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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

OSVALDO FRANCISCO VALLADARES,

Respondent.

_____/

Supreme Court Case
No. 87,153

FILED 8/1
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JUL 19 1996
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Respondent's Reply to The Florida Bar's

Initial **Brief On Petition for Review**

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PRELIMINARY STATEMENT

A final hearing was held in this matter on April 1, 1996 before Referee Raphael Steinhardt. On April 15, 1996 Referee Steinhardt forwarded his Findings of Fact and Recommendations to the Supreme Court which was received on April 16, 1996. Petitioner had until June 3, 1996 to file a Petition for Review and did so on May 29, 1996. Respondent then filed a Motion to Dismiss the Petition for Review based upon the fact that said Petition failed to delineate with specificity exactly what issues in the Referee's Findings of Fact and Recommendations to the Supreme Court the Petitioner wished to have reviewed by the Supreme Court. Subsequently, Petitioner filed a Motion for Leave to Amend Petition for Review and pointed to the fact that the Petition for Review was *unartfully drafted* (paragraph 2) and that *justice would not be served by permitting imprecise wording to serve as a basis for dismissal* (paragraph 5) as the reasons supporting said motion. Respondent, on June 18, 1996, filed an Objection to Petitioner's Motion for Leave to Amend Petition for Review and cited Rule 3-7.7© of the Rules Governing The Florida Bar which states that: "The filing of such Petition or cross petition shall be *jurisdictional* as to a review to be procured as a matter of right, but the Court may in its discretion consider a late filed petition or cross petition upon a showing *of good cause.*" (Emphasis added). Further, Respondent maintained that

Petitioner failed to establish or even allege, in its motion far leave to amend, good cause why it should be allowed leave to amend its unartfully drafted Petition for Review and therefore failed to invoke this Court's discretionary powers.

Without waiving any rights in the foregoing pending motions, which could make this matter moot, Respondent files its Reply to Petitioner's Initial Brief on Petition for Review.

STATEMENT OF THE CASE AND FACTS

A final hearing was conducted on April 1, 1996 by Referee Raphael Steinhardt pursuant to The Florida Bar's three count complaint against Respondent which was predicated upon the order of Emergency Suspension of November 15, 1995. The Order of Emergency Suspension was based upon the *sworn* representations made to this Court by The Florida Bar in its Petition for Emergency Suspension. The Petition for Emergency Suspension was in turn based upon the Affidavit of Carlos Ruga, Staff Auditor for The Florida Bar, which was attached to the Petition for Emergency Suspension as an exhibit. The Petition for Emergency Suspension stated in paragraph 3 that, *The Florida Bar has received notice from staff of clear, convincing and undeniable* evidence *that Respondent misappropriated funds entrusted* to *him."* Upon cross examination at trial *of* Mr. Ruga by Respondent's counsel, Richard B. Marx, this statement turned out to be inaccurate. Mr. Ruga candidly testified that he *never read the allegations* contained in the Petition for Emergency Suspension. Further, he stated that there was:

> *NO CLEAR EVIDENCE THAT RESPONDENT MISAPPROPRIATED FUNDS ENTRUSTED TO HIM. (T.44-46)*
>
> *NO CONVINCING EVIDENCE THAT RESPONDENT MISAPPROPRIATED FUNDS ENTRUSTED TO HIM. (T.44-46)*

NO UNDENIABLE EVIDENCE THAT RESPONDENT MISAPPROPRIATED FUNDS ENTRUSTED TO HIM. (T.44-46)

(See Findings of Fact and Recommendations to the Supreme Court). (Emphasis added).

When specifically questioned by the Referee at trial as to whether Respondent misappropriated any funds entrusted to him, Mr. Kuga stated "No, I have no knowledge." (T.T.52).

Thus, as to Count I of the Complaint, the Referee found that Respondent did violate Rules 4-1.15(a), 4-1.15(c), 4-1.15(d) and 4-8.4(g) of the Rules of Professional Conduct, Rule 5-1.1(e)(2), and 5-1.2 of the Rules Regulating The Florida Bar. However, he also found there was no showing that Respondent misappropriated any money and thus there is no restitution involved. Accordingly, the Referee found that Respondent did not violate Rule 4-8.1(b) as to Count I of the Complaint. *(See* Findings of Fact and Recommendation to the Supreme Court at pp. 13-14).

As to Count II of the Complaint, which dealt with practicing while administratively suspended for CLER credits and failure to pay Bar dues, the Referee found that Respondent *technically* violated Rule 4-8.4(g), and Rule 4-5.5, but that this was an unintentional act with a logical explanation. There was no question that Respondent had been suspended and reinstated. Accordingly, as to Count II of the Complaint, the Referee found that Respondent did not violate Rule 3-4.8.

Finally, as *to* Count 111, the Referee found that Respondent **did** violate rules 4-1.4(a) and 4-8.4(g), but although there was a lack of communication, **there** was no prejudice to the client. Accordingly, the Referee found that Respondent did not violate Rules 4-1.2 and 4-1.4(b) as to Count III of the Complaint. A5 to the issue of the **alleged** undisclosed bank account, the **Referee** issued an order on March 26, 1996 for Respondent *to* produce certain bank statements, **canceled** checks, check stubs, **deposit** slips, *etc...* for the period January 1, 1993 **to** the present from Respondent's trust account at Capital Bank (Account No.: 17000020102) by March 28, 1996. Respondent produced said **records** at the Miami Office ***of*** the Florida Bar on **March 28, 1996** with the exception of one check and a few monthly statements. Respondent requested the missing items from his bank and they were sent via fax to the **Referee's** chambers the morning of April **1**, 1996 directly from the bank and delivered to The Florida Bar's counsel. *(See* Findings of Fact and Recammendations to the Supreme Court at pages 4-5).

The Referee recommended the following discipline:

1) Ninety-day suspension with automatic reinstatement per Rule 3-5.1(e).

2) Three year probation, with Respondent at his own cost and expense employing the **services** of a certified public accountant to render reports of all Operating and Trust accounts an a quarterly basis to Staff

Counsel of the Florida Bar.

3) Remain under contract with F.L.A., Inc. **during** the probationary period and be **subjected** to random drug testing.

4) **Be** monitored during the probationary period by a supervising attorney.

5) Pay costs of $3,467.22.

Despite the **testimony** of the Bar's Staff Auditor Carlos Ruga, the findings by the **Referee** the Florida Standards for Imposing Lawyer Sanctions and **the** case law, the Bar has continued to ask for disbarment.

SUMMARY OF ARGUMENT

The Referee's findings of fact is supported by competent and substantial evidence. In turn, the Referee's recommendations for discipline are supported by his findings of fact, the Florida Standards for Imposing Lawyer Sanctions and the case law.

ARGUMENT

THE NINETY-DAY SUSPENSION RECOMMENDED BY THE REFEREE IS SUPPORTED BY HIS FINDINGS OF FACT, THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND THE CASE LAW

The Case of The Florida Bar v. Garland, *651* So.2d 1182 (Fla. 1995) sets forth the proper standard of review as to how appeals from referee's report are to be decided. A referee's findings of fact are presumed correct unless they are clearly erroneous or lacking in evidentiary support. Where the referee's findings are supported by competent, substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. Id. at 1184 *Citing* The Florida Bar v. MacMillan, 600 So.2d 457 (Fla. 1992) and The Florida Bar v. Stalnaker, *485* So.2d *815* (Fla. 1986).

The record in the instant case supports the Referee's findings of fact by competent and substantial evidence. In turn, the Referee's findings of fact, as well as the Florida Standards for Imposing Lawyer Sanctions and the case law support the Referee's recommendations for discipline.

Petitioner's initial brief does not argue that the Referee's findings of fact are not supported by competent and substantial

evidence, nor does it argue that his findings of fact do not support the recommendations for discipline. Petitioner's arguments in its initial brief ignore the Florida Standards for Imposing Lawyer Sanctions, the case law and merely argues that the ninety-day suspension recommended by the Referee is inadequate.

Petitioner argues that the ninety-day suspension is an inadequate deterrent and is unfair to society and gives three reasons for that position. First, Petitioner argues that automatic reinstatement is not desirable for a person with an admitted substance abuse problem. Secondly, Petitioner argues that the ninety-day suspension is not commensurate with the nature of the violations, that trust account violations have produced many disbarments. Thirdly, Petitioner argues that the substance abuser and not substance abuse should be properly viewed as the responsible party. Petitioner even goes as far as implying that Respondent is using his efforts to seek rehabilitation to exonerate himself.

Petitianer's first argument, that automatic reinstatement is not desirable for a person with an admitted substance abuse problem, is unsupported by any case law or authority. Petitioner merely states that Respondent should be given discipline that will require meeting the burden of full compliance with the rules and regulations governing admission to the Bar as provided by Rule 3-7.10(a), but gives no support as to why this position

should be followed by this Court. This approach to lawyer sanctioning would serve to drive lawyers with addiction problems underground and would not provide the addicted attorney with an incentive to do anything but to hide the addiction and prolong the damage.[1]

Ignoring the reality of the problem of alcohol/drug addiction represents a disservice to the public, the profession and the lawyer. The disease of alcoholism [and drug addiction] is chronic, progressive, and undermines the judgment of the individual user. Dependence on alcohol and other mood-altering substances brings about personality change and erratic behavior. The records are replete with examples of misappropriation of client funds, neglect of duties and responsibilities owed to clients, and general poor performance by addicted lawyers. However, the reality is that those who are in recovery should be supported in their efforts. Lawyers in recovery should be seen as a tremendous asset to the profession. Id. at 20.

The Referee's discipline of Respondent takes into account the fact that the legal profession can make a significant contribution to "the war on drugs" by allowing Lawyer

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[1] See Raymond P. O'Keefe, ***The Cocaine Addicted Lawyer and the Disciplinary System,*** **St.** Thomas Law Review, vol. 5, 1992, at 234-35., and Carl Anderson, Thomas G. McCracken and Betty Reddy, ***Addictive Illness in the Legal Profession: Bar Examiners Dilemma,*** The Professional Lawyer, vol. 7, May 1996, at 16.

Assistance Programs, such as F.L.A., Inc.', to continue the task of educating the profession on the disease of cocaine addiction, and by assuring the sanctioning body can receive evidence of the attorney's recovery from drug addiction as a mitigating, instead of an aggravating, factor. This will allow the profession to follow the enlightened lead of the recent cases involving attorneys' problems with alcohol and that addiction is a disease which can be cured. (See Findings of Fact and Recommendations at 15 citing O'Keefe at 234-35).

In addition, Standard 11.1 of the Florida Standards for Imposing Lawyer Sanctions provides that "...good faith, ongoing supervised rehabilitation by the attorney through F.L.A., Inc., whether or not the referral to said program(s) was initially made by F.L.A., Inc., or occurring both before and after disciplinary proceedings have commenced may be considered as mitigation. Moreover, Petitioner's argument that because Respondent has an admitted substance abuse problem he should be disbarred or suspended for more than ninety days runs contrary to Standard 10.3(a) of the Florida Standards for Imposing Lawyer Sanctions.

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[2] F.L.A., Inc. is an arm of the Supreme Court of the State of Florida and works independently of, but cooperatively with The Florida Bar, the Board of Bar Examiners, the Judicial Qualifications Committee, local bar associations, and the bar at large. F.L.A. provides programs and services to assist attorneys, judges, law students and other legal professionals who may be impaired in their ability to function in a legal setting as a result of alcohol and/or chemical dependency problems. They provide evaluation, support, aftercare programs, and monitoring services.

That Standard provides that the appropriate sanction for an attorney found guilty of felonious conduct (which is not the case with Respondent because he never had any criminal problems resulting from his addiction) as defined by Florida State Law involving the personal use and/or possession of a controlled substance, who has sought and obtained assistance from F.L.A., Inc., or a treatment program approved by F.L.A., Inc., should receive a suspension of ninety-one (91) days or ninety (90) days if rehabilitation has been proven. In his Findings of Fact the Referee found that Respondent's actions in voluntarily advising The Florida Bar of his chemical dependency, admitting himself to the South Miami Hospital Addiction Treatment Program and completing treatment, joining F.L.A., Inc., and entering into contract with them, and closing down his law office are commendable. Further, he found that the actions of Respondent while impaired were not voluntary and were due to his addiction problem. His chemical dependency was the factor that brought him here and he has made an extraordinary effort to get his life back and rehabilitate himself. (See Findings of Fact at 13). Thus, the evidence presented before the Referee clearly established rehabilitation and therefore the recommended discipline of ninety day was supported by competent and substantial evidence.

Loss of control due to addiction may properly be considered as a mitigating circumstance in order to reach a just conclusion as to the discipline to be properly imposed. The extreme

sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable. The Florida Bar v. Rosen, 495 So.2d 180-182 (Fla. 1986) citing The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978).

The case of The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987) is very similar to the instant action. In that case, the evidence showed numerous counts of client neglect, and depicted a practitioner who allowed his law practice to deteriorate rapidly into a state of disarray and disorder. The case involved three separate disciplinary complaints tried by the same Referee. The Supreme Court consolidated the three proceedings and rendered a disciplinary judgement on the misconduct considered in the aggregate.

In the first of the Sommers cases (case no. 68,641), The Florida Bar filed an eight-count complaint claiming failure to perform legal work in a timely manner. The referee recommended that Sommers be found guilty of misconduct on seven of the counts and not guilty on one of the counts and recommended a six-months conditional suspension. In the second Sommers case (case no. 67,926), The Florida Bar filed a three count complaint alleging neglect of legal business and the referee found Sommers guilty on all three counts and recommended a six-month conditional suspension. In the third Sommers case (case no. 67,890), The Florida Bar filed a complaint charging a violation of disciplinary rule 9-102(B)(3), which requires maintaining records

of funds and accounting therefore. The referee found Sommers guilty of violating this rule and recommended he receive a private reprimand and a six-month probation. In all three cases the referee noted that Sommers' misconduct was related to a Substance abuse problem and that he voluntarily entered a chemical dependency treatment facility. Id. at 343.

In Sommers the Supreme Court held that the principal concern of the Bar and the Supreme Court in attorney discipline cases are to protect the public, warn other members of the profession about consequences of similar misconduct, impose appropriate punishment on errant lawyers, and to ***allow for and encourage reformation and rehabilitation.*** Id. (Emphasis added). It seems that the Bar in the instant action does not agree with this last prong of the standard established by this Court and ignores it completely throughout its initial brief.

This Court viewed Sommers in the totality of the circumstances and concluded that the appropriate discipline was a ninety day suspension and probation for three years. As a condition to his probation Sommers was also to make restitution to clients, participate in The Florida Bar's program of supervised recovery for drug-impaired lawyers, oversight of his legal practice by disciplinary staff of The Florida Bar, filing of quarterly reports setting forth the status of all cases and legal business he is handling on behalf of clients, and the

payment of costs. The discipline ordered by this court in Sommers is almost identical to the discipline ordered by the referee in the case at bar with the exception of restitution. The Bar argues throughout its initial brief that the cumulative effect of multiple rules violation alone mandates more serious discipline than ninety days (See Petitioner's Initial Brief pages 6 and 9). However, this pasition is unsupported by the case law.

Secondly, Petitioner argues that the ninety-day suspension recommended by the Referee is not commensurate with the nature of the violations and asks this Court to take judicial notice of the fact that *trust account violations have produced many disbarments.* However, Petitioner fails to point to any cases which are on point as to the facts and the law. Petitioner also states that failure to respond to the Bar's inquires is a serious violation which undermines the disciplinary system as a whole. (See Initial Brief at page 7). Petitioner's argument seems to look at results of prior cases without taking into consideration the facts of those cases and applying them to the facts of the instant case. In fact, all the cases cited by Petitioner in its brief are distinguishable from the case at bar on the facts.

Petitioner cites the cases of The Florida Bar v. Hirsch, 342 So.2d (Fla. 1977), The Florida Bar v. Miller, *546* So.2d 219 (Fla. 1989, and The Florida Bar v. Welch, 427 So.2d 720 (Fla. 1983) for the proposition that those cases involved isolated incidents of

trust account violations and the discipline called for a ninety day suspension. However, the facts of these cases are not even remotely related to the facts of the instant case and Respondent fails to see the implications to this case other than in the support of the correctness of the Referee's recommendations as to the ninety-day suspension.

Next, Petitioner cites 'the cases of The Florida Bar v. Williams, 604 So.2d 447 (Fla. 1992) and The Florida Bar v. Marvides, 442 So.2d 220 (Fla. 1983) for the proposition that cumulative and/or multiple violations justify disbarment. Again, Petitioner looks at the results of these cases and ignores the facts of each case and expects this Court to do likewise. Petitioner does admit however, that the offenses involved in the foregoing cases were more serious than in this case.

In the Williams case The Florida Bar charged Respondent with a an eight count complaint which was considerably more serious than the case at bar. However, unlike the instant case, the only mitigating factor in Williams shown in the record was that Respondent was a sole practitioner and may have been considered inexperienced in the practice of law. The Mavrides case does not give us much to go on given the fact that there was no appearance made on behalf of the respondent. Marvides was found guilty of eight instances of violation of the code of professional responsibility and disbarment was ordered. However, we do not

know if there were any mitigating factors involved because respondent did not make an appearance.

In arguing for disbarment the Bar mentions standard 9.22(e) and (f) of the Florida Standards for Imposing Lawyer Sanctions which include, in part: (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process. The Bar goes on to cite The Florida Bar v. Inglis, 660 So.2d 697 (Fla. 1995) for the proposition that Respondent should be disbarred because of aggravating factors. In the Inglis case this Court held that disbarment was an appropriate sanction, where respondent lied under oath as an aggravating circumstance, and engaged in cumulative misconduct of taking part in an altercation with a process server, misstating paternity law to clients, and relying solely on information given by the client and failing to contact title company or review public records before advising client to bring eviction proceedings against a real estate purchaser who had failed to qualify for assumption of mortgage. Inglis s clearly distinguishable, on the facts, from the case at bar.

No such aggravating factors were found by the Referee in the instant case. In fact, Respondent's demeanor was always very cooperative with the Bar's investigation. Respondent has at all times during these proceedings been very candid in admitting his

failings and taking responsibility for his actions. (See T.T. at 107-113). Respondent voluntarily advised the Bar of his chemical dependency problem, voluntarily admitted himself to the South Miami Hospital's Addiction Treatment Program, voluntarily closed his law practice and voluntarily joined F.L.R., Inc. and A.A. (See Findings of Fact pages 7-8). There was no showing whatsoever at trial that Respondent in any way engaged in any bad faith obstruction of the disciplinary proceeding or submitted false evidence or false statements. Moreover, the Referee found that Respondent's actions in facing his addiction problem were *commendable,* and that his actions while impaired were not voluntary and were due -to the addiction problem. The Referee found that "Respondent's chemical dependency was the factor that brought him here and he has made an extraordinary effort to get his life back and rehabilitate himself". (See Findings of Fact at page 13).

On an issue as important to a member of The Florida Bar as his license, Petitioner certainly had, at the very least, an obligation to verify the allegations of its Petition for Emergency Suspension. Rule 4-3.3(a) (1) of the Rules Governing The Florida Bar requires that "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal". Petitioner's Petition for Emergency Suspension was not accurate and possibly could have mislead this Court into issuing the

Emergency Order of Suspension and could have violated Rule 4-3.3(a)(l) of the Rules Regulating The Florida Bar. The Bar may have also violated Rule 4-3.3(d) of said rules which requires candor towards the tribunal. Carlos Ruga, The Florida Bar's Staff Auditor, never read the Petition for Emergency Suspension nor the Complaint filed by The Florida Bar. The Petitioner then used the affidavit of Carlos Ruga in a way that the Petition for Emergency Suspension could be considered misleading or deceptive as to Respondent's conduct.

Even after it became clear to Petitioner and to the Referee that Respondent had not misappropriated client funds (See T.T. at 44-46), Petitioner continued to seek disbarment (T.T. at 147). Petitioner has failed to consider the Florida Standards for Imposing Lawyer Sanctions as well as the case law."

In a recent case, also out of the Miami office of The Florida Bar (The Florida Bar v. Lubin, Supreme Court Case No. 87,157, dated July 3, 1996), The Florida Bar tendered the respondent's Unconditional Guilty Plea and Consent Judgment for

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[3] The Florida Standards for Imposing Lawyer Sanctions state that they "...provide a format for Bar counsel, referees and the Supreme Court of Florida to consider each of these questions before recommending or imposing appropriate discipline:

(1) duties violated;
(2) the lawyer's mental state;
(3) the potential or actual injury caused by the lawyer's misconduct;
(4) the existence of aggravating or mitigating circumstances.

The Bar will use these standards to determine recommended discipline to the referee and the court..."

Discipline which called for a thirty (JO) month suspension, nunc pro tunc, November 15, 1995, Even though the misconduct in the Lubin case was far more egregious than the misconduct in the instant case, the Bar did not seek disbarment. The following misconduct was stipulated to in the Lubin case:

A. That on or about May 23, 1994, Respondent deposited into an account maintained at Intercontinental Bank and identified as Lubin and Polisar, P.A. Trust Account Number 0101445952, two checks totaling $18,400.00.

B. That said checks were issued by Florida Insurance Guaranty Association, Inc. and made payable to Dennis Kose, a single individual, and Michael Lubin, Esquire.

C. That Respondent used all the funds pertaining to Dennis Kose for personal and business obligations unrelated to Mr. Kose.

D. That the trust account of Lubin and Polisar, P.A. was closed with a zero balance on September 29, 1994.

E. That no funds were paid to Mr. Kose from this closed trust account.

F. That restitution was made to Dennis Kose of the amounts received on his behalf minus fees and costs.

G. That on or about July 13, 1995, Respondent deposited into an account maintained at Intercontinental Bank and identified as Michael H. Lubin, Attorney at Law Trust Account Number 0101448167, a draft in the amount of $12,000.00 made payable to Ricardo Oliva and Michael H. Lubin, attorney.

H. That the beginning balance in said trust account on July 13, 1995 was an overdraft in the amount of $572.27.

I* That the deposit of Mr. Oliva's funds covered the overdraft and left a balance in the amount of $11,427.73.

J. That Respondent used the funds pertaining to Mr. Oliva to make a payment Dennis Kose in the amount of $7,269.00.

K. That the balance of funds pertaining to Mr. Oliva were used by Respondent to satisfy personal and business liabilities of Respondent which were unrelated to Mr. Oliva.

L. That restitution was made to Ricardo Oliva for the amounts received on his behalf minus fees and costs.

M. That on or about April 26, 1995, Respondent deposited into an account maintained at Intercontinental Bank and identified as Michael H. Lubin, Attorney at Law Trust Account Number 0101448167, three (3) drafts totaling $5,200.00.

N. That said checks were issued by Allstate Insurance and made payable as follows: one draft in the amount of $2,500.00 made payable to Ines Altagra Passopulo and Michael Lubin; one draft in amount of $1,800.00 and made payable ta Orayba Ocumarea and Michael Lubin; and one draft in the amount of $900.00 made payable to Endira Mota and Michael Lubin.

0. That during the period from April 26, 1995 through May 16, 1995, Respondent used almost all af the client funds referred to in [paragraphs 13 and 14 above] by issuing eleven (11) trust account checks totaling $4,500.00, made payable to himself and using $136.04 for business and personal obligations unrelated to his clients.

P. That the balance in Respondent's trust account on May 16, 1995 was $563.96.

Q. That restitution was made to Ines Altagra Passopulo for the amounts received on her behalf minus fees and costs.

R. That restitution was made to Orayba Ocumarea for the amounts received on her behalf minus fees and costs.

S. That restitution was made to Endira Mota for the amounts received on her behalf minus fees and costs.

T. That on or about May 19, 1995, Respondent deposited into an account maintained at Intercontinental Bank and identified as Michael H. Lubin, Attorney at Law Trust Account Number 0101448167, a draft in the amount of $15,000.00 issued by Aetna Insurance and made payable to Erika Blume and Michael Lubin, attorney.

U. That during the period May 19, 1995 to July 31, 1995, Respondent used the funds pertaining to Erika Blume for personal and business matters unrelated to Ms. Blume.

V. That restitution was made to Erika Blume for the amounts received on her behalf minus fees and costs.

W. That during the months of June and July 1995,

Respondent's trust account number 0101448167 had a total of eleven (11) overdrafts and five (5) trust account checks were presented to the bank for payment and were dishonored due to insufficient funds.

X. That on or about February 10, 1995, Respondent deposited into an account maintained at Intercontinental Bank and identified as Law Offices of Michael H. Lubin Trust Account Number 0101447342, a draft in the amount of $3,750.00 issued by Underwriters Guarantee Insurance Company and made payable to Maria Brown, a single individual and Michael Lubin, as attorney, as full and final settlement of all claims arising from date of loss January 27, 1994.

Y. That the trust account referred to above was closed on March 22, 1995.

AA. That restitution was made to Maria Brown for the amounts received on her behalf minus fees and costs.

BB. That on or about September 5, 1995 a subpoena duces tecum was duly executed and served upon Michael H. Lubin, Esquire, commanding him to appear at the offices of The Florida Bar and to produce at that time all of his trust account records from the accounts identified as Michael H. Lubin, Attorney at Law Trust Account No. 0101448167 and Michael Lubin P.A. Real Estate Closing Trust Account No. 0101446303, both maintained at Intercontinental Bank, and any other trust account in which he had signatory capacity, for the period January 1, 1994 through the present.

CC. That at the request of Respondent's counsel, an extension of time for production was granted until September 13, 1995.

DD. That on September 13, 1995 and October 5, 1995, Respondent appeared at the office of The Florida Bar and produced skeleton records from the subpoenaed trust accounts.

EE. That Respondent failed to fully comply with the duly issued and executed subpoena duces tecum dated September 5, 1995.

FF. That Respondent maintained a trust account identified as Michael H. Lubin Real Estate Closing Trust Account Number 0101446303 for real estate matters.

GG. That Michael H. Lubin Real Estate Closing Trust Account Number 0101446303 is connected with an account identified as Intercoastal Title Services, Inc., Account No. 0101446345,

maintained at Intercontinental Bank.

HH. That Respondent is the principal of Intercoastal Title Services, Inc.

II. That thousands of dollars were transferred between Michael H. Lubin Real Estate Closing Trust Account Number 0101446303 and Intercoastal Title Services, Inc. Account Number 0101446345.

JJ. That without the required trust account records, i.e. receipt and disbursement journals, client ledger cards, bank and client reconciliations, and the bank records of Intercoastal Title Services, Inc., a full audit of this particular trust account cannot be conducted.

KK. That during the month of January 1995, three (3) trust account checks drawn on Michael H. Lubin Real Estate Closing Trust Account Number 0101446303 were dishonored due to insufficient funds.

As to the mitigating factors in the Lubin case the Bar stipulated to: "An addiction to prescription medication resulting from the Respondent's medical condition. Respondent has sought and successfully completed rehabilitation".

It is incongruous that The Florida Bar in the Lubin case would stipulate to this multitude of serious trust account violations where the respondent repeatedly misappropriated client funds of numerous clients totaling over $54,000.00, yet in the case at bar where the Referee found no misappropriation of client funds and the misconduct that was found does not even come close to the level and severity of the misconduct in Lubin, the Bar seeks disbarment. The Bar even refuses to acknowledge Respondent's addiction and rehabilitation as a **mitigating factor** in the case at Bar. This behavior on the part of the Bar towards

the Respondent is consistent with the many abuses that the Bar has perpetrated on him throughout the litigation of this matter. (T.T. 44-46).

Thirdly, the Bar states that "Respondent's efforts to seek rehabilitation, while commendable, cannot serve to exonerate him." (See Initial Brief at page 7). Respondent has never sought exoneration during these proceedings, but rather that the issue of his rehabilitation be given the proper weight as a mitigating factor as is set forth in Standard 11.1 of the Florida Standards for Imposing Lawyer Sanctions, and well established in the case law. The Bar has completely ignored the issue of Respondent's rehabilitation as a mitigating factor and continues to misstate the law and the facts to this Court. Petitioner cites the cases of The Florida Bar v. Setien, 530 So.2d 298 (Fla. 1988), The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989) and The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) for the proposition that this Court should not consider the issue of addiction.

These cases are inapplicable to the case at bar. In the Setien case the issue of Setien's addiction was put before the Referee as a mitigating factor, however, the referee rejected it because the Bar successfully rebutted that testimony. Id. at 300. The Golub case involved the respondent misappropriating $23,608.34 from an estate. No showing of misappropriation of funds has been made in the instant case. (See Findings of Fact at page 14). The Petitioner has gone as far as implying that Golub

applies "...because the person had a drug addiction, that warranted disbarment." (See T.T. at 127-28). However, Petitioner could not answer the Referee's inquiry as to how the Golub case applied here. Shuminer case also does not apply here because that case involved misappropriation of funds and that was not established in the instant action.'

Petitioner next argues that Respondent violated Rule 4-5.5 by practicing while suspended and cites the case of The Florida Bar v. Bauman, 558 So.2d 994 (Fla. 1990) for the proposition that such a violation merits disbarment. In Bauman the Supreme Court suspended respondent for six months effective May 1, 1987, and ordered him to take and pass the professional responsibility exam as a condition for reinstatement. While suspended, Bauman engaged in at least five distinct acts of practicing law and on one of these occasions was held in contempt by a circuit judge for holding himself out as an attorney. Subsequent to the contempt citation, he again represented clients in court. This Court held that, "We can think of no person less likely to be rehabilitated than someone like respondent who wilfully, deliberately, and continuously, refuses to abide by an order of this Court." Id. In the instant action the Referee found that

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[4] The Bar's insistence in arguing these cases calls into question whether the Bar is violating Rule 4-3.3(a)(3) of The Rules Governing The Florida Bar which requires that, "A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client,.."

Respondent technically violated Rules 4-8.4(g) and 4-5.5, however, this was clearly an unintentional act with a logical explanation. (See Findings of Fact at page 14). Therefore, the Bauman case is inapplicable to the case at Bar.

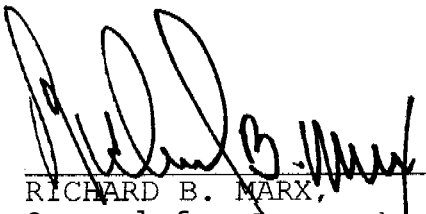
CONCLUSION

The Bar's arguments that the ninety day suspension recommended by the Referee should be rejected in favor of disbarment or a longer suspension is unpersuasive. The Bar's arguments are neither supported by the facts of the instant case nor by the case law it cites in support thereof. The Referee's findings of fact are supported by competent and substantial evidence. In turn, the Referee's recommendations for discipline are supported by his findings of fact, the Florida Standards for Imposing Lawyer Sanctions, and the case law,

REQUEST FOR ORAL ARGUMENT

Respondent hereby requests oral argument.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded via U.S. Mail to: Elena Evans, Esq., Bar Counsei, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; John T. Berry, Esq., Staff Counsel, The Florida Bar, and John F, Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 17 day of July, 1996.

RICHARD B. MARX,
Counsel for Respondent