IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,298

TFB NO. 95-11,133(6E)

THE FLORIDA BAR,
Complainant,

v.

GREGORY GLEN SHULTZ
Respondent.

_____/

INITIAL RESPONSORIAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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REFERENCES

In this Brief, Gregory Glen Shultz is referred to as "Respondent" . The Florida Bar is refereed to as "The Florida Bar".

"The Report of Referee in the Supreme Court Case No. 87,2098, dated September 3, 1996 is refereed as " The Referee's Report" or " Report of the Referee".

TR-1 will refer to the "Transcript of the Findings of Fact" announced by the referee in the case of The Florida Bar v. Gregory Glen Schultz, Case No. 87,298 dated August 2, 1996.

TR-2 will refer to the "Transcript of Disciplinary Hearing" before the referee in Case No. 87, 298, dated August 5, 1996.

TR-3 will refer to the Transcript of the "Supplemental Evidentiary Hearing" in case No. 87,298, dated August 26, 1996.

TR-4 will refer to the "Transcript of the Final Hearing " in case No. 87,298, dated July 19, 1996.

TR-5 will refer to the "Transcript of Hearing before a Bar Grievance Committee" in case No. 87,298, dated November 15, 1995.

"Rule" or **"Rules"** will refer to the Rules Regulating the Florida Bar. **"Standard"** or **"Standards"** will refer to the Florida Standards for Imposing Lawyer Discipline.

STATEMENT OF FACTS AND CASE

Respondent, Gregory Glen Schultz has a Juris-Doctor Degree and a Master of Taxation. Respondent was admitted to the practice of law in September of 1983 in the State of Florida. In Michigan, he served a distinguished term as a Michigan Securities Law Judge. (TR-2 at 260). Respondent was practicing securities law and tax law on an Initial Public Offering (IPO) in Michigan and was traveling extensively to Florida to be with his family. Respondent has various business interests in the Caribbean and has a select handful of clients in Michigan, involved in public stock offering. (TR-5 at 80).

At that time in 1994, Respondent was building and bringing a concrete block manufacturing plant on-line and into production in Costa Rica and was therefore traveling extensively to Costa Rica. (TR-5 at 80). Duriug a period from March to April, 1994, Respondent purchased four(4) airline tickets from Kenna Travel Services owned by Kenna Van Nortwick. (Hereafter Van Nortwick). The details of those four tickets are as follows: The first ticket purchased on or about March 24, 1994 cost four hundred and ninety two dollars and ninety five cents ($492.95); The second were two tickets purchased on or about April 8, 1994 and cost five hundred and eleven dollars and ninety five cents. ($5 11.95); The third ticket purchased cost four hundred and ninety two dollars and ninety five cents ($492.95). (TR-1 at 23-26). Respondent had purchased tickets from Van Nortwick for almost eight years and was a reliable and trustworthy customer of Kenna Travel Services. Duriug a period of eight years, Van Nortwick never provided any accounting statement to the Respondent. (TR-5 at 35). It is a long standiug business practice between the parties Respondent's paying off the balance due by either check or by his credit card. (TR- 5 64-65). Van Nortwick had no billing system (TR -5 at 45).

On April 6, 1994, Respondent paid off the outstanding balance by issuing a check in the amount of $1,235.00. (TR -5 at 75). It had been Respondent ' practice to pay off the balance due at the end of each months, (TR-5 at 108). Respondent made a notation "Paid through April 1, 1994, Kenna" on the check for his record keeping purpose. (TR-5 at 75). It was subsequently cashed. (TR-5 at 76).

On April 30, Respondent issued another check in the amount of $1,235.95 made payable to Kenna's Travel Service with notations on it to pay off the balance due as of the end of April.

(TR -5 at 74). (Respondent's Exhibit 3). The notation reads 'Paid through May 1, '94". (TR -5 at 75). A copy of the check reflects the number of the check to be 1778. (TR- S at 74). On or around May 13, 1996, Respondent was informed by Van Nortwick that the check which tendered previously was lost and was asked if Respondent could issue a replacement check. (TR 5-74). Upon this request, Respondent issued a replacement check for the amount of $1,235.95 dated April 30, 1994 and hand -delivered to Van Nortwick. (Respondent's Exhibit 4). A copy of the check reflects the number of the check to be 1782. Van Nortwick called Respondem several days later to notify that she found the first check and that she was going to tear up the second check. (TR- S at 74). Respondent asked her to return remnants of the second check . (TR -5 at 74). The second check had never been returned to Respondent. (TR-S at 74). This conversation took place in May, 1994. (TR 108). The records reflect that two witnesses overheard Respondent's conversation with Van Nortwick as to her claim of lost check. (TR-4 at 109).

Bridgett Kenny, an employee of a landlord from whom Respondent leased his office space testified that Bridgett Kenny overheard Respondent's conversation with Van Nortwick. In the course of the conversation, Van Nortwick told Respondent that she had found the check and that she had also in her possession of a second check that Respondent issued to Van Nortwick as a replacement check. (TR-4 at 85). Sydney Mawby, a business associate of Respondent testified that he overheard Respondent's conversation with Van Nortwick in which Van Nortwick asked him to issue a replacement check. (TR-4 at 108). Sydney Mawby eye-witnessed that Respondent stopped by Van Nortwick's office to drop the replacement check off. (TR-4 at 109).

In June 1994, Respondent purchased a ticket for Costa Rica from Kenna's Travel Services for his business associate Sydney Mawby. (TR-5 at 80). Due to the wrong date on the ticket, it caused one of Respondent's business associates to fly from Tampa to Miami, but being denied a seat on the flight from Miami to Costa Rica. (TR-S at 80). Subsequently, Van Nortwick made the same type of error. At that time, Respondent expressly requested Van Nortwick to make the ticket at least six months open when he purchased the ticket for Respondent's business associate, Marty Howell. Van Nortwick failed to do so, When Marty Howell attempted to use the return ticket in Costa Rica, it was discovered that the ticket had already expired. (TR -5 at 82). Respondent had to purchase a ticket from another agency for Marty Howell. (TR- S at 82).

At that time, Van Nortwick was notified about the problem by Respondent. Bridgett Kenny overheard the conversation between Van Nortwick and Respondent regarding the ticketing error. Van Nortwick testified that she had no dispute over the ticketing errors. (TR-4 at 37).

On September 16, 1996, Respondent purchased a ticket for Costa Rica for his business trip. (TR -5 at 85). Respondent was scheduled to fly to Costa Rica on the same day. (TR -5 at 85). Respondent went to Kenna's Travel service to pick up the ticket that he had already paid off by a credit card. (TR -5 at 70). At that time, Van Nortwick demanded Respondent to pay off the outstanding balance due in the amount of $2,009.80. (TR-5 at 70). The amount was supposedly to cover the purchase prices for four tickets purchased during March and April, 1994. Iu responding to Van Nortwick's demand, Respondent tendered a check in the amount of $2,000 and postdated to December 26, 1994. (TR-1 at 34). The amount was reduced from $2,009.80 to $2,000 even by Van Nortwick. (TR 1 at 32-34). Van Nortwick made a demand orally on the basis of an invoice she had kept for her own reference. (TR -5 at 5 1). Van Nortwick's travel service did not have a billing system (TR-5 at 51). Respondent asked Van Nortwick if he could pay it by post-dated check. Van Nortwick agreed. Respondent issued and tendered a check dated December 26, 1994 as a payment for the four outstanding tickets. At that time, Van Nortwick neither produced any accounting statement to Respondent nor explained the reason why sum of the purchase price for four airline tickets minus the amount he had already paid by issuing the check dated on April 30 amounted to $2,009.80. Respondent was scheduled to fly to Costa Rica on the same day, so Respondent could not do anything but issuing the check for the amount as requested. (TR -5 at 85). The check was postdated for 90 days by Respondent to allow time to resolve the disputed issues regarding Van Nortwick's ticketing error and ambiguous billing. (TR-5 at 85). It was agreed between Van Nortwick and Respondent that Van Nortwick would not deposit the check until they would have meeting to reconcile the accounts. At that time, neither the check Respondent issued in April nor the one issued in May were negotiated. (TR-5 at 102). On the same day, Respondent executed a stop payment authorization on the check. (TR-1 at 2). Subsequent to December 26, 1994, Van Nortwick deposited the check. (TR 1 at 2). On or around January 3, 1995, Van Nortwick discovered that she could not cash the check due to Respondent's stop payment order. Id. Respondent attempted to contact Van Nortwick to reconcile the

account during the period ofbetween September and December of 1994. (TR- 5 at 98). However, it was unsuccessful. (TR-4 at 177). On January 3, 1995, Respondent had contacted Van Nortwick in order to reconcile the accounts. (TR-4 at 177). However, Respondent was told that Van Nortwick had already deposited the check . Respondent told Van Nortwick that he stopped payment on the check, and attempted to reconcile the account. (TR-4 at 179). On February 14, 1995, Van Nortwick filed a small claims action against Respondent seekiug recovery for the "alleged" balance due. On or about February 17, 1995, Van Nortwick filed a Bar complaint alleging the same claim for unpaid balance for four airline tickets. In June, 1996, the parties stipulated that Respondent agreed to pay Van Nortwick one thousand seven hundred dollars($1,700.00) and that Van Nortwick agreed to enter a Voluntary Dismissal with Prejudice and notify the Florida Bar that this matter was settled. The one thousand and seven hundred dollars($1,700.00)were paid by Respondent on July, 1, 1995.

In November 1995, the Sixth Judicial Circuit Grievance Committee held a hearing. (TR-5). Respondent testified that at the time he executed a stop payment order, he believed that he had paid off the purchase price of four airline tickets by his previously issuing two checks totaling over $2,000 of which one was allegedly lost by Van Nortwick and the other might still be in Van Nortwick's possession. (TR 5 at 111). To support the contention, Respondent submitted a carbon copy of a check dated April 30, 1994, which was made payable to Kenna's Travel Service in the amount of $1,235.95, numbered 1779 as Exhibit 2. Respondent also submitted a carbon copy of the check numbered 1782, which was made payable to Kenna's Travel Service in the amount of $1,235.95 as Exhibit 3. Respondent was unable to present the originals of those checks since they were neither cashed nor negotiated by Kenna's Travel Service. (TR-5 at 124) . In November 1995, Florida Bar Grievance Committee found probable cause for each three counts of the Bar Complaiut for further disciplinary proceedings against Respondent. The Final Hearing was held on July 19, 1996. (TR-4). On August 2, 1996, the Referee issued his findings of fact. (TR-1). On August 5, 1996, the Disciplinary Hearing was held before the Referee Stringer.

(TR-4). The Referee found that Respondent had violated the following Rules Regulating the Florida Bar;

The Rules 3-4.3:

> "The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is omitted in the course of the attorney's relation as an attorney or Otherwise, whether omitted within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitutes a cause for discipline".

Rule 4-8.4(a):

> " A lawyer shah not violate or attempt to violate the rule of Professional Conduct, knowingly assist or induce another to do so through the acts of another ";

Rule 4-8.4(c):

> "A lawyer shall not engage in conduct involving dishonest, fraud, deceit or misrepresentation".

Upon its finding, the Referee recommended that Respondent be disciplined by suspension for a period of six (6) months. The Referee further recommended that Respondent shall make restitution in the amount of $300.00 to Van Nortwick.. Respondent moved for evidentiary hearing to present documentary evidence concerning "out-of-sequence" checks to refute the finding that Respondent fabricated the two checks 1779 and 1782. The motion was granted. (TR-2 at 268-9) in order to give an opportunity to present documentary evidence concerning the issue since this is an extremely important part. (TR-2 at 267). The fmal recommendation was postponed after the evidentiary hearing, The evidentiary hearing was held on August 26, 1996. (TR-3) . Respondent submitted the bank records, The bank records clearly show that the two out-of-sequence checks which the Referee originally found to be fabrication were not the only checks Respondent issued and were out-of-sequence. Since the Referee based its findings solely on the fact that two checks were out -of -sequence, the Referee struck the comments in his

Findings of Fact (TR-3 at 308) and all discussion he made at the disciplinary hearing with respect to the two checks, The Referee stated that the evidence was not clear and convincing at that point concerning that the two checks were fabrication. (TR-3 at 308-09). Then the Referee recommended that Respondent be suspended from the practice of law for six months. (TR- 3 at 309). The Referee ordered Respondent to make restitution to Van Nortwick for the difference between the debt, $2,009.80 and the amount Respondent had paid to settle Van Nortwick's civil action. (TR-3 at 310). This cause was filled by Respondent. on September, 7 1996.

SUMMARY OF THE ARGUMENT

The Referee's findings are clearly erroneous, and are contrary to the great weight of the evidence in the record and admission of the witness. The Referee's factual finding failed to make any explicit findings that Respondent engaged iu conduct involving dishonesty or fraud. This Court should scrutinize surrounding facts and circumstances carefully in determining Respondent's subjective state of mind since Respondent's intent or motive are crucial to violation of the rules with which Respondent has been charged, yet the Referee failed to make any specific circumstances indicating Respondent's intent. The record, taken in its entirety, failed to show that there is competent, substantial evidence to prove that Respondent engaged in conduct involving dishonesty, deceit or fraud or misrepresentation to injure Van Nortwick.

Further, the recommended discipline, six months suspension is clearly disproportionate to the nature of the conduct involved and insignificant harm to the public, It is unduly harsh and is totally unjustified. It is a well established rule that mishandling clients' funds and giving false testimony in the judicial proceedings warrant the most serious sanction. However, neither reasons are found in the present case. There is no specific finding that Respondent lied under oath and no clients' interests were harmed by Respondent's alleged misconduct. Respondent should not deserve a harsher penalty than lawyers who stole their own clients' funds or lied under oath in the proceedings. It is true that specific findings of a lawyer% a pattern of misconduct or serious harm to the public may justify deviation from the common thread among those decisions or the statutory rules. However, such justifications do not exist in the present case.

This Court repeatedly held that primary goals in disciplinary action is to protect the public from unethical practitioners and only secondarily, to punish the offender and act as a deterrent to others. At the same time, the Court must consider the interest of the public not being denied the service of a qualified lawyers as result of undue harshness iu imposing penalty.
Further, if a lawyer who is merely involved iu a debt dispute with a non-client individual, in good faith and with reasonably belief that the amount is disputed is disciplined, it would ultimately undermine the objective of disciplinary action by depriving the public from receiving worthy

representation of a qualified lawyer, form which the public would ultimately receive a benefit. In balancing the ostensibly conflicting interest in protecting an individual against the interest to the public interest, the Court should find that the recommended sanction is inappropriate under the rule and mandate of the public policy in lights of all circumstances.

POINTS ON APPEAL

I . THE REFEREE'S FINDING OF FACTS ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE IN THE RECORD AND THE ADMISSION OF THE WITNESS. IN THE ABSENCE OF COMPETENT, SUBSTANTIAL EVIDENCE, THE REFEREE'S FACTUAL FINDINGS THAT RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD AND MISREPRESENTATION ARE CLEARLY ERRONEOUS,

II. THEREFEREE CORRECTLY OVERTURNED THE INITIAL FINDINGS THAT THE RESPONDENT FABRICATED THE EVIDENCE AND GAVE FALSE TESTIMONY SINCE RESPONDENT SUCCESSFULLY REFUTED THE INITIAL FINDINGS BY CLEAR AND CONVINCING EVIDENCE.

III, THE REFEREE ERRED IN RECOMMENDING SIX (6)MONTHS SUSPENSION SINCE IT IS UNDULY HARSH IN LIGHT OF CONDUCT INVOLVED AND WHERE NO CLIENTS' INTERESTS WERE HARMED.

IV. PUBLIC POLICY MANDATES THAT PROTECTION OF THE PUBLIC FROM HARM RESULTING FROM A LAWYER'S MISCONDUCT BE THE ULTIMATE GOAL OF THE DISCIPLINARY ACTION. WHEN THE INTEREST OF AN INDMDUAL FROM NOT BEINGHARMED BY A LAWYER'S MISCONDUCT IS BALANCED AGAINST THE INTEREST OF THE PUBLIC OF NOT BEING DENIED A QUALIFIED LAWYERS' REPRESENTATION, IMPOSING SEVERE SANCTION IN THE PRESENT CASE CLEARLY UNDERMINES THE GOAL OF THE DISCIPLINARY ACTION.

ARGUMENT

1. THE REFEREE'S FINDING OF FACTS ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE IN THE RECORD AND THE ADMISSION OF THE WITNESS, IN THE ABSENCE OF COMPETENT EVIDENCE, THE REFEREE'S FACTUAL FINDING THAT RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY ARE CLEARLY ERRONEOUS.

The Referee found that Respondent's activity violated 3-4.3, 4-8.4(a), and 4-8.4(c) of Rules Governing the Florida Bar. The Referee's findings are clearly erroneous, and are contrary to the great weight of the evidence in the record and admission of the witness. With respect to violation 4-8.4(a) and (a), the Referee's factual tiding made no explicit tidings that Respondent engaged in conduct involving dishonesty or fraud. Thus, Respondent respectfully urges this Court to re-weigh and reconsider the evidence.

The Referee stated in the Finding of Facts: (TR - 1 at 7)

> Respondent "tendered $2,000 check to Van Nortwick he did so with a dishonest, fraudulent, and deceitful intent, with intent to make misrepresentation to Van Nortwick as evidenced by his immediately stopping payment. His act is contrary to honesty and justice".

As a general rule, factual finding responsibility in disciplinary proceedings is delegated to a referee. The referee's tidings are entitled to presumption of correctness and are usually upheld. The Florida Bar v. Hayden, 583 So. 2d 1016 (Fla. 1991). As such, proceedings before this Court do not usually take on the nature of a trial de novo. The Florida Bar v. Hooper, SO9 So. 2d 289, 291 (Fla. 1987). However, the Court should not be bound by a referee's fmdings if the findings are not supported by substantial or competent evidence. Findings are clearly erroneous if they failed to satisfy the lawyer's guilt by clear and convincing evidence free of substantial doubts or inconsistencies. The Florida Bar v. Bass, 106 So. 2d 77 (Fla. 1958); The Florida Bar v. Rayman, 238 So. 2d 594,597 (Fla. 1970).

When a lawyer is charged in violation of the rule which prohibits a lawyer from engaging in dishonesty, fraud, deceit or misrepresentation, this Court scrutinizes surrounding facts and circumstances carefully in determining a lawyers subjective state of mind.

The Introduction to the Standard provides that " 'intent' is the conscious objective or purpose to accomplish a particular result". Although, mere absence of corruptive motive or deceitful intent does not necessarily bar disciplinary action, this Court has repeatedly stated that a lawyers subjective intent must be proven by clear and convincing evidence when the lawyer was found to have engaged in conduct involving dishonesty, deceit or fraud.

In The Florida Bar v. Gentry, 447 So. 2d 1342 (Fla. 1984), the Honorable Chief Justice Boyd, stated in his opinion, concurring in part and dissenting in part that if a lawyer is disciplined for the charged of his conduct engaging iu dishonesty, deceit, fraud or misrepresentation, a factual finding should be supported by an explicit Ending of the lawyer's intent or knowledge. In Gentry, a lawyer received fimds from a client, he removed money from a trust account and deposited it into a personal saving account. He was recommended guilty of the misconduct involving dishonesty, deceit, fraud or misrepresentation, when he allegedly used trust account check knowingly it is worthless iu order to placate his creditor temporally. The Chief Justice stated that even though there was evidence that respondent learned on the following day that a trust account check has been dishonored, there was no evidence of fraudulent intent. By analogy from the Penal Law, Chief Justice stated that in criminal proceedings, failure to pay labor, service or material shah constitute prima facie evidence of intent to defraud, but proof of an unpaid creditor is not sufficient to sustain the burden to prove intent to defraud.

Id. at 1345.

Conversely, if a lawyer innocently and in good faith engaged in conduct which turns out to have resulted in some harmful or detrimental effects to the other party, the Court will not find the lawyer's guilt solely based on its effect In The Florida Bar v. Bass. 106 So. 2d 77 (Fla. 1958), the Court found some neglecting misconduct on the part of the lawyer, yet the court exonerated the lawyer as to violation of the rule prohibiting a lawyer from engaging in dishonesty or fraudulent conduct. The Court held that the lawyer had no intent to cover up his neglect, thus, held that the lawyer did not engage conduct involving dishonesty.

Here, Respondent's guilt was merely iuferred from the fact that he tendered a post-dated check to Van Nortwick and that Respondent executed a stop payment order on the check on the same day as Respondent issued the check. However, there is no showing that respondent engaged in conduct with intent to defraud or knowingly misrepresent Van Nortwick. Respondent

issued and tendered a post-dated check to Van Nortwick upon her consent. Further, Van Nortwick knowingly and voluntarily relinquished her right to demand a check which could be cashed immediately at the time she accepted the check. There is no record of overreaching, nor undue influence exerted by Respondent.

Contrarily, there are facts and circumstances indicating that Van Nortwick accepted the check upon their mutual understanding that they should work to solve some disputes concerning the disputed amount over the balance due. It is true that if a lawyer tendered worthless checks knowingly there was insufficient funds in the account, the lawyer is disciplined for the conduct involving dishonesty, fraud, or misrepresentation. The Florida Bar v. Davis, 361 So. 2d 159 (Fla. 1978). Because such conduct together with a drawer's knowledge of insufficient funds itself carries a presumption of deceitful iutent on the part of the drawer of the check. As such, tendering a worthless check violates the rule prohiiitiug a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation without showing actual and subjective intent of the lawyer. It also violated the Penal Code in Florida. F. S. 832.05 (2)(a). However, tendering a post-dated check alone is not unlawful under the provision. In Bander-as v. States, the defendant issued a postdated check which was returned for insufficient funds. At the trial the defendant was convicted for misdemeanor of issuing worthless check in violation of F.S §832 (2)(a). At the appeal, the conviction was overturned because the statute expressly excluded a postdated check from its scope of "worthless check".

In the present case, there are facts and circumstances indicating that Van Nortwick accepted the check upon her understanding that the check could not be cashed until December 26, 1994. Further, by analogy from the Penal Law, Respondent's issuing a postdated check itself does not alone constitute prima facie evidence of his intent to defraud Van Nortwick. In The Florida Bar v. Bratton, 389 So. 2d 637 (Fla., 1980), a client sued a lawyer and recovered a judgment for $500 plus costs. When the lawyer issued a postdated check to the client to satisfy the judgment, the check was returned for insufficient funds. The Court exonerated the lawyer upon its finding that issuing a postdated check did not constitute the act involving dishonesty, fraud, deceit or misrepresentation. Moreover, under the Standard, "intent" is defined as "the conscious objective or purposes to accomplish a particular result". The facts in the present case clearly failed to

prove it. Respondent's state of mind is crucial and material to justify that Rule was violated, yet the Referee's findings failed to find any specific evidence of Respondent's intent.

It should be further noted that a drawer of a check is entitled to stop payment of any check drawn on his or her account by an order to the bank at any time before it has been accepted or paid by the drawer bank, by describing the check or account with reasonable certainty. F.S. §674. 403(a). A drawer of a check is entitled to assert any defenses or claim against a payee, including failure of consideration or fraud arising from the underlying transaction. Liebowitz v. Wright Properties, Inc., 427 So. 2d 783 (Fla. 4th DCA 1983).([W]ant or failure of consideration is a defense as against any person not having the rights of a holder in due course).

Respondent testified in the hearing that he believed that the check might be negotiated to the third party who was entitled to claim holder in due course states unless he stopped it.
If Respondent had stopped the payment with intent to evade the existing legitimate debt, it would had violated both Penal Law and The Rules. However, the facts and circumstances show contrary to it. In the absence of specific findings as to Respondent's motive or intent, Respondent's activity should not be found as the conduct to which warrants disciplinary action. When he stopped by Van Nortwick's office to pick up the ticket, he was demanded to pay off the outstanding balance. The amount demanded was supposedly to cover the purchase price of four airline tickets purchased during March and April 1994. Respondent reasonably believed that the "alleged" balance might have already been paid off, or at least the amount was incorrect by his previously issuing two checks totaling over $2,000.00 of which was allegedly lost and the other might still be in Van Nortwick's possession. Respondent and Van Nortwick maintained a good relationship as merchant and customer for a period of more than eight years. During the period, no accounting statements were ever tendered to Responded. Van Nortwick acknowledged that she had no billing system Respondent had to keep paying the balance as requested. Respondent was frequently traveling and purchasing a lot of airline tickets during the period. Considering the fact that Van Nortwick never send a written billing statement to Respondent for the past eight years, no reasonable person would believe that any billing mistake had ever occurred during the period.

In fact, there was a dispute over the purchase price for the four airline ticket. Van Nortwick testified that Respondent owed $2,009.85 as of April 1994, and that she demanded to

pay off the balance on September 16, 1994. However, no billing statement was produced and no demand was made during the time between April to September 1994. All of Respondent's transactions running a period from May to August were paid off by his credit cards. Respondent in good faith believed that the balance due was not the sum of all four outstanding tickets in the amount of $2,009.85. Respondent had no choice but to pay off the amount as demanded. Under the circumstances, Respondent's stop payment order was self-help remedy which a drawer of the check is entitled to exercise.

Respondent's state of mind, intent or motive are crucial to the violation that Respondent has been charged with, yet the Referee failed to find any specific evidence to support it. The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970) in which the Florida Bar charged that the lawyer solicited from the client's heirs in making payment to the presiding judge for the purpose of influencing his decision in a will contest. The complaining witness stated that he had given the entire money directly to the lawyer, However, the check was endorsed by the complaining party only. Further, the complaining witness stated the money was to be given to a judge, while at other times he denied that the purposes was for a bribe. Further the complaining party failed to show to whom the money was given. Upon finding such discrepancy in the evidence, the court concluded that the complaining party's own testimony was self-contradicted and that it did not present that degree of proof necessary to warrant the findings of guilt. Rayman has stated, quoting the Supreme Court of New Mexico in In re Martin, 67 N. M. 276,354 P. 2d 995 :

> " [E]vidence to sustain a charge ofunprofessional conduct against a member of the bar, where in his testimony under oath he has fully and completely denied the asserted wrongful act, must be clear and convincing and that degree of evidence does not flow from the testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances".

In the instant case, the Referee erred in finding Respondent's fraudulent or deceitful intent by clear and convincing evidence as required by Rayman. discrepancies, substantial doubts or inconsistencies in the evidence still exist. The records reflect that two witnesses overheard Respondent's conversation with Van Nortwick as to her claim of lost check. Van Nortwick, however testified that she never received the check from Respondent nor lost the check for the payment of the four airline tickets. However, Van Nortwick testified that she might have possibly received either one of the checks presented by Respondent in the hearing.

The Referee's tidings are based on inferences solely drawn from the circumstances and uncorroborated statements made by a complaining witness. In The Florida Bar v. Junkin, 89 So. 2d 481 (Fla. 1956), the Court held that a lawyer's misconduct was not proven by the evidence with any degree of certainty if the only evidence on which the recommendation for disablement rests was the complaining witness's evasive and inconclusive statement.

The court in The Florida Bar v. Bass, 106 So. 2d 77, 79 (Fla. 1958) has stated that ;

> "The power to disbar or suspend a member of the legal professions is not an arbitrary one to be exercised lightly or with either passion or prejudice. Such power should be exercised only in a clear case for weighty reasons and on clear proof ".

In the present case, discrepancies, substantial doubts or inconsistencies in the evidence still exist, yet the existence of genuine dispute over the unpaid balance for the four airline ticket was clearly overlooked by the Referee. Those inconsistencies among evidence severely damaged Respondent's credibility. The record, taken in its entirety, failed to show that there is competent, substantial evidence to prove that Respondent engaged in conduct involving dishonesty, deceit or fraud or misrepresentation to injure Van Nortwick. Respondent's state of mind, intent or motive are crucial to violation of the rules with which Respondent has been charged, yet the Referee failed to make any specific circumstances indicating Respondent's intent. The Referee's findings are clearly erroneous with respect to the alleged violation of Rule. 3-4.3, 4-4. S(a), and (c).

II. THE REFEREE CORRECTLY OVERTURNED THE INITIAL FINDINGS THAT THE RESPONDENT FABRICATED THE EVIDENCE AND GAVE FALSE TESTIMONY SINCE RESPONDENT SUCCESSFULLY REFUTEDTHEINITIAL FINDINGS BY CLEAR AND CONVINCING EVIDENCE.

The Referee initially found that Respondent gave untruthful statements in his testimony in the proceedings and presented the fabricated evidence.
The Referee stated;

> " The Court find that these checks are a fabrication; that there were never tendered to Kenna's travel Service. This is evidence by the fact that respondent's Exhibit 4-B is a check for which he does have the original,

> showing the front and back' dated April, 1994, a check to Kenna's Travel Services in the amount of $1,235... a date subsequent to the date on which he alleged these other checks were written".

Subsequently, the Referee reversed his initial finding regarding fabrication of evidence. The Referee correctly reversed his initial findings. At the supplemental hearing, Respondent presented bank records to support his contention that Respondent issued some out-of-sequence checks several occasions. Since the Referee's initial findings as to fabrication of evidence is solely based on the fact that the two checks are out-of-sequence, Respondent's additional evidence, the bank record itself was clear enough to overturn the Referee's initial findings that Respondent fabricated the evidence.

Further, the records clearly reflect that Van Nortwick, under oath testified in the Grievance Committee hearing that she had never received the check in the amount of $1,235.95 from Respondent. However, when confronted with the evidence presented, she acknowledged that she had probably received one of the checks which appeared to be either the check numbered 1779 (Exhibit 2) or a check numbered 1782 (Exhibit 3). If Van Nortwick had received or at lease acknowledged that one of these checks was once in her possession, the Referee's original findings that the checks were never tendered to Van Nortwick were contrary to the evidence inconsistent early statement. inconsistent early statement. The Referee correctly reversed his iuitial tidings that Respondent fabricated the evidence.

Since the Referee's findings that Respondent fabricated the evidence were based solely on the fact that the two checks are out-o&sequence, there is no specific showing that Respondent lied under oath.

It is true that an attorney's giving false testimony in judicial proceedings is the most harmful and hurtful conduct to the adulteration of justice, to the public and to the legal profession. The Florida Bar v. Dodd' 118 So. 2d 17, 19 (Fla. 1960). Intentional presentation of false testimony may result in the lawyer's disablement, The Florida Bar v. Agar, 394 So. 2d 405, 456 (Fla. 1981). In The Florida Bar v. Neely, 372 So. 2d 89 (Fla.. 1979), the Court concluded that a lawyer lied under oath at various grievance committee hearings. It was based on the Court's finding that the lawyer failed to maintain his consistency when confronted by his own inconsistent early statement. Similarly, the Court in The Florida Bar v. Stockman, 377 So. 2d 1146 (Fla.

1979) suspended a lawyer for sixty days when the Court fond that he fabricated letters to exculpate himselfto hide his negligee in dealing with his client.

However, unlike attorneys in the cases mentioned above, Respondent had maintained his contention with respect to his issuance of two checks throughout the disciplinary hearing. Even though Van Nortwick claimed that she had never asked Respondent to issue a replacement check, the conversation between Van Nortwick and Respondent regarding Van Nortwick's misplacing the check was overheard by a disinterested witness. Ms. Kenny, an employee of the landlord from who Respondent leased his office space testified that she heard that Van Nortwick asked Respondent to issue a replacement check because Van Nortwick misplaced the first one. Respondent's contention that he personally delivered the replacement check to Van Nortwick is further supported by Respondent's business associate's testimony. Since the Referee struck all discussion regarding the two checks in his initial findings, there is any specific showing that Respondent lied under oath. The Referee correctly reversed his findings.

III. THE REFEREE ERRED IN RECOMMENDING SIX (6) MONTHS SUSPENSION SINCE IT IS UNDULY HARSH AND IN APPROPRIATE IN LIGHT OF NATURE OF CONDUCT INVOLVED AND WHEN NO CLIENTS' INTERESTS WERE HARMED.

Sanctions should be determined on case-by-case basis in light of all circumstances including the nature and seriousness of the misconduct and the effect of such conduct on the public, administration ofjustice and members of the bar. The Florida Bar v. Breed, 378 So. 2d 783 (Fla. 1979). The Court must consider similar conducts of an attorney in determining what is the appropriate sanction, Id. at 785.

The goal of sanctions is achieved if it is fair to the public, and the attorney. The Florida Bar v. Charnock, 661 so. 2d 1207 (Fla. 1995). The Florida Bar. v. Berman, 659 So. 2d 1049 (Fla. 1995). The court's scope of review with respect to sanction is broader than that of review of a referee's findings. Since the Court has the ultimate responsibility to order an appropriate. The Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994).

The Referee recommended Respondent be found guilty in violation of the following Rules; Rule 3-4.3, (minor misconduct), 4-8.4 (a) and 4-8.4(c).

Under the Standard 9.22, the Referee found the following as aggravating factors;

9.22(a) prior disciplinary offenses;

9.22(b) dishonest or selfish motive;

9.22(g) refusal to acknowledged wrongful nature of conduct,

and

9.22(h) vulnerability of victim

The Referee found no mitigating factors. Upon its finding, the Referee recommended that Respondent be suspended for a period of six (6) months. The Referee further recommended that Respondent shall make restitution in the amount of $300.00 to Van Nortwick. Respondent respectfully urges this Court that suspension for a period of six(6) months is unduly harsh and inappropriate in light of nature of respondent's conduct.

In The Florida Bar v. Neelv, 502 So. 2d 1237(Fla. 1987), the Court suspended the lawyer for three months from practice of law. The lawyer engaged in cumulative misconduct in failing to forward payments in accordance with his client's wishes, demanding his client to sign a letter requesting withdrawal of the client's bar complaint, and giving false statement under oath before a grievance committee. Comparing the nature and seriousness of the misconduct in Neely, Respondent's act does not warrant six months suspension, It is especially true when no clients' interest were harmed, and Respondent acted in good faith, with reasonable belief to reconcile the account.

It is a well established rule that mishandling clients' fund and giving false testimony in the judicial proceedings warrants serious sanction, However, ifmitigating factors override seriousness of the lawyers misconduct, although not excusing misconduct itself, it affects the nature and extent of the sanction imposed. In The Florida Bar v. Lund, 410 So. 2d 922 (Fla. 1982), the Court suspended the lawyer merely for ten days for making untruthful statement at disciplinary proceedings upon its finding that the lawyer had no intent to misrepresent, isolate nature of the conduct, and insignificant harm to the public, The Court in The Florida Bar v. Stockman, 377 So. 2d 1146 (Fla. 1979) suspended a lawyer for sixty days when he was found to have fabricated letters presented to a grievance hearing to exculpate himself to hide his negligee in dealing with his client. In cases where an attorney was disciplined for the writing of worthless checks, the

attorney were merely reprimanded. In The Florida Bar v. Hill. 265 So. 2d 698 (Fla. 1972), even a lawyer intentionally tendered a worthless check knowingly there were insufficient funds, severe sentence such as six months suspension was not imposed.

In the absence of the findings that Respondent gave false statements in the proceedings, and that no clients' interests were harmed, Respondent should not deserve a harsher penalty than lawyers in the cases mentioned above. It is true that specific findings of a lawyer's a pattern of misconduct or serious harm to the public may justify deviation from the common thread among those decisions or the statutory rules. In The Florida Bar v. Breed. 378, So. 2d 783 (Fla., 1979). However, there is no pattern of misconduct nor serious harm to the public in the present case.

In The Florida Bar v. Delav-Donna, 583 So. 2d 307 (Fla. 1989), a lawyer who represented an estate mismanaged the trust created by the estate, which brought the one of the beneficiaries of the trusts to the brink of financial ruin.

The lawyer fostered frivolous, unfounded litigation involving the beneficiary, blocked any release of trust funds to the beneficiaries, and demanded that the beneficiary pay him $1,100,000 to stop the legal proceeding against the beneficiary. The referee found that the lawyer engaged in misconduct involving dishonest solely for his selfish interest and recommended the lawyer be disbarred.

Conversely, Respondent's conduct in issuing a postdated check and executing a stop payment order constitute a single, and isolate incident which could potentially and minimally harm an individual merchant who was unsatisfied with the billing dispute with Respondent. Respondent merely stopped the payment on the check in order to give both parties time and opportunity to reconcile the account. Even assuming the *auguendo* that to execute a stop payment order is the type of act which triggers disciplinary actions, in the absence of specific showing of Respondent's intent to defraud or misrepresent to Van Nortwick, the deviation from the standard may not be justified. In light of all circumstances, including isolate nature of the conduct, and insignificant harm to the public, six months suspension is unduly harsh and cannot be justified under any circumstances.

The Referee further erred in failing to find mitigating factors, First, case law support that the vindictiveness of a complaining party is recognized as mitigating factor. Further, The Standard 9.32(m) provides that remoteness of prior offenses is considered as a mitigating factor. Respondent had practiced law for over twenty years, His disciplinary record is clean except for a public reprimand imposed just once.

In light of all circumstances, there are no specific findings which could justify deviation from the standard. For the foregoing reasons, Respondent urges this Court that six months suspension is disproportionate and unduly harsh, which is totally unjustified.

IV. PUBLIC POLICY MANDATES THAT PROTECTION OF THE PUBLIC FROM HARM RESULTINGFROM A LAWYER'S MISCONDUCT BE THE ULTIMATE GOAL OF THE RULES FOR DISCIPLINARY ACTION. WHEN THE INTEREST OF AN INDIVIDUAL FROM NOT BEING HARMED BY A LAWYERS MISCONDUCT IS BALANCED AGAINST THE INTEREST OF THE PUBLIC, IMPOSING SEVERE SANCTION ON RESPONDENT CLEARLY UNDERMINES THE GOAL OF THE DISCIPLINARY ACTION.

This Court repeatedly held that primary goals in disciplinary action is to protect the public, the administrating of justice and the legal profession in preserving the purity of the Bar, The Florida Bar v . Pincus, 300 So. 2d 16 (Fla. 1974). It is a well established rule that "the purposes of disciplinary proceedings is primarily to protect the public from unethical practitioners and only secondarily, to punish the offender and act as a deterrent to others". Id. Disciplinary proceedings must be fair to society, both in terms of protecting the public from unethical conduct and the same time not denying the public the service of a qualified lawyers as result of undue harshness in imposing penalty. The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

It is true that a lawyer must maintain the highest standards of ethical and moral uprightness and fair dealing regardless whether he is acting s lawyer or an individual. The Florida Bar v. Ward, 599 So. 2d 650 (Fla. 1992). Respondent acknowledge that the Rules Regulating the Florida Bar section 3.4-3 expressly encompasses a situation where no lawyer/client relationship is involved. However, it should be noted that the seriousness of the harm to society resulting from a

lawyer's misconduct in dealing with his own client is significantly larger than the harm from a conduct in which the lawyer was acting in his personal capacity such as a customer in the present case. A lawyer is a trustee of his client and is expected to execute that trust and that a lawyer owes fiduciary duty to his client. The Florida Bar v. Ward, 599 So. 2d 650 (Fla. 1992). Mishandling a client's fund justifies the most serious sanction, since a lawyer breaching a fiduciary duty is the most damaging event to the image of the legal profession, which undermines the purity of the bar. Ward held, quoting The Florida Bar v. Dancu, 490 So. 2d 410, 42 (Fla. 1986) that "[O]ur primary goal of disciplinary action is to assure that the public cam repose this trust with confident". Ward held that " there is a presumption that disablement is the appropriate punishment of lawyers who intentionally steal client funds". Id. at 652. However, presumption does not apply in cases where lawyers have stolen money outside a client context, The Florida Bar v. Childers, 582 So. 2d 617, 617 (Fla. 1991) (The lawyer is suspended for ninety days who deposited a check which belong law firm iu her personal savings account.). "Theft under any circumstance warrants discipline". Ward, at 652. A lawyer, however steals from someone other than a client, "this specific 'public trust' is not violated to the same extent as if the lawyer had stolen money for his own client". Id. "Appropriate sanction must take into account whether duty violated was owed specifically to a client, or a member of the public, single or in combination". Id.

In the present case, no harm to clients resulted. There was only one individual merchant who was dissatisfied with her failing to collect money from Respondent, Even assuming that this type of activity is the one which justifiably triggers disciplinary action, Respondents act in issuing and tendering the post-dated check and executing stop payment order cannot be characterized as "theft". It should be distinguished from the lawyers' conduct in mishandling clients' trust accounts in the cases cited above. Further, Respondent was not even negligent in failing to pay the debt. Respondent testified that he had a genuine dispute over the debt with Van Nortwick. In light of all circumstances, Respondent should not be sanctioned more severe than the lawyers who mishandled clients' trust funds or issued a worthless check with knowledge of insufficient funds.

The preface of the Standard provides that "'the Supreme Court must 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 0 of aggravating or mitigating circumstances

Furthermore, it is imperative for this Court to recognize the potential adverse impact on public and legal professions which could be reasonably expected from imposition of severe discipline in the case like this. By imposing discipline on a lawyer who disputed a debt when he was acting as a customer, it would send a wrong message to the public. Dissatisfied creditors or debt collectors would file disciplinary actions with the Florida Bar once binding judgments had been rendered in a civil litigation in favor of the lawyer, It would ultimately result in a fraud of disciplinary actions freely flowing out of control in the future.

Moreover, it would adversely affect the quality and efficiency of a legal profession if this Court allows dissatisfied creditors to pursue their claims against a lawyer in a disciplinary action as an alternative to costly civil litigation. In The Florida Bar v. Delay-Donna, 583 So. 2d 307, the Court stated that "disciplinary actions cannot be used as a substitute for what should be addressed in private civil actions between attorneys and third parties". In Della-Donna, a lawyer was ordered by the referee restitution of excessive fees to the client. The Court recognized the basic rule that disciplinary proceedings are not designed to redress private grievance and denied the referee's order for restitution. In the present case, disciplinary action was in fact used as a substitute for what was addressed in a private civil action between Van Nortwick and Respondent. After a binding judgment was entered, restitution was ordered which was intended to replace the binding judgment in the civil action. If this Court allows creditors of attorneys to pursue private grievance iu disciplinary proceedings, members of the Bar would be highly discouraged to pursue their legitimate rights against creditors in private civil actions for fear of beiug prosecuted and punished in the name of "misconduct" in the subsequent disciplinary proceedings.

It has been further stated that the discipline should be fair to the society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the service of a qualified lawyer as a result of undue harshness of imposing the penalty. The Florida Bar. v. Lord, 433 So. d 983, 986 (Fla. 1993). If a lawyer who is merely involved in a debt dispute with a non-client individual., in good faith and with reasonable belief that the amount is disputed, is disciplined, it ultimately undermine the objective of disciplinary action by depriving

the public from receiving worthy representation of a qualified lawyer, from which the public would ultimately receive a benefit.

Respondent is a distinguished member of the Bar and has been practicing law for almost twenty three years. Respondent is a good husband and a father of three, and is a respected member of society. Neither the client' interests nor the interests of the public at large were harmed by the Respondent's alleged conduct. In balancing the ostensibly conflicting interest in protecting an individual's interest against interest to the public not being denied of a qualified lawyer's representation, this Court should find that the recommended sanction is unduly harsh and inappropriate under the rule and mandate of the public policy in lights of all circumstances.

CONCLUSION

The Referee's findings of facts are contrary to the great weight of the evidence in the record and the admission of the witness. The Referee's findings that Respondent violated 3-4.3, 4-8.4(a) and (c), are clearly erroneous lacking any evidential support.

Respondent's state of mind, intent or motive are crucial to violation of the rules with which Respondent has been charged, yet the Referee failed to make any specific circumstances indicating Respondent's intent. As such, the Referee's tidings are clearly erroneous with respect to the alleged violation of Rule. 3-4.3, 3-4.8(a), and (c).

The Referee further erred in recommending six months suspension since it is unduly harsh and inappropriate in light of the nature of conduct involved. Under the case law, the circumstances of cases which justify six-months suspension were much more severe than the one in the present case. The severity of the punishment recommended by the referee exceeds the necessity of the goals of the disciplinary action. It is a well established principle that the purpose of the discipline should be fair to the society, both in terms of protecting the public from lawyers misconduct's, but at the same time, the public should not be denied the service of a qualified lawyer as a result of undue harshness of imposing the penalty.

The Respondent solely disputed a debt over the unpaid balance for the airline tickets with his merchant. There was no specific showing of Respondent's deceitful intent No clients' interests were harmed. This case was already settled between the parties in the prior civil action brought by the complaining witness. For the reasons shown above, Respondent respectfully urges this Court to find that Respondent's conduct did not warrant six(6) months suspension as recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Respondent's Initial Brief in support of Petition for Review has been furnished by U.S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and copies have been furnished by U.S. mail to Joseph A. Corsmeier, Assistant Staff Counsel for the Florida Bar. Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, and to John T Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 323990-2300 by U.S. Mail all this 7 day of November, 1996.

JAY A. HEBERT
ATTORNEY FOR RESPONDENT