically authorized the receipt of funds by respondent's trust account from Southern Bell. Judge Ross approved the respondent fee agreement and the settlement: the fee percentage was to be paid to respondent's firm and the balance held in trust or redeposited to the court registry. Both original forms of the proposed releases were submitted by respondent for the court for Judge Ross's consideration and this was done prior to tendering same to Atlanta and Southern Bell. The bar's comment and RR 8 and 9 are in error; there is no original release in the court file as the original

releases were and are in the litigant's file. The PTS 8 suggests that the trial court saw both original documents and the entirety of both the court file and the law firm's file; these included the proposed closing statement on fee disbursements from the "gross proceeds". PTS K & L suggests that the final order entered by Judge Ross was done on his own motion which closed the case due to "case management time standards." The second order directed that the Southern Bell monies could be received and the funds that remained were to be placed into the court registry, after the deductions for fees and costs were made, per the Champagne contract and the proposed respondent closing statement.

PTS M is a letter sent from the respondent's firm to Southern Bell containing the belief that the court had approved the tender of the settlement check, the acceptance of the funds, the payment of fees and costs and had ordered the deposit of the remaining balance of the gross proceeds into the court registry, with interest. That letter simply repeated what the attachments, the court documents and pleadings, had indicated. PTS tab J & M G. These show only that a forty percent fee would be obtained from the "gross proceeds" because a lawsuit had to be filed.

Thus, RR 9 states, in error that the respondent accepted an improper or excessive amount. The fee was to be paid from the total of all sums paid to or for or on behalf of Leonard Champagne by Southern Bell. This amount was taken, of course, from the "gross" settlement amount stated as paid by defendant of $10,515.00. This "gross" sum total was before the state, local

and federal and tax percentages and pension or profit sharing contributions by Champagne were deducted by Southern Bell. The $10,515.00 "gross amount" is the only record evidence of payment and is reflected on the check stub.

The clear and convincing evidence of record reflects respondent acting per Champagne's contract language and in accord with several court orders only. Thus, no excessive fee, only the proper fee percentage was taken from the "gross" amount paid out by Southern Bell. Compare The Florida Bar v. Rood, 633 So. 2d 7 (1994) where with no written contract nor closing statement, unlike here; Rood was a medical malpractice case wherein the respondent attorney failed to pay a judgment, a time limit had expired and a contempt order had been ignored, yet (only) a 1 year suspension issued. By comparison, the referee's recommendations of two three year suspensions appears unduly harsh and unsupported by the record.

As to respondent's supervision of his staff, RR 10 is again unsupported by the record and an erroneous conclusion is thereby reached. The two office staff letters reviewed were submitted by persons known by the recipient of the letters to be legal assistants or law clerks to the respondent; at the time of their tender, the only law firm attorney was the respondent himself.

In fact, the bar prosecuted the second letter sent by respondent's office to his undersigned defense counsel, Fred Haddad, who clearly knew the respondent's staff. The respondent firm's custom of identifying each of the staff members by a title,

(legal assistant, secretary, law clerk, file clerk, etc.), was the only authorized practice or record evidence. The written office manual requirements of respondent was supported by unrebutted testimony of both Ganz and Keller, as well as the respondent himself. Under Rule 4.5.1(g) of Rules Governing The Florida Bar, then, there is no basis for the referee to properly conclude, as he did in RR 10, that there was other-than-an-isolated failure to include such a designation on the two letters in question, (for example) that were sent to Attorney Haddad and to Star Lite Pools. The referee's conclusion that "lack of supervision" occurred at any time is in error. In fact, the record reflects daily and weekly meetings by respondent to review correspondence and pleadings, as well as the use of the aforesaid written office manual governing procedures for respondent's firm. This is not unauthorized practice of law but reasonable supervision of subordinates by respondent and should not be sanctionable conduct.

As to the Amburgey complaint (which is case #79,345), once again, an associate attorney of the respondent's firm, one Steven Marks, signed the standard workers compensation agreement with Amburgey. Respondent never met or spoke with Mr. Amburgey until Mr. Marks left to establish his own practice in the spring of 1989. The referee's findings RR 2 & 3 are not supported, once again, by the record, inasmuch as the first deputy commissioner (Seppi) had twice authorized in his order(s) that respondent's firm hold into trust and then withdraw the biweekly $71.40 in fees; Seppi also had

specifically approved respondent's written fee agreement submitted by Marks in advance.

The issue of laches in prosecution and in decision-making here is also in question as respondent clearly has been prejudiced by the delay in these proceedings and in the referee making his findings. There has been no probation and no emergency suspension of respondent and no great public harm found, heretofore, under Rules 3-5.2(a) or 3-5.2(b) yet respondent has suffered for some six years by the pendency of these unduly lengthy proceedings.

Thus respondent submits that, as in Devine v. Florida Department of Professional Regulation (involving a dentist), 451 So 2d 994 (DCA 1984) prejudice to respondent's defense has, however, resulted from such delay. Unlike in The Florida Bar v. Marks, 492 So 2d 1327 (1986), here, the bar's delay in waiting and "fishing" for added counts (now found to be "minor and technical") and assembling them to demonstrate multiplicity is unreasonable and unfair. Given this court's broad discretion and this long delay by the bar, plus the "minor and technical" nature of the allegations, any discipline should be diminished accordingly.

The respondent firm's representation began in 1988. On or about May 15, 1989, Mr. Amburgey's attorney of record in the worker compensation case, Steven Marks, was permitted to withdraw. Only thereafter did respondent become the attorney of record and only until substitute counsel was obtained as workers compensation Judge Seppi had required. The transcript reflects the testimony of Vivian Keller, legal assistant and the proffers of Robert James and

Barbara Prachniak, as well as respondent on certain written memos to respondent from Marks. He wrote the respondent that the disbursal of monies from the workers compensation insurance carrier payments made to the trust account of the respondent and then held for some 3 months and could now be paid to Amburgey and to the firm for fees. This, Marks wrote was in accord with worker compensation Judge Seppi's two prior orders. This he assured was the custom and practice and in accord with his reading of the statute and the applicable rules. There is no other evidence of record.

However, this was a cumbersome process. It is a matter of interpretation as to the language of the two prior orders from Judge Seppi, as to when disbursal of fees and costs to the law firm's operating account from its Trust Account could properly take place. This is unintentional mistake by the respondent. The referee fails to discuss whether this is mitigating factor noting, however, that when the timing of these disbursals was called into question by the bar, the funds were immediately replaced back to trust by respondent. This involved $171.14, an arithmetic error so that a further petition to the new workers compensation judge was filed by respondent himself.

Again, a misunderstanding as to the two prior worker compensation Judge orders by respondent - who was not experienced in such matters although associate counsel Mr. Marks represented that he was - did not show intent to violate any Rules of The Florida Bar but, rather, reasonable reliance by respondent on the associate attorney research and memo. See The Florida Bar v. Aaron, at 686.

As to RR 3, the referee unjustifiably concluded that this step constituted misrepresentation by omission even though the workers

compensation judge could not definitely recall whether there had been discussion of the prior disbursal and repayment by respondent. However, the record notes and the testimony make clear that both Amburgey and his new counsel did not object to the disbursal and respondent was not even present at the hearing; the substitute counsel dealt with the technical error on the early withdrawal of the $71.40 bi-weekly. The record does reflect, however, that the respondent had consulted with the Chairman of The Florida Bar's Worker Compensation Committee Glen Raymond Malca as to the interpretation of the two prior judge's two orders. This is not a case of intentional misconduct but an understandable misunderstanding by respondent. His misinterpretation of two prior worker compensation orders and Marks' research memo authorizing disbursal of fees from trust funds held for some three months pending the judge's order is not and should not be sanctionable conduct.

As to RR 4-6, the communication problem with Amburgey and the timeliness of respondent's withdrawal, the court's attention is drawn to the difficult process causing the change in the method of submission of the workers compensation checks. They came from the west coast insurer to the law firm for handling and then transmission to Ohio for signing by Amburgey and then receipt back from Ohio; they then were deposited into the trust account, where clearance had to be awaited before tender of the client's percentage to Amburgey, again back in Ohio. This became cumbersome and a problem arose around the 1988 holidays. Marks wrote a letter, after consultation with other attorneys and a

teleconference with Judge Seppi and to Mr. Amburgey suggesting a change to an alternate arrangement of tendering the checks directly to Amburgey four out of five times and then the law firm keeping one check. There was a 20% fee arrangement.

Respondent was not involved other than being informed that this is what the workers compensation Judge and Marks had both confirmed was an acceptable arrangement. There is no contrary evidence; the signature on the offensive letter is not respondent's and this is uncontroverted. Respondent was not involved in any other respect other than becoming aware that there was a problem with a difficult client Mr. Amburgey and then contacting and speaking with Mr. Amburgey. Respondent, the record shows, moved to withdraw shortly thereafter when Marks did so. This is reasonable supervision of subordinate lawyers by respondent's firm under Rule 4-5.1(g) of the Florida Bar rules and should not be sanctionable. The record reflects that Judge Seppi would not allow respondent to withdraw until Amburgey had substitute counsel, although respondent had so requested. There is no contrary evidence so that the referee and the bar are in error.

As to case #81,631, the Jenkins grievance, see PTS T. In that contract, (same as Champagne) the word "immediately" was in the respondent's contingency fee agreement and was at issue. The respondent had such language stricken from future contracts. The bar and the referee correspondingly err in addressing this grievance, given that there was a "not guilty" finding in

Count III which the bar did not contest. (Given a second conflicting grievance dismissed) The bar also stated throughout that it was not pursuing this issue[1]

The Reese complaint begins on or about November 19, 1991. The testimony shows that the traditional written legal agreement was not available for the referee's consideration in that Reese asserts that he never signed same, and respondent said that it had been apparently been removed by Reese or lost after signing. The referee erred in failing to consider respondent's proffer of his third party witnesses; these were persons from the respondent's former staff and from two government agency offices (who were in joint teleconferences with Reese and respondent). This is according to the unrebutted testimony.

Due to the respondent's proper exercise of his professional judgment, he filed first for Reese in his whistleblower matter, which respondent testified had to be done before any wrongful termination action could be pursued. This was required administrative procedure, respondent suggested. Inasmuch as fact issues remained, summary judgment was then improper by the referee. Compare The Florida Bar v. Huggett, 626 So 2d 1308 (1993). As to material fact issues, note, for example, the phone message tapes involving respondent and/or legal assistant Modrano (referenced at RR 12-13). The record says only that the respondent "wished to

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[1] Through administrative proceeding and evidentiary hearings as well as a federal court lawsuit, respondent pressed Jenkins cause aggressively over the course of some six months. Some $65,000.00 was obtained for Jenkins by respondent or paid to him by the defendant City of Fort Lauderdale. However, no fee whatsoever was received by respondent, to date, despite the contingent percentage agreement.

resolve the matter" and "drop the bill", that is, if Reese would concomitantly want to drop the grievance. There was no implied or stated threat of any kind in the record, only a quid pro quo to satisfy any client concerns: the referee errs in his contrary finding and sanction recommendation.[2]

Given the bar's failure to suspend respondent when these matters arose some six or more years ago, or at any time since, the bar is guilty of laches. See The Florida Bar v. Micks, 628 So 2d 1104 (1993) where the referee should have considered such delay and resulting prejudice to the respondent, for example, here, as with missing witnesses.

Furthermore, the "minor and technical" nature of the violations, even if they are considered to be correct determinations by the referee, do not warrant the significant sanctions such as three or more years of suspension, or disbarment. The six year lag in time is not reasonable and was only intended by the bar to obtain and to process multiple counts together, however specious they may be individually. Compare The Florida Bar v. Lipman, supra, 497 So.2d 1165 (1986).

SUMMARY OF ARGUMENT

The referee finds at RR 14, that there was "a severe lack of attentiveness" by respondent and recommends three year consecutive suspensions. Based upon prior reported cases, this is not

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[2] The record illustrates that respondent was unable to locate certain essential witnesses, Mr. Blackwell, Mr. "Bill" christian and Mr. Medrano, as well as Joseph Scott, due to the passages of time, unfortunately, all to respondent's extreme prejudice.

justified and is unduly harsh given the lack of clear, competent and substantial evidence of record. See, for example, The Florida Bar v. Bergman 517 So 2d 11 (1987) where a six month suspension is ordered where supervision was an issue.

ARGUMENT

I. Conduct of the respondent in this case indicates no more than unintentional mistake and "technical or minor" violations of the rules.

This court should consider that the prior disciplinary record of respondent is a letter of reprimand and a minor misconduct finding. Also there was no serious breach of the obligations of a lawyer to a client where a significant client interests was found.

First and foremost, there has been no fraud; in fact, the opposite in the Champagne matter should be considered. The respondent sought and acted only to protect Champagne's interest and to hold the Southern Bell's time-dated offer in place. Pursuant to the written agreement for legal services, respondent sought to obtain court authority to deposit such funds and to sign such release and to deposit all into the court registry. There is no other evidence.[3] The true nature of the two versions of the Champagne release were that each was signed by Ganz and notarized as Ganz's signature only. This was fully disclosed and the court's instruction was requested before either release version was relied

[3] The State Attorney apparently agreed with this argument when dropping any prosecution of respondent for felony notary violation. The August 1993 nolo plea was to a repealed misdemeanor statute, FS.117.09(1).

upon or released from respondent's office and mailed to Southern Bell. The respondent's client, simply, was missing and reasonable efforts could not locate him.

Why else would the petition be filed given that respondent sought only that the settlement be considered by a judge and the totality of the funds be deposited into the court's registry?[4] There is and was no "greed" evidenced by respondent, only respondent's best efforts to reasonably advance the client interests. See The Florida Bar v. Rosin, 521 So 2d 1085, (1988) where only a public reprimand was deemed proper as to a similar respondent when "hindsight" was applied to the lawyer's exercise of judgment.

The instant case and the bar citation of The Florida Bar v. McMillan, 600 So.2d 457 (1983) are distinguishable; the latter is a guardianship matter and a failure to disclose a transaction to the court where $4,500.00 was an issue. McMillan is not like the Amburgey complaint because both Amburgey and his new workers compensation counsel knew of the "minor technical" errors and nevertheless supported the petition of respondent to obtain costs and fees. Those involved fully realized that two prior Judge's orders and interpretation by attorney Steven Marks who had been handling the file and had given respondent several instructions as to the disbursements respondent were at issue. There are two

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[4] The record contains respondent's 8/14/89 Petition. The court's attention is directed at paragraphs 5 and 6 of same which state that the Southern Bell release "arrived on June 22, 1989" and that "since June 22, 1989, Mr. Champagne has been impossible to contact or locate." Query how then could any reasonable person ever believe that either proffered release was signed and notarized by Champagne himself (rather than respondent and firm staff) when he was "impossible to contact or locate?"

written memos in the record represented in the hearing transcript, signed by Marks to Spann, and "per" workers compensation Judge Seppi. In addition, in this case there is mitigation in that respondent paid back all sums (including the erroneous $171.14), immediately, within days of being informed of the improper reading of the two prior orders from Judge Seppi.

A) No fraud on any court occurred here as respondent sought only to reasonably protect client interests

In The Florida Bar v. Sound 599 So. 2nd 101, (19___) a Judge's rubber stamp was used to disguise the hand writing of the offending lawyer who had failed in other legal attempts to obtain relief so that forgery was at issue. The bar's comparison is without merit: this case is unlike Sound in that no forgery was ever made or attempted.

The testimony of Ganz and respondent was that an attempt was to obtain Champagne's signature on a properly executed release that would be acceptable to the court and to Southern Bell and in accord with a reasonable interpretation of the missing client instructions. In the case at bar, there was a good faith belief of respondent and the participants in the respondent's law firm that what was proposed as being done was reasonable and was to protect the Champagne/client interests. Again, the fact is that the respondent sought only to obtain the funds from Southern Bell and to deposit them, in full, into the court registry pending the resurfacing of the client Champagne. No fee was initially at issue at all.

In The Florida Bar v. O'Malley 534 So.2d 1159, also cited by the bar, false testimony under oath is the issue. There is no such fact or allegation in the record in the present matter so that the bar's reliance is misplaced.

In The Florida Bar v. Gold 203 So.2d 324 (1967) and The Florida Bar v. Dubow 636 So. 2d 1287 (1994) where the court found active forgery on the part of the offending lawyer in order to "further that lawyer's purposes". Once again, there is no such lawyer purpose or intent here, only certain misunderstandings. Compare The Florida Bar v. Aaron, supra.

The respondent here sought only to determine, after researching and consulting with the Florida Bar attorneys through the Ethics Hot Line, the correct course(s) of action. After drafting pleadings for the trial court's consideration, respondent attended two evidentiary hearings where respondent asked the court to review the firm's entire legal and financial file, plus the court file. The court did so and then deliberated, reviewed the research and was "fully advised on the premises" including the missing client problem. Only with the issuance of such court orders did respondent then act to accept the funds, and tender the two releases to Southern Bell and close out the file and disburse funds.[5]

It is notable in this regard that the referee found from Champagne's statement that he did not authorize the settlement as

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[5] These funds are believed to have remained in the court registry by Champagne through 1995.

"unworthy" of belief. This was based upon the testimony of the new Florida Bar admittee Ganz and the legal assistant Keller. Each testified and presented affidavits given to Judge Ross as to their direct client contacts when given instruction, twice, to each, for the firm to act on Champagne's behalf to accept the settlement and release Southern Bell (although Champagne was "hiding" from divorce proceedings).

There is no adequate evidentiary support for the bar maintaining that there is a "fraud" on the court here. The clear, competent, substantial and overwhelming evidence was that the respondent acted candidly to the tribunal in all respects. He went to the court and to Judge Ross for declaratory relief. He went also to the first and second workers compensation judges for instruction. Only upon receiving their respective determinations did respondent act. In terms of the costs and relatively small fees involved in Amburgey, his new counsel knew fully the circumstances, including that the sums had been placed back into the trust account pending a third and final order of the new workers compensation judge. Furthermore, Amburgey himself had specifically concurred and agreed with this new workers compensation judge's order allowing the release of the fees to respondent's firm.

B) <u>There is no criminal misconduct established which warrants the proposed action being taken against respondent here.</u>

There is nothing in the record as to respondent violating Florida statute c.117.09 (1) or (2). The referee errs in

concluding that respondent "pled guilty" to a misdemeanor involving any violation of the notary statute, (which was then repealed); this is simply incorrect and the cases cited by the bar are related to notarization violations and, therefore, inapposite. A single incident of improper notarization may, however, warrant only a public reprimand, as in The Florida Bar v. Day 520 So. 2d 581 (1988), The Florida Bar v. Bell, 493 So. 2d 457 (1986), and The Florida Bar v. Farinas, 608 So. 2d 22 (1992) and The Florida Bar v. Sireci, 589 So. 2d 294 (1991).

Again, only respondent and Ganz testified. Both were supported by legal assistant Keller who at the time of testimony had not been employed by respondent for several years.

That testimony was that respondent merely notarized the signature of Norman Ganz in two different fashions while awaiting court instruction: use the release, without the "typo"/reading, "Ganz for Champagne" tender to Southern Bell, destroy them both, or hold the case open and await Champagne being found or lose the time-barred offer.

No representation at all in any of the pleadings before Judge Ross was to the contrary. In fact, the only comment, in the pleadings with Judge Ross in the Champagne matter, were that Champagne could not be found. Therefore, how could Champagne ever have been available at that time to sign the release document when he was missing? It is a factual impossibility. For anyone to believe a forgery or fraud was intended is unsupportable. Sworn testimony of Ganz and Keller at the evidentiary hearing before

Judge Ross was that Champagne could not be found although Champagne had confirmed that he did wish to accept the money, even though he was apparently "hiding out" during his difficult divorce. Thus, the referee's conclusion is unjustified.

The bar is correct, therefore, in that respondent did not himself forge any instrument whatsoever. The bar is, however, incorrect in supporting the referee's erroneous conclusion that respondent did anything other than notarize Ganz's signature twice.

In the Amburgey matter, the power of attorney suggested in respondent's contract was an issue. For Amburgey to timely receive payments, four checks were his, while the fifth when obtained from the carrier would be for the law firm's fees of 20 percent was, respondent believed, in accordance with the workers compensation approved contract.

The respondent acted only upon memos and research from the associate attorney Marks and reviewing the two rather unclear orders of Judge Seppi of the workers compensation division. There is no other evidence that respondent had ever spoken to Amburgey but once and upon Amburgey's request. Withdrawal occurred thereafter.

Amburgey testified that Steve Marks, was his lawyer. Changing the method previously found to be extremely cumbersome of tendering to Amburgey what had come to the firm's trust account from the West Coast insurer and then back again, was only to help Amburgey get his money quicker and more easily.

There had been some five delay because of insurer and postal service problems and just in the simple handling of these checks. In any event, it is not respondent who actively sent the offensive letter, but Marks who did so after research and consultation. The

bar and referee erroneously regard this as "extortion" by respondent, who did learn of the problem and admitted that the supported the proposed decision by Marks. No "forcing" Amburgey to sign a power of attorney occurred: Amburgey had other counsel up in Ohio with which he was then consulting. Respondent conduct was quite reasonable given his lack of experience in workers compensation and his reliance upon the association memos and judge's order (as he left w pre-signed checks for Marks to mail when the insurer checks were signed and deposited and cleared).

There is and has been no prosecution of respondent under Fla. Statute c.440.34 (6)(a). This is because, clearly, respondent had at least two previous orders from Judge Seppi plus memos from Steven Marks as the attorney of record for Amburgey on which to rely.

The bar also errs when stating that respondent removed "his" attorney fees. This is simply incorrect. The costs and fee percentage were held for more than four months, in the firm's trust account before the disbursal to the law firms operating account, perhaps based upon incorrect legal research and interpretation of Judge Seppi's order. Ms. Kozin, Mr. Ganz, Ms. Keller, Mr. Marks and respondent all received compensation from the law firm's operating account only. The fees were not "his".

C). No cumulative misconduct exists here only disputed them "minor and technical" allegations.

As to Rule 5.11(b) of the Florida Standards for Imposing Lawyer Sanctions, there is of record absolutely no evidence of false swearing, extortion, theft or misrepresentation relating to this respondent which justifies the proposed severe sanctions.

There is also no cumulative misconduct which warrants any enhanced discipline or disbarment. Compare The Florida Bar v. Williams, 604 So. 2d 447, (1992) and The Florida Bar v. Mavrides, 442 So. 2d, 220 (1983). Those matters involved issuance of worthless checks, trust account violations, shortages and commingling and are "light years" away from the facts underpinning the "minor and technical" violations of which this respondent is accused.

The bar comments at page 21 of its supporting brief "that these defalcations occurred in 1988" and cites The Florida Bar v. Golden, 566 2d 1286 (1990). The respondent suggests, however, that in 1988 respondent was midway through his fourth year of practice as a Florida lawyer having entered into private practice of law for the first time. No workers compensation case had been accepted or handled before Marks came along and requested to handle Amburgey (he said he had two years of experience.) Respondent's record reflects that he was a trial attorney for the Federal Government prior to relocating and sitting for the Florida Bar exam and being admitted in mid-1984).

There is no clear and convincing evidence that misconduct occurred by respondent, no pattern of any taking of monies or of any selfish motive and no greed is demonstrated by respondent in either of these two matters. Compare The Florida Bar v. Rayman, 238 So.2d 594, 598 (1970), where this court notes that severe sanctions as disbarment are inappropriate. Respondent acted only to ease the burden and to protect the client's interests when commencing the Champagne investigation inquiry and that court case.

Respondent did the same when the Amburgey problems relating to representation by Mr. Marks and the delay in the holiday mail and the cumbersome processing of the checks became issues.

D). There are mitigating, not only aggravating, factors which should be considered, particularly with laches by the bar.

As to aggravating factors, the bar argues that somehow, greed and a pattern of multiple offenses is suggested. This is without merit from the record and is clearly in error. Compare The Florida Bar v. Stalnaker 485 So 2d 815, (1986). Under Rule 9.22(b) of the Florida Bar Standards for Lawyer Sanctions, there has been no demonstration, given two written contracts and two to four judge's orders of approval, that respondent was in any way improperly enriched by the Amburgey or Champagne fee/cost arrangements. Furthermore, the bar's excessive delay should be deemed laches prejudicing respondent's defenses and affecting any punishment. Cf. The Florida Bar v. Guard 453 So.2d 392 (1984)

1. Respondent's principal motive was to benefit the client in unusual and difficult circumstances.

In fact, the only testimony in the record in the Broward Circuit Court supports the proposition that this respondent wished only that the entire matter be placed into the court registry where it was to sit until Champagne "awoke". Similarly, as to Amburgey, respondent acted reasonably and held the insurance monies in the trust account until Marks and/or workers compensation Judge Seppi told him otherwise: recall that respondent's capacity then was as

the sole signer on the firm's trust account, not as record counsel for Amburgey.

2. Significant Misconduct does not exist here.

In Champagne, respondent acted only to give the court the benefit of his research, the information from the Florida Bar Hotline and the statutory provisions, respondent sought only instruction on what he was to do in this unusual situation. regarding Champagne being missing and the Southern Bell offer being withdrawn for settlement due to the passage of time. Respondent had filed no fee claim, only a request to accept the funds, release Southern Bell and put the funds into the registry.

As to Amburgey, respondent was again completely candid: the early disbursement was revealed to the client, to the substitute counsel, to the Florida Bar Chair Raymond Malca, and to the Florida Bar investigating attorney Richard Liss as well as to the workers compensation judges. This was due to an erroneous interpretation of the workers compensation orders by associate attorney Marks upon whom respondent reasonably relied. Again, respondent was not even present when the second workers compensation judge eventually allowed disbursement to respondent's firm from trust of fees and costs. Notably, when such authorization was given, only Amburgey's substitute attorney and insurance carrier lawyers were apparently present.

3. Only "Minor and Technical" charges were found, however erroneously.

There are no true "multiple" offenses; the bar has created sixteen counts of alleged misconduct by accepting and then breaking out and prosecuting these "minor and technical" matters as separate and duplicative yet brought in one full swoop. There were no excessive fees taken by respondent since, after fully disclosing, the trial judge(s) had allowed the contract fee. Judges Ross Seppi thoroughly reviewed the matters and heard testimony and considered the pleadings. See The Florida Bar v. Miller, supra, where a similar lack of intent although a trust account violations occurred, warranted a reprimand rather than suspension to issue.

As far as withdrawal from representation by respondent in Amburgey is concerned, he did so, as soon as substitute counsel could be found. Mr. Amburgey and the record both reveal that Judge Seppi would not allow Amburgey to proceed pro se despite his request to proceed without having counsel. The two letters from law firm employees without the designation of legal assistant/law clerk or secretary was against the custom and written rules of the law firm and these isolated instances do not warrant such severe sanction as suspension or disbarment. Compare The Florida Bar v. Hall 521 So.2d 1117 (1988) where such neglect warranted a reprimand.

4. Nothing but cooperation by respondent is proven in the record.

There is no bad faith or breach of confidentiality in the Reese complaint. Under Rule 4-1.6(c)(i) of Rules and Regulation of the Florida Bar, respondent testified he believed the whistle-

blowers allegations needed to be first disclosed to proper authorities before any wrongful discharge action could be considered. The client Reese consented for this to be done in the joint teleconference. Based on the record, the Bar erroneously believes that there was any attempt by respondent to do anything other than to satisfy that legitimate client's concerns. The record reflects an 8½ by 14 detailed single space notarized affidavit by respondent which had been prepared for this client, Reese.

The respondent's reaction was reasonable and understandable in trying to resolve this complaint. It appeared that respondent had become "open season" given the public nature of these matters by the time the Reese complaint surfaced. Thus, any time there was an attempt to collect a fee in a resistant client, a bar complaint seemingly resulted. This became so no matter how poorly grounded in fact, it was, and a "snow balling" effect resulted. This was countenanced, if not encouraged,[6] by the local bar counsel office which did not decline matters that were clearly fee disputes and should not have become a grievance.

5. Prior record of respondent does not justify the proposed overly harsh results.

The prior disciplinary record of respondent indicates minor misconduct/admonishment in 1993, with a private reprimand in 1987. Neither matter related to any significant or serious violation but

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[6] The discussion before the referee was that a former law partner of respondent, one Stephen Jerome, seemingly solicited respondent's clients and represented Champagne, for example, and explored grievance potential of the others. This occurred after Marks left respondent's staff and joined Jerome's office instead.

rather represented the first brush of respondent with the bar's disciplinary machine as he was a relative "newcomer" to private practice and to the Florida Bar's ranks. Furthermore, the referee improperly "went behind" the misdemeanor action against respondent under the repealed statute so that improper and unwarranted conclusions were reached. Cf, The Florida Bar v. Onett 504 So.2d 388 (1983).

No mitigation factors were considered by the referee in his findings despite their presentation. The referee erred and failed to take into account respondent's lack of substantial private practice experience, and the full and complete cooperation of the respondent throughout the years of these proceedings. The respondent's demeanor and the remorse which he displayed, given the unfortunate "minor and technical" charges presented, were also erroneously ignored. The December 1993 and May 1994 transcripts reflect the new referee holding repeated off-the-record discussions.

Again, the referee failed to consider that no serious harm was visited upon any client and that restitution had been fully made of the $171.14 at issue in Amburgey. If this is neglect, given this court's broad discretion, this court need not defer to the referee or the bar. The motive of the respondent and the only evidence of record would support a finding that respondent wished to benefit his client(s), while building up his relative inexperience in Florida law. These are each factors in mitigation which should be

considered. Compare The Florida Bar v. Inglis 471 So.2d 381 (1993) and The Florida Bar v. Moran 462 So.2d 1089 (1981)

II. Referee taxation of entire of costs is improper.

Respondent argued to the referee as to the excessive costs requested by the bar. This was objected to given the bar's failure to specifically break out and document same. This court should, therefore, reduce the assessment, if any, of costs against respondent given the "not guilty" findings. Compare The Florida Bar v. Chilton 616 So.2d 449 (1993) and The Florida Bar v. Allen 537 So.2d 105 (1989). Lastly, the bar presented no auditor nor need for same so that assessing his costs is similarly unjustified. See The Florida Bar v. Kyle 530 So.2d 918 (1989) (involving a resignation).

CONCLUSION

Disbarment, being the most extreme penalty, should arguably be imposed only in cases where the attorney has demonstrated the most infamous type of misconduct; it is may be only in those instances where the possibility of the attorney's rehabilitation and restoration to an ethical practice are the least likely. It is called the remedy of "last resort"; where the conduct of an attorney indicates that he is beyond redemption, unlike the case at bar.

A test of disbarment has been stated as the presence or absence of moral turpitude or a corrupt motive. Mere negligence alone is an insufficient basis for disbarment or for consecutive suspensions, even though the negligence may be repeated, but unintentional. See, The Florida Bar v. Penn (1982, Fla) 421 So.2d

497 (decided under predecessor law governing the bar); Florida Bar v. Moore (1966, Fla) 194 So.2d 264 (decided under predecessor law governing bar); The Florida Bar v. Oxford (1960, Fla) 127 So.2d 107; Florida Bar v. Dunham (1961, Fla) 134 So.2d 1 (decided under predecessor law governing the bar): Florida Bar v. Ruskin (1961, Fla) 126 So.2d 142 (decided under predecessor law governing the bar. Sheiner v. State (1955, Fla) 82 So.2d 657, on remand (11th Cir.Ct) 9 Fla. Supp 121, later proceeding (11th Cir.Ct) ; Florida Bar v. Turk (1967,Fla) 202 So.2d 848 (decided under predecessor law governing the bar; Florida Bar v. Carlson (1966, Fla) 183 So.2d 541; The Florida Bar v. Whitney (1970, Fla) 237 So.2d 745; The Florida Bar v. Thompson (1972, Fla) 271 So.2d 758; Lambdin v. State (1942) 150 Fla 814, 9 So.2d 192 (decided under predecessor law governing the bar: Gould v. State (1930) 99 Fla 662, 127 So. 309, 69 ALR 699;Zachary v. State (1907) 53 Fla 94, 43 So.925; Fowler v. Finley (1892) 30 Fla 85, 110 So. 514. The Florida Bar v. Davis (1978, Fla) 361 So.2d 159 (decided under predecessor law governing the bar, and holding that although knowing issuance of worthless checks constitutes unethical conduct and subjects the attorney to professional discipline, in absence of a showing of moral turpitude from surrounding circumstances, the appropriate sanction was suspension and not disbarment).

Removal from the bar, as opposing counsel asserts, should not be decreed where punishment less severe, such as a reprimand, or fine, would accomplish the end desired. This is especially true where the clear and convincing evidence shows lack of intent or

mistake by respondent. See Florida Bar v. Cramer 643 So.2d 1069 (1994).

The discipline of permanent disbarment is reserved for only the "most egregious" of cases, unlike that at bar here. As aforesaid, the Supreme Court is not compelled to defer to the new referee's report here where there simply is a lack of evidence in support of the proposed findings. See The Florida Bar v. Mooren 462 So.2d 1089 (1985) and The Florida Bar v. Inglis 471 So.2d 38 (1985).

In imposing a sanction after a finding of lawyer misconduct, a court should consider the duty violated; the lawyer's mental state; the potential or actual injury caused by the lawyer's misconduct; and the existence of aggravating or mitigating factors. The Florida Bar v. Penn (1982, Fla) 421 So.2d 497; The Florida Bar v. Blalock (1974, Fla) 302 So.2d 758; The Florida Bar Re Hipsh (1991, Fla) 586 So. 2d 311, 16 FLW S 509, each such condition was not discussed by the referee.

Thus under the current record, neither disbarment is justified nor are the consecutive three year suspensions warranted here for this respondent under Rule 3-7.7(c)(15) of Rules and Regulations of the Florida Bar.

Also, under Spevack v. Klein, 385 U.S. 511 (1967), respondent should not be punished, in effect, for having invoked his 5th amendment rights in the bar's disciplinary proceeding. See DeBack v. State 512 So.2d 164 (1987). This referee appears to have done so, here, given that respondent elected to obtain this court's determination rather than to "bargain" away his valued law license and reputation.

Given respondent's lack of intentional misconduct in the record, this court should consider in mitigation this regrettable error of respondent and weigh the relatively "minor and technical" nature of the violations. In doing so the conclusion can only, thereby be fairly reached that the proposed discipline sanctions are excessive. Compare The Florida Bar v. London 632 So.2d 70 (1994). Rather, based upon the case law and precedent cited by respondent, a public reprimand may be just and more appropriate in this cause.

Respondent awaits this court's resolution with anticipated hope for a fairer and just decision, more properly based upon the actual record developed below.

Respectfully submitted,

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