IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,

Complainant,

Case No. 87,399
[TFB Case No. 96-30,176 (05B)]

v.

SCOTT ROBERT PORTER,

Respondent.

______________________________/

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The transcript of the final hearing held on April 8, 1996, shall be referred to as "T", followed by the cited page number(s).

The Report of Referee dated April 8, 1996, will be referred to as "ROR", followed by the cited page number(s).

The respondent's Initial Brief dated June 10, 1996, will be referred to as "RB", followed by the cited page number(s).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

STATEMENT OF THE CASE AND FACTS

The Florida Bar adopts the facts as enumerated in the Report of Referee which were not contested due to the respondent's failure to file responsive pleadings and pursuant to the referee's Order on Motion For Default dated March 5, 1996. The statement of facts in the respondent's Initial Brief is incomplete. The bar also asserts that the respondent's statement of the case is incorrect and submits the following statement as to the proceedings in this case:

By Order of the Supreme Court of Florida dated October 19, 1995, the respondent was placed on emergency probation pursuant to a Petition For Emergency Probation filed by The Florida Bar [Case No. 86,621; TFB Case No. 96-30,474 (05B)(CEP)]. The basis of the bar's petition concerned two grievances against the respondent submitted by Maxwell A. McNally and Diane Keely which created a well-founded concern the respondent was engaged in an ongoing course of conduct involving violations of The Florida Bar Rules Regulating Trust Accounts. Accordingly, the chair of the Fifth Judicial Circuit Grievance Committee "B" issued a subpoena duces tecum to the respondent at his record bar address on August 10, 1995, compelling him to produce certain trust account records

and client files in order to facilitate a compliance audit of the respondent's trust account. Attempted service of the subpoena on the respondent was made on August 10, 1995, by certified mail, return receipt requested, at his record bar address. The envelope containing the subpoena was returned to the bar marked "unclaimed." The bar attempted to serve another subpoena by certified mail, return receipt requested, on August 14, 1995, but it too was returned marked "unclaimed."

The Supreme Court's Order of emergency probation required the respondent, in part, to immediately provide bar counsel with all trust account records which he is required to maintain so that the bar could verify compliance with the Court's Order imposing emergency conditions of probation.

On December 5, 1995, the bar filed a Petition For Emergency Suspension against the respondent on the basis that the bar was unable to serve on the respondent the subpoena duces tecum so that a compliance audit could be done of his trust accounts as required by the Court's October 19, 1995, Order. The bar had to obtain the records directly from the two banks at which the respondent maintained trust accounts. A review of the those bank

records created a well-founded concern that the respondent was engaged in on ongoing course of conduct involving violations of The Florida Bar Rules Regulating Trust Accounts which had caused, or was likely to cause, immediate and serious harm to his clients and/or the public. By Order of the Supreme Court of Florida dated December 14, 1995, the respondent was placed on emergency suspension [Case No. 86,974; TFB Case No. 96-30,939 (05B)(CES)].

Pursuant to R. Regulating Fla. Bar 3-5.2(d), the bar filed the formal Complaint against the respondent which forms the basis of the present disciplinary case. On January 30, 1996, the Complaint was served on the respondent at his record bar address by certified mail, return receipt requested. The Complaint was returned to the bar on February 23, 1996, marked "unclaimed." On February 26, 1996, the referee, The Honorable Nath C. Doughtie, was appointed.

On March 1, 1996, the bar filed a Motion For Default regarding the respondent's failure to serve any responsive pleadings or motions to the Complaint. By order dated March 5, 1996, the referee granted the bar's Motion For Default due to the respondent's failure or refusal to accept service of the

Complaint and serve responsive pleadings as required by R. Regulating Fla. Bar 3-7.6(g)(2). The referee further ruled that the final hearing would be limited solely to the determination of the appropriate sanctions to be imposed against the respondent.

The final hearing in this case was conducted on April 8, 1996. The respondent was present for the final hearing. During the final hearing, the referee signed the Report of Referee prepared by bar counsel recommending the respondent be disbarred and that he pay the bar's costs in prosecuting this case. Also during the April 8, 1996, final hearing, the bar filed an Affidavit of Costs reflecting that at that time the costs incurred by the bar in this case totaled $928.50.[1]

The referee's report was considered by the Board of Governors of The Florida Bar during its May, 1996, meeting. The Board voted not to seek review of the referee's findings of fact and recommendation that the respondent be disbarred. On May 9, 1996, the respondent filed his Petition For Review of Report of

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[1]Although the signed Report of Referee assesses costs against the respondent, the amount reflected in the bar's Affidavit of Costs was not included in the Report. Contemporaneously with the filing of this Answer Brief, the bar will submit an Amended Affidavit of Costs reflecting the total costs incurred by the bar.

Referee and this Answer Brief is in response to the respondent's Initial Brief dated June 10, 1996.

SUMMARY OF THE ARGUMENT

Under the Rules Regulating The Florida Bar service of process is not required to obtain jurisdiction over respondents in disciplinary proceedings. However, due process requires that respondents be given reasonable notice. Such notice is accomplished by service of the complaint on the respondent by registered or certified mail to the last known address of the respondent according to the records of The Florida Bar or such later address as may be known to the person effecting the service. In this case, the respondent has only had one record bar address to which pleadings were appropriately served by the bar. The respondent chose not to claim his certified mail from The Florida Bar and due to that dilatory conduct, a default was entered against the respondent and the referee has recommended he be disbarred. The bar has complied with all notice and service of process requirements under the rules and the respondent cannot now say he has been prejudiced when he chose not to participate in these proceedings.

The respondent failed to file any responsive pleadings in this case and a default was entered against him. The respondent

appeared at the final hearing and the referee afforded him the opportunity to present any defenses he might have. The respondent offered little more than excuses for why he did not receive adequate notice of the proceedings. Therefore, there was no error in the referee continuing with the final hearing and executing the Report of Referee.

The bar prepared the proposed Report of Referee for the referee's signature at the final hearing under the possibility the respondent would not appear for the final hearing as he had failed to participate at all during the course of the proceedings. The facts and information put into the Report were as accurate as the bar knew them to be and were utilized without any input from the respondent. The respondent cannot now claim the bar has misrepresented the facts when he has failed and/or refused to file responsive pleadings or present his defenses at the final hearing.

Considering the circumstances of this case, disciplinary case law, and the Florida Standards For Imposing Lawyer Sanctions, the referee's recommendation of disbarment is appropriate.

ARGUMENT

POINT I

THE RESPONDENT WAS PROVIDED WITH NOTICE OF THIS DISCIPLINARY PROCEEDING TO HIS RECORD BAR ADDRESS AS REQUIRED BY THE RULES REGULATING THE FLORIDA BAR.

Pursuant to R. Regulating Fla. Bar 3-7.11(b):

> Mailing of registered or certified papers or notices prescribed in these rules to the last mailing address of an attorney as shown by the official records in the office of the executive director of The Florida Bar *shall be sufficient notice and service unless this court shall direct otherwise.* (Emphasis supplied).

The formal Complaint against the respondent in this case was filed with the Supreme Court of Florida on January 30, 1996. On that date, a copy of the Complaint was served on the respondent by certified mail, return receipt requested, to his record bar address: 1111 Donnelly Street, Post Office Box 1276, Mt. Dora, Florida, 32757. The respondent was notified by the post office on February 1, 1996; February 9, 1996; and February 19, 1996, of this certified mail. On or about February 22, 1996, the respondent called bar counsel and was informed that the formal Complaint had been filed against him and he should be receiving a copy of same in the mail. The respondent took no affirmative action to pick up his mail and the copy sent to his record bar

address by certified mail was returned to the bar on February 23, 1996, marked "unclaimed." Under the Rules Regulating The Florida Bar, service of process is not required to obtain jurisdiction over respondents in disciplinary proceedings because every member of The Florida Bar is within the jurisdiction of the Supreme Court of Florida and its agencies. In bar disciplinary proceedings notice in lieu of process is sufficient. Pursuant to R. Regulating Fla. Bar 3-7.11(c):

> . . . due process requires the giving of reasonable notice and such shall be effective by the service of the complaint upon the respondent by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the respondent according to the records of The Florida Bar or such later address as may be known to the person effecting the service.

By sending a copy of the Complaint to the respondent at his record bar address by certified mail, return receipt requested, the bar was complying with the requirements of the R. Regulating Fla. Bar 3-7.11 regarding proper notice and service.

The Supreme Court of Florida has provided some direction regarding the issue of whether the bar's service of pleadings and notices on respondents is sufficient. In <u>The Florida Bar v.</u>

Bergman, 517 So. 2d 11 (Fla. 1987), the referee found that the bar had effected proper notice and service of the complaint and other pleadings on the attorney. The Court approved the referee's finding of guilt and recommendation of a six (6) month suspension. Although no petition for review was filed by the attorney, he did file a motion for rehearing claiming that he had not received sufficient notice of the disciplinary proceedings. The attorney argued that had he known of the disciplinary charges against him, he would have presented a defense. The Court remanded the matter back to the referee to determine whether the bar had provided sufficient notice to the attorney. The referee found, upon rehearing, that the bar had effected proper service on the attorney by sending pleadings to his record bar address pursuant to Integration Rule 11.01(2) (subsequent to 1987, the Integration Rules were amended to the Rules of Discipline, specifically Rule 3-7.11). Further, the referee found that the bar had attempted to locate the attorney when it was discovered that he was no longer at his record bar address, but the attempts were unsuccessful. The attorney contended that the bar should have made a more diligent effort to locate him to which the referee offered the following opinion:

> It would be unduly burdensome to expect The Florida Bar to find every respondent who chooses to move and not notify The Florida Bar of his whereabouts. Further, if actual notice was made mandatory, a respondent could avoid prosecution simply by making himself unavailable to The Florida Bar's service, presenting an obvious threat to the protection of the public. [At p. 13].

The Court approved the Report of Referee on remand and ordered the attorney be suspended for six (6) months and that he pay restitution to his clients.

The respondent admits in his initial brief that during his February 22, 1996, telephone conversation with bar counsel, he was informed that a complaint would be coming in the mail, but that "no such complaint arrived." (RB, p. 3). During that conversation, the respondent did not advise bar counsel of a change of address nor did he indicate any potential problems in receiving his mail. It is the members of The Florida Bar who are charged with notifying the bar of a change of mailing address. R. Regulating Fla. Bar 3-7.11(b). To the bar's knowledge, as reflected in its official records, from the time of the service of the Complaint until the present time, the respondent's record bar address has never changed.

The respondent suggests in his initial brief that the bar should have taken additional steps to ensure he was served a copy of the formal Complaint and that the bar decided not to cooperate with the respondent rather than ensure proper service and/or notice of the complaint. (RB, p. 3). On the contrary, the bar did effect proper notice and service upon the respondent as prescribed by the Rules Regulating The Florida Bar. Rather, it is solely due to the respondent's conduct of not claiming his certified mail that has caused the alleged inadequate notice of these disciplinary proceedings.

Subsequent to the Bergman case discussed herein, the Court has consistently held that service of pleadings to respondents' record bar address is sufficient notice and service, regardless of whether respondents accept, receive, or even read their mail. In The Florida Bar v. Daniel, 626 So. 2d 178 (Fla. 1993), copies of the complaints and requests for admissions in the pending disciplinary cases against the attorney were sent by certified mail to the attorney's record bar address, but he failed to respond. The bar then filed a motion to deem matters admitted and a motion for summary judgment, copies of which were also sent by certified mail to the attorney's record bar address, but they

were returned unclaimed. Subsequently, a hearing was conducted before the referee in which the attorney appeared in order to contest jurisdiction by maintaining that the referee lacked jurisdiction because, among other things, the bar had not served him with a "filed" copy of the complaint. The referee found that the bar had effected proper service of its complaints and pleadings upon the attorney. The Court held that sending pleadings and requests for admissions by certified mail to the attorney's record bar address in accordance with the bar rules governing process and notice in lieu of process effects proper service in attorney disciplinary proceedings.

In The Florida Bar v. Santiago, 521 So. 2d 1111 (Fla. 1988), disciplinary actions were instituted against the attorney for failing to perform various actions in conjunction with a temporary suspension order and for openly practicing law in violation of the suspension order. It was uncontroverted that the attorney had received the various orders from the Court and the bar correspondence pertaining thereto, but that he was experiencing personal difficulties during that time and did not open the correspondence because he believed it contained "bad news." In recommending the attorney be disbarred, the Court

stated:

> We cannot countenance such behavior and reject the proposition that disciplinary proceedings and orders of this Court can be ignored by consciously deciding not to open mail. To accept such a proposition as mitigation would require that the Bar and this Court take physical custody of respondents in order to ensure notification of disciplinary actions or proceedings has been accomplished. [At p. 112].

See also The Florida Bar v. Hawkins, 643 So. 2d 1074 (Fla. 1994) [attorney who refuses to accept service of petition for order to show cause why she should not be held in contempt for failing to comply with the terms of her disciplinary resignation is subject to disbarment for a period of five years]; and The Florida Bar v. Delves, 397 So. 2d 919 (Fla. 1981) [attorney was found to be uncooperative in the disciplinary proceeding where the record reflected he left unclaimed seven communications sent to him by certified mail at the grievance committee level as well as a copy of the complaint, even though the postal service sent him two notices for each communication except one].

In this case, the bar has complied with all due process and notice requirements. The bar is not required under any rule of procedure to track down respondents who seek to avoid service of

pleadings or who are negligent in participating in bar disciplinary matters. Had the respondent simply claimed his certified mail, he would have had notice of the bar's allegations in its Complaint. The respondent was put on notice by bar counsel that the Complaint was being sent to him through the mail, but the respondent did nothing upon receiving that information. The respondent's lack of affirmative action does not render the service improper or the final hearing defective. The bar should not have to force the respondent to participate in these proceedings when such an obligation is ethically and professionally incumbent upon the respondent as a member of The Florida Bar. As this Court reiterated in The Florida Bar v. Vaughn, 608 So. 2d 18 (Fla. 1992), "an attorney has a professional duty to respond courteously and to cooperate with a bar disciplinary proceeding." [At p. 21].

POINT II

BECAUSE THE RESPONDENT FAILED TO RESPOND OR PARTICIPATE IN THIS DISCIPLINARY PROCEEDING, AND A DEFAULT WAS ENTERED AGAINST HIM, THERE WAS NO ERROR IN THE REFEREE CONDUCTING THE FINAL HEARING AND EXECUTING THE REPORT OF REFEREE PREPARED BY THE BAR.

It is uncontroverted that the respondent has not filed any pleadings, responsive or otherwise, in this disciplinary matter. On March 1, 1996, the bar served a Motion For Default and a Notice of Final Hearing on the respondent, by certified mail, return receipt requested, to his record bar address. The respondent did not submit a reply to either document and the referee entered an Order on Motion For Default on March 5, 1996. Accordingly, the April 8, 1996, final hearing was to be conducted to determine the discipline to be imposed as the allegations in the bar's Complaint were, in effect, deemed admitted pursuant to the referee's March 5, 1996, order.

Prior to the April 8, 1996 final hearing, bar counsel's staff attempted to contact the respondent about the final hearing but were only able to speak with the respondent's wife. In fact, the respondent admitted at the final hearing that it was due to his wife advising him of the final hearing that morning that he

was able to appear. (T, p. 6).

During the final hearing, bar counsel informed the referee and the respondent of the attempts by the post office to serve a copy of the complaint on the respondent at his record bar address, by certified mail, through notices dated February 1, February 9 and February 19, 1996. Documentary evidence of those attempts and the unclaimed returned complaint and envelope were submitted by the bar into evidence [T, p. 5]. Bar counsel further informed the court of attempts by the post office to serve a copy of the bar's Motion For Default on the respondent at his record bar address, by certified mail, through notices dated March 2, March 9 and March 17, 1996. Documentary evidence of those attempts and the unclaimed returned motion and envelope were also submitted by the bar into evidence [T, pp. 5-6]. Upon receiving this evidence, the referee asked the respondent for his response. The respondent advised he did have a telephone conversation with bar counsel on February 22, 1996, in which he was informed the Complaint was being forwarded through the mail; that the Complaint was not available for him to pick up subsequent to his telephone conversation with bar counsel and prior to it being returned to the bar by the post office; that he

was only informed of the final hearing through his wife; and that he had never seen a copy of the bar's Complaint [T, pp. 6-7]. The respondent did not offer the referee any defenses nor did he attempt to seek a continuance or delay of the final hearing so that he might review the allegations in the bar's Complaint. The respondent simply left it to the referee's discretion.

In cases where the attorneys do not cooperate or participate in bar disciplinary proceedings, it becomes apparent they have as much indifference for the bar matters as they have for their professional obligations. In one such case, the referee specifically noted the attorney's total lack of cooperation with the bar during the disciplinary proceedings through his failure to appear at the grievance committee and final hearing despite personal knowledge of the hearing dates or notice by certified mail. The referee felt this was the same callous disregard for the proceedings of The Florida Bar as the attorney had shown toward his client's legal matter. The Florida Bar v. Jones, 543 So. 2d 751 (Fla. 1989).

In the instant matter, the referee indicated during the final hearing that the respondent should have shown a lot more

diligence or active response, particularly where his professional life is in jeopardy [T, pp. 7-9]. The referee executed the proposed Report of Referee prepared by the bar based upon the underlying allegations and the respondent's lack of response in the disciplinary proceedings [T, p. 9]. The respondent did not object to the referee signing the report or to the disciplinary recommendation contained therein of disbarment, nor did the respondent submit any information in mitigation. There was no error in the referee conducting the final hearing or executing the Report of Referee, which were all done within the respondent's presence. The respondent gave the referee no other alternatives.

POINT III

THE REFEREE'S REPORT DATED APRIL 8, 1996, IS NOT INACCURATE NOR DID BAR COUNSEL MISREPRESENT FACTS OR INFORMATION TO THE REFEREE DURING THE FINAL HEARING OR IN PREPARING THE REPORT.

The respondent states at page 4 of his initial brief that bar counsel made a misrepresentation during the final hearing by stating that the respondent has failed to cooperate with The Florida Bar. The record in this case is clear, and as shown herein, that the respondent has not cooperated with the bar and has not participated in these proceedings other than to appear for the final hearing. The respondent further states that the bar has failed to accurately represent his efforts to communicate with the Orlando office of The Florida Bar concerning this matter and that the bar has failed to return his calls. The respondent never made failing to return his calls an issue during the final hearing and to the bar's knowledge the first mention of same is in his initial brief. Rather, at the final hearing the respondent made mention of the telephone conversation he did have with bar counsel on February 22, 1996. To the bar's best information and belief, no telephone calls from the respondent went unreturned. Regardless, the respondent has provided no information or evidence showing he did cooperate with The Florida

Bar, or that he attempted to communicate with the bar other than his February 22, 1996, telephone call. The bar has not provided any misinformation to the referee and all representations made by bar counsel were based on the evidence and the record in this case.

The respondent also takes issue with certain findings of fact in the Report of Referee which he claims are inaccurate and that they, and other "undisputed" assertions, are not supported by evidence submitted by the bar to the referee at the final hearing (RB, p. 5). It is true that the bar did not submit evidence at the final hearing in support of the allegations in the Complaint. The referee specifically found in his March 5, 1996, Order granting the bar's Motion For Default that by the respondent's failure or refusal to accept service of the complaint and serve responsive pleadings as required by R. Regulating Fla. Bar 3-7.6(g)(2), he "has forfeited his right to contest the factual allegations set forth in the complaint." Further, the referee ruled that the final hearing set for April 8, 1996, was to be limited solely for the determination of the appropriate sanctions to be imposed against the respondent. Therefore, there was no need for the bar to present evidence at

the final hearing because the allegations were proven by the respondent's failure to file responsive pleadings.

The respondent has not filed an answer to the bar's Complaint as required by R. Regulating Fla. Bar 3-7.6(g)(2). Although the bar did not serve requests for admission in this case, the bar's allegations were, in effect, deemed admitted through the referee's order of default. This Court, on numerous occasions, has addressed situations where attorneys have failed to respond to requests for admissions or file responsive pleadings and then sought to challenge those admissions deemed admitted by the referee. See The Florida Bar v. Tobin, 21 Fla. L. Weekly s225 (Fla. May 23, 1996) [attorney lacked the ground to challenge admissions because he failed to timely file a response to the bar's requests for admission]; The Florida Bar v. Dubow, 636 So. 2d 1287 (Fla. 1994) [finding that referee acted within her discretion in deeming matters admitted where petitioner ignored the bar's requests for admissions]; The Florida Bar v. DeMarco, 601 So. 2d 1197 (Fla. 1992) [attorney may not contest the referee's findings of guilt in an attorney discipline proceeding where he fails to respond to request for admission of allegations]. In this case, had the respondent participated at

all, he could take issue with the referee's findings of facts. As it is, he cannot now dispute the facts when he failed and/or refused to accept service of the complaint, failed to file responsive pleadings, failed to conduct discovery or take any actions in defense of the bar's allegations.

Although, the respondent states at page 6 of his initial brief that in the referee's report "Bar Counsel omitted portions of disciplinary history for Referee's consideration", the bar does not know to what he is referring. According to the official records of The Florida Bar, the respondent's disciplinary history is as reflected in Section V of the referee's report [ROR, p. 3]. The bar would note, however, that in stating the respondent received a public reprimand in Case No. 89-30,112, dated December 12, 1991, he also received a six (6) month period of probation which was not included in Section V of the referee's report. If this is the omission to which the respondent refers, the bar apologizes for the oversight.

In summary, at all times during this case the bar has acted in accordance with the Rules Regulating The Florida Bar in providing notice to the respondent of the disciplinary action.

The respondent has refused to accept service of certified documents from The Florida Bar, and has not provided the bar with notice of any changes in his record bar address. The respondent has failed to file any responsive pleadings or take any affirmative action to defend himself against the bar's allegations. It is apparent the respondent has chosen to ignore his professional obligations as a member of The Florida Bar. Therefore, another hearing before the referee, a review of the Report of Referee, or any other relief requested by the respondent are not warranted.

POINT IV

DISBARMENT IS THE APPROPRIATE DISCIPLINE UNDER THE CIRCUMSTANCES OF THIS CASE.

In this case, the respondent was charged with and found guilty of failing to promptly disburse $18,000 he held in trust on behalf of a client, the majority of which was to be used as a pay-off on a chattel mortgage to a third party; disbursing a trust account check to the client for her proceeds of the sale but not disbursing the funds to pay off the mortgage; repeatedly representing to the client that he had mailed a check disbursing the funds to pay off the mortgage when he had not; disbursing the funds over six (6) months after the transaction had closed; and failing to deposit the funds in a trust account although he issued a trust account check to his client that should have been drawn against those funds. The referee found the respondent guilty of violating the following Rules Regulating The Florida Bar: 3-4.3 for committing an act which is unlawful or contrary to honesty and justice; 4-1.15(b) for failing to properly deliver to a client any funds the client is entitled to receive; 4-1.15(d) for failing to comply with The Florida Bar Rules Regulating Trust Accounts; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; 5-1.1(a) for using trust

funds for purposes other than those for which they were entrusted to the lawyer and refusing to account for and deliver trust funds upon demand; and 5-1.1(d) for failing to follow the minimum trust account procedures.

The fact that the respondent misused trust funds in a real estate transaction is a serious transgression, but it becomes even more egregious considering that the respondent was placed on emergency probation and emergency suspension as a result of his misuse of those funds, his trust account problems, and his failure to comply with duly authorized Florida Bar subpoenas. This Court has repeatedly asserted that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment. The Florida Bar v. Shanzer, 572 So. 2d 1382, 1383 (Fla. 1991). However, the Court has imposed the less severe sanction of suspension in light of significant mitigating factors such as remorse, drug addiction, full and fair disclosure to the disciplinary board, a cooperative attitude toward the proceedings or emotional problems. The Florida Bar v. Benchimol, 21 Fla. L. Weekly s226 (Fla. May 23, 1996).

In this case, no mitigating factors exist. Rather, the respondent has completely failed to present any defenses on his behalf or otherwise participate in the disciplinary proceedings. Although the respondent appeared for the final hearing he offered nothing that would tend to mitigate his misconduct. On the contrary, there is much in aggravation in this case including a risk of public or client harm which formed the basis for the respondent's emergency suspension.

There are similar cases where disbarment was imposed for misusing trust funds, with little or no mitigation present. In The Florida Bar v. McIver, 606 So. 2d 1159 (Fla. 1992), the attorney's flagrant use of estate and client funds was found to be intentional. The attorney was disbarred even though he contended no one suffered any pecuniary loss. The Court concluded that the attorney's acts exposed his clients to great risks. Although there was some mitigation present, it was insufficient to lessen the penalty. An attorney was disbarred in The Florida Bar v. Williams, 604 So. 2d 447 (Fla. 1992) for cumulative misconduct, including issuing worthless checks, trust account violations and trust account shortages. The referee noted that while no client suffered any actual loss and the attorney repaid

all shortages, she admitted to intentionally using the trust account funds to "keep her office open." The attorney expressed that she knew that the practice of using her trust funds was wrong. The only mitigating factor present was the attorney's inexperience in the practice of law but that was insufficient to overcome the substantial aggravating factors present. See also The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992) [disbarment for theft of clients' funds despite mitigating factors]; The Florida Bar v. Elliot, 548 So. 2d 664 (Fla. 1989) [10 year disbarment for misappropriating over $103,000 in proceeds from a sale of real estate and over $7,800 which had been entrusted to him for the purpose of paying off a mortgage]; The Florida Bar v. Burns, 542 So. 2d 1335 (Fla. 1989) [disbarment for failing to disburse trust funds as ordered by the court while using the funds for purposes other than those for which they were entrusted to him, and personally benefitting from the interest earned on trust accounts].

At page 5 of his initial brief, the respondent states that there is no reference to the Florida Standards For Imposing Lawyer Sanctions in the referee's report. He suggests that in order for the referee to recommend disbarment, he would have to

apply Standard 4.11 as opposed to Standards 4.12 through 4.14 which call for lesser disciplines. Although referees and the Court have utilized the Florida Standards For Imposing Lawyer Sanctions in numerous cases, there is no requirement that they be considered. The main purposes of the Standards are for guidance and consistency in imposing attorney discipline subsequent to a finding of guilt based on clear and convincing evidence. There is no error in the referee not considering the Standards. The respondent further states, "[t]he list of proposed Rule violations contained in Section III of the report does not use any of the other Standards, and relies solely upon the application of Fla. Stds. Imposing Law. Sancs. 4.1" [RB, p. 6]. The Rules Regulating The Florida Bar do not use or rely upon the Standards as they are ethical violations as opposed to the Standards which are akin to disciplinary recommendations after a violation of the Rules is found. The bar would agree with the respondent that Standard 4.11 is appropriate in this case which calls for disbarment when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury. In addition, the following aggravating factors are present in this case under Standard 9.2: prior disciplinary offenses, dishonest or selfish motive, bad faith obstruction of

the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, and substantial experience in the practice of law. The bar does not see any mitigating factors present in this case under Standard 9.3.

Based upon the circumstances of this case, the respondent's misconduct as charged, his failure to participate in the disciplinary proceedings and/or failure to cooperate with the bar, the referee's recommendation of disbarment and the respondent's payment of the bar's costs is warranted and should be upheld.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and recommendations as to guilt and order the respondent be disbarred from the practice of law and require the respondent to pay the bar's costs in prosecuting this case which total $1,056.74.

Respectfully submitted,

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AND

KATHI LEE FERGUSON
Bar Counsel
The Florida Bar
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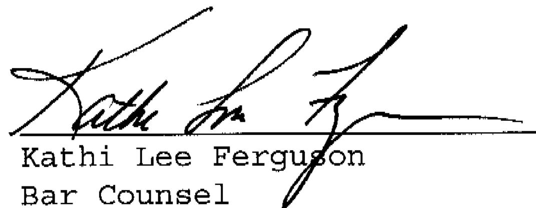
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 813729

By: [signature]
KATHI LEE FERGUSON
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Scott Robert Porter, 1111 Donnelly Street, Post Office Box 1276, Mt. Dora, Florida, 32757; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 26th day of June, 1996.

Respectfully submitted,



Kathi Lee Ferguson
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 87,399
[TFB Case No. 96-30,176 (05B)]

v.

SCOTT ROBERT PORTER,

Respondent.
______________________________/

APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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(April 8, 1996)

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

COPY

THE FLORIDA BAR,

Complainant,

-vs-

Case No. 87,399
[TFB Case No. 96-30,176(05B)]

SCOTT ROBERT PORTER,

Respondent.
_______________________________/

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ORLANDO

ORDER ON MOTION FOR DEFAULT

This cause came on for further consideration of the Motion for Default filed by Complainant, The Florida Bar. Upon a review of the motion, the files and records of this case, and the applicable law, the Referee finds as follows:

1. Respondent,Scott Robert Porter, is accused of disciplinary violations, a further description of which is contained within the Bar's complaint. The complaint was sent to respondent on January 30, 1996, via certified mail, return receipt requested, at the respondent's record bar address as required by Rule 4-7.10(b). The mail was returned "unclaimed" on February 23, 1996. Moreover, respondent has previously failed to accept receipt of the complainant's certified mail on two separate occasions.

It is therefore the conclusion of the Referee that respondent, by his failure or refusal to accept service of the complaint and

serve responsive pleadings as required by rule 3-7.6(g)(2), Rules of Discipline, has forfeited his right to contest the factual allegations set forth in the complaint.

2. The matter is set for final hearing on April 8, 1996, limited solely to the determination of the appropriate sanctions to be imposed against respondent. The final hearing will be heard at the Alachua County Courthouse, Gainesville, Florida, at 1:15 p.m.

Accordingly, it is hereby ORDERED that the Complainant's Motion for Default is GRANTED and this matter is continued for further proceedings consistent with this order.

DONE AND ORDERED this 5 day of March, 1996, in Chambers, Gainesville, Alachua County, Florida.

ORIGINAL SIGNED BY
NATH C. DOUGHTIE
CIRCUIT JUDGE

NATH C. DOUGHTIE, Referee

Copies provided to:

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 87,399
[TFB Case Nos. 96-30,176(05B)]

v.

SCOTT ROBERT PORTER,

Respondent.
______________________/

REPORT OF REFEREE

I. Summary of Proceedings:

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on April 8, 1996. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorney appeared as counsel for The Florida Bar:

Kathi Lee Ferguson

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent Is Charged:

After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

The respondent represented a client in the sale of a mobile home in April, 1995. A third party held a chattel mortgage on the mobile home and the outstanding balance due on the mortgage was $16,561.29. At the closing on May 1, 1995, the respondent was given a check made payable to the client in

the amount of $18,000.00 for the respondent to place in his trust account pending the passing of clear title. The title cleared and passed to the buyers on or about May 22, 1995. At that time the chattel mortgage was to be paid off. The respondent failed to forward the money although he did pay his client $1,358.85 by check 1151 drawn on his account at First Union Bank of Florida dated June 12, 1995. When the client inquired as to why the chattel mortgage had not been paid, the respondent repeatedly assured that he had mailed the check. The client finally received payment for the sale of the mobile home, on November 20, 1995. The respondent issued a check in the amount of $17,378.01, on the First Union Trust Account and entered a transaction date on the check of May 1, 1995. The client thereafter successfully negotiated the check.

A review of the respondent's trust accounts was performed by Charles Lee, a staff investigator with The Florida Bar, in September 1995, for the period May 1, through August 31, 1995. Copies of the respondent's trust account statements obtained by the bar directly from the two banks, show that the settlement check from the buyer was never deposited to either of the respondent's trust accounts despite the fact he issued a check to his client that should have been drawn against those funds.

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty and Rule Violations Found:

As to each ethical violation alleged in the bar's complaint I make the following recommendations as to guilt or innocence:

Rule 3-4.3 - recommend guilty;
Misconduct.

Rule 4-1.15(b)- recommend guilty;
It is undisputed that the Respondent in this case failed to properly deliver to his client funds that the client was entitled to receive.

Rule 4-1.15(d)- recommend guilty;
It is undisputed that the Respondent failed to comply with The Florida Bar Rules Regulating Trust Accounts.

Rule 4-8.4(a) - recommend guilty;
It is undisputed that the Respondent engaged in conduct involving dishonesty, fraud, deceit and misrepresentation.

Rule 5-1.1(a)- recommend guilty;
It is undisputed that the Respondent used trust funds for purposes other than those for which they were entrusted to him and refused to account for and deliver those funds upon demand.

Rule 5-1.1(d) - recommend guilty;
It is undisputed that the Respondent failed to follow the minimum trust accounting procedures.

IV. Recommendation as to Disciplinary Measures to Be Applied:

I recommend that the Respondent be disbarred.

V. Personal History and Past Disciplinary Record:

After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 37
Date admitted to bar: November 16, 1984
Prior disciplinary convictions and disciplinary measures imposed therein:
The prior disciplinary record affidavit indicates the respondent received a public reprimand in Case No. 89-30,112, dated December 12, 1991; probation in Case No. 96-30,474 dated October 19, 1995 and emergency suspension in Case No. 96-30,939 dated December 14, 1995.

VI. <u>Statement of costs and manner in which costs should be taxed</u>:

I find the following costs were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
	1. Bar Counsel Travel Costs	$ 00.00
B.	Referee Level Costs	
	1. Transcript Costs	$000.00
C.	Administrative Costs	$750.00
D.	Miscellaneous Costs	
	1. Copy Expenses	$ 00.00
	TOTAL ITEMIZED COSTS:	$000.00

It is recommended that all of the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 8 day of April, 1996.

ORIGINAL SIGNED BY
NATH C. DOUGHTIE
CIRCUIT JUDGE

Nath C. Doughtie, Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:
Kathi Lee Ferguson, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801

Scott Robert Porter, Respondent, 1111 Donnelly Street, P. O. Box 1276, Mt. Dora, Florida 32757

John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300