IN THE SUPREME COURT OF FLORIDA

047

THE FLORIDA BAR,

Complainant

vs.

HAROLD BEHRMAN,

Respondent/Petitioner.

Case No. 81,866

FILED
SID J. WHITE
FEB 27 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

AMENDED INITIAL BRIEF OF PETITIONER

On Appeal from Report and Recommendation, and Orders of Referee in Florida Bar Disciplinary Proceeding

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STATEMENT OF THE CASE AND THE FACTS

I. COURSE OF PROCEEDINGS BELOW

The Florida Bar on November 25, 1992 obtained an Emergency Suspension of Respondent.. On June 1, 1993 the Bar filed its complaint. On February 23, 1994, the Emergency Suspension was terminated. The hearing was held on March 28, 1994 before Referee Bernard R. Jaffe. In his June 23, 1994 Report, the Referee found Respondent not guilty of all charges alleging dishonesty, fraudulent behavior and making a false statement to the Bar; he found Respondent guilty of trust account violations and ordered restitution and payment of costs. The Bar filed a Petition for Clarification and on August 15, 1994 a brief hearing was held; Respondent filed a Motion for Rehearing; on October 13, 1994 the Referee issued orders on both matters. The Board of Governors declined to request review. Respondent filed his Petition for Review on November 26, 1994. This Court has jurisdiction pursuant to Rule 3-7.7 of the Rules Regulating the Florida Bar.

II. MATERIAL FACTS

(Transcript references are to the two-volume transcript of the March 28, 1994 hearing, unless otherwise indicated.)

Respondent Harold Behrman is a 79-year-old attorney licensed in Florida and New York. After being admitted into the New York Bar in 1939, Respondent practiced law for approximately two-and-one half years (before entering military service in World War II). After his honorable discharge, Respondent engaged in business, opening a number of retail outlets which sold women's jewelry and accessories. Eventually, Respondent sold the business. In 1987, Respondent passed the Florida Bar and was admitted to practice in this State. (Tr. 16-18). Subsequently, he had a

modest law practice, involving some personal injury cases (Tr. 20) and had no disciplinary problems in connection therewith.

Eventually, when Respondent was planning to relocate his office closer to Miami, he happened to meet one R. Mark Hunter, who told Respondent that he was a Pennsylvania attorney who did not practice law, but instead was a broker who assisted entrepreneurs to obtain financing from their own sources, by providing them with guarantees from his clients, who would furnish such guarantees to institutional lenders, in return for a fee. (Tr. 27-28). Hunter suggested that Respondent might want to lease office space from Hunter, who was located in North Miami. Respondent entered into a lease arrangement with Hunter. (Tr. 26-27).

In the early fall of 1991, Hunter asked Respondent to consider serving as escrow agent for borrowers' funds in connection with the types of financial transactions he had previously described. (Tr. 30-31). Hunter told Respondent that borrowers would remit a small percentage of the total amount they wished to borrow from institutional lenders of their own choosing, and that these remitted sums would be utilized by Hunter's clients (investor entities named Altima and Koning) in their activities, as a predicate to the offering of the guarantees in question. (Tr. 31).

In response to Respondent's request for documentation, Hunter showed him a contract form of the nature he used with prospective borrowers, explaining that it was typical of the documents that he would be using in the arrangements he was asking Respondent to serve as escrow agent. (Tr. 31-33). Respondent read the form, and said that he would be willing to be an escrow agent on these terms. (Tr. 32-33). Hunter noted to Behrman that the contract required that the investors had to give deposits up front to permit processing of an application. (Tr. 31-32).

Hunter further explained to Respondent that if the funding was not effectuated, at least two

thirds of the escrowed funds would be remitted to each of the potential borrowers by Hunter's client, Altima or Koning. The provision was clearly set forth in the contract and in fact executed by the very borrowers themselves, in paragraph 20 of each contract. *See* Bar Exhibits 6 and 19 and Respondent's Exhibit "A", introduced at the March 28, 1994 trial. (Tr. 151-52; 244-45, 251).

Hunter further explained to Respondent that the portion of the deposit not returned would have been expended for the costs and expenses relating to the prospective guarantors' activities, and would include a $1,000.00 fee to Respondent for each of the loan transactions. (Tr. 33).

Indeed, one potential borrower, a Capt. Eslie Birchwood, had two-thirds of his $ 25,000 deposit returned to him by Hunter after Hunter did not come through with a funding guarantee. At the hearing herein, Birchwood confirmed receipt of this money (Tr. 143), and further confirmed that he had signed a contract (Bar Exhibit 6) containing the same Paragraph 20 which stated that the Escrow Agent (Respondent) would be directed to return to Birchwood's company, Sunbird Airways, the commitment fee, less as much as one-third. (Tr. 151-53). Birchwood so testified at the trial before the Referee. (Tr. 143). (Although Birchwood testified that he did speak to Respondent on the phone on occasions, subsequent to his remitting the funds, Carol Gunter Hunter's secretary, says that in all the calls she took from Capt. Birchwood, he asked to speak to Mr. Hunter, never to Respondent. (Tr. 167).

(Birchwood also gave a Release in exchange for that refund. The Referee initially recommended that Respondent make restitution to Birchwood for the $1,000 fee Respondent had received out of Birchwood's deposit. At the August 15, 1994 hearing on the Bar's Motion for Clarification, in response to Respondent's representation that Birchwood had confirmed receipt of the two-thirds refund that his contract provided for, and had given a Release therefor, the Referee

stated that he would withdraw his recommendation of restitution to Birchwood if Respondent would furnish a copy of that Release. Respondent did so, attaching it as Exhibit C to Respondent's Motion for Rehearing, filed over Certificate of service of September 9, 1994. Nonetheless, the Referee refused to withdraw his recommendation that Respondent refund to Birchwood that $1,000 fee.)

Respondent thereupon set up a single IOTA trust escrow account, dedicated to the escrowing of funds to be received by Hunter from the prospective borrowers who would be dealing with Hunter's clients. In addition to files containing the contracts, Respondent retained his trust account bank statements, and thus had full records of the transactions, although Respondent did not maintain separate files or ledgers, as required by Rule 5-1.2(b) of the Rules Regulating the Trust Accounts.

In each instance, upon being advised by Hunter that disbursements were to be made, Respondent complied with these instructions, since these instructions were wholly in accordance with the terms of the executed contracts which he had been given. Prior to such disbursements, the only contact between Respondent and any of the borrowers who had been dealing with Hunter, was his receipt of checks made out to his trust account, as he expected they would be. He was never involved in any negotiations with them leading to and execution of the contract or disbursements of the funds. At no time prior to disbursing any of said borrowers' funds did Respondent ever have any other contact with the borrowers.

At Hunter's direction, instead of making disbursement checks payable to Hunter's entities Altima Investments, N.V. Koning Investment Capital, N.V., Respondent on occasion would make checks payable to R. Mark Hunter and/or his business partner, John Allen. Hunter had represented to Respondent that, if the checks were instead made out to Altima or Koning, there would be a lengthy delay as Respondent's trust disbursements checks cleared the recipient banks and while the

entities' checks thereafter sent on and cleared, and that by making out the checks directly to Hunter or his business partner, for delivery to Altima, this was accelerated. The disbursements were for the intended purpose. As Respondent had received written instructions from Altima and Koning that he should follow directions from Hunter as the agent for those entities, Respondent had every reason to regard Hunter's instructions as totally authorized and proper. (Tr. 68-71; the document, entitled, "Appointment of Counsel", directing Respondent to follow the directions of Hunter in disbursing escrow funds, is attached as an exhibit to respondent's "Motion for Reconsideration.)

On one occasion, Respondent wrote a check from the trust account for $500.00, payable to "Mark Hunter" for the purpose of paying Respondent's office rent for February of 1992. (*See* Exhibit to Report of Referee.) As Respondent was entitled to a total of $4,000.00 in escrow agent fees for the four separate transactions in which he served as escrow agent, he regarded it as appropriate to pay the personal obligation directly, as payment still would not bring the amount he had withdrawn for his own use to the $4,000.00 to which he was ultimately entitled in fees. Respondent readily acknowledges that the more appropriate method would have been for him to have paid out those fees to himself, depositing them into his operating account, and thereafter remitting and disbursing his own rent payment from the operating account.

Respondent could not know that mail, faxes and other material addressed to Respondent were being diverted by Hunter or his secretary, Carol Gunter, acting at Hunter's instructions. Gunter testified that 98 to 99 percent of items addressed to Respondent were first seen by Hunter. (Tr. 164-65). Even telephone calls to Respondent were first screened by Hunter. (*Ibid.*). Hunter sometimes withheld items from Respondent. (Tr. 166). Gunter even saw Hunter rifling through Respondent's files and extracting letters and faxes, which he would then throw away or destroy. (Tr. 167).

As noted, Respondent called John Dodds to testify at the March 28, 1994 hearing before the Referee (Tr. 223-249). Mr. Dodds confirmed that, as he had told Bar counsel in 1992, he believed that Respondent had been duped by Hunter, just as he and other investors had been. (Tr. 248). Indeed, Mr. Dodds and his business partner, Charles Crabtree, had been skeptical of giving any more money to Hunter, as Hunter had previously lost $50,000.00 of their money, which they had given to him for a similar purpose. Hunter had simply told them that he had been "conned" by the people with whom he had dealt, and was requesting more money from them. Dodds testified (Tr. 226-229) that he and his partner were being assured by Hunter that their funds would be escrowed, then agreed to give him an additional $23,000.00 in October, 1991. At no time did either of these men have any contact with Respondent other than to be introduced to him perfunctorily while in the office visiting Hunter; Dodds was never led to believe that Respondent was Hunter's business associate. (Tr. 231-32).

When investor Blanton finally contacted Respondent directly, complaining that he had not had any word about the status of the transaction (Tr. 53), Respondent sought his files and records to investigate the matter, and found that all of these had been taken from his office. Hunter denied any knowledge of their whereabouts. However, Hunter's secretary, Carol Gunter, testified at the hearing that it was common for Hunter, in Respondent's absence, to enter Respondent's office and remove files and to extract papers and records therefrom, without ever telling Respondent. When the Florida Bar contacted Respondent, he had to rely upon Hunter's representations to him that all of these matters were being resolved with the borrowers to their satisfaction. As Respondent had seen contracts providing that up to one-third of the amounts remitted by investors could be retained by Hunter, and had as yet received no communication to the contrary from investors, he felt that

Hunter was telling the truth and advised the Bar in his September 16, 1992 letter that the transactions had been successfully concluded to the satisfaction of all parties. The Florida Bar filed a complaint on June 1, 1993, charging Respondent in four counts as follows:

Count I: That by virtue of his receipt and disbursement of the money sent by Dodds and his partner, Crabtree, Respondent committed acts which: were unlawful or contrary to honesty and justice (Rule 3-4.3); constituted criminal misconduct (Rule 3-4.4); violated the rules of conduct or assisted another to do so (Rule 4-8.4(a)); committed criminal acts reflecting adversely on Respondent's honesty, trustworthiness or fitness as a lawyer (Rule 4-8.4(b)); engaged in conduct involving dishonesty, fraud, deceit or misrepresentation (Rule 4-8.4(c)): and violated the Rule requiring that he apply money entrusted to him for a specific purpose to that purpose (Rule 5-1.1(a)).

Count II: That by virtue of his receipt and disbursement of the money sent by Blanton, Respondent committed the same acts in violation of the same Rules;

Count III: That by virtue of his no longer having the trust account records (which were stolen from his office) and not producing them for inspection on demand of the Florida Bar, Respondent violated Rules 5-1.1(d) and 5-1.2(b), requiring maintenance of minimum trust account records;

Count IV: That by stating in his September 16, 1992 response letter to the Bar that all transactions in which he had acted as escrow agent were successfully concluded to the satisfaction of the parties, Respondent violated Rule 4-8.1(a), the proscription against making material false statement in connection with disciplinary matter, and Rule 4-8.4(c), the proscription against engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

On November 16, 1992, the Florida Bar filed a Petition for Emergency Suspension of

Respondent, which was granted on November 25, 1992. On December 7, 1992, in a meeting in the Florida Bar office, Respondent reluctantly filed a Petition for Resignation, which he subsequently moved to withdraw, and said Petition was granted by this Honorable Court on April 15, 1993.

A May, 1993 motion by Respondent to lift the emergency suspension was opposed by the Bar and was denied. On June 1, 1993, the Bar filed its complaint. Respondent filed a renewed Motion to Dissolve Emergency Suspension, which motion was granted and Respondent was reinstated effective February 23, 1994, after having been subjected to an emergency suspension of approximately fifteen months' duration. It is also noted that Respondent was subjected to extremely pointed publicity, virtually alleging that he was personally guilty of intentional fraudulent acts, in at least one newspaper article which appeared in or about December, 1992.

Pretrial proceedings and discovery were held, in the course of which the Florida Bar on January 5, 1994 deposed Respondent, his former employee Ryder Littlehale and Hunter's former secretary, Carol Gunter. Gunter testified, as she later did at trial, to Respondent having been denied all contact with the borrowers and his being denied knowledge of those borrowers' attempts to contact him. Nonetheless, the Bar did not withdraw or amend any of its claims or allegations.

The refusal of the Florida Bar to withdraw the most egregious claims (those alleging criminal acts, fraud, dishonesty, etc., relative to Rules 3-4.3, 3-4.4 and 4-8.4) cannot be justified. Not only did the depositions make it clear that Respondent had been prevented from knowing facts by Hunter's fraudulent concealment of information and by his interception of communications directed to Respondent, but in fact the Florida Bar staff counsel had admitted to complainant Dodds in conversations beginning in October 1992 that she realized that it may well have been the case that Respondent had been a victim of Hunter's duplicity and had been used by Hunter, and that

Respondent's wrongdoing had consisted instead of failing to check directly with Dodds to get his express permission before disbursing his funds, and that Respondent accordingly had failed to live up to his independent obligation as an escrow agent. Dodds so testified. (Tr. 234-239). Dodds further testified that he told Bar staff counsel that he felt Respondent was a victim of Hunter, and that she intimated that she agreed but felt that Respondent had "abused" the use of the escrow account. (Tr. 248). Clearly the Referee agreed that Respondent did not intentionally violate his obligations, as he absolved Respondent of wrongdoing under Rules 3-4.3, 3-4.4 and 4-8.4; had the Bar amended its complaint to delete these clearly unwarranted charges once it became aware of the lack of foundation therefor, the need for a trial and the attendant costs (which should not be assessed against Respondent) and the resulting expenses and burden to Respondent and his witnesses and counsel, would all have been obviated.

A hearing by way of a full day trial was held on March 28, 1994. Testimony and evidence were adduced as indicated above. *Interestingly, the Bar declined to call investor Dodds, one of the two persons whose complaints had prompted this investigation; instead Respondent called him to attest to Respondent's lack of involvement, as the Bar well knew he would.*

On June 23, 1994, the Referee filed his Report finding the Respondent guilty of not adhering to proper trust accounting procedures, in violation of Rules 5-1.1(a), 5-1.1(c), 5-1.1(d) and 5-1.2(b) of the Rules Regulating The Florida Bar, but found that Respondent was not guilty of violating Rules 3-4.3, 3-4.4, 4-8.4(a), (b) and (c) of the Rules Regulating The Florida Bar.

As to the finding of a violation of trust accounting rules, under Rule 5-1.1(a), the Referee found that:

> [t]he respondent as an escrow agent, had the duty to hold the monies received in

> trust, and to apply those monies for the purposes entrusted. The respondent testified that he disbursed, in reliance on a missing contract. This referee concludes respondent did not comply with the standards as set forth in Rule 5-1.1(a).

The Referee made no factual finding, and referred to no testimony or other evidence which even hinted that, Respondent knew or should have known that his disbursements were inconsistent with the investors' intentions.

The Referee attached to his report a fax which Blanton said he sent to Respondent. However, Blanton admits he sent it to Hunter's fax number, (Tr. 104) and that when he called to confirm that the money had been received, he spoke with Hunter, not Respondent. (Tr. 93-94). Respondent never received it (Tr. 255). Respondent's secretary Gunter testified that faxes (as well as mail and telephone messages) to Respondent were intercepted by Hunter (Tr. 164-167).

The Referee further found that, because Respondent did not comply with the trust accounting standards of the said Rules and particularly because he issued the $500.00 rent check described above, that Respondent had violated the relevant trust accounting rules.

The Referee recommended Respondent be suspended for three (3) months, and thereafter, until he proved rehabilitation, and that he make restitution in the amount of $1,000. 00 each for three escrow accounts of Blanton, Dodds and Birchwood. There had been no complaint relative to Captain Birchwood, who was allowed over Respondent's objections to testify at the hearing). [1]

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[1]The Referee, upon the undersigned objecting, said Birchwood's testimony would be limited to the scope of stating that Hunter never resolved things to Birchwood's satisfaction; for the sole purpose of disproving Respondent's statement in his September 16, 1992 letter to the Bar that all matters had been resolved to the satisfaction of all parties. (Tr. 53-56). The undersigned notes (Tr. 56) and Respondent testified (Tr. 80-82; 193-95; 211-212) that, as Respondent's files were missing when he wrote the letter, he had to rely on Hunter's representations.

On July 1, 1994, the Bar filed its "Motion for Clarification," noting that the Referee had sought proof of rehabilitation and that a suspension period of ninety (90) days or less may not require such proof. In Respondent's response thereto, Respondent noted that he had used the $500.00 trust fund to pay a personal debt when there were still funds in the trust account which were his by virtue of his $4,000.00 fees due; Respondent further stated that proof of rehabilitation should not be required under the circumstances and that his fifteen months emergency suspension made it inappropriate to suspend him for any further period. Respondent further noted, although he clearly did not meet the formal requirements for trust account record keeping, that there is no basis for holding that his disbursements were otherwise than in accordance with the instructions Respondent had received from Hunter, who had mislead Respondent just as he had misled the borrowers. The Referee set these motions and these matters down for hearing on Monday, August 15, 1994. In the meantime, the Bar filed its Reply, opposing the Respondent's Response, on the grounds that it had alluded to factual findings and the facts as adduced in the records, and had requested modification in the Referee's proposed sanctions; the Bar objected to Respondent making these arguments, although it made no articulation as to why Respondent's [in effect] Motion for Rehearing was for any reason inappropriate.

At the August 15, 1994 hearing, the Referee verbally ruled that he would not recommend a requirement of proof of rehabilitation, and stated he would withdraw his recommendation for "restitution" to Birchwood if Respondent could document that Birchwood had received the requisite two-thirds return of his escrowed funds and had given a release therefor to Hunter and his principal entity. (Aug. 15, 1994 ts. 13). The Referee declined to address the other issues which Respondent had raised in his filing with the court prior to the hearing. In Respondent's Motion for

Reconsideration, Respondent reiterated these points, with greater articulation, and again requested that the Referee amend his report to find the Respondent not guilty of application of trust funds to purposes other than for which they were entrusted and regarding the maintenance of trust account records and their production pursuant to subpoena, and to delete the requirement of restitution to Captain Birchwood, on the ground that he had given a written release in return for monies received, and further deleting the requirement that Respondent pay costs. As to the issue of the $1,000.00 restitution to Birchwood, the Referee had categorically stated at the hearing on August 15, 1994, that, if Respondent could show that Birchwood had given a release, no restitution as to him would be required (August 15, 1994 Tr. 13). However, the Referee declined to modify his prior report in this regard.

The Board of Governors considered the Referee's report and subsequent orders on November 11, 1994 and declared its intention not to file a petition for review. Respondent filed his Petition for Review of the Report of Referee and of the orders of October 13, 1994, respectively denying Respondent's Motion for Reconsideration and partially granting the Bar's Motion for Clarification.

SUMMARY OF ARGUMENT

Other than for the violation of failure to maintain full trust accounting records (*i.e.*, ledger cards and journals), the Florida Bar failed to prove any of its charges by a preponderance, much less than by the requisite clear and convincing evidence standard. Indeed, there is no competent substantial evidence in the record supporting any other finding of guilt.

Despite the fact that the Bar knew by October or November of 1992 that it had absolutely no basis to charge Respondent with fraudulent or dishonest behavior, or any other wilful

wrongdoing, the Bar nonetheless obtained an emergency suspension to oppose Respondent's requests for dissolution thereof, until this Respondent was able to obtain this Honorable Court's Order Dissolving the Emergency Suspension after fifteen months. The Bar did not file its Complaint against Respondent until June 1, 1993, charging Respondent in Counts I and II of criminal acts, dishonesty and fraud, all of which it knew by then were totally insupportable charges. In any event, two months before the March, 1994 hearing before the Referee, the Florida Bar took depositions of Respondent and his employee, Ryder Littlehale and of Hunter's secretary, Carol Gunter, which made it undeniable that there was absolutely no basis to continue the allegations of Count I and II, given Respondent's willingness, expressed in his September 16, 1992 letter (Bar Exhibit 9) to make restitution, and those charges should have been dropped at that point, if not earlier.

The Bar also knew by the time of the filing of its complaint that Respondent had not wilfully failed to produce his trust account records, as these had been taken from his office; the Bar knew that he had indeed maintained records fully documenting the trust account transactions, although he had failed to maintain a journal and ledger cards. Thus, Count III should not have been as expansive as it was.

The Bar was accurate in stating in Count IV that Respondent's September 16, 1992 response letter to the Bar (Bar Exhibit 9), stating that all transactions were successfully concluded to the satisfaction of the parties, was factually inaccurate. However, it was aware that he had to rely solely on Hunter's representations, as Respondent stated in the letter he was doing, in view of the fact that he had absolutely no records left from which to refresh his recollection of the details, or otherwise document what he was saying. Certainly, following the January, 1994 depositions, the Bar well knew that, in making that representation in the September 1992 letter, Respondent had certainly not

engaged "in conduct involving dishonesty, fraud, deceit or misrepresentation," and such a claim should have been dropped at that point.

Moreover, as Respondent had offered in September, 1992 to return the fees which he had received,[2] and had otherwise given all of the information available to him to the Florida Bar, there was absolutely no reason to proceed to a trial herein. The Referee exonerated Respondent from all charges of wrongdoing, except for the Referee's finding that Respondent failed to apply monies received in trust for the specific purposes entrusted, as to which finding the Referee erred. Since there was absolutely no question that Respondent had been shown contracts, signed by the investors, containing a paragraph 20 which clearly stated that up to one-third of the investors' deposits which had been sent to the escrow agent could be withheld, and as Respondent had been given written instructions to follow the directions of Hunter and his partner as agents for the entities which were supposed to furnish the loan guarantees, Respondent acted in accordance with what he reasonably believed to be the strict instructions as to his obligations which he had expressly sought and received from Hunter. Accordingly, Respondent was not shown to have violated the requirement of applying monies other than for the purposes entrusted.

The Referee erred in finding that Respondent violated Rules 5-1.1(d) and 5-1.2(b) by issuing a $500.00 check to pay his office rent out of the trust escrow itself, because those rules merely prescribed the records to be kept regarding trust accounts, and the trust accounting procedures to be followed. While Respondent did violate these rules in failing to maintain a separate cash receipts

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[2]At this time Respondent had been told only of the complaints by Blanton and Dodds (Pines Development). He offered to return his $1,000.00 escrow fee to Blanton, and explained that Hunter had shown Respondent documentation of his offer to return to Pines Development the entire amount escrowed in return for a release.

and disbursements journal and a separate file or a ledger, he did maintain his bank statements and canceled checks, and therefore was not guilty of any impropriety which amounted to a wilful refusal to document trust account transactions, nor did such failure in any way prevent any auditor from being able to analyze the history of the account transactions. What did serve as an impediment to such ascertainment by the Florida Bar, was the fact that Hunter stole the files from Respondent's office, but this is not attributable to Respondent and he should not be punished therefor.

Moreover, it is permitted by Rule 5-1.1(a), of the Rules Regulating Trust Accounts, that, although an attorney may not normally look to trust account funds for payment of fees, "[t]his is not to preclude the retention of money or other property upon which the lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collection." This is essentially what Respondent did, although it is agreed that it would have been better had that $500.00 rent check been paid from his operating account after he had withdrawn the fees due him from the trust account.

The recommendation to suspend this Respondent is wholly unwarranted. The Florida Standards for Imposing Lawyer Sanctions at most justify an admonishment; even a public reprimand, which requires negligence in dealing with client property, cannot be justified in this case. To impose a suspension, however, requires either wilful wrongdoing or gross negligence, neither of which was shown here, even by a preponderance, much less by clear and convincing evidence.

ARGUMENT

I. THE REFEREE ERRED IN HIS FINDING THAT RESPONDENT DISBURSED FUNDS IN VIOLATION OF HIS DUTIES AS ESCROW AGENT

Fiduciary obligations are the same for attorneys and non-attorneys; the essence of fiduciary

loyalty is that "a fiduciary, be he an attorney or not, must account for and deliver over property or money of a beneficiary, client, or third party which has been entrusted to him for a particular purpose and which he was required to have held in trust." *Williams v. Hunt Bros. Const., Inc.*, 475 So.2d 738, 741 (Fla.2d DCA 1985). Respondent does not dispute that lawyers have a particular obligation to be circumspect in this regard. *Id.*, citing *The Florida Bar v. Ruskin*, 232 So.2d 13 (Fla. 1970). However, lawyers, as do lay people, fulfill this obligation when they comply with specific instructions pertaining to the conditions under which they disburse funds. *Williams v. Hunt Bros. Const., Inc. supra.* Even a plausible verbal agreement is sufficient to define an attorney's escrow obligations, although a written agreement is "strongly urged." *The Florida Bar v. Fitzgerald,* 491 So.2d 547, 548, 548 n.1 (Fla.1986).

Here, experienced investors were defrauded by R. Mark Hunter, whose believability and persuasiveness were so great that, even investors (Dodds and Crabtree) who had "lost" $50,000, without ever having any documentation from Hunter as to his disposition thereof, nonetheless gave him another $23,000 and a release for the first defalcation, merely upon his word! By contrast, Respondent insisted on seeing documentation from Hunter, who showed him an unexecuted boilerplate contract and several executed contracts, the authenticity of which were confirmed in the testimony of investors at the trial. Moreover, Respondent was given a formal document purportedly from the two corporations which Hunter represented, authorizing and instructing Respondent to follow Hunter's instructions in respect to disbursements. Respondent reasonably relied on these documents, which Hunter gave to Respondent *because of Respondent's insistence on having his duties categorically spelled out.*

Sophisticated investors had readily given Hunter hundreds of thousands of dollars solely

upon his verbal representations, but Hunter could not persuade Respondent to be an escrow agent until giving Respondent documents spelling out in detail the rights of the investors and the obligations of the escrow agent!

Respondent exercised far more caution than did sophisticated commercial business people who were investing substantial sums. There is no substantial competent evidence supporting the Referee's finding that Respondent violated his duties as an escrow agent.

II. THE REFEREE ERRED IN FINDING THAT RESPONDENT DID NOT COMPLY WITH THE REQUIREMENT OF RULE 5-1.1(a) TO APPLY MONIES RECEIVED IN TRUST FOR THE PURPOSES ENTRUSTED, AND ERRED IN RECOMMENDING A FINDING OF GUILT AS TO SUCH VIOLATION

Respondent respectfully notes that he did not act in his capacity as an attorney for the investors whose funds were sent to his escrow account at Hunter's direction. Rule 5-1.1(a) must be read *in pari materia* with Rule 4-1.15. Rule 5-1.1(a) deals with entrustment of property to an attorney for a specific purpose, and is part of Chapter 5 which deals *in toto* with "Rules Regulating Trust Accounts."

> To be liable under subsection (b) [of Disciplinary Rule 4-1.15], an attorney must have failed to promptly deliver property to a client or a third person *in connection with legal representation. See id.* comment. There is no suggestion in the record that the [complainants'] request [to the Respondent attorney] to pick up and deliver their arcade receipts was in connection with an attorney-client relationship. Indeed, the record suggests that respondent simply acted gratuitously. Accordingly, a charge of having violated rule 4-1.15(b) cannot be sustained. However, respondent's failure to promptly deliver the [complainants'] property under these circumstances *is* an act contrary to honesty and justice. Thus, the referee's finding of guilt on these facts under Rule 3-4.3 is supported by the record.

The Florida Bar v. Neely, 540 So.2d 109, 110-111 (Fla.1989; emphasis supplied in part). Thus,

even intentional misconduct amounting to fraud, while otherwise punishable, is not a basis for sanctions under Rule 4-1.15 if the lawyer was not in an attorney-client relationship with respect to a party having an interest in the funds. Clearly, this Respondent cannot be sanctioned under that rule for having acted in good faith as a mere escrow agent, in strict accordance with what he reasonably believed were the intentions of the persons who had sent the funds.

Although an attorney may violate some Disciplinary Rules even when acting outside the scope of his role as an attorney, he cannot be said to violate Disciplinary Rule 4-1.15 when he is not acting as an attorney, either for the owner of the property or for another in connection with the reason for which he was holding it. *Florida Bar v. Neely, Supra.* In *Neely*, the Court did find a violation of Rule 3-4.3, committing an act contrary to honesty and justice. *This Respondent, by contrast, was found Not Guilty of committing such an act.*

In *Neely*, the respondent attorney held funds of the complainants, Mr. and Mrs. Mancuso. He had previously represented them in various matters, and currently was representing their daughter in another matter. As he was about to travel to Miami, where they had a business, they asked him as a favor to collect cash from their arcade machines and deliver it to them upon his return to Daytona. He later refused to turn over the money despite their repeated requests made directly to him, unless they would sign papers permitting his withdrawal as attorney for their daughter. The attorney had had four prior sanctions, including three suspensions followed by probation. (*Id.* at 110 n. 3.) Finding mitigating circumstances (that the respondent reimbursed his client for the court costs in her case which was dismissed by his failure to prosecute, and that his malpractice was during a period when he was suffering from severe diabetes), this Court approved yet another 91-day suspension with a requirement to demonstrate rehabilitation! In this case, by contrast, this

Respondent has had no prior disciplinary complaints, much less sanctions, and did nothing involving *any* intentional violation of his obligations, much less fraudulent misconduct.

III. THE REFEREE ERRED IN FINDING THAT RESPONDENT FAILED TO COMPLY WITH RULES 5-1.1(d) AND 5-1.2(b) WHEN HE ISSUED A CHECK FROM HIS TRUST ESCROW ACCOUNT TO PAY HIS OFFICE RENT AND ERRED IN RECOMMENDATION

Respondent does not dispute that he failed to maintain ledger cards and a separate cash receipts and disbursements journal. To that extent, he fell short of complying with prescribed trust accounting procedures. However, he did have bank records, cancelled checks, bank statements and his checkbook and deposit slips, which were stolen from his office along with his files. The records he did maintain certainly would have permitted reconstitution of all transactions, had they not been stolen. Moreover, bank records subpoenaed from the bank itself bear out that Respondent had disbursed exactly as he said, in strict accordance with his instructions.

As to the Respondent's writing a $500 rent check directly from his trust account to Hunter for Respondent's February 1992 office rent, there is no disputing the impropriety of such a direct disbursement. Respondent concedes that he should have written over each $1,000 escrow fee as soon as it was earned, to remove it from the Trust Account.

However, at the time of his writing the $500 rent check, more than that was due Respondent as fees out of the Trust balance. Indeed, it is provided in Rule 5-1.1(a) of the Rules Regulating Trust Accounts, that, although an attorney may not normally look to trust account funds for payment of fees, "[t]his is not to preclude the retention of money or other property upon which the lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions

or collection." This is essentially what Respondent did, although Respondent concedes that the $500.00 rent check should have been paid from his operating account after he had withdrawn the fees due him from the trust account.

Thus, while such direct payment was improper, the payment was not of funds belonging to anyone other than Respondent, and this certainly mitigates the wrongdoing. It surely does not justify a suspension or other serious punishment, beyond admonishment for a technical violation of trust account rules causing no injury. Rule 4.14, Florida Standards for Imposing Lawyer Sanctions.

IV. THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT BE SUSPENDED

The investors who trusted Mark Hunter lost hundreds of thousands of dollars. Hunter looked them in the eye and convinced them to trust him and to invest large sums through him, and even was able, through only his charm and persuasiveness, to induce Dodds and his partner Crabtree to release him from claims for a large past loss and to give him more money. When Crabtree insisted on an escrow account, Crabtree was satisfied when Hunter said that an independent attorney would be an escrow agent. Crabtree did not ask to meet the escrow agent, and even after learning that the escrow agent was Respondent, an elderly lawyer in Hunter's office, Crabtree did not seek any assurance from Respondent, who innocently believed that he was fulfilling to the letter all the obligations which he so assiduously had tried to ascertain and to follow.

The seriousness of Hunter's outrageous conduct, and of the investors' losses, is obvious. Equally obvious is the absence of any wrongdoing on the part of Respondent. Neither through intentional misconduct, nor through negligence, did Respondent contribute to this tragedy. Instead,

he was victimized as much as they. They lost large sums of money; he had the humiliation of being accused in a press release of fraudulently stealing large sums of money, and he suffered the financial losses engendered by being suspended for fifteen months without a hint of due process, when the Bar knew, following the conversations Bar counsel had in 1992 with Dodds, Blanton and others that nothing he had done even remotely resembled what he had been charged with doing.

Respondent was not shown to have engaged in dishonest conduct. Dishonesty involves "disposition to lie, cheat or defraud; untrustworthiness; lack of integrity." *The Florida Bar v. Pettie*, 424 So.2d 734, 737 (Fla.1982), quoting from Black's Law Dictionary, and noting that even some illegal acts do not involve dishonesty. To constitute conduct involving dishonesty, the conduct must approach lying, cheating, defrauding or untrustworthiness. *Ibid.* Here, the Respondent never made any representations to any borrowers, or withheld any information from them, or did anything from which anyone could logically infer untrustworthiness. The only allegation along these lines was that Respondent assured the Bar in his letter of September 16, 1992 (Bar Exhibit 9) that the matters had been resolved to the satisfaction of all concerned. As he noted in his letter, Respondent made this statement in reliance on Hunter's assurances, with no reason to doubt the truth of these assurances, especially since Mr. Dodds had told Respondent, whom he had by then met, that Hunter was still trying to line up the guarantee for Dodds and his partner. The Referee's finding of conduct involving dishonesty is not supported by any competent, substantial evidence and certainly has not been proved by clear and convincing evidence.

> In imposing discipline for trust account violations, this Court's case law suggests a clear distinction between cases where the lawyer's conduct is deliberate or intentional and cases where the lawyer acts in a negligent or grossly negligent manner.

The Florida Bar v. Weiss, 586 So.2d 1051 (Fla. 1991), noting, *inter alia*, that in *The Florida Bar*

v. Burke, 578 So.2d 1099, 1102 (Fla.1991), it was held that "grossly negligent misappropriation of client funds warrants a 91-day suspension." *Weiss, supra,* at 1053. Here, there is no showing or finding that this Respondent committed any negligent misappropriation, much less a grossly negligent one. Respondent was shown signed contracts, and was as misled as were the investors who relied on representations solely of Hunter, not of Respondent, whom they did not meet prior to sending in their funds and Respondent's innocent, good faith disbursement thereof. Moreover, these were not funds of his client, as Respondent had no client.

A sixty-day suspension has been imposed for *intentional* wrongdoing, as with fraudulent concealment of material facts and willful failure to make an accounting of funds received. *See, e.g., The Florida Bar v. Adams*, 453 So.2d 818 (Fla.1984); *see also* Ehrlich, J., dissenting in part in *The Florida Bar v. Jennings*, 482 So.2d 1365, 1366-67 (Fla.1986) (criticizing the majority's approval of a Referee's recommendation of *public reprimand* for an attorney who abused his status as an attorney to secure loans from relatives and who fraudulently concealed the material fact that he had placed multiple encumbrances on property each of them believed was exclusively mortgaged to them; and recommending a suspension of at least 91 days.)

In *State v. Rhubottom*, 132 So.2d 395 (Fla.1961) a suspension (of one year) was imposed on an attorney who had borrowed money from clients in order to finance a lavish lifestyle and to conduct litigation which he hoped would produce a massive windfall. In the course of his actions, he defrauded the clients, placed multiple encumbrances on their collateral, applied other available funds to his own debts rather than to the repayment of his trusting clients, and perjured himself in testimony to the Grievance Committee which investigated him. The Referee and this Honorable Court felt that a one-year suspension was adequate. By contrast, this Respondent has suffered a

fifteen month emergency suspension without any opportunity for a hearing, when no one accuses him of intentionally misappropriating anything or of any willful misstatement.

The very worst that can be said of Respondent -- and it would be impossible to find proof of this, by even a preponderance much less by clear and convincing evidence -- is that Respondent was guilty of an *un*intentional mishandling of *non*client property. This justifies no more than an admonishment. Rule 4.14, Florida Standards for Imposing Lawyer Sanctions. Even a showing of negligence in dealing with client property, causing injury to the client, would justify no more than a public reprimand. *Id.*, Rule 4.13. There is no provision for defamation, public humiliation, willful continuation of an unjustified suspension (originally sought when the Bar did not realize Respondent's innocence, and willfully continued when the Bar knew from investor statements that the facts originally believed were nonexistent) or the denial of the means of livelihood for a man whose life had been exemplary. To suspend this Respondent, after all he has suffered, would be unconscionable.

V. THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT PAY THE COST OF THE PROCEEDINGS

It is one thing for the Florida Bar to recover costs necessitated by a trial, when there were justiciable issues to be determined. However, it was another for the Bar to insist on going ahead in the face of sworn deposition testimony of Hunter's secretary and categorical statements by Hunter's victims, that Respondent had been deceived into serving as an escrow agent. No trial would have been needed, and the expenses would not have been engendered, had the Bar acted properly. The Respondent in his September 16, 1992 letter offered to make restitution of his fees;

the Bar's response was to persecute him. Moreover, where an item of expenses is not expressly provided for, it may not be assessed. *The Florida Bar v. Neely,* 540 So.2d 109, 111 (Fla.1989), citing *The Florida Bar v. Allen,* 537 So.2d 105, 106, 107 (Fla.1989).

It was improper for the Referee to require Respondent to pay the cost of the audit or investigation herein, since Respondent offered in September, 1992 to return his fee, and because he otherwise had told the Bar everything he knew, the Bar could have resolved this matter at that time. The cost of an audit or investigation may be taxed against a respondent *only* where such cost is "necessitated by" the respondent's own failure to maintain records or to produce them upon direction of the Supreme Court, a Grievance Committee, the Board of Governors or a Referee. Rule 5-1.1(c), Rules Regulating Trust Accounts. Here, no audit or investigation was necessitated by Respondent's failure to maintain records or produce them; instead, the audit and the investigation were totally unnecessary; to the limited extent the obtaining of the bank records was necessary, the cost thereof was necessitated by Hunter's purloining of Respondent's records, not of any failure by Respondent. Accordingly, the assessment of these costs was in error.

Witnesses Blanton and Birchwood in their testimony confirmed that they had signed the commitment contracts. They did not have to be called by the Bar to testify; they proved nothing, and could prove nothing, pertinent to the charges against Respondent. That the Bar declined to call as a witness Dodds, who had told the Bar that he believed Respondent to have been the unwitting dupe of Hunter even as Dodds and his partner had been, and who had been advised by Bar counsel that the Bar appreciated that Respondent had not acted with willfulness, underscores the gross impropriety of the Bar being compensated for its expenses. Instead, the Bar should pay Respondent's expenses, and his reasonable attorneys' fees (those paid and those not paid because of

his financial situation).

VI THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT MAKE RESTITUTION

The Referee erred in recommending restitution. At the outset, it is reiterated that, as noted above, Captain Birchwood acknowledged in his testimony (Tr. 143, 151-153) that he had signed the contract (Bar Exhibit 6) with the standard Paragraph 20 stating that if the loan did not go through, he would receive back at least two-thirds of his deposit. He gave to Hunter a Release of all claims, having received back as much as he was entitled to See Exhibit C to Respondent's September 9, 1994 Motion for Rehearing. Also as noted, the Referee had said that if the Release were shown to him, he would withdraw Birchwood as a party entitled to restitution. (Transcript of August 15, 1994 hearing, p.13).

Respondent should not be required to pay any restitution to any party, as he did everything in good faith that he was required to do. He insisted on seeing documented evidence of his obligations and the terms of the escrow and these were given to him in the form of signed contracts and an "appointment as counsel" providing his instructions and directing him to follow Hunter's instructions. Respondent is close to destitute, and did absolutely nothing wrong which in any way caused harm to the investors who were defrauded by Hunter. All the investors agreed that up to one-third of their investments could be retained by Hunter, and the $1,000 which was taken as a fee in each case by Respondent was a small fraction of that. Moreover, the Referee refused to entertain Respondent's arguments on the restitution issue or on other matters, prohibiting Respondent from arguing the points he had raised in his Response to the Bar's "Motion for Clarification," August 15,

1994 Transcript at p. 5), and refusing by denial of Respondent's subsequent Motion for Rehearing.

VII THE BAR FAILED TO MEET ITS BURDEN OF CLEAR AND CONVINCING PROOF.

The Florida Bar has the burden of proving each alleged rule violation by clear and convincing evidence. *The Florida Bar v. Burke*, 578 So.2d 1099, 1102 (Fla.1991). In this State's seminal case, the Court of Appeal for the Fourth District held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983). See also, State v. Mischler, 488 So.2d 523 (Fla. 1986) and Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).

Respondent served simply as a bare escrow agent, and represented no clients whatsoever. He was fully appreciative of his fiduciary and ethical obligations, both as an escrow agent and as an attorney. Accordingly, he required Hunter to provide him with documentation clearly delineating his (Respondent's) obligations to all concerned, including the investors whose funds would be remitted to Respondent, as well as to the corporate entities (Altima and Koning) whom Hunter represented.

When Hunter provided Respondent with agreements signed by the investors themselves, containing the explicit statement that up to one third of each investor's initial remittance could be withheld as expenses by Hunter's entities, and when he further supplied Respondent with documents "appointing" Respondent as escrow agent and directing

Respondent to follow instructions from Hunter as the entities' agent, he fully satisfied Respondent's inquiries as to Respondent's obligations. The investors' testimony that they had indeed signed these contracts, shows that the form and substance of the executed contracts given to Respondent were of a nature which satisfied those highly sophisticated investors, and it is totally unreasonable for the Bar to take the position that Respondent somehow should have divined that Hunter was defrauding the investors and Respondent.

Although Respondent does not maintain that a favorable finding on a respondent's behalf necessarily requires the conclusion that the Bar was acting wrongly in pressing such charges, the circumstances here mandate just such a conclusion.

Indeed, the Referee's total exoneration of Respondent as to all of the charges involving dishonesty, fraud or other intentional wrongdoing (aside from the question of writing his own rent check out of trust funds when the balance due him was greater than that amount), show the total illegitimacy of the Bar's continuing to press these charges.

The Bar, knowing in October, 1992, that Respondent himself may have been duped by Hunter (as Bar staff counsel admitted to Mr. Dodds), certainly required that all charges suggesting otherwise should have been dropped at that time. Indeed, given that Dodds had told the Bar of the history of his investments with Hunter and of Hunter's ability to get Dodds and his partner, Crabtree, to invest more, after Hunter had "lost" their $50,000.00, certainly mandated that the Bar tread very carefully even in its allegations of misapplication of trust funds.

At the very least, following the January, 1994 depositions of Respondent and Hunter's secretary, Carol Gunter, for the Bar not then to have dropped the charges of fraud,

dishonesty and illegal acts, cannot be justified.

Even more indefensible is the fact that the Bar vigorously sought to oppose Respondent's desperate attempts to have the emergency suspension lifted. Indeed, the Bar's Petition for Emergency Suspension was filed in mid-November, 1992 after conversations with Mr. Dodds, in which Bar staff counsel had expressed her full awareness that Respondent had not been guilty of dishonest or fraudulent conduct. The Bar had learned all of the underlying facts from Respondent in his September 16, 1992 letter and was aware that the trust account totally bore out everything Respondent said.

Moreover, the Bar was fully aware that Respondent had never even been accused of wrongdoing at any other time, and that Respondent's actions which were subject to review involved only the small escrow account, which by now was inactive and involved only Respondent acting as escrow agent at Hunter's behest.

Accordingly, the Bar clearly knew, well before it filed its Petition for Emergency Suspension, that there was no basis for seeking such a suspension. An emergency suspension is reserved to those instances where facts personally known to affiants are sworn to in support of such a petition, which facts, "if unrebutted, would establish clearly and convincingly that an attorney appears to be causing great public harm." Rule 3-5.2(a), Rules Regulating the Florida Bar. The limited facts, attested to by investigator Carlos Ruga in his affidavit, were selectively presented to this Honorable Court when the Bar was certainly aware of additional facts clearly showing that Respondent not only was no longer acting as an escrow agent for Hunter and that the single escrow account no longer existed, but also knew that Respondent had never intentionally acted with any fraudulent or improper intent.

That the Bar could seek (and subsequently fight to maintain) an emergency suspension despite its awareness of the total absence of any basis for such a suspension, only underscores the wrongfulness of the Bar pursuing the charges of fraud, dishonest and other intentional wrongdoing.

If this were a Federal Court, the Bar would be required under Rule 11not only to pay virtually all of Respondent's attorneys fees and all other attendant costs of defending the totally unfounded charges, but undoubtedly would be subject to additional sanctions as well. In a state court proceeding, under §57.105, Fla. Stat., Respondent would also be entitled to attorneys' fees.

CONCLUSION

Wherefore, this Honorable Court (a) should reverse the findings that Respondent disbursed in violation of his duties as an escrow agent; (b) reverse the findings that he violated Rules 5-1.1(a) when he made these disbursements in accordance with the strict guidelines he had insisted upon and had been given; (c) reverse the finding that he violated Rules 5-1.1(d) and 5-1.2(b) in disbursing $500 out of the portion of the escrow funds aggregating the fees he was entitled to withdraw; (d) rule that Respondent should not be suspended; (e) rule that Respondent owes no restitution or costs; (f) require the Bar to issue a press release announcing Respondent's exoneration of charges of fraud and

other intentional malfeasance; (g) require the Bar to pay Respondent's costs and reasonable attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was sent by U.S. Mail to ARLENE K. SANKEL, ESQ., Bar Counsel, THE FLORIDA BAR, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 and upon JOHN A. BOGGS, ESQ., Director of Lawyer Regulation, THE FLORIDA BAR, 650 Appalachicola Parkway, Tallahassee, FL 32399-2300, this 24 day of February, 1995.

By: _____
Kenneth D. Stern