097

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CYRUS ALAN COX,

Respondent.

CASE NOS: 87,536
88,381

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The following abbreviations are used in the brief:

Resp. Ex.	=	Respondent's Exhibit from final hearing
TFB Comp. Ex.	=	The Florida Bar's Exhibit from final hearing
R.R.	=	Report of Referee
T.	=	Transcript of final hearing before Referee on August 19, 20, 21 and September 19, 1996

STATEMENT OF THE CASE

This disciplinary proceeding is before the Court upon Respondent's Petition For Review and Complainant's Cross-Petition For Review. Respondent contests the Referee's recommended findings of fact and guilt and his recommendation of discipline in the two cases pending. Complainant's Cross-Petition For Review seeks review of the Referee's recommendation of discipline and the Referee's finding of not guilty in Count VII in case number 87,536.

The Florida Bar's case consisted of two complaints consolidated for final hearing. The first Complaint in case number 87,536 consisted of eight counts, seven of which sprung from a grievance filed by Michael Marder, Esquire and David Lenox, Esquire, two partners of Respondent's former employer, Greenspoon, Marder, Hirschfeld and Rafkin. (Hereinafter Greenspoon firm). [TFB Comp. Ex. 33. The allegations of the first seven counts were that Respondent mishandled a variety of client matters. Those counts included Respondent's handling of matters for clients, Wimberly (Count I), ZacZac (Count III), Crenshaw (Count IV), Ballweg and Jann (Count VI), and Meek (Count VII).

The seven counts generally alleged improper retention of fees, conflicts of interest, improper trust accounting, commingling of trust and law firm or personal funds, conduct involving dishonesty, fraud, deceit and misrepresentation, and failure to properly communicate with a client.

At final hearing, none of these clients appeared to testify against Respondent's handling of their respective matters. To the contrary, Jim Ballweg and Norbert Jann testified on Respondent's behalf and indicated knowledge of and satisfaction with

Respondent's actions, In fact, Mr. Ballweg travelled from St. Petersburg and Mr. Jann expended $12,000.00 to travel from his home in Switzerland to appear and testify on behalf of Respondent. [T. 657, 671, 719].

The last count of case number 87,536 arose from a Complaint brought by Respondent's client, William J. Costley. In the Costley matter, the Complainant alleged that Respondent: failed to use due diligence; failed to keep the client reasonably informed; failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions; engaged in conduct that is unlawful or contrary to honesty and justice; charged a clearly excessive fee; failed to promptly deliver funds to a client; failed to comply with trust accounting rules; failed to take the steps necessary to protect a client's interests upon termination of representation; and engaged in conduct involving dishonesty, fraud, deceit and misrepresentation.

Case number 88,381 consists of a single count predicated upon a complaint brought by Respondent's client, Martha Skinner. In the Skinner Complaint, Complainant alleged that Respondent participated in the improper witnessing and notarization of a will.

Final hearing on both cases was conducted on August 19 - 21, 1996 in Orlando and September 19, 1996 in Ocala.

In case number 87,536, at the close of the Complainant's case the referee directed a verdict in favor of the Respondent in Counts I and III. [R.R. at 4, 8]. Furthermore, the Referee found Respondent not guilty as to all rule violations alleged in Counts IV, V, and VII. [R.R. at 29]. Moreover, the Referee found Respondent not guilty of all allegations and rule violations in

Count II, except Rule 4-1.15(d). [R.R. at 29]. By virtue of Respondent labelling his client account "escrow" instead of "trust", the Referee found a violation of Rule 4-1. 15(d). [R.R. at 7].

Additionally, the Referee found Respondent not guilty of many rule violations stemming from Counts VI and VIII. Specifically, there was a finding of not guilty by the Referee as to the alleged violations of Rule 3-4.3 (Count VI) [R.R. at 24], and Rules 4-1.5(a), 4-1.15(d), 4-1.16(d), 4-8.4(c), 5-1.1(d), 5-1.2(b) (Count VIII). [R.R. at 28]. Of the 49 rule violations originally alleged by The Florida Bar in this complaint, Respondent was found not guilty of 34 rules, or nearly 70% of all of the charges.

In case number 88,381, the Referee recommended Respondent be found guilty of all three rule violations charged; to wit: Rules 3-4.3, 4-8.4(c) and (d).

As a result of his finding in case number 87,536, the Referee recommended the imposition of a thirty (30) month suspension followed by three (3) years probation. As a condition of probation, the Referee further recommended that Respondent be required to attend and complete The Florida Bar Trust Account Procedures Course and be subjected to random audits.

In case number 88,381, the Referee recommended a one (1) year suspension to run concurrent with the recommendation in case number 87,536.

Respondent seeks review of certain factual findings and rule violations in case number 87,536 in Count VI and factual findings and rule violations in case number 88,381. As to Count VI, Respondent specifically contests the Referee's findings of rule

violations as to Rule 4-1.7(b), (Conflict of Interest; General Rule); Rule 4-1.8 (Conflict of Interest; Prohibited Transactions); Rule 4-4.1(d), (Truthfulness in statements to others); Rule 4-8.4(c) (Misconduct; conduct involving dishonesty, fraud, deceit or misrepresentation) and Rule 5-1.1(g), (Trust Accounts, Disbursements against uncollected funds).

Further, Respondent seeks review of the recommendations of discipline.

STATEMENT OF THE FACTS

The genesis of these proceedings was a letter of complaint dated February 3, 1995 by Michael Marder and David Lenox, two lawyers employed with Respondent's previous employer, the Greenspoon firm. [TFB Comp. Ex. 3]. This letter followed by one month Respondent's termination from the firm which occurred on or about January 5, 1995. [T. 58]. The Greenspoon firm kept mast of Respondent's personal possessions in his office, including his chair, desk, computer and other things, without any discernible legal basis. [T. 142, 143]. This initial letter was followed by eight additional letters with attachments to various Florida Bar functionaries from Mr. Marder and/or Mr. Lenox levelling a host of allegations against Respondent. [T. 138]. The text of these accusations exceeded 60 pages and the attachments thereto totalled nearly 200 pages. [T. 138]. The mounds of paper generated by the Greenspoon firm led to seven (7) of the eight (8) counts in case number 87,536.

In case number 87,536, for the purpose of this brief, only the facts surrounding Count VI are important.

Count VI involved Respondent's handling of legal and non-legal matters for Ballweg, Jann and ALPS Marketing, Inc. [T. 687, 688, 719]. The Complainant alleged that Respondent was guilty of conflicts of interest, misappropriation and improper trust record keeping.

The undisputed facts established that Ballweg and Jann were business partners in the operation of ALPS Marketing, Inc. [T. 664, 687]. ALPS Marketing, Inc. is in the business of marketing different products, one of which was produced by Jann. [T. 663].

In February or later of 1995, Respondent was given an ownership interest in ALPS Marketing, Inc. [T. 704, 705].

Jann is a Swiss National, who holds an MBA degree from Foutainbleau in Paris, and is also licensed to practice law in three cantons (states) in Switzerland. [T. 657, 659]. Ballweg had extensive experience in the insurance, finance, petroleum and marketing industries and was educated at the University of Madrid, University of Munich, University of Maryland and Harvard Business School. [T. 685]. Accordingly, it was clear from the record that both Ballweg and Jann were sophisticated in matters of business.

In July 1994, Jann wired $150,000.00 into Respondent's trust account for the use of the ALPS group of companies, including start up costs. [T. 559, 665, 688, 689]. Ballweg signed a promissory note to Jann for the $150,000.00. [T. 584, 587, 588, 666, 674, 683, 689, 705].

On July 14, 1994, Respondent wrote a detailed letter to Jann "to formalize the business aspects of our professional relationship concerning the line of credit you have determined to provide to Action Loss Prevention of $150,000.00". [Resp. Ex. 10]. This letter very specifically detailed the manner in which the funds could be accessed. However, the July 14, 1994 letter preceded the receipt of funds by some eleven (11) days. Furthermore, Jann testified that he modified the agreement by telephone and gave authority to Respondent beyond the four corners of the letter, a fact which was confirmed by Respondent. [T. 587, 668, 675]. In fact, on cross examination by The Florida Bar, Jann stated that expenditures of Respondent were authorized by telephone and communicated by Jann to either Ballweg or Respondent. [T. 676,

677]. Further Jann indicated that Respondent could make expenditures on Jann's behalf. [T. 676].

Ballweg confirmed that July 14, 1994 agreement was modified almost immediately, but certainly within four (4) days of Respondent's receipt of the funds. [T. 711, 7133.

Thereafter, Jann wired $200,000.00 to Respondent and along with Ballweg directed that it be placed into Respondent's operating account. [T. 559, 689]. Ballweg also signed a note for the $200,000.00 sum. [T. 584, 587, 588, 666, 674, 683, 689].

Jann testified that with regard to both the $150,000.00 and the $200,000.00 deposits, Ballweg had the authority to spend the funds in his discretion. [T. 667, 689]. Furthermore, Ballweg testified that he gave Respondent authority to expend the funds sent by Jann for use by ALPS, Inc. [T. 690]. In fact, Ballweg testified that he knew "every single transaction, every check that goes through the accounts" and that Respondent had his authority to make each disbursement made on the trust, operating, and ALPS, Inc. accounts. [T. 690, 712]. Similarly, Jann was provided with a ledger or account register of every transaction. [T. 591, 665].

On the issue of potential conflicts of interest based on Respondent's business dealings with these two clients, and the clients' potentially differing interests, the following testimony was adduced at hearing.

Respondent testified that he discussed potential conflicts with Jann and Ballweg. [T. 588]. Respondent stated that Jann, as an attorney, understood. [T. 588]. Ballweg who was also sophisticated in business, understood as well. [T. 588]. After a discussion of these issues, both Jann and Ballweg waived any

conflict. [T. 588].

Ballweg confirmed that he was advised of his right to seek independent counsel in the event of a conflict in a memo from Respondent. [T. 714 - 716]. Ballweg indicated that based upon his 20 years as a business man, he did not feel independent counsel was necessary. [T. 714, 716]. Jann, too, rejected the idea of a conflict or need for independent counsel based on his experience as a lawyer and business man, and further based upon his desire to minimize legal costs. [T. 664].

In addition to having no complaint about the handling or expenditure of their funds, or about any perceived conflict, neither Ballweg nor Jann had any complaint whatsoever about Respondent. [T. 684, 719]. In fact, at the time of the hearing below, Ballweg and Jann intended to increase the salary that was being paid Respondent. [T. 720].

SUMMARY OF ARGUMENTS

The Referee erred in several findings of fact and guilt in Count VI of case number 87,536. The Referee erred in the assessment of all of Complainant's costs against Respondent as the majority of the rule violations alleged were unproven and resulted in not guilty findings. Based upon evidence presented by Respondent, it is obvious that if proper investigation had been conducted, many counts would not, or at least should not, have been brought.

Finally, the Referee's recommendation of discipline is grossly excessive based upon the few violations actually proven and their relatively minor nature.

THE REFEREE'S RECOMMENDATIONS AS TO FINDINGS OF GUILT IN COUNT VI **OF CASE NUMBER 87,536 ARE NOT SUPPORTED BY THE EVIDENCE BELOW.**

After the close of the evidence the Referee found Respondent guilty of the following rule violations relative to Count VI of Case Number 87,536, for which there was no evidence or insufficient evidence, to wit: Rules **4-1.7(b), 4-1.8(a), 4-4.1(a), 4-8.4(c)** and **5-1.1(g).** The erroneous nature of the referee's findings will be analyzed on a rule by rule basis below.

Rule **4-1.7(b)** and Rule **4-1.8(a)**

Rule **4-1.7(b)** of the Rules Regulating The Florida Bar states that:

> (b) Duty to Avoid Limitation **on Independent** Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

Moreover, Rule **4-1.8(a)** states that:

> (a) Business Transactions With or Acquiring Interest **Adverse** to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, **or** other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

In Count VI, the Referee found that Respondent violated both Of these rules in his dealings with Ballweg and Jann. Yet the record and Referee's findings are silent as to what conflict existed between the clients (Rule 4-1.7) or what conflict existed between Respondent and clients (Rule 4-1.8).

The Referee did find that "In his letter of July 14, 1994, the Respondent neither revealed his involvementwiththe company as its attorney nor his interest in it and its proposed subsidiaries". [R.R. at 16]. Such non-disclosure, if true, could potentially implicate Rule 4-1.8(a). However, these findings are clearly erroneous.

First, the July 14, 1994 letter [TFB Comp. Ex. 39, Resp. Ex. 10], clearly set forth Respondent's responsibilities to ALPS Marketing, Inc. in some detail. Further, Respondent's non-legal involvement was reduced to writing in a separate document dated June 15, 1994, which was signed by Ballweg as president of ALPS and Respondent. [Resp. Ex. 9]. The fact that the non-legal involvement was revealed one month earlier eliminates the perception and the finding that Respondent did not disclose his involvement in the July 14, 1994 letter.

Moreover, Respondent had no interest in ALPS as of the date of the July 14, 1994 letter to Jann. Such interest was not created until Ballweg and Jann gave Respondent partial ownership in the company sometime in 1995. [T. 705]. As such "his interest" in ALPS could not be revealed in July 1994 as it did not exist.

Accordingly, there is no support for the proposition that a conflict was created by the contents or lack thereof of the July 14, 1994 letter.

Additionally, it is obvious that any potential conflict, real or imagined, was disclosed to, discussed with and dismissed by the clients.

The following testimonial excerpts illustrate the Respondent's disclosure and the rejection of the need for independent counsel by Ballweg and **Jann.**

> (By Mr. Tozian) Q. Did Mr. Cox advise you that you might need some independent advice?
>
> (By Mr. Jann) A. You see - - I mean, **I'm a lawyer** and a businessman for quite a long time. I mean, you should know that I should know what risk I can take. Mr. Ballweg is a businessman for quite a long time, and Mr. Cox is an attorney for quite a long time and is familiar with international affairs and - - when money is involved.
> I mean, why should we take another outside counselor? I mean, that only costs money and brings you nothing. I mean, because oh yes. It can bring you something. I mean, it can bring you into a situation like that, I mean, we paid other counselors, outside counselors money, and that's the situation we're in now. [T. **664].**

Mr. **Ballweg's** recognition and rejection of the conflict issue was equally clear.

> (By Mr. Turner) Q. Okay. Did Mr. Cox ever sit down with you and present to you any sort of written documentation that there might be some sort of conflict for Mr. Cox representing you and representing Mr. **Jann** at the same time?
>
> (By Mr. Ballweg) A. We had discussed that, yeah.
>
> **Q.** Did he sit down and present anything in writing to you, sir?
>
> A. He had written me a memo, at one time; yes, he did. And I had disregarded it because, to be quite honest with you, I've **been** in this business and a businessman for **20-** some **years.** [T. 7143.
>
> * * * *
>
> (By Mr. Ballweg) I believe that I received a memo at one time, Your Honor, telling me that I had an opportunity to seek individual counsel if there was any type of conflict of interest between the parties. I did not think that was necessary. [T. **716].**
>
> * * * *

(By Mr. Turner) Q. Did Mr. Cox also do a memo to that effect when he became an owner in the corporation, sir?

A. No.

Q. He didn't do it then?

A. He didn't do it then because the three of us sat down and discussed it.

It is clear from the testimony of Ballweg that Respondent discussed the potential for conflict between Ballweg and Jann which was reduced to writing. Ballweg consented to the dual representation and declined independent counsel based on his vast business experience and apparent comfort from his friendship with the parties. [T. 686, 714].

It is also clear that in February of 1995 when Respondent was given an ownership interest in ALPS Marketing, Inc., a second conversation as to potential conflicts was initiated by Respondent. Once again, Ballweg and Jann consented to the arrangement, declining to hire independent counsel. Respondent also confirmed that discussions were conducted concerning issues of conflict and that Ballweg and Jann waived or dismissed any such notions. [T. 588].

Accordingly, it is clear that Respondent complied with Rules 4-1.7(b) and 4-1.8(a) regarding the disclosure of potential conflict and the consent of the clients, Further, it is obvious that upon being given an ownership interest in the business in February of 1995, Respondent discussed conflict potential again with Ballweg and Jann. The clients were both sophisticated, experienced business men who trusted one another and who were capable of making, knowing intelligent decisions. While Respondent did not obtain the consent in writing per Rule 4-1.8(a), neither

client is complaining or denying the conflict was disclosed. Accordingly, any perceived violation due to the absence of a writing is de minimis.

Therefore, the Referee's recommendation of a guilty finding as to Rule 4-1.7(b) and Rule 4-1.8(a) is completely unsupported by the record. In fact, such a finding flies in the face of the undisputed testimony of Ballweg, Jann and Respondent. It is respectfully submitted that the Referee's recommended findings as to these two rules must be rejected.

Rule 4-4.1(a) and Rule 4-8.4(c)

Rule 4-4.1(a) entitled Truthfulness In Statements To Others reads as follows:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person;

Unfortunately, the Referee's findings do not specify any particular statement made by Respondent which is allegedly false or any particular conduct which is dishonest, fraudulent, etc. The Referee's findings of fact as to Count VI are contained in pages 14 - 24 of his report. However, Respondent is only able to determine two areas in the Referee's findings of fact which might be construed to implicate or suggest a false statement by Respondent or which may otherwise touch upon the referenced rules.

First, on page 21 of the report of referee, the Referee's findings comment on Respondent's explanation of the second wire transfer ($200,000.00) from Jann to Respondent's operating account. There the Referee finds:

> After being confronted, the Respondent, in a memo dated

November 28, 1994, to Michael Marder **advised the money was legal fees he earned two years before** while a sole practitioner. [R.R. at 21]. (emphasis added).

If, in fact, Respondent wrote such a memo, it would appear to be false as all knowledgeable witnesses agree that the wire transfers were ALPS Marketing, Inc. operating costs received from Norbert Jann. However, the Referee is inexplicably mistaken about the content of the November 28, 1994 memo. The memo actually states in pertinent part that:

> "the funds received on November 18, 1994 by wire transfer from Switzerland are personal funds. These monies do not represent client funds for work completed for Greenspoon, Marder, Hirschfeld and Rafkin, P.A. Greenspoon, Marder, Hirschfeld and Rafkin, P.A. has no obligation, claim or responsibility for funds received." [TFB Comp. Ex. 2]. (emphasis added).

Clearly, Respondent did notrepresentthe $200,000.00 transfer to be legal fees as the Referee erroneously found. Indeed, the words "legal fees" are not even found in the subject memo. Instead Respondent characterized them as "personal funds" which he confirmed in his testimony before the referee. [T. 589, 590]. Accordingly, the Referee's finding that Respondent violated Rule 4-4.1(a) and/or Rule 4-8.4(c) cannot be predicated on the Referee's erroneous reading of the referenced memo.

The only area in Count VI where the Referee specifically finds any representation to be untrue is with regard to Respondent's letter to Jann dated November 6, 1994. With regard to Respondent's actions the Referee finds:

"He further stated that in his opinion, Mr. Jann's funds had been used in accordance with the terms of the agreement. In fact, this was not true." [R.R. at 23].

In truth, the Referee paraphrases, somewhat inaccurately, the November 6, 1994 letter from Respondent to Jann in his findings. The inaccuracy in the Referee's finding can be traced to the Complaint as it appears to be merely a regurgitation of paragraph 96 of the Complaint. The Respondent's letter actually states:

"In summary, in my opinion, the funds initially transferred for this venture have been used in accordance with the terms presented". [TFB Comp. Ex. 43. (emphasis added).

Whether or not the funds "were used in accordance with the terms presented" is a matter of opinion. Respondent in his letter felt that they were so used. More importantly, Jann indicated in his testimony that he had been shown all financial records and he had no complaints. [T. 665]. He further stated that Ballweg had discretion to spend the funds as he saw fit. [T. 667]. Jann also expressed an interest in the bottom line and not in "buying pencils". [T. 667]. Such testimony evinces an opinion that Jann felt the funds had been "used in accordance with the terms presented".

Ballweg also indicated he was aware of and approved each and every expenditure including Respondent's purchases which could be deemed personal. [T. 720].

Respondent respectfully suggests that the Referee's finding that Respondent's representation (that the funds had been used in accordance with the agreement) was untrue, is without evidentiary

support since both Jann and Ballweg were aware of and sanctioned all expenditures.

Accordingly, the findings of a violation of Rule 4-4.1(a) and Rule 4-8.4(c) must be rejected as being clearly erroneous and lacking in evidentiary support. There is simply no finding in Count VI to support these recommended violations.

Rule 5-1.1(g)

Rule 5-1.1(g) is entitled Disbursement Against Uncollected Funds, and generally prohibits such disbursement but allows early disbursement under specifically enunciated circumstances. The Referee's finding that Rule 5-1.1(g) was violated in Count VI is wholly without evidentiary support, In fact, Complainant made no such factual allegation in Count VI. Clearly, there was not even any mention in the record of disbursement against uncollected funds in contravention of Rule 5-1.1(g). Simply stated, the disbursement of uncollected funds was not mentioned.

The Florida Bar did, inexplicably, make a prayer for such a finding in its Complaint (at 31). However, Complainant did not allege or offer any proof of disbursement of uncollected funds.

As the finding of a violation of Rule 5-1.1(g) has no support in the record it must be repudiated.

THE REFEREE ERRED **IN HIS FINDING RELATED TO CASE NUMBER 88,381 GIVEN TEE BURDEN** *OF* **PROOF AND TEE EVIDENCE PRESENTED.**

The burden of proof in attorney disciplinary proceedings is clear and convincing evidence. The Florida-r v. Wagner, 212 **So.2d** 770 (Fla. 1968). In case number 88,381, it is undisputed that Respondent allowed Mr. Goethe to execute the will outside the presence of **a** notary. [T. 647, **912].** However, the Referee below also found that Respondent was not present for the signing of Mr. Goethe's will. [R.R. at **2].** It is respectfully suggested that this latter finding is not supported by clear and convincing evidence for the following reasons.

First, the only **"proof"** that Respondent was not present was found in the affidavit made by Martha Skinner. [TFB Ex. **23].** Respondent's counsel objected to the admission of the document because Ms. Skinner did not appear and was not subject to cross-examination. [T. 315, **316].** However, the Referee allowed the document in over the objection. [T. **317].** Nevertheless, this hearsay testimony was uncorroborated by any admissible evidence.

While this Court has previously allowed hearsay evidence in disciplinary proceedings, the reliability of the hearsay must be weighed or established carefully. The Florida Bar **v.** Vannieg, 498 **So.2d** 896 (Fla. 1986); The Florida Bar v. Maynard, 672 **So.2d** 530 (Fla. 1996).

In this instance the reliability of the hearsay is strained by both the affidavit of Susan B. Melton and the Respondent's testimony. [TFB Ex. **22].** Ms. Melton was an unidentified party claiming to be present for the execution of Mr. Goethe's will. She did not **appear** at the hearing and was not subject to cross-examination. The Respondent objected on these grounds and also

objected on the basis that Ms, Melton was not revealed as a witness in the answers to interrogatories filed by Complainant. [T. 315, 316]. Despite the objections of Respondent, the affidavit was admitted by the Referee. Nevertheless, Ms. Melton's hearsay affidavit did not affirmatively state Respondent was not present. It simply stated that "there was not a notary present to witness when Mr. Goethe signed the will". [TFB Ex. 22]. Moreover, Respondent testified that he was present for the signing, but candidly admitted the notarization was done back at his office. [T. 647, 912].

Accordingly, the Referee's finding that Respondent was not present for the signing of the will is thinly propped up by only the uncorroborated hearsay affidavit of Martha Skinner which was admitted over the Respondent's objection. The hearsay affidavit of Susan Melton does not confirm Respondent's absence, and Respondent denies he was absent. Thus, this hearsay is not corroborated and therefore is unreliable.

Surely, this type of evidence is not sufficient to sustain the Complainant's burden of clear and convincing evidence. The Complainant has abused this Court's prior rulings which allow hearsay (under circumstances of reliability), in its decision to call no live witnesses on this critical issue. The Complainant has dropped to an absolute nadir in apathetic prosecution. The method of proof offered evinces a cavalier disregard for even the most basic notions of fairness in prosecution. That Complainant can prosecute this case without calling live witnesses on the one hand, and ask for disbarment on the other is remarkable in its temerity.

The time has finally arrived for this Court to treat the Complainant as it does other administrative agencies in the admissibility of hearsay evidence. The Court should follow the example and standard of Section 120.58, Florida Statutes (1995) which states in pertinent part:

> "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions". (emphasis added).

Further, one state court has held that if "hearsay evidence is corroborated by otherwise competent, substantial evidence it may support an agency determination". Spicer v. Metropolitan Dade County, 458 So.2d 792, 794 (Fla. App, 3 Dist. 1984).

In this instance, the Referee's finding that Respondent was not present for the signing of the will was not supported by any competent, substantial evidence. As such, the burden of clear and convincing evidence has not been met and the finding must be reversed.

THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS UNDULY HARSH BASED UPON THE MATTERS PROVEN AND THE PAST DECISIONS OR THIS COURT.

The Referee's findings which are supported by clear and convincing evidence reveals the following scenario as to violations. In case number 87,536 Respondent failed to label his trust account properly as shown in Count II; engaged in improper trust record keeping and trust practices in Count VI; and failed to diligently represent and communicate with Client in Count VIII. Furthermore, in case number 88,381, Respondent participated in the improper notarization of a client will. The Referee's recommendation of a 30 month suspension is excessive given the number and nature of the proven violations.

It is submitted that it appears that a punishment ranging from public reprimand to a 90 day suspension is the appropriate discipline from a review of past cases of this Court.

First, the improper notarization, standing alone, would warrant a public reprimand. In The Florida Bar v. Day, 520 So.2d 581 (Fla. 1988), the court imposed a public reprimand upon an attorney who "notarized numerous affidavits without requiring the affiants to personally appear before her", citing conduct involving dishonesty, fraud, deceit and misrepresentation and conduct prejudicial to the administration of justice.

It is respectfully suggested that Respondent's inadequate trust record keeping and commingling and improper designation of "escrow account" is also deserving of a public reprimand standing alone. This Court has decreed that public reprimand is appropriate in such trust accounting cases involving "ignorance and gross negligence". The Florida Bar v. Perez, 608 So.2d 777 (Fla. 1992). Also, a public reprimand has been administered where, as here, an

accused commingled funds and used client funds with the client's consent. The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978).

Even when the accused's records were still not in compliance at the time of a follow-up audit, (including lack of proper record keeping, negative balances and continued commingling), a public reprimand was imposed. The Florida Bar v. Borja, 554 So.2d 514 (Fla. 1990).

It is important to note that after the follow-up audit below, Respondent took remedial steps to ensure further compliance with the trust accounting rules. Those steps included hiring Pedro Pizarro, an ex-staff auditor of The Florida Bar. Mr. Pizarro testified that as of August 31, 1996, he believed Respondent's trust account was in substantial compliance with Chapter 5 relating to Trust Accounts except for a $4.40 charge due to a bank discrepancy. [T. 856, 859]. Mr. Pizarro also opined that Respondent and his wife, who serves as his bookkeeper, presently have a "clear understanding" of Chapter 5 so as to ensure the proper maintenance of the trust account in the future. [T. 859].

Respondent also testified that he had implemented suggestions made by Mr. Pizarro related to his trust account and that he felt comfortable that he understood the trust rules so as to ensure future compliance. [T. 916, 918].

Given these past decisions dealing with improper trust accounting and further given the remedial measures taken by Respondent, a public reprimand is appropriate for his failure to comply with the trust rules.

Finally, Respondent's diligence and communication problems with Mr. Costley alone, would in all likelihood, result in the

imposition of an admonishment.

The Florida Standards For Imposing Lawyer Sanctions addresses situations such as presented by the Costley matter under Standard 4.4 and states in pertinent part:

> 4.44 Admonishment is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes little or no actual or potential injury to a client.

Accordingly, it is clear that the individual violations would result in no greater than a public reprimand if viewed alone. Taken together, their cumulative nature may require a greater sanction. Yet, there was no proof of client injury in any case. In fact, only one client, Costley appeared at hearing to testify against Respondent. Conversely, three clients appeared and testified on Respondent's behalf expressing absolute satisfaction with his services, Those clients included Mr. Jann, Mr. Ballweg and John Guy who testified Respondent did nice work for a fair fee. [T. **796].**

Furthermore, it is clear that several of the mitigating factors set forth in Standard 9.3 are present and should be given due consideration in arriving at an appropriate discipline. Those factors include, full and free disclosure to disciplinary bound or cooperative attitude toward proceedings, absence of a dishonest or selfish motive, remorse [T. **909],** and interim rehabilitation. [T. 856, **914].** Only **one** aggravating factor appears to exist, prior disciplinary record.

Given all of these factors it is respectfully suggested a penalty of public reprimand to a 90 day suspension is the appropriate discipline.

THE **REFEREE ERRED IN TAXING ALL** COSTS **AGAINST RESPONDENT GIVEN THE NUMEROUS NOT GUILTY FINDINGS AND THE HAPHAZARD INVESTIGATION AND PROSECUTION OF THIS HATTER.**

The Referee recommended the taxation of all costs against Respondent in both case numbers below. The total costs in case number 87,536 were **$12,032.26** and the total costs in case number **88,381 were** $903.00. The costs were recommended over the objection of Respondent.

Respondent called witnesses from Switzerland **(Jann),** California (Jon Cox), Colorado (Gerald **Padmore)** and St. Petersburg (Jim Ballweg) at considerable cost to disprove the allegations in Counts V and VI. None of these witnesses had ever been contacted by representatives of The Florida Bar. **[T.** 363, 365, 671, **719].** Had the Complainant taken the time to even telephonically contact any of these witnesses, the bringing of Count V and the more serious allegations of Count VI, i.e. misappropriation would not have been brought.

Additionally, Count **III** involving Ms. ZacZac was refuted by the Respondent's production of an affidavit from Ms. ZacZac. [Resp. Ex. **13].** Had the Complainant contacted Ms. ZacZac instead of simply adopting the baseless allegations of misappropriation by **Mr.** Marder, Count III would not have existed. Indeed, this count resulted in a directed verdict.

Moreover, Count I also resulted in a directed verdict further suggesting a slipshod investigative effort by Complainant.

Respondent respectfully suggests that it is fundamentally unfair to assess all of the Complainant's costs in case number 87,536 against Respondent when five (5) of the eight (8) counts brought resulted in outright not guilty findings. Also, many other

rule violations alleged in other counts resulted in not guilty findings.

Under Rule 3-7.6(o), the Referee's award may be reversed upon the showing of an abuse of discretion. Respondent respectfully believes that an abuse of discretion exists where the Complainant, as here, calls only one client as a live witness at hearing and does not even bother to contact at least five (5) crucial witnesses who effectively eviscerated the Complainant's unfounded allegations.

Therefore, Respondent requests this Court reverse the Referee and assess costs in a pro rata basis. As only three (3) of eight (8) counts resulted in guilty findings in case number 87,536, the Complainant should receive no more that 37.5% of the total costs of $12,032.26. The Respondent suggests that costs in the amount of $4,512.10 be assessed against Respondent under this formula.

CONCLUSION

Complainant failed miserably to prove the vast majority of the allegations brought below, particularly the more serious ones. Proper investigation, indeed, any investigation would have revealed that the majority of the Complaint under case number 87,536 should not be brought.

Furthermore, the Referee's recommendation of discipline is excessive given the number and nature of the violations supported by clear and convincing evidence. Given these violations and the past decisions of this Court, along with the Standards For Imposing Lawyer Sanctions, the proper discipline is in a range of public reprimand to a ninety (90) day suspension. Further, the Court should tax costs on a pro **rata** basis in the amount of **$4,512.10.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail delivery this 19 day of May, 1997, to: Eric M. Turner, Esquire, Assistant Staff Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801.

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