

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SUPREME COURT CASE NO. 94,239

v.

THE FLORIDA BAR FILE NO.97-70,655(11F)

ELENA C. TAULER,

Respondent.

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**RESPONDENT'S ANSWER BRIEF**

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## **STATEMENT OF THE CASE AND OF THE FACTS**

Respondent stipulated to the facts as stated in Complainant's brief. Complainant added additional facts which are not in dispute. Respondent adds the following facts for a complete understanding of the hearing before the Referee.

At the hearing, Carmen Melendez, the Director of The Winners Net Community Action Program, testified. (T. 65). This non-profit organization was established in 1994 to offer assistance to residents in low income areas throughout the community. Some of the problems this program attempts to assist are domestic violence, youth gangs, and homelessness.

Respondent has actively participated in this program since its inception by rendering free legal advice to the organization itself as well as its clients. (T. 68). Ms. Melendez personally calls the Respondent for assistance and the Respondent always volunteers. (T. 69). As an example of Respondent's application of her legal skills and legal knowledge through volunteering, Respondent represented a young girl, pro bono, through court proceedings to help the young girl regain custody of her child. (T. 69). Another example of Respondent's volunteer legal services, according to Melendez, was how Respondent attends rallies about four or five times a year which the program sponsors in low income neighborhood parks in order to attract members of the community

and offer them their services. These rallies are always held on Saturdays and Respondent renders her services there by patiently counseling many needy individuals for a period of four to six hours, despite the fact that this event takes her away from spending time with her own family. (T. 70-73).

Respondent is the only attorney who offers her time fully to the program without hesitation and at no charge. (T. 73). Ms. Melendez stated that Respondent's reputation in the community is high and that people in the community are very grateful to Respondent for her services. (T. 74).

The second witness to testify at the hearing on the Respondent's behalf was Reverend Robert Cruz. Reverend Cruz is the founder and pastor of the House of Praise Church in Miami, Florida. (T. 76).

The Reverend married Respondent and her husband, Jack Tomas. Respondent and her husband have attended the church for five years, during which Respondent has been very involved with the church, donating her time and legal services on several legal matters. (T.77).

Reverend Cruz further testified that Respondent's reputation in the community is that of a very decent and happy person. (T. 78).

The Reverend has counseled Respondent and her husband regarding marital problems. (T. 78). Reverend Cruz stated that Respondent admitted to him her violation

of The Florida Bar rules and she was very remorseful and worried. This situation caused a strain on the marriage. (T. 79). The Reverend testified that, up until the Bar rule violations occurred, the Respondent's marriage was a good one. However, the Respondent did not agree with her husband who was adamant that what she did was justifiable. Respondent knew that what she had done was wrong. (T. 81).

Jack Tomas, Respondent's husband of seven years, and a former surgical oncologist, testified at the hearing. Dr. Tomas and Respondent have five children. The two eldest children are from Respondent's first marriage, and the other three children are from this union. (T. 83).

In 1990, Dr. Tomas underwent low back surgery for a herniated disk but continued his surgical practice. (T. 84). However, in 1993, Dr. Tomas suffered a relapse of the herniated disk and underwent a second surgery in 1994. (T. 84). Performing surgery became increasingly difficult for him. (T. 84)

Dr. Tomas had another specialty in the practice of diseases of the breast. He emphasized this practice since it did not require that he stand for prolonged periods of time. Two years later, the pain in his back was so severe, he had to discontinue his surgical practice and, as a result, was forced to close both practices and declare bankruptcy. (T. 84).

Dr. Tomas testified that two years prior to the Bar violation problem, he would aid

Respondent and her law partner in maintaining the law office. (T. 86). As a result of his disability, he was no longer the primary income earner and Respondent was now pressured to be the primary income earner. (T. 86, 87). In 1996, Respondent approached Dr. Tomas in a panic with the \$16,000 trust account deficit. (T. 87). Dr. Tomas no longer had the funds from his practice to support Respondent's practice, therefore, they needed a solution to replace the funds. (T. 87). The solution Dr. Tomas came up with was refinancing his and Respondent's home. (T. 88).

Respondent's husband explained that he and Respondent had a favorable mortgage and they had to sacrifice it for a terrible mortgage to refinance the house in order to obtain the necessary funds to be replaced in the trust account. Respondent was extremely anxious and frustrated with the situation. The frustration grew for Dr. Tomas as well since he, the primary income earner, was now not able to rescue himself and his wife from financial trouble. (T. 89).

Dr. Tomas explained that he and his wife were under a great deal of pressure since they had fallen almost three months behind on the mortgage payments. The mortgage broker they consulted for the refinancing required that they bring their mortgage up to date and pay \$10,000 in closing fees. Dr. Tomas testified that, as a result of these demands, he placed pressure on Respondent that this was the only solution to the problem. (T. 90).



Dr. Tomas believed that this matter became his problem because, as the primary income earner, his ego was affected by not having the funds to resolve the situation. (T. 90). Respondent's law practice was their only income. Therefore, he channeled excess income from his surgical practice to solidify Respondent's practice. As a result of this, Respondent took on a partner, Robert Shearin, to help her handle the increased caseload produced by heavy advertising. Dr. Tomas stated that, by being a family, any problem one person had became the other person's problem as well. (T. 91).

Dr. Tomas stated that Respondent was against the idea of removing more monies from the trust account, for any reason. Respondent refused to take additional trust funds under any circumstance. According to Dr. Tomas' testimony, this created a great deal of tension in their relationship. (T. 92). Dr. Tomas felt he had failed his family because he could not provide for them. He felt that Respondent was being uncooperative with him by not wanting to take additional trust funds. (T. 93). Dr. Tomas would pressure the Respondent to cooperate with him on a daily basis, constantly arguing in the months of June and July 1996. (T. 93, 94).

According to Dr. Tomas, Respondent finally agreed with his idea out of desperation and due to Dr. Tomas' overwhelming pressure which "wore her will down."

Respondent was in fear of her husband due to his abusive and domineering attitude towards her. (T. 94). The marriage was so strained that the couple nearly separated. Dr.

Tomas admitted to episodes of physical violence in which he never struck the Respondent but did throw objects against the wall, break doors, and shout. (T. 96). This constant arguing and physical violence spanned a period of approximately three to four months, from June 1996 through October 1996. (T. 97).

The money taken from the trust account (not the initial \$16,000 amount) was used by him to refinance the home. (T. 97).

Dr. Tomas and Respondent sought spiritual help from Reverend Cruz on several occasions for their marital problems resulting from the Bar violation matter. (T. 98). As a result of this counseling, Dr. Tomas and Respondent have taken steps to avoid future marital and emotional problems between them, including Dr. Tomas controlling his temper and applying positive methods for resolving conflicts. (T. 99)

Dr. Tomas and Respondent sought, unsuccessfully, financial assistance from their family. Dr. Tomas' colleagues were not able to lend them money either. (T. 101). Dr. Tomas and Respondent drove leased vehicles and had no assets. (T. 101). Dr. Tomas assisted Respondent financially in her law practice not because Respondent had financial difficulties maintaining her practice, but because his surgical practice was dwindling and, therefore, it was vital that Respondent's law practice be solidified to become the primary income earner. (T. 102, 103).

Respondent attempted to borrow money from friends to replace the \$16,000

deficit, however, no one was able to assist her. (T. 104). The primary reason for Respondent misappropriating funds from her trust account was the pressure that Dr. Tomas placed on her. (T. 105). An additional, and significant reason for the misappropriation of funds was fear of punishment from The Florida Bar. (T. 105).

Efforts were made to rectify the error prior to November, 1996 and immediately after realization of the problem in June, 1996. (T. 105, 106). Respondent's only intent was to correct the deficit right away. (T. 106). The delay from June/July 1996 to November 1996 to replace the funds was due to the lengthy process of finding a mortgage broker that would accept their application and being approved for their home refinancing. (T. 107). After they finally received the refinancing funds, after updating the first mortgage, paying taxes, and other expenses, they were left with \$32,000, which were tied up in the new trust account opened by Respondent and her new partner, Donna Rooney, who joined the practice around August 1996. (T. 107). Once those funds were released by Donna Rooney, Respondent was able to replace the trust funds. (T. 108).

According to Dr. Tomas, the primary goal in his and Respondent's lives at that time was to rectify the problem immediately. (T. 108).

Respondent, Elena Tauler, testified at the hearing. (T. 109). Respondent has been a member of The Florida Bar since 1989. She was born in Cuba and arrived in the United States with her father and sister at the age of 12 where she lived in California until

the age of 16 when she moved to Florida. (T. 110). Her parents were divorced when she was five years old and she grew up in her father's custody. Her father passed away three years ago. (T. 111).

Respondent graduated from Miami Springs Senior High School and attended college part-time at Miami-Dade Community College while working to help support her father who was retired. (T. 111, 112). Respondent subsequently attended University of Miami Law School while still working. (T. 112).

Respondent's first marriage took place soon after high school graduation and she had two children. Her first husband, Antonio Tauler, was a medical student whom she supported by dropping out of college and working. After five years, they divorced and Respondent began law school as a single parent. (T. 113, 114). After completing law school, Respondent became personally involved with her law partner, Calvin Fox, in what was an abusive relationship. (T. 115, 116). The relationship ended, against Mr. Fox's will, and Respondent was forced to obtain an injunction against Mr. Fox. Mr. Fox was eventually arrested for stalking the Respondent. (T. 116).

Respondent and Dr. Tomas were friends as teenagers who lost touch and met again in the early 1990's and began dating. Dr. Tomas is four years her senior and married her in 1993. Three children were born of this marriage. (T. 117).

Respondent testified that she has always maintained a small practice, not the kind

that can support a family. Therefore, her husband's income as a surgical oncologist was the main income for the family. Due to this lack of pressure, Respondent was free to practice law on many pro bono cases and in community service. The paying cases served mostly to cover overhead expenses leaving little extra money. (T. 118).

After Respondent's break-up with Calvin Fox, she found it difficult to restructure her law practice. (T. 118, 119). Mr. Fox left Respondent with many unpaid bills and she found herself having difficulty with the financial aspects of the practice. Respondent has received counseling for her tendency to become involved with strong-willed, domineering men. (T. 119).

According to Respondent, she needed a partner to help her with her increasing caseload, thus, she hired Robert Shearin. (T. 120). Once her husband's health began to deteriorate, Respondent saw a need to take on more cases in order to make a greater financial contribution to the family. (T. 120).

Respondent further testified that her husband, Dr. Tomas, had an understandably difficult time handling his physical disability and inability to work. Dr. Tomas was in constant pain causing him to be extremely irritable and aggressive. Respondent's husband was very difficult to deal with and seemed like he was going through a personality change. (T. 121).

Regarding the Dalia Oliva matter, Respondent stated that she was the attorney Ms.

Oliva hired for the Lopez case. (T. 121). However, Respondent referred the case to Carlos del Amo due to the fact that she became pregnant and could not handle such a big case on her own. Just before trial, Ms. Oliva changed attorneys from del Amo to Alan Hodin. This caused Respondent to lose track of the case. (T. 122).

Ms. Oliva advised Respondent, after the case settled, that she was not satisfied with Mr. Hodin's services and returned to Respondent for representation. Ms. Oliva had a dispute over trust funds with Mr. Hodin regarding a bounced check that Mr. Hodin had given Ms. Oliva. (T. 122). Respondent did not want to get involved with the case again and asked Robert Shearin to handle representation of Oliva in her lawsuit against Hodin. He did so. (T. 122, 123). Mr. Hodin's trust funds were transferred to the Tauler & Shearin trust account to be held until a possible Medicaid lien was resolved. (T. 123). Respondent received no fees from Oliva's case. (T. 124).

Ms. Oliva wanted the trust funds paid to her, however, there was the potential Medicaid lien to be sorted out. (T. 124). Robert Shearin was involved with deciphering the Medicaid lien issue. Respondent had no involvement with that case at all. (T. 125). There was a letter and a document entitled Medicaid Lien which were addressed to Respondent, however, Respondent had never seen such documents and, additionally, the address on the documents was incorrect. (T. 125, 126). These documents should have been forwarded to Carlos del Amo since he was the attorney on the case. (T. 126).

Respondent never corresponded with Medicaid or made telephone calls to Medicaid. (T. 126). Robert Shearin would discuss the matter with her and advise her that he did not have any answers. Shearin left Respondent with the trust funds when he left the partnership. (T. 127) Shearin and Respondent were no longer drawing salaries, prompting Shearin to leave the partnership, and leaving Respondent alone with the practice. (T. 128).

Respondent testified that her bookkeeper had told her that there were \$16,000 in attorney's fees in trust that had not been withdrawn. Taking her bookkeeper's word, Respondent wrote a check for attorney's fees in the amount of \$16,000. (T. 128). At the end of the month, when Respondent routinely reviews her trust account, she discovered the error (the correct amount of attorney's fees was \$1,600, not \$16,000). (T. 128, 129).

Respondent had to move out of the office building where her office was located, had nothing to sell, and nowhere to get money from to rectify the problem. (T. 129). Her husband was no longer practicing as a surgeon and was considering bankruptcy. (T. 129, 130). The situation was a nightmare for Respondent, and was a great burden upon her. (T. 130).

After considering several different options, none of which worked, Respondent approached her husband about the problem, but he did not have money to assist her. (T. 130). He felt that the only solution was to refinance the mortgage. (T. 130). What

caused Respondent to hesitate on this solution was that it would mean removing more funds from the trust account. Respondent regrets having done so. (T. 131).

Respondent testified that her husband was extremely volatile due to his physical condition. He was irritable and intimidating, throwing objects against the wall. (T. 132). Her husband went as far as pushing her onto the bed. (T. 132). Respondent felt intimidated and scared for her small children. (T. 132, 133). Her husband pressured her on a daily basis to remove more funds from the trust account to refinance the mortgage. (T. 133). Dr. Tomas felt that the end justified the means, however, Respondent testified that she never saw it that way. (T. 133).

During June and July 1996, Respondent was under a great deal of stress over her practice, trials, hearings, etc., in addition to her husband's financial situation and caring for the children. Respondent described the situation as unbearable. (T. 134). Due to all of these factors, Respondent and her husband sought counseling from Revered Cruz. (T. 134, 135).

Respondent testified that it was never her intention to harm any client. (T. 135)

Respondent recognized that it was her responsibility to avoid trust account errors in the first place. This matter has cost her in more ways than one. She attempted to rectify the situation right away. There was no one she could turn to. (T. 136).

Respondent is remorseful and repentant for all her actions. (T. 137). Respondent



has consulted with and retained an accountant for trust account management. (T. 137, 138). Respondent ceased taking new cases in March of 1998 because she felt she should not take on new clients until this matter was resolved. (T. 138, 139). Also, Respondent was aware that there would be repercussions from The Florida Bar for her actions, and she did not want to have to drop cases halfway through. (T. 139).

Respondent further testified that her husband regrets asking her to go along with his idea. (T. 139).

As to the Release and Indemnity Agreement (TFB 6), Shearin was handling the case and had all the knowledge regarding the Medicaid lien. (T. 141). Respondent also testified that since she was holding the trust funds and, because she had had so much trouble with them, she did not want the responsibility if Shearin would ask her to give them to Oliva. Respondent wanted a release and agreement signed by the client that the client was going to hold the funds and obtain a release from Medicaid. (T. 144). Respondent was aware that a Medicaid issue existed, but not that there was an actual Medicaid lien. Respondent had no idea that she was violating any rules or statutes by doing this. (T. 145).

Shearin provided conflicting information regarding his communication with Medicaid. (T. 145). Respondent relied on Shearin's information since he was the attorney handling the matter and she therefore never had any communication with

Medicaid. (T. 146). Medicaid never contacted Respondent by letter or telephone. (T. 147).

Respondent received absolutely no financial benefit from returning the funds to Dalia Oliva. She received only grief and stress. (T. 147). Respondent has learned a very sad and expensive lesson from this ordeal. Respondent expressed remorse and accepts responsibility for her poor judgment and unethical conduct. (T. 148).

The Bar called Judith Hefren. (T. 40) Ms. Hefren is the Bureau Chief over Medicaid, Third Party Liability for the Agency for Healthcare Administration in Tallahassee, Florida. Ms. Hefren is also the Custodian of Records. (T. 41)

The Agency for Healthcare received a request from attorney Robert Shearin to accept less than the full amount of the Medicaid lien. (T. 50) Neither the Agency for Healthcare or Judith Hefren had any contact with Respondent regarding the Medicaid lien. (T. 56, 58, 59)

In a letter from the Agency for Healthcare to The Florida Bar dated February 14, 1997 (TFB No. 7), the Agency for Healthcare was aware that the \$35,000, which was to be held for Medicaid, was paid from Respondent to the Lopez family. Thus, the Agency for Healthcare was aware of the money being transferred to Dalia Oliva in February, 1997. Although the Agency for Healthcare was made aware of the fact that the money was being held by Dalia Oliva, the Agency has made no effort to collect the funds from

Dalia Oliva. (T. 60, 61)

Furthermore, there are no records of any correspondence, telephone conversations, etc., between the Agency for Healthcare and Respondent regarding the Medicaid funds.

(T. 61) All correspondence was with Robert Shearin or others.

### **SUMMARY OF ARGUMENT**

In the summer of 1996, Respondent improperly used funds from her trust account. In March, 1998, Respondent stopped practicing law due to her misconduct. In November, 1998, The Florida Bar served a Complaint upon Respondent. On December

9, 1998, Respondent admitted the underlying facts which gave rise to the Complaint.

The Referee held a hearing in 1999 and determined that Respondent violated various rules regulating The Florida Bar. The Referee found, pursuant to 9.32, Florida Standards for Imposing Lawyer Sanctions, that Respondent suffered from personal or emotional problems; made a timely good faith effort to make restitution or to rectify consequences of her misconduct; made full and free disclosure to Disciplinary Board; had a cooperative attitude towards the proceedings; had a positive character and reputation; and was remorseful. In addition, the Referee found the Respondent was amenable to rehabilitation.

Finally, the Referee found that a suspension protects the public from unethical conduct and, at the same time, does not deny the public the services of an otherwise qualified and compassionate lawyer.

Rule 3-7.7(c)(5) regulating The Florida Bar places the burden upon The Florida Bar as the party seeking review to demonstrate that the Report of Referee is erroneous, unlawful, or unjustified. In light of the record in this case, along with the facts in mitigation, The Florida Bar simply cannot make any showing that the Referee's Report is erroneous, unlawful, or unjustified.

**POINT ON APPEAL**

Whether the Referee's recommendation of a three year suspension followed by one year probation, trust account monitoring, initial LOMAS review, and restitution is erroneous, unlawful, or unjustified.

## ARGUMENT

### SUSPENSION, PROBATION, AND THE CONDITIONS OF PROBATION ARE THE APPROPRIATE DISCIPLINE FOR THE RESPONDENT.

Respondent agrees that this Court's scope of review of recommended discipline is broader than that afforded to findings of fact because this Court has the ultimate responsibility to determine the appropriate sanction.

Complainant relies upon *The Florida Bar v. Shanzer*, 572 So.2d 1382 (Fla. 1991). The Referee in *Shanzer*, after weighing the aggravating and mitigating factors, determined that disbarment was appropriate. The Referee in the instant case did not simply add the X's and O's, that is, the aggravating and mitigating circumstances. The Referee carefully weighed each aggravator and mitigator in making the determination that suspension was appropriate.

The Complainant also relies upon *The Florida Bar v. Shuminer*, 567 So.2d 430 (Fla. 1990), standing for the proposition that disbarment is the only appropriate remedy in cases of misappropriation.

In the instant case, the Referee made specific findings that Respondent suffered from personal or emotional problems, made a timely good faith effort to make restitution or to rectify consequences of misconduct, made a full and free disclosure to disciplinary board, was cooperative toward the proceedings, had a positive attitude and reputation, and

was remorseful. The Referee further found (at page 8 of the Report of Referee):

“It is obvious that Respondent, Elena C. Tauler, is amenable to rehabilitation. Under the facts and circumstances of this case, suspension protects the public from unethical conduct and, at the same time, does not deny the public the services of an otherwise qualified and compassionate lawyer.”

The Court heard overwhelming testimony from Carmen Melendez, the Project Director of the Community Action Winners Net, which assists primarily indigent and immigrant persons with domestic relation legal problems. Respondent was essentially the staff attorney, dedicating hundreds of hours assisting poor people who otherwise would have received little or no legal help. Respondent assisted hundreds of primarily women on a pro bono basis.

Thus, there was a finding that Respondent is amenable to rehabilitation and that suspension fulfills the goals of The Florida Bar in protecting the public from unethical conduct and while at the same time not denying the public the services of an otherwise qualified attorney.

The Bar suggests there is no apparent relationship between Respondent’s emotional problems and the nature of her misconduct. After hearing from Respondent and Respondent’s husband, along with Reverend Cruz, the Referee found (at page 7 of the Report of Referee):

“The Respondent, indeed, suffered from personal and emotional problems. The testimony of her husband, Dr.

Tomas (no longer practicing surgical oncology), was very disturbing. It was patently obvious that he was the prime mover in the wrongdoings committed by Respondent. Dr. Tomas was an overbearing husband who had surgeries on his own back and had recently lost his own surgical practice. This coincided with his own bankruptcy, screaming and yelling at Respondent, throwing objects against the wall at Respondent, and his brow-beating of Respondent at a time when they were losing their home. (Respondent is the mother of five children, three of them with Dr. Tomas).” Emphasis added.

Dr. Tomas indicated that because of financial demands he placed great pressure on Respondent. (T. 90) Respondent was against the idea of removing additional monies from the trust account for any reason. Respondent refused to take additional trust funds under any circumstances. This created a great deal of tension in the relationship between Dr. Tomas and Respondent. (T. 92) Dr. Tomas felt that Respondent was being uncooperative with him by not wanting to take additional trust funds. (T. 93) Dr. Tomas would pressure the Respondent to cooperate with him on a daily basis, constantly arguing in the months of June and July 1996. Respondent finally agreed with his idea out of desperation and due to Dr. Tomas’ overwhelming pressure, which wore her will down. Respondent was in fear of her husband due to his abusive and domineering attitude towards her. (T. 94)

Dr. Tomas admitted to episodes of physical violence in which he never struck the Respondent but did throw objects against the wall, break doors, and shout at Respondent.



(T. 96) This constant arguing and physical violence spanned a period of approximately three to four months, from June 1996 through October 1996. (T. 97) Dr. Tomas was extremely volatile due to his physical condition. Dr. Tomas was irritable and intimidating and would throw objects against the wall. (T. 132) Respondent was intimidated and also scared for her small children. (T.132,133)

Dr. Tomas pressured Respondent on a daily basis to remove more funds from the trust account to refinance their mortgage. (T. 133) Dr. Tomas felt that the end justified the means, however, Respondent did not see it that way. It was the undue pressure from Respondent that Dr. Tomas placed on his wife, the Respondent. Although this does not excuse Respondent's poor judgment in misusing the trust funds, it is a mitigating factor.

Complainant suggests that Respondent did not make a timely good faith effort to make restitution or to rectify consequences of her misconduct. There is little question that Respondent attempted to rectify the consequences of the misappropriation of funds. No client lost a dime. The funds were eventually returned to Dalia Oliva. The Agency for Healthcare has made no effort whatsoever to seek the funds from Dalia Oliva. The Release and Indemnity Agreement (TFB Exhibit 6) released Respondent and Robert Shearin. The agreement required that Dalia Oliva, under oath, deposit the funds in a separate account and not release or disburse those funds until Oliva reached a settlement with Medicaid, or received a release from Medicaid. The Agency for Healthcare knew,

according to the letter from the Agency for Healthcare dated February 14, 1997 (TFB Exhibit 7), that it was the Agency for Healthcare's understanding that the funds were paid from attorney Tauler to the Lopez family. Judith Hefren has testified that she is unaware of any efforts made by the Agency for Healthcare to recoup these funds or request the funds from Dalia Oliva. (T. 61)

Thus, two years before the hearing in this case, the Agency for Healthcare was aware that the funds were transferred from Respondent to Dalia Oliva. Nevertheless, the Agency for Healthcare has made no effort or requests for the funds from Dalia Oliva. There was ample testimony from Dr. Tomas and Respondent of the efforts made to replace the misappropriated funds (refinancing the house). Again, this does not excuse the misappropriation of the funds. It does mitigate Respondent's improper actions.

Dr. Tomas was approached by the Respondent, in a panic, when the original \$16,000 trust account deficit was discovered. (T. 87) Dr. Tomas and Respondent agreed to refinance their home. (T. 88) This was done at great expense. (T. 90)

The Complainant does not dispute that Respondent made full and free disclosure to The Florida Bar or that Respondent has had a cooperative attitude toward the proceedings. The Florida Bar does not contest that Respondent is remorseful. The Referee found, in the Report of Referee, at page 8:

“A final mitigating factor is the uncontroverted remorse shown by Respondent; I find her credible as to how sorry she

was for her actions. This testimony is buttressed by the testimony of Reverend Cruz, counselor to Respondent and her husband, who elaborated concerning Respondent's remorse and her admission to him in 1996 that she had done wrong. "

Reverend Cruz stated Respondent admitted her violation of The Florida Bar rules and her remorse. (T. 79) This situation caused a strain on the marriage. (T. 79) Respondent did not agree with her husband who was adamant that what she did was justifiable. Respondent knew that what she had done was wrong. (T. 81)

In *The Florida Bar v. Kassier*, 711 So.2d 515 (Fla. 1998), the attorney wrote numerous trust account checks off a worthless account, misappropriated client funds, commingled funds, and failed to inform clients about their cases. The court ordered a one year suspension, three years probation, LOMAS review, along with monthly trust account reports. *Kassier's* mitigation was that he was intelligent, committed to law practice, was under emotional stress, and his inability to manage his practice. However, in aggravation, Kassier continued to write checks that had no sufficient funds, did not repay the parties, did not cooperate with The Bar, and did not admit wrongdoing.

In the instant case, Respondent not only has accepted complete responsibility for her actions, but also voluntarily stopped practicing law in March, 1998 because she did not want to take on new clients until this matter was resolved. (T. 139) Respondent was well aware that there would be repercussions from The Florida Bar for her actions and

did not want to leave clients without counsel. (T. 139)

The Florida Bar seeks disbarment in every misappropriation case. If disbarment was the only discipline for misappropriation, there would be no reason for the Referee to make a recommendation. There are many examples where attorneys have commingled or used trust funds for other purposes but received less than disbarment. 90 day suspension, restitution to the client, *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997); one year suspension, rehabilitation, retake ethics portion of Bar exam, *The Florida Bar v. Krasnove*, 697 So.2d 1208 (Fla. 1997); 90 day suspension, *The Florida Bar v. Kramer*, 643 So.2d 1069 (Fla. 1994); ethics portion of Bar exam, two year suspension, *The Florida Bar v. Corces*, 639 So. 2d 604 (Fla. 1994); one year suspension, rehabilitation, trust account seminars and two years probation, *The Florida Bar v. Borja*, 609 So.2d 21 (Fla. 1992); 24 month suspension and a showing of rehabilitation, *The Florida Bar v. Rosen*, 608 So.2d 794 (Fla. 1992); 90 day suspension, ethics portion of Bar exam, *The Florida Bar v. Fine*, 607 So.2d 416 (Fla. 1992); Two year suspension, ethics portion of Bar exam, *The Florida Bar v. MacMillan*, 600 So.2d 457 (Fla. 1992); eighteen month suspension, *The Florida Bar v. Adler*, 589 So.2d 899 (Fla. 1991). Filed with the court, and part of this record, is the Respondent Elena C. Tauler's Case Law Summary Chart which was relied upon by the trial court in recommending discipline. (T. 302, 303)

The Referee's recommended discipline meets this three-fold test of *Kassier*.

“Attorney discipline must meet a three-fold test. It must be fair to society by protecting the public from unethical conduct but not denying the public the services of an otherwise qualified lawyer. It must be fair to the attorney by sufficiently punishing ethical breaches but at the same time encouraging reformation and rehabilitation. It must be severe enough to deter others prone to commit similar violations. Citations omitted. We have noted that “the extreme sanction of disbarment is to be imposed only ‘in those rare cases where rehabilitation is highly improbable.’” *The Florida Bar v. Kassier*, 711 So.2d 515 (Fla. 1998).”

A three year suspension is certainly severe punishment. It will protect the public from unethical conduct, but at the same time will allow Respondent, who is an attorney committed to the practice of law, and who has shown, through the testimony of Carmen Melendez and Reverend Cruz, is an attorney who serves the public. Respondent's commitment to pro bono work, dedicating hours on weekends helping poor, impoverished, and disadvantaged persons is something that the Bar should be proud of. It is something that will be continued if Respondent is permitted to practice law in the future.

The Bar does not dispute, and the Referee found, that Respondent is a candidate for rehabilitation. It is apparent from the record and the Referee's Report that Respondent can be reformed. The recommended discipline fashioned by the Referee is designed to assist Respondent in reforming her conduct. Respondent cooperated with the

Bar and acknowledged her wrongdoing upon receiving the Complaint from The Florida Bar.

Respondent is required to undertake a LOMAS review, will be on probation if she is re-admitted to the Bar, and will have to make monthly trust account reports. The discipline in this case is severe, meaningful, and appropriate. The Florida Bar cannot demonstrate that the Report of the Referee, and the recommendations therein, are erroneous, unlawful, or unjustified. A complete review of this record demonstrates that the Referee carefully sifted through the aggravating and mitigating factors and fashioned a punishment appropriate for the Respondent's actions. That discipline should be approved by this Court.

### **CONCLUSION**

Based upon the foregoing reasons and citations of authority, the Respondent, Elena C. Tauler, respectfully requests that the Report of Referee be accepted and ratified with the Respondent suspended as set forth in that report.

**CERTIFICATE OF SERVICE**

I hereby certify that the original and seven copies of this Respondent's Answer Brief was forwarded via Federal Express to the Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to **Cynthia Ann Lindbloom, Esq.**, Assistant Staff Counsel, The Florida Bar, Rivergate Plaza, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 on this \_\_\_\_\_ day of December, 1999.

Respectfully submitted:

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By: \_\_\_\_\_  
Scott W. Sakin, Esq.

**CERTIFICATE**

I HEREBY CERTIFY that this brief is typed in Times New Roman, 14 point  
type.

By: \_\_\_\_\_  
Scott W. Sakin, Esq.