IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

F. LEE BAILEY,

Respondent.
_____/

Case No. SC96767
TFB Nos. 1996-51,085(15B)
1997-50,110(15B)

ANSWER BRIEF OF THE FLORIDA BAR

DAVID R. RISTOFF
7026 Little Road
New Port Richey, Florida 34654
(727) 842-9758
Florida Bar No. 0358576

DEBRA JOYCE DAVIS
Assistant Staff Counsel
The Florida Bar
Tampa Airport Marriott, Suite C-49
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 0093556

TERRANCE E. SCHMIDT
1301 Riverplace Blvd., Suite 1818
Jacksonville, Florida 32207-9022
(904) 398-1818
Florida Bar No. 0165042

TABLE OF CONTENTS

APPENDIX

TABLE OF CITATIONS

CASES

PAGE

STATUTES

SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar." The Respondent, F. Lee Bailey, will be referred to as "Respondent."

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC96767 held May 30 through June 5, 2000, and "RR" will refer to the Amended Report of Referee dated July 24, 2000.

"Ex." will refer to exhibits presented by The Florida Bar and by the Respondent at the final hearing before the Referee in Supreme Court Case No. SC96767.

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

STATEMENT OF THE CASE AND OF THE FACTS

The Bar filed a seven-count Complaint charging Respondent with violating numerous Rules Regulating The Florida Bar for misappropriating funds entrusted to him, engaging in conflicts of interest, making misrepresentations, revealing confidential information, and commingling, while representing a federal criminal defendant, Claude Duboc. The Bar dismissed Count six before the final hearing. The Honorable Cynthia A. Ellis, Judge of the Circuit Court of the Twentieth Judicial Circuit, served as Referee and presided over the five-day final hearing, held May 30 through June 5, 2000. In a detailed 24-page Report of Referee issued July 24, 2000, Judge Ellis found the Respondent guilty of all of the alleged rule violations and recommended that this Court impose permanent disbarment. RR 17 - 21. [1] Respondent petitioned this Court to review Judge Ellis' findings and recommended sanction.

Respondent's former client, Claude Duboc, was indicted by the United States of America in early 1994 in the Northern District of Florida and charged with multiple counts of drug smuggling under Title 21, United States Code. The indictment also included forfeiture claims under Title 18. RR 2; Ex. 10. After his

[1] The Amended Report of Referee is attached as Appendix A.

arrest in Hong Kong in March 1994, Duboc waived extradition and was transported, via Los Angeles, to the Northern District of Florida. RR 2; Ex. H, p.10. When Duboc arrived in Los Angeles, his former wife, Robin Duboc, hired Robert Shapiro, and a third-party hired Michael Nassatir, to represent Duboc. RR 2; TR 754. Mr. Shapiro then contacted Respondent, who Duboc agreed would serve as his Florida counsel. RR 2; TR 756. Respondent knew that Shapiro and Robin Duboc had discussed a three-million dollar legal fee to be privately funded and divided equally, "'one [million] for each lawyer.'" RR 2; TR 760.

Respondent met with Assistant United States Attorneys Gregory Miller and Thomas Kirwin at the U.S. Attorney's Office in Gainesville on April 13, 1994, before ever meeting his client. RR 2; TR 122, 751 - 753. Shortly thereafter, Respondent flew to Los Angeles and met with Robert Shapiro, Michael Nassatir, and Claude Duboc. Shapiro Deposition, p.10, TR 754 - 756. The issue of attorneys' fees arose three days later at an April 19, 1994 dinner meeting in Tallahassee attended by Respondent, Robert Shapiro, AUSA Tom Kirwin, AUSA Roy Atchison, AUSA Greg Miller, and Carl Lilley, special agent with the drug enforcement administration. RR 2, TR 757 - 761. During the meeting, Robert Shapiro raised the possibility of a three-million dollar legal fee and asked whether the U.S. Attorneys' Office would find that reasonable. TR 761. Although Miller

did not agree to the fee, he did not find the proposed three-million dollar legal fee, to be allocated one million each to Shapiro, Respondent and Nassatir, unreasonable. RR 2; Shapiro Deposition, p.11, lines 15 - 23; TR 123, 125, 241 - 242, and 761.

After the dinner meeting, Duboc, Tom Kirwin, Greg Miller, Roy Atchison, Respondent and Carl Lilley had a series of meetings on April 25 and 26, 1994, to discuss a plea, repatriation of assets and payment of attorneys' fees. TR 128, lines 4 - 5. Respondent prepared a list of Duboc's assets. RR 3, Ex. 7. Respondent testified at the final hearing in the instant case that "this list was delivered to the prosecutors and they were given overnight to let it marinate, because I wanted to whet their appetites for a deal to be made the following day, and the deal having been made would enable them to start transferring." RR 3; TR 772. The deal Respondent proposed was for Duboc to plead guilty, forfeit all of his assets to the United States Government, and later argue that his "extraordinary cooperation" warranted a reduced sentence. RR 3; TR 763.

Duboc's cooperation began by his identifying and transferring cash accounts from around the world into a covert bank account identified by the United States Attorneys' Office. RR 3. But Duboc also owned real and personal properties located primarily in France, including two large estates that required significant

infusions of cash for maintenance, valuable automobiles, boats, furnishings and artwork. RR 3. In addition, Duboc owned 602,000 shares of stock in Biochem Pharma, Inc., a Canadian pharmaceutical company, then valued at $5,891,352.00 -- just under $10.00 per share. Duboc projected a dramatic increase in the value of the stock and suggested that it should not be sold because: (1) the company was researching a cure for AIDS and (2) a sudden sale of a large block of the stock would cause the price to fall. RR 3; Ex. 17, p. 3.

Duboc's primary interest was to maximize the amount of forfeitures to the United States Government, in order to obtain a sentence reduction for his "extraordinary cooperation." Ex. 13, p. 8 - 9. In furtherance of this goal, and with the consent and clerical assistance of the United States Government, Duboc transferred his Biochem stock to the Swiss account number provided by Respondent. RR 3. Duboc also transferred his Obayashi and Pasco stock to the Respondent for him to liquidate and forward the proceeds to the United States Government. Complaint and Answer to Complaint, par. 23.

Respondent was to serve as trustee of Duboc's French properties, and the Biochem stock was to provide a sufficient fund from which those assets could be marketed, maintained and liquidated. RR 3. Respondent and representatives of the U. S. Attorneys' Office also discussed and agreed that the government would not

oppose any legal fees that the court might approve to be paid from the stock. TR 250. Respondent has consistently acknowledged that legal fees were subject to approval by Chief Judge Maurice M. Paul. Ex. 17, p. 5; TR 994.

On May 17, 1994, a pre-plea conference was held in Judge Paul's chambers, after which Duboc entered his guilty plea in open court and pledged his complete cooperation. RR 4; Ex. 10. Present at the pre-plea conference were Judge Paul, U. S. Attorney Michael J. Patterson, AUSA Miller, and AUSA Kirwin. TR 255. Also present were the Respondent and his pilot, Joaquin Fuster, and Edward Shohat, who also represented Mr. Duboc for a time. TR 255, 995 - 996. Before the guilty plea, no one -- not the Respondent, Duboc, co-counsel, members of the United States Attorneys' Office, nor Judge Paul -- ever suggested that the stock Respondent now claims to own in "fee simple" was ever anything other than an intangible asset to be held in trust by the Respondent for the specific intended purposes listed above. RR 4. In fact, in his letter dated January 21, 1996 [2] to Judge Paul, Respondent wrote "I had in principle agreed to hold the funds in the nature of a trust, with final approval for legal fees to be approved by Your Honor." Ex. 17, p 4.

---

[2] A copy of the January 21, 1996 letter is attached as Appendix D .

Respondent first espoused his claim of owning the Biochem stock, and his entitlement to the appreciation in stock value, through an associate appearing at the January 12, 1996 hearing before Judge Paul on Duboc's motion to substitute counsel. Ex. 13, pp. 4 - 8. The Biochem stock was then trading at about $40.00 per share -- four times more than when Respondent received the stock. Ex. 13, p. 8, line 21. In orders dated January 12, 1996 [3] and January 25, 1996 [4], Judge Paul froze the stock, and directed Respondent to return the stock and to account for his expenditures. Ex. 1, 2. When Respondent failed to comply, Judge Paul found Respondent in contempt and jailed him for 44 days. [5] Judge Ellis' findings of guilt and recommended sanction relate to Respondent's misconduct involving the misappropriation of trust assets for his own benefit, conflicts of interest, misrepresentations, violation of court orders, *ex parte* communications and commingling.

---

[3] A copy of the January 12, 1996 order is attached as Appendix C.

[4] A copy of the January 25, 1996 order is attached as Appendix E.

[5] See Respondent's brief, p. 24.

SUMMARY OF THE ARGUMENT

Respondent has acknowledged in writing, in sworn testimony, and in his brief that a third party, the United States Government, had an interest in the Biochem stock transferred to him by Duboc. Respondent argues, however, that although he received the stock for specific intended purposes, for which he was required to provide an accounting, he was not guilty of an ethical violation when he used the stock for his personal benefit and later claimed it as his own. Respondent's argument is based on his assertion that the specific word "trust" was not spoken in connection with the stock and that there was no writing evidencing that he held the stock in trust.

Contrary to Respondent's assertions, an attorney's ethical obligation to hold property belonging to others in trust and to safeguard that property with the care of a professional fiduciary does not hinge on the use of a specific word, nor on the existence of a writing evidencing a formal trust agreement. The propriety of the Respondent's conduct does not rise or fall upon whether the word "trust" was used in the May 17, 1994 conference with Chief Judge Paul, but rather on what all of the parties understood the nature of the transfer to be -- an entrustment. After hearing five days of testimony, judging the credibility of the witnesses, and reviewing all of the evidence, Judge Ellis found that the Respondent held the stock

in trust and that he violated numerous ethical rules when he converted the stock for his personal benefit. As detailed extensively in Judge Ellis' 24-page Report of Referee, the record contains clear and convincing evidence to support her findings of fact and recommendations of guilt.

Judge Ellis found that "the numerous violations, all of which are serious and egregious, plainly warrant permanent disbarment." RR 20-21. This finding is fully supported by both the facts and the law. The record is replete with clear and convincing evidence supporting the Referee's factual findings, and the recommended sanction is well supported by existing case law. This Court should therefore approve the Report of Referee and permanently disbar the Respondent.

ARGUMENT

I. Judge Ellis' findings of facts should be approved because the respondent has failed to meet his burden of demonstrating that there is no evidence in the record to support the referee's findings or that the evidence clearly contradicts the conclusions.

Respondent's burden on review is to demonstrate that there is no evidence in the record to support the Referee's findings or that the record evidence clearly contradicts the conclusions. *Florida Bar v. Vining*, 721 So.2d 1164, 1167 (Fla.

1998). Respondent cannot satisfy his burden of showing that the Referee's findings are clearly erroneous "by simply pointing to the contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings." *Florida Bar v. Vining*, 761 So.2d 1044, 1048 (Fla. 2000).

During the final hearing, Respondent's counsel correctly stated that the standard of proof in a Bar disciplinary proceeding is "clear and convincing evidence," and that "the clear and convincing test does not rise quite to the level of beyond and to the exclusion of every reasonable doubt." [6] Respondent now attempts to elevate the clear and convincing standard to one requiring facts "proven beyond a reasonable doubt," quoting *State v. Mischler*. [7] *Mischler* is distinguishable, however, because it involved a requirement of "clear and convincing reasons" for a sentencing guideline departure in a criminal case.

Respondent also argues that the standard for proving an oral trust agreement is an enhanced burden of proof. [8] In *Hiestand v. Geier*, 396 So.2d 744, 748 (Fla.

---

[6] TR Vol. V, p. 609, citing *Florida Bar v. Quick*, 279 So.2d 4 (Fla. 1973); and In *Re: Davey*, 645 So.2d 398, 404 (Fla. 1994).

[7] Respondent's brief, p. 37, quoting *State v. Mischler*, 488 So.2d 523, 525 (Fla. 1986).

[8] Citing *Sottile v. Mershon*, 166 So.2d 481 (Fla. 3d DCA 1964) and *Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative*, 52 So.2d 670 (Fla. 1951).

3d DCA 1981), the Third District Court of Appeal reviewed case law relating to the method of proving a resulting trust and found that, although some Florida courts have required evidence to be clear, strong and unequivocal, the clear and convincing evidence standard is also found. The court noted that the standard of evidence required to prove a constructive trust is "clear and convincing." *Id.* In holding that "clear and convincing . . . is the standard applicable to establish a resulting trust," the court relied on the holding of this Court in *King v. King*, 111 So.2d 33 (Fla. 1959), that evidence of an implied trust must be of "clear and convincing character." *Hiestand* at 748.

The Bar has met its burden of proof by clear and convincing evidence, while the Respondent has failed to meet his heavy burden of establishing that the record is wholly lacking in evidentiary support for Judge Ellis' findings, including her specific finding that he held the Biochem stock in trust. RR 7, par. 5. This Court has consistently held that where a referee's findings are supported by competent substantial evidence, it is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Vining* 721 So.2d at 1167, *quoting Florida Bar v. MacMillan*, 600 So.2d 457, 459 (Fla. 1992). Judge Ellis was in the best position to assess credibility and to determine guilt, and her findings and recommendations should be approved, because they are clearly supported by

competent substantial evidence.

Count I

Respondent commingled trust funds from the sales of the Obayashi and Pasco stock with his personal funds, by depositing the proceeds into his personal money market account. The Obayashi and Pasco stock, also identified in these proceedings as the Japanese stock, was entrusted to Respondent for the specific purpose of liquidating the stock and forwarding the proceeds to the United States, in furtherance of Duboc forfeiting all of his assets. Complaint and Answer to Complaint, par. 23. Respondent liquidated the Obayashi and Pasco stock and deposited the $730,000.00 derived therefrom into his personal money market account on or about July 13, 1994. Ex. 20, 21, 22, 31, 32, 33. Respondent did not transfer the $730,000.00 to the United States until on or about August 15, 1994, and he has never remitted the interest earned those funds while they were in his personal account. RR 4 - 5.

Respondent's money market account was not a lawyer's trust account, and was not created or maintained by Respondent as a separate account for the sole purpose of maintaining the referenced funds, contrary to Rule 4-1.15(a), Rules of Professional Conduct. Complaint and Answer to Complaint, par. 26. Further,

when Respondent deposited these funds into his money market account, Respondent had personal funds in the account contrary to Rule 4-1.15(a), Rules of Professional Conduct. Ex. 20, 21.

Respondent now states that he did not "lie" about the sale of the Japanese stock and its layover in his Barnett Bank account, and that his "candor was unconditional." Respondent's brief, p. 50. Respondent answered Request for Admissions number 7, however, denying that he had deposited the Obayashi and Pasco stock sales proceeds into his money market account in violation of The Florida Bar trust accounting rules prohibiting commingling. Ex. 28, 29, 30. Respondent specifically answered Request for Admissions number 7 stating that he "assume[d] that Credit Suisse transferred the funds after the sale, to the only account whose identification that they knew, Respondent's money market account at Barnett Bank at West Palm Beach, on July 13, 1994." Ex. 29. Respondent's denial of his personal involvement in the sale and transfer of stock proceeds, is absolutely refuted by his own letters directing Credit Suisse to sell the shares and to wire the proceeds to his money market account. Ex. 31, 32, and 33.

The allegation of commingling may not be as serious as Respondent's misappropriations, his misuse of client funds, self-dealing, conflict of interest, and misrepresentations, but his lack of candor provides insight into Respondent's total

disregard for rules and procedures and further evidences his lack of honesty and trustworthiness. Likewise, Respondent's continued refusal to account for the interest accrued on the $730,000.00, while the funds were held by him in his private account, underscores his cavalier attitude toward the sanctity of trust funds. RR 5.

Count II

The 602,000 shares of Biochem were entrusted to Respondent by Duboc in May 1994, pursuant to an oral agreement with the office of the United States Attorney for the Northern District of Florida for the following specific purposes:

A. To use so much of the Biochem stock as required for the maintenance of certain Duboc owned real and personal property located in Europe, pending the liquidation of such property;

B. To provide a res from which attorneys' fees could be paid after application and approval by Judge Paul;

C. To forfeit to the United States so much of the Biochem stock or the proceeds of such stock as thereafter remained to inure to the benefit of Duboc and the United States of America.

TR testimony of McGee (41 - 43), Kirwin (145 - 146), Miller (255 - 260), Patterson (484 - 486) and Shohat (517 - 518); Ex. 44, transcript testimony of Shapiro, at p. 202; Ex. 34, sworn statement of Claude Duboc, at page 18; Ex. 4, Judge Paul's

Order of Civil Contempt, at p. 4.

This oral trust agreement was announced and ratified by Respondent during a meeting in chambers with Judge Paul on May 17, 1994. Testimony of Miller (255 - 260), Kirwin (TR 145 - 148), Patterson (484 - 486), and Shohat (517 - 518). Respondent's expenditures of approximately $3.6 million, funded by the sales and loan proceeds from the Biochem stock, for his law offices, other business interests and payment of personal expenses, had no nexus to the specific purposes of entrustment of the stock to Respondent and constitute misuse of client funds and misappropriations. Ex. 20; Ex. 47, Judge Paul's order p. 30.

Judge Ellis found that the "testimony and exhibits, quantitatively and qualitatively support the establishment of a trust" and that "a trust was in fact established between Duboc and Respondent at the time the stock was transferred to Respondent." RR 7 and 13. The record is replete with competent substantial evidence to support these findings. TR 130 - 147, 251 - 260, 435 - 481, 484; Ex. H, pp. 32 - 33. This Court should therefore approve the Referee's finding of fact that the Respondent received the Biochem stock in trust.

Respondent argues extensively that he violated no ethical rule when he used the Biochem stock for his personal benefit because "[t]here was no 'trust'" and "[t]here was no clear and convincing evidence of a 'trust.'" Respondent's brief,

pp. 35 - 43. To bolster his position, Respondent incorrectly states that Assistant United States Attorney Thomas F. Kirwin "testified that the word 'trust' was never used." Respondent's brief p. 39. To support his assertion, Respondent quotes from the August 28, 2000 Volume III of the deposition transcript in the Court of Federal Claims case, in which AUSA Kirwin stated "I don't remember that the words 'in trust' were ever used." p. 268, lines 23 - 24.

Respondent's counsel had similarly questioned AUSA Kirwin on May 18, 2000, when the deposition in that case began. AUSA Kirwin responded that although he did not recall whether the specific words "in trust" were used or not, he knew that the stock was to be used to fund specific objectives. Stipulated supplemental record, May 18, 2000 Volume I of AUSA Kirwin's deposition, p. 19. AUSA Kirwin has testified consistently before, during, and after the final hearing.

At the final hearing in the instant case, AUSA Kirwin testified that the stock was to be transferred to Mr. Bailey to use for the maintenance and marketing of Duboc's property and for legal expenses incurred. TR 134 - 135. AUSA Kirwin further testified that the stock was also intended to provide a source of fees for the Respondent, upon application and approval by Judge Paul. TR 135, 146. When asked what was to happen to the balance of the proceeds of the Biochem stock, AUSA Kirwin responded unequivocally "It would be forfeited to the United

States." TR 135. AUSA Kirwin's testimony, and the testimony of other members of the U. S. Attorneys' Office, Respondent's client and Respondent's co-counsel, all confirm that the Biochem stock was transferred to the Respondent in trust. RR 5.

AUSA Miller was lead counsel in Duboc's criminal case before entry of the plea, and the primary spokesperson for the government during the pre-plea discussions. TR 255 - 256. AUSA Miller testified at the final hearing in the instant case that he advised Judge Paul during the May 17, 1994 pre-plea meeting that the stock had been "given to the defense in trust by their client" and that the Respondent acknowledged his acceptance of that understanding. TR 259 - 260.

Even co-counsel Robert Shapiro and Edward Shohat testified as to the existence of a trust providing a fund from which Duboc's French properties could be maintained and liquidated, with the ultimate beneficiary to be the United States Government. RR 5; Shapiro deposition p. 17, lines 20 - 25, p. 18, lines 1 - 3, p. 43, line 24 and p. 44 lines 1 - 4; TR Shohat testimony 521 - 522.

By misusing and misappropriating sales and loan proceeds derived from the Biochem stock, Respondent violated Rules 3-4.3 (a lawyer shall not engage in conduct which is unlawful or contrary to honesty and justice); 4-8.4(b) (a lawyer shall not engage in criminal misconduct); 4-8.4(c) (a lawyer shall not engage in

conduct constituting dishonesty, fraud, deceit or misrepresentation) and 5-1.1(a) (money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose).

By commingling the sales / loan proceeds with his own funds in the money market account, Respondent violated those provisions of Rule 4-1.15(a), Rules of Professional Conduct, which mandate that a lawyer hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation, and that in no event may the lawyer commingle the client's funds with those of the lawyer.

By depositing the sales / loan proceeds into the money market account, Respondent violated that provision of Rule 4-1.15(a), Rules of Professional Conduct, which requires lawyers to hold funds of clients and third persons that are in a lawyer's possession in connection with a representation in a separate account.

Count III

Respondent's continued misuse and misappropriations of the Biochem stock sales and loan proceeds, even after Judge Paul's order of January 12, 1996, provide an additional basis for the violations cited above, and for violations of Rules proscribing conduct contrary to honesty and justice; disobedience of an obligation under the rules of a tribunal; and conduct prejudicial to the administration

of justice.

The January 12, 1996 order provided:

> (2) The court retains jurisdiction over Mr. Bailey to obtain from him a full accounting of the monies and properties *held in trust by him* for the United States of America. This accounting should include all monies, real and personal property and other assets obtained by him from, or for the benefit of, the defendant Duboc as well as all disbursements, liens or other payments made by him on account of or for the benefit of Claude Duboc or the United States. This should include, but is not limited to, a full accounting of the 602,000 shares of stock in Biochem Pharma, Inc., that was *delivered to Bailey to be held in trust* for the United States. The accounting is to be delivered to the Court personally by Mr. Bailey within 10 days of this Order;

and

> (5) All monies, real and personal property and other assets received by Bailey from or on behalf of Duboc, including the aforementioned shares of Biochem Pharma stock shall be frozen as of the date of this order and no further disbursement of any of these funds shall be made unless authorized by this Court.

(emphasis added).

On December 28, 1995, Respondent's money market account bank statement reflected a balance of $358,855.00, of which $350,000.00 was derived from a December 21, 1995 deposit of Biochem sales / loan proceeds, and $8,855.00 was not directly identified as related to Duboc. Ex. 28, 29, Request for

Admissions and Answer, par. 18.

From December 29, 1995 through January 11, 1996, Respondent deposited funds totaling $69,466.00 [having no nexus to the Duboc representation] into his money market account and disbursed funds totaling $60,000.00 [having no nexus to the Duboc representation] from the account. These transactions produced a January 11, 1996 closing balance of $368,321.00, of which $350,000.00 represented sales / loan proceeds from the Biochem stock. Complaint and Answer to Complaint, par. 38; Ex. 20, 56.

From January 12, 1996 through January 24, 1996, Respondent deposited funds totaling $37,726.00 [having no nexus to the Duboc representation] to his money market account and disbursed funds totaling $20,000.00 [having no nexus to the Duboc representation] from the account. These transactions produced a January 24, 1996 closing account balance of $386,047.00, of which $350,000.00 represented sales / loan proceeds from the Biochem stock. Complaint and Answer to Complaint, par. 35.

By order entered January 25, 1996, Judge Paul directed Respondent to bring to the Court at a stated date, time and place:

> . . . all shares of stock of Biochem Pharma, Inc. held by him, or by others, which represent the stock turned over to him by the Defendant, Claude Duboc, or Duboc's

> representatives. If the Biochem Pharma, Inc. stock has been replaced by any other form of asset while in the possession of Mr. Bailey, then the replacement stock will be brought to this Court at the time of the above hearing.

Ex. 2; Complaint and Answer to Complaint, par. 36.

From January 25, 1996 through February 26, 1996, Respondent deposited funds totaling $20,607.00 [having no nexus to the Duboc representation] to his money market and disbursed funds totaling $366,515.00 [having no nexus to the Duboc representation] from the account. These transactions produced a February 26, 1996 closing account balance of $40,139.00. Complaint and Answer to Complaint, par. 37.

The following illustrates the activity in Respondent's money market account from December 28, 1995, through February 26, 1996:

Dates:	Biochem Pharma, Inc. Sales/Loan proceeds	Non-Duboc Sources:	Uses:	Money Market Balance
12/21/95	$350,000.00			
12/28/95		$8,855.00		$358,855.00
12/29/95 to 1/11/96		69,466.00	$60,000.00	368,321.00
1/12/96 to 1/24/96		37,726.00	20,000.00	386,047.00
1/25/96 to 2/26/96		20,607.00	366,515.00	40,139.00
	$350,000.00	$136,654.00	$446,515.00	

Complaint and Answer to Complaint, par. 38; Ex. 56.

Of the $446,515.00 total disbursements by Respondent from his money market account from December 29, 1995 through February 26, 1996, none had any nexus to the specific purposes of the entrustment of the Biochem stock to Respondent. Ex. 20, 21, 22, 25, 26. Respondent therefore misused and misappropriated at least $309,861.00 ($350,000.00 of the Biochem stock sale and loan proceeds, less the closing money market balance of $40,139.00) from December 29, 1995 through February 26, 1996.

In fact, Respondent transferred $290,000.00 of the aforementioned disbursements to his personal account on January 29, 1996, to cover at least nine checks dated January 25, 1996, which were used to repay Respondent's line of credit with Republic Bank ($150,000.00), fund Respondent's business interests ($106,126.70), and fund Respondent's personal expenses ($13,078.46). Complaint and Answer to Complaint, par. 41; Ex. 20, 21, 22, 25, 26. Respondent's bank records illustrate that he depended on the Biochem stock to fund his personal financial obligations.

By misusing and misappropriating sales and loan proceeds derived from the Biochem stock, Respondent violated Rules Regulating The Florida Bar 3-4.3 (a lawyer shall not engage in conduct which is unlawful or contrary to honesty and

justice); 4-8.4(b) (a lawyer shall not engage in criminal misconduct); 4-8.4(c) (a lawyer shall not engage in conduct constituting dishonesty, fraud, deceit or misrepresentation) and 5-1.1(a) (money or other property entrusted to an attorney for a specific purpose, is held in trust and must be applied only to that purpose).

By continuing to expend funds from his money market account after service upon and knowledge by the Respondent of the January 12 and the January 25, 1996 orders of the Court, Respondent violated Rules Regulating The Florida Bar 3-4.3 (a lawyer shall not engage in conduct that is contrary to honesty and justice); 4-3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists) and 4-8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice).

Count IV

Respondent's misrepresentations to Judge Paul concerning the dates and times that Respondent saw and read the January 12, 1996 and January 25, 1996 orders violated several Rules, including those prohibiting dishonesty and false statements to a tribunal. In the February 1996 proceedings before Judge Paul, Respondent testified that he did not see the January 12, 1996 or January 25, 1996 orders, referenced above, until February 2, 1996. Complaint and Answer to

Complaint, par. 44; Ex. 41, February 2, 1996 transcript testimony of Respondent, at p. 210, line 18 through p. 216, line 8 and p. 203, lines 5 through 7. Respondent had, however, received a copy of the January 12, 1996 order on January 16, 1996, and had received a copy of the January 25, 1996 order on January 25, 1996.

Respondent testified at the final hearing in the instant case that his fax machine in his New York apartment was turned off on January 12, 1996, but that it was operational on January 16, 1996. TR 1086 - 1090. Respondent claims to have read only those faxes pertaining to the case of *U. S. v Watts* on January 16, 1996, and not Judge Paul's order of January 12, 1996. TR p. 1088, line 23 through p. 1090, line 23. Respondent's associate, Ms. Toni Kennedy, discussed the order during a telephone conversation with the Respondent on January 15 or 16, 1996. RR 11; TR 1090; Ex. P. AUSA Kirwin also discussed the January 12, 1996 order during a telephone conversation with the Respondent on January 16, 1996. TR 169 - 171. Respondent told AUSA Kirwin that because of Judge Paul's order, he would not do anything with the stock, including paying some insurance bills he had received on one of the French properties, until Judge Paul decided who should pay those bills. TR 171.

Further, Respondent returned to his West Palm Beach office on January 17, 1996, and spent the entire next day, January 18, 1996, in the office

preparing an accounting to comply with the January 12, 1996 order, but claims not to have read Judge Paul's order. TR p. 1090, line 24 through p. 1071, line 15. Respondent also attended a meeting with AUSAs Miller and Kirwin on January 19, 1996, during which he acknowledged receiving the order and complained that it had been obtained *ex parte*. TR Miller's testimony, 268 - 276.

Judge Ellis found "patently ludicrous" Respondent's statement that he did not see the January 12 and January 25, 1996 orders until February 2, 1996. RR 12-13; Ex. 5, Judge Paul's February 29, 1996 Order of Civil Contempt, p. 2. By testifying falsely, under oath, before Judge Paul, Respondent violated Rules 3-4.3 (a lawyer shall not engage in conduct contrary to honesty and justice); 4-8.4(b) (a lawyer shall not engage in criminal misconduct) and 4-8.4(c) (a lawyer shall not engage in conduct constituting dishonesty, fraud, deceit or misrepresentation). This false testimony also violated Rule 4-3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal). Judge Ellis concluded that the Respondent had also testified falsely before her at the final hearing. RR 21.

Count V

By appropriating to his own uses and purposes proceeds derived from the Biochem shares entrusted to him, Respondent deprived Duboc and the United States Government of the value of the stock and deprived Duboc of the benefit he

sought to obtain at the time of his sentencing. TR Shohat testimony 530; Ex. 34, sworn statement of Claude Duboc, pp.15 - 16; Ex. 45, Judge Paul's order of October 23, 1997, p. 30. Respondent's claim of owning the stock in "fee simple," and the appreciation of the stock's value, clearly placed him in a financial position adverse to his client. Judge Ellis found that the conflict was both "blatant and obvious" because the more Respondent gained, the less Duboc would have to contribute in the form of "extraordinary cooperation." RR 14.

Respondent testified at the final hearing that he did not reduce the terms of his claimed interest in the appreciation of the stock to writing, and that he did not advise Duboc to consult with another attorney about the proposed transaction, or obtain Duboc's written consent to Respondent's claimed ownership interest. TR 1018, line 24 through 1019, line 14.

Respondent's memorandum dated July 18, 1994, to Claude Duboc's father, Raymond Duboc, illustrates his attitude of self-dealing regarding the French property in Vallauris. [9] Ex. 48. TR 1069 - 1072. Despite Respondent's assurances to the government that he had the contacts and resources to arrange the sale, liquidation and repatriation of the French assets, his own memorandum

[9] A copy of the July 18, 1994 Memo is attached as Appendix F.

illustrates his extreme self-dealing and contradicts those assertions to the government. TR 417 - 418. Respondent stated that he was "certainly in no hurry" to sell, adding that "[i]ndeed, because of its breathtaking beauty, I am disposed to return here frequently until title passes to another." Ex. 48, p. 1. Respondent also stated that he was negotiating with a potential buyer who would allow him "the use of the house for two weeks per year for ten years." Ex. 48, p. 2.

Accordingly, Respondent violated Rules 4-1.7(b) (a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation may be materially limited by the lawyer's own interest); 4-1.8(a) (a lawyer shall not 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). Respondent's conduct also violated Rule 4-1.8(b) (a lawyer shall not use information relating to a representation of a client to the disadvantage of the client).

Count VI - Dismissed

Count VII

In letters dated January 4 and January 21, 1996 to Judge Paul, Respondent further violated rules prohibiting conflicts of interest, self-dealing, disclosure of confidential information, *ex parte* communications, and improper attempts to influence a trier of fact.

In December 1995, Henry Uscinski and Mark Lebow filed on behalf of Duboc a Motion for Substitution of Counsel to replace and substitute Respondent. Complaint and Answer to Complaint, par. 55. On January 4, 1996, Respondent wrote an *ex parte* letter to Judge Paul. [10] Ex. 12; Ex. 28, 29, Request for Admissions and Answer, par. 30. In this letter, Respondent made disparaging remarks about the counsel that would replace him, knowing that upon his discharge, Respondent would be required to account for the stock that he was holding in trust, and that his misuse and misappropriation of trust funds would be discovered. RR 7.

The January 4, 1996 letter constituted an improper communication with Judge Paul as defined by Rules 4-3.5(a) (a lawyer shall not seek to influence a

[10] A copy of the January 4, 1996 letter is attached as Appendix B.

judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of Court) and 4-3.5(b) (in an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending).

This January 4, 1996 letter also made repeated references to confidential communications between Respondent and his client, Claude Duboc, including that Duboc was at one time urged to help set up a drug offense so that he could disclose it to the government and win "brownie points" for sentencing purposes, and that Duboc was on two other occasions counseled to "hold back" information in order to have "a little something left" to offer in exchange for a Rule 35 motion. Ex. 12, p. 2; and TR testimony of Shohat, at p. 533, line 4 through p. 537, line 11. Respondent also included information in that letter that disparaged the case and his client, including comments that none of the counts was triable and that Duboc was a "multi-millionaire druggie." Ex. 12, at p. 2.

Respondent's January 4, 1996 letter to Judge Paul violated Rules Regulating The Florida Bar 4-1.6(a) (a lawyer shall not reveal information relating to representation of a client) and 4-1.8(b) (a lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation). Further, Respondent sent no copies of the

January 4, 1996 letter to the federal prosecutors in the case or to any other party, as is required by Rule 4-3.5(b)(2). Ex. 12; Complaint and Answer to Complaint, par. 59.

On January 21, 1996, Respondent sent a second letter to Judge Paul with a copy to one of the federal prosecutors. Ex. 17; Complaint and Answer to Complaint, par. 60. In the January 21, 1996 letter, Respondent threatened to reveal privileged matters if Duboc persisted in his claim that the stock did not belong to Respondent. Ex. 17, at p. 7. The January 21, 1996 letter constituted an improper communication with Judge Paul as defined by Rule 4-3.5(a) (a lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of Court).

The January 21, 1996 letter also made repeated references to confidential communications between Respondent and his client, Claude Duboc, in violation of Rules 4-1.6(a) (a lawyer shall not reveal information relating to representation of a client) and 4-1.8(b) (a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless the client consents after consultation). TR testimony of Shohat at p. 537, line 12 through p. 540, line 5.

Respondent's claim of an absolute ownership interest in the Biochem stock constitutes a conflict of interest with Duboc in violation of Rules 4-1.8(a) (a lawyer

shall not enter into a business transaction with a client or knowingly acquire an ownership interest adverse to a client); 4-1.8(b) (a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation) and 4-1.7(b) (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).

As set forth above and in extensive detail in the Report of Referee, the record contains substantial, competent evidence that clearly and convincingly supports Judge Ellis' findings of fact and recommendations of guilt. The Referee was in the best position to review the evidence and to assess the credibility of the witnesses who testified during the five-day final hearing. Therefore, consistent with its prior holdings, this Court should not reweigh the evidence or substitute its judgment for that of the Referee, but should approve Judge Ellis' findings of fact and recommendations of guilt.

II. Judge Ellis appropriately exercised her discretion to exclude polygraph evidence and expert witness testimony.

In addition to Respondent's arguments that he did not believe he held the stock in trust and that there was no clear and convincing evidence of a trust, he also

argues that Judge Ellis erred in excluding polygraph evidence and expert witness testimony. Respondent's brief, pp. 45 - 49. In both instances, Judge Ellis heard the arguments of counsel, applied applicable law, and made informed, reasoned decisions to exclude the proffered evidence. These decisions were well within the Referee's discretion.

Judge Ellis heard the arguments of counsel and considered case law submitted on the admissibility of polygraph evidence and, thereafter, declined to consider in evidence the proffered testimony of two polygraph examiners, George Slattery (who tested the Respondent's pilot, Joaquin Fuster, on May 14, 1996) and James Earle (who tested the Respondent on May 27, 2000). TR pp. 656 - 726. The Fifth District Court of Appeal in *Cassamassima v. State*, 657 So.2d 906, 907 - 908 (5th DCA 1995) noted that, since 1952, polygraph results have been inadmissible in Florida to prove guilt, although polygraph evidence may be admitted by agreement of the parties. Although Respondent acknowledged before Judge Ellis that under existing law, polygraph evidence is inadmissible in Florida (TR 657), he nevertheless argues that polygraph evidence should be considered as to the merits and mitigation in this case, relying on *Florida Bar v. Pavlick*, 504 So.2d 1231 (Fla. 1987).

In *Pavlick*, the Bar sought to disbar an attorney based on a felony

conviction. This Court upheld a referee's decision to admit polygraph results as "evidence in mitigation" *Id.* at 1234. Judge Ellis distinguished *Pavlick*, on a factual basis and also because that referee considered the polygraph evidence in mitigation only, not as substantive proof. The admissibility of polygraph evidence in bar disciplinary proceedings was not specifically an issue before this Court in *Pavlick*. In Justice Ehrlich's dissent, however, he stated that the "referee was impressed with and apparently influenced by, testimony of a witness who administered a polygraph test to respondent, which evidence, while admissible in a bar proceeding, would be clearly inadmissible in a trial because the reliability of a polygraph test has not been proven." *Pavlick* at 1235.

Respondent cites *United States v. Piccinonna* (I), 885 F.2d 1529 (11th Cir. 1989) for the proposition that polygraph evidence is admissible in federal courts in this circuit. *Piccinonna* provides a three-prong test for the potential admissibility of unstiplulated polygraph evidence in the Eleventh Circuit: (1) advance notice, (2) the opportunity for the opposing side to conduct its own polygraph examination, and (3) admissibility under the Federal Rules of Evidence. *Id.* at 1536 - 37. Respondent did not proffer the testimony of Dr. Earle until the morning of the final hearing, and therefore, he clearly failed to meet the first two requirements of *Piccinonna* (I). Also, Judge Ellis noted that Dr. Earle's report could be

procedurally barred, as noncompliant with three orders on case management conferences. TR 723.

Although this Court has not specifically addressed the admissibility of polygraph evidence in bar disciplinary proceedings, other than by dicta in Justice Erhlich's dissent in *Pavlick*, the rules adopted by this Court governing bar admissions provide that the admissibility of polygraph results shall be in accordance with Florida Law. By analogy, Respondent's request for consideration of the polygraph evidence in this proceeding should be denied, because unstipulated polygraph results are not admissible in Florida. In *United States v. Piccinonna* (II), the district court highlighted compelling reasons for excluding polygraph evidence:

> a single polygraph testing session represents an inadequate foundation upon which an expert can base an opinion on the defendant's 'character' for truthfulness or untruthfulness. It is inconceivable that anyone, expert or not, can form a valid reliable, and admissible opinion as to the 'character' of a witness based on nothing more than one single polygraph examination. Such testimony, when based on one single session, would be inadmissible as speculative and without any adequate foundation, and is thus likely to mislead any fact finder.

Piccinonna (II), 729 F.Supp. 1336, 1338 (S.D. Fla. 1990), *aff'd,* 925 F.2d 1474 (11th Cir. 1991). Based on all of the forgoing considerations, Judge Ellis did not

abuse her discretion in excluding the polygraph evidence.

Likewise, after hearing arguments of counsel on the proffered opinion of Attorney Timothy Chinaris, Judge Ellis appropriately exercised her discretion to exclude his testimony. TR Vol. V, pp. 617 - 619. Judge Ellis found that Florida Statute §90.702 governed the admissibility of opinion testimony by experts, and concluded that an ethics expert would not assist her in understanding the evidence or in determining a fact in issue in the case. Judge Ellis therefore granted the Bar's *ore tenus* motion to exclude Mr. Chinaris' testimony. TR pp. 618 - 619. The record is clear that Judge Ellis gave ample consideration to the relevancy and admissibility of the proffered expert testimony and that she did not abuse her discretion in declining to receive the testimony in evidence.

III. Judge Ellis' recommendation of permanent disbarment should be accepted because the respondent has failed his burden to overcome the presumption of correctness, and the recommendation is reasonably supported by existing case law.

In *Florida Bar v. Lord*, 433 So.2d 983, 986 (Fla.1983), this Court defined the three objectives of Bar discipline: (1) fairness to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer; (2) fairness to the respondent, being

sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and (3) deterrence to others who might be prone or tempted to become involved in like violations.

A referee's recommended discipline is persuasive. *Florida Bar v. Reed*, 644 So.2d 1355, 1357 (Fla. 1994) and *Florida Bar v. Pearce*, 631 So.2d 1092, 1093 (Fla. 1994). This Court has consistently held that, although it has the ultimate responsibility to determine the appropriate sanction, it will not second-guess a referee's recommended discipline if that discipline is reasonably supported by existing case law. *Florida Bar v. Lecznar*, 690 So.2d 1284, 1287 (Fla. 1997). In fact, this Court has held that "a referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not 'clearly off the mark.'" *Florida Bar v. Vining*, 721 So.2d 1164, 1169 (Fla. 1998).

The Florida Standards for Imposing Lawyer Sanctions provide guidance for determining an appropriate sanction in attorney disciplinary matters. Several Standards apply in this case and support disbarment. [11] In addition, Standard 9.22

---

[11] Applicable standards, absent aggravating and mitigating circumstances, are: Standard 4.11 (disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury); Standard 4.21 (disbarment is appropriate when a lawyer, with the intent to benefit the lawyer or another, intentionally reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes

lists several aggravating factors that may justify an increase in the degree of discipline to be imposed. Judge Ellis found that disbarment was appropriate under the applicable Rules, Standards and case law, even without considering any aggravating factors. RR 20. Judge Ellis went on, however, to find the following aggravating factors present in this case: a dishonest or selfish motive; a pattern of misconduct; multiple offenses; the submission of false statements; a refusal to acknowledge the wrongful nature of conduct; and substantial experience in the practice of law. RR 21.

---

injury or potential injury to a client); Standard 4.31 (disbarment is appropriate when a lawyer, without the informed consent of the client (a) engages in representation of a client knowing that the lawyer's interest are adverse to the client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client); Standard 4.61 (disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury); Standard 5.11(b) (disbarment is appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft); Standard 5.11(f) (disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice); Standard 6.21 (disbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding); Standard 7.1 (disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system).

This Court has disbarred attorneys who have abused their positions of trust and breached their fiduciary duties owed to clients and third parties. In *Florida Bar v. Crabtree*, 595 So.2d 935 (Fla. 1992), this Court disbarred Crabtree for engaging in misconduct involving "complex fiscal transactions in which Crabtree was employed to repatriate $1.5 million from Europe for a client in Florida without disclosing the source of the funds." *Id.* at 936. To accomplish this task, Crabtree involved another client in several transactions and also received a personal interest in the assets, and failed to fully disclose to the clients his interest or the fact that they were all involved in the same transactions. *Crabtree* at 936.

Crabtree was found to have: (1) engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation; (2) entered into business transactions with a client without full disclosure and consent of the client; and (3) been involved in representing two clients at the same time who could have adverse interests without their knowledge or consent. The Court upheld the referee's recommendation of disbarment, finding that Crabtree had taken fees and an interest in transactions without fully explaining his part and share in the transactions. *Id.*

In the instant case, Respondent took fees and otherwise used the sales and loan proceeds of the Biochem stock for his own benefit, without fully disclosing that fact to Duboc, to the United States, to Judge Paul, or to other co-counsel in

the case. Ex. 20, 21, 22, and Ex. 30, Judge Paul's October 3, 1997 order, at pp. 30 - 31. In Duboc's letter to Respondent dated January 31, 1995, he wrote "Keep the stock - at 12 3/8 closing Dec 30th - $7,449,750 - more volume at least in Canada and, I have heard, more good things to come." Ex. 35, pp. 5 - 6. Clearly, on January 3, 1995, Duboc was under the impression that Respondent then held the 602,000 shares of stock that were entrusted to him, as 602,000 shares multiplied by $12.375, equals $7,449,750.00. In his response to Duboc dated January 8 - 10, 1995, Respondent's only comment concerning the stock is on page 12, where Respondent wrote "Stock looks good." [12] Ex. 36. Respondent did not attempt to correct his client's false impression that the 602,000 shares of the stock were still intact, even though Respondent had sold 150,000 of the shares in October 1994. Ex. 20. Duboc's communication with the Respondent about the stock supports his position that he did not give the stock to the Respondent in "fee simple."

In *Florida Bar v. Anderson*, 594 So.2d 302 (Fla. 1992), this Court held that the willful misappropriation of public funds warranted disbarment, even though Anderson was not acting as an attorney. *Id.* at 303. While employed as an executive assistant with the Tampa Housing Authority, attorney Anderson

[12] A copy of the January 1995 Memorandum is attached as Appendix G.

converted publicly owned funds to pay off her personal credit-card debt. *Id.* at 302. In the instant case, the Respondent also misappropriated funds that would have inured to the benefit of the United States Government.

In *Florida Bar v. Della-Donna*, 583 So.2d 307, 312 (Fla. 1989), the Supreme Court disbarred Della-Donna for five years for misconduct involving charging clearly excessive fees, working under actual conflicts of interest, and intentionally misusing funds from an estate. Della-Donna and his partner acted as legal counsel for the estate, trusts and foundations, while Della-Donna held fiduciary positions as trustee and officer of the foundations. *Id.* at 308. The referee specifically found Della-Donna's conduct to have been "motivated by personal and financial self-gain and aggrandizement."

In the instant case, Respondent also breached his position of trust and fiduciary duties by acting in his own self interest. Clear and convincing evidence supports the conclusion that he was motivated by personal and financial gain. Respondent's bank records reveal that his practice was unable to support his lifestyle and the length of time he spent working on another high profile case in California, for which he received no fee. Ex. 20; Shapiro deposition p. 55, lines 17 - 25; TR 1005, 1017, 1041 - 1050.

In another recent opinion, this Court disbarred an attorney for five years, for

converting to his own use, proceeds from his uncle's estate, for which he was the personal representative. *Florida Bar v. Korones,* 752 So.2d 586 (Fla. 2000). This Court disbarred Korones, despite mitigating factors including remorse, financial and familial difficulties, health problems, a good reputation, and restitution. Disbarment is appropriate in the instant case because of Respondent's multiple and serious violations, all of which are related to his misuse of trust property. This Court's holdings in prior cases supports this position. *See Florida Bar v. Spann*, 682 So.2d 1070, 1074 (Fla. 1991) (holding that disbarment is appropriate where there are multiple and serious violations).

In *Florida Bar v. Shanzer*, 572 So.2d 1382, 1383 (Fla. 1991), this Court reiterated its position that it 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." This Court disbarred Shanzer for misconduct involving trust account record-keeping requirements, retaining interest on trust accounts for personal use, misappropriating funds, and causing trust account shortages. In the instant case, Respondent misused and misappropriated trust funds, and retained interest earned on trust funds for his personal use.

Even where restitution was made, this Court in *Florida Bar v. McClure*, 575 So.2d 176, 177 (Fla. 1991), did not hesitate to disbar an attorney who had

wrongfully withheld funds from two estates and failed to perform required trust accounting procedures:

> The evidence shows that McClure mismanaged the funds to the detriment of the beneficiaries of the estate. Her misconduct pertained directly to legal work of fiduciary services performed on behalf of the estates and, therefore, directly related to the representation of the estates in probate proceedings. Although restitution has been made, it makes little difference to the beneficiaries whether money was withheld from the estates intentionally or through negligence.

McClure at 178.

Respondent's misconduct in this case is more serious than the misconduct for which this Court disbarred McClure. Like McClure, Respondent intentionally disbursed funds to himself without the knowledge and consent of his client and the third party in interest in those funds. In his August 24, 1994 Affidavit (Composite Ex. 49), Respondent explained that his client held forfeitable, but as yet unforfeited, assets as "trustee" for the government, because those assets had been acquired with tainted funds. Therefore, Respondent knew, from the onset, the nature of the government's interest in the stock.

In fact, in his January 21, 1996 letter to Judge Paul, Respondent acknowledged that he held the stock in the "nature of a trust" and that the United States had an interest in $5,891,352.00. Ex. 17, pp. 4 - 5; See also, in Ex. 24, a

November 28, 1995 letter to Credit Suisse. This admission is completely inconsistent with Respondent's subsequent allegations that he owned the stock in fee simple. Respondent's position flies in the face of logic. No plausible construction of the facts can justify the unjust enrichment of the Respondent by approximately 18-million dollars -- the appreciation of the Biochem stock.

The agreement between Duboc and the United States to defer forfeiting the Biochem stock was for the purpose of protecting and maximizing the liquidation values of the stock and of other forfeitable assets, specifically the French estates. Duboc transferred the stock to his counsel with the approval of the United States to further his plea agreement, not to vest in Respondent a sole ownership interest in the stock. RR 3, 5.

In *Florida Bar v. Rhodes*, 355 So.2d 774 (Fla. 1978), this Court stated that improper withdrawals of funds from an estate for the personal use and benefit of attorney warrants disbarment. Over a period of time, Rhodes, the executor of an estate, withdrew funds totaling $19,900.00 from the estate and used these funds for his own benefit. For this misconduct, Rhodes was disbarred.

Respondent's conduct is more egregious than that of Rhodes, because Respondent continued to convert funds for his personal use even after a Federal Judge had ordered the funds to be frozen, and Respondent made intentional

misrepresentations concerning his receipt of the Judge's orders. Ex. 1, 4, 5, 20, 21, 22, 25, 26. Respondent also engaged in self-dealing and a conflict of interest with Duboc (Ex. 12, 17, 48; TR testimony of Shohat), and violated trust accounting rules prohibiting commingling.

Florida Bar v. Harper, 421 So.2d 1066, (Fla.1982), is another case involving misconduct similar to that of the Respondent. Harper, the executor of an estate, was disbarred for making improper payments to himself, investing the estate funds causing a loss to the estate, converting the funds to his own use, and failing to make an appearance after being served with a citation to appear regarding revocation of letters testamentary. *Harper* at 1066. Respondent, like Harper, misappropriated funds to his own use and benefit. He also failed to comply with Judge Paul's demand for the return of the Biochem stock and an accounting, and engaged in violations related to trust accounts.

In *Florida Bar v. Golub*, 550 So.2d 455 (Fla.1989), Golub, as the attorney and personal representative of the estate, removed approximately $23,608.34 from the estate, and used it for his own benefit, without the permission of the heirs, debtors, or the Probate Court. Notwithstanding mitigating factors such as Golub's extreme alcoholism, voluntary self-imposed suspension, cooperation in the bar proceeding, and his lack of a prior disciplinary record, this Court held that

unauthorized removal of substantial sums from the estate warranted disbarment.

Likewise, in *Florida Bar v. Tillman*, 682 So.2d 542 (Fla. 1996), Tillman misappropriated client funds, commingled client and personal funds, and failed to follow trust accounting rules. In aggravation, the referee found a dishonest and selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of misconduct, and lack of remorse. Lack of a prior disciplinary record and a short period of time in practice of law were the mitigating factors. In approving disbarment as the appropriate sanction, this Court found that mitigation in *Tillman* was not adequate to lower the discipline. *Tillman* at 543. This Court reiterated the presumption of disbarment upon a finding of misuse of client funds or misappropriation. *Id.*

Judge Ellis found no mitigation in the instant case. As this Court has held, the misuse of client funds is unquestionably one of the most serious offenses a lawyer can commit and "[m]isuse of client funds in itself warrants disbarment." *Florida Bar v. Knowles*, 572 So.2d 1373, 1375 (Fla. 1991). Despite Respondent's argument that the recommended sanction is too harsh, there is no basis for deviating from the presumption of disbarment. The aggravating factors, including a dishonest and selfish motive, pattern of misconduct, multiple offenses, submission of false statements, and Respondent's substantial experience in the practice of law,

all support Judge Ellis' recommendation that the Respondent be permanently disbarred.

CONCLUSION

This Court has not hesitated to impose disbarment where there is clear and convincing evidence of misappropriation of trust funds. After a five-day final hearing, Judge Ellis issued a detailed Report of Referee finding by clear and convincing evidence that the Respondent misappropriated trust funds and engaged in other serious misconduct. This Court should therefore approve the Report of Referee, accept Judge Ellis' findings and recommendations, and permanently disbar the Respondent.

Respectfully submitted,

_____

DEBRA JOYCE DAVIS
Assistant Staff Counsel
The Florida Bar
Tampa Airport Marriott, Suite C-49
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 0093556

DAVID R. RISTOFF
7026 Little Road
New Port Richey, Florida 34654
(727) 842-9758
Florida Bar No. 0358576

TERRANCE E. SCHMIDT
1301 Riverplace Blvd., Suite 1818
Jacksonville, Florida 32207-9022
(904) 398-1818
Florida Bar No. 0165042

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Express Mail to **Honorable Thomas D. Hall, Clerk, Supreme Court of Florida ,** 500 South Duval Street, Tallahassee, Florida 32399; and true and correct copies were furnished by Express Mail to **Bruce Rogow and Beverly A. Pohl,** Counsel for Respondent at Broward Financial Centre, Suite 1930, 500 East Broward Boulevard, Fort Lauderdale, Florida 33394; and by Express Mail to **Don Beverly,** Counsel for Respondent at 823 North Olive Avenue, West Palm Beach, Florida 33401; and by regular U.S. Mail to **David R. Ristoff,** 7026 Little Road, New Port Richey, Florida 34654; and by regular U.S. Mail to **Terrance E. Schmidt,** Suite 1818, 1301 Riverplace Boulevard, Jacksonville, Florida 32207-9022; and a copy to **John Anthony Boggs, Staff Counsel,** The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this ____ day of _____, 2001.

_____
DEBRA JOYCE DAVIS
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE

CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font, and the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Antivirus for Windows.

_____

DEBRA JOYCE DAVIS