IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LEE HOWARD GROSS,

Respondent.

______________________________/

Supreme Court Case Nos.
SC01-1403, SC01-2737,
SC02-1592, and SC03-210

The Florida Bar File Nos.
1999-71,301(11M), 2000-70,390(11M),
2001-70,681(11M), 2002-71,060(11M),
2002-70,081(11M), and 2002-70,374(11M)

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

The trial transcript will be referred to as "TR1, TR2, or TR3" depending on whether reference is made to the May 19, 2003, June 24, 2003 or June 26, 2003 Final Hearing, followed by the referenced page number(s). (TR1 __).

The Amended Report of Referee shall be referred to as (ARR ___).

STATEMENT OF THE CASE AND OF THE FACTS

Respondent's listing of the facts in the initial brief was insufficient. His presentation was unbalanced as he spent an inordinate amount of time arguing mitigating evidence rather than presenting the details of the misconduct that brought him before this Court. Accordingly, it is necessary to elaborate to provide a more complete and accurate reflection of the record and to gain a full appreciation of the gravity of the misconduct in these cases.

Supreme Court Case No. SC01-1403
The Florida Bar File Nos. 1999-71,301(11M) and 2000-70,390(11M)

Between 1995 - 2000, Respondent misappropriated the funds of twelve (12) clients in an amount in excess of $94,000. During this time period, Respondent paid previous liabilities with recent deposits, similar in nature to a "ponzi scheme".

On or about September 17, 1999, a subpoena duces tecum was duly executed and served upon Respondent requiring Respondent to produce trust account records and client files. Respondent failed to produce all required bank statements, canceled checks, deposit slips, the required receipt and disbursement journal, any client ledger card or the bank and client reconciliation. Respondent failed to maintain the trust account records required by the Rules Regulating Trust Accounts and failed to perform the required trust account procedures as set forth in the Rules Regulating Trust accounts.

Based upon The Florida Bar's audit of Respondent's three (3) trust accounts between September 1, 1995 and January 31, 2000, it was determined that Respondent deposited personal funds together with client funds in the trust accounts. The Florida Bar's audit further revealed that Respondent paid for personal matters such as office supplies, telephone bills, employee salaries, rent, furniture, and food from Respondent's trust accounts. **ARR 2-4; 8-9**.

Additionally, on September 19, 2001, the Referee orally issued an Order Deeming Matters Admitted due to Respondent's failure to provide a timely

response to the Bar's Request for Admissions. Subsequently, this Order was set aside due to agreement between the Bar and Respondent. On April 25, 2002, this Court issued a written Order to Compel for Respondent's failure to provide complete Answers to the Bar's Request for Production and Interrogatories in SC01-1403. On May 14, 2002, the Referee issued a 2nd written Order to Compel for Respondent's continuing failure to provide complete Answers to Request for Production and Interrogatories in SC01-1403. **TR3 145-146**.

Supreme Court Case No. SC01-2737
The Florida Bar File No. 2001-70,681(11M)

On or about August 17, 1998, Arturo Dominguez retained Respondent, on behalf of Arpechi Windows, Inc. (hereinafter "Arpechi"), to defend Arpechi in a civil action filed against them by Aries Insurance Company (hereinafter "Aries"). On or about September 1, 1999, Aries filed a Notice of Non-Jury Trial for September 10, 1999 at 11:15 a.m. Respondent failed to appear for the trial set for September 10, 1999 and did not file a motion for continuance or otherwise provide notice to the court or opposing counsel as to the reason for his absence.

On or about September 10, 1999, the court issued a final judgment in favor of Aries in the amount of $4,598.00. Respondent did not notify Mr. Dominguez, or any other representative(s) of Arpechi, about the September 10, 1999 trial date or

about the final judgment entered against Arpechi.

On or about August 10, 2000, a writ of execution was filed by Aries against Arpechi. On or about August 11, 2000, Arpechi remitted $7,500.00 to Aries, and/or it's assignee, to satisfy the aforementioned judgment. **ARR 4-5; 9.**

Supreme Court Case No. SC02-1592
The Florida Bar File No. 2002-71,060(11M)

On or about July 24, 1998, Respondent deposited into his trust account a check from the Law Offices of George L. Garcia, PA, Interest on Trust Account, in the amount of $17,000.00, payable to Lee Gross, P.A. Trust Account. Mr. Garcia identified this disbursement as "Loan for Taxes". Respondent identified this deposit as a loan from Mr. Garcia.

On or about June 13, 1998, Respondent executed a Uniform Residential Loan Application in which he requested a loan in the amount of $265,000.00 for the purpose of purchasing a property in the amount of $295,000.00. In the application, Respondent indicated that George Garcia PA., was holding $30,000.00 as a cash deposit towards the purchase of the property.

The Settlement Statement for the transaction was dated July 22, 1998 and George Garcia, Esquire was the settlement agent. The Settlement Statement reflected, among other things, that the principal amount of the new loan was

$250,750.00; the payoff of the first mortgage loan was $229,741.06; the deposit of earnest money was $35,000.00; the cash from borrower was $18,171.76; the cash to seller was $28,627.56; and the broker in this transaction, AIG Capital Corp., was due $7,522.50.

The proceeds of the loan in the amount of $254,286.19 from One Stop Mortgage Inc. were transferred to Mr. Garcia's trust account on July 23, 1998. The only funds in Mr. Garcia's trust account pertaining to this transaction were the $254,286.19 from the lender. The deposit did not exist and there was no cash from the borrower. The sellers listed in the Settlement Statement, Luis & Lisset Diaz, had no idea that their names had been used to perpetrate this fraud. The $254,286.19 was disbursed and Respondent received $17,000.00 of these funds.

On or about July 22, 1998, Respondent executed an Adjustable Rate Note in which he promised to pay the $250,750.00 plus interest to the lender and agreed to make payments every month in the amount of $2,427.82 beginning on September 1, 1998. Respondent failed to make the required payments on the note and on or about January 13, 1999, Aames Capital Corporation filed a complaint to foreclose the property (One Stop Mortgage assigned the mortgage to Aames.).

On or about February 9, 1999, Respondent filed a Motion To Dismiss Complaint and Lis Pendens. On or about March 4, 1999, the Court denied

Respondent's Motion To Dismiss Complaint and Lis Pendens and gave Respondent fifteen (15) days to file an answer to the complaint. On or about March 29, 1999, Respondent filed his Answer to the complaint denying each and every allegation of the complaint and also filed Defendant's First Set of Interrogatories.

Respondent used his skills as an attorney in order to delay the foreclosure and to benefit from it. The property was finally sold on June 1, 1999, to the mortgage holder, Aames Capital Corporation, who obtained a judgment against Respondent in the amount of $275,248.45.

As a result of the transaction, Respondent netted $17,000.00 and the use of the house for almost a year. The $17,000.00 that Respondent received from the transaction was used by him to pay his client, Lavanie Scott, from whom Respondent had previously misappropriated funds.

Subsequent to the mortgage fraud transaction, Respondent opened up a title company with, and accelerated the amount of real estate transactions he engaged in with suspended attorney, George Garcia, knowing that Mr. Garcia was the settlement agent of the previous fraudulent transaction. Furthermore, upon being subpoenaed in September 1999, by The Florida Bar to produce documents from any and all trust accounts in which he had signatory capacity, Respondent failed to

reveal the existence of a trust account from which a number of these transactions emanated. **TR3 28-29.**

On or about April 5, 2002, a subpoena duces tecum was duly executed and served upon Respondent commanding his presence at the office of The Florida Bar to testify and produce bank account records on April 23, 2002.

In addition, on or about April 5, 2002, another subpoena duces tecum was duly executed and served upon Respondent commanding him to testify and produce client files.

Respondent failed to appear on April 23, 2002 and failed to produce any records or communicate with The Florida Bar.

On April 26, 2002, Respondent delivered to The Florida Bar some bank account records but failed to produce all the bank statements and canceled checks and did not produce any deposit slips, wire transfers, receipt and disbursement journals, client ledger cards, bank and client reconciliations, settlement statements or client files. **ARR 6-8; 10-11.**

Supreme Court Case No. SC03-210

The Florida Bar File No. 2002-70,081(11M)

Respondent was retained to represent Vladimir Kolychkine (hereinafter "Kolychkine") in a criminal matter.

On or about March 17, 2001, Respondent informed Kolychkine's girlfriend, Tracey A. Bailey (hereinafter "Bailey"), that he filed Kolychkine's Motion for Transportation to Broward County in two (2) criminal cases. Respondent also informed Bailey that Judge Rosenberg had signed the orders granting Kolychkine's Motion for Transportation to Broward County in open court on March 26, 2001. On or about April 23, 2001, Bailey went to Respondent's office and picked up copies of the two (2) signed Orders Granting Kolychkine's Motion for Transportation to Broward County in the aforesaid cases.

The court records reflected that neither case was on the docket for March 26, 2001, and the court files did not contain these signed court orders. Additionally, Judge Rosenberg confirmed that he did not sign said orders. Subsequently, at the final hearing on June 26, 2003, Respondent finally admitted that "I forged the judge's signature on both of those orders." **ARR 5-6; 9-10.**

The Florida Bar File No. 2002-70,374(11M)

In or around 1998, Tonya Sheets (hereinafter "Sheets") retained Respondent to represent her in two (2) criminal traffic cases, one in Lake County and the other in Osceola County. Respondent advised Sheets that he would charge her $7,500.00, in total, to represent her in the two cases. In January and May of 1998, Sheets' grandmother, Blanche Duffy, paid Respondent with two (2) checks totaling

$7,500.00 to represent Sheets in the aforesaid cases. Respondent failed to make a required court appearance in the Lake County case resulting in the court issuing an order to show cause.

On or about March 27, 1998, Respondent deposited a check from an insurance company made payable to Respondent and Sheets in the amount of $7,016.80 in his trust account which purportedly included Sheets' endorsement on the check. Respondent forged and/or was responsible for the forgery of Sheets' signature on said check. Respondent never notified Sheets that he had received the check. The proceeds of said check were solely for the benefit of Sheets due to an insurance settlement related to the Lake County case.

At the final hearing on May 19, 2003, Respondent finally admitted that he forged Sheets' signature on a written plea of guilty in the Lake County case. Respondent never informed Sheets that he had entered such a plea on her behalf. Subsequently, Ms. Sheets spent time in jail partially due to Respondent's actions. **TR1 84**.

On or about October 5, 2000, Respondent met with Sheets at her place of employment. Prior to Respondent's October 5, 2000 meeting with Sheets, an audit had been conducted by The Florida Bar's branch auditor who determined that Respondent used the entire proceeds of the aforementioned 1998 insurance

settlement check to satisfy personal and/or business obligations unrelated to Sheets. Prior to said meeting, The Florida Bar's branch auditor asked Respondent to provide evidence to justify his use of the 1998 insurance settlement proceeds. During the meeting, Sheets signed a retroactive "affidavit and authorization" which was notarized, authorizing Respondent to keep the proceeds from the aforementioned 1998 insurance settlement.

Also, at the meeting, Respondent and Sheets both signed an agreement entitled "Tonya Sheets Retain At No Cost Lee Gross..." setting out various work that Respondent agreed to perform for Sheets related to the aforesaid Lake County and Osceola County cases and additionally Sheets' car/credit problems. Said agreement noted that all costs "has been paid or has been waived by attorney". Respondent agreed to perform the services in "Tonya Sheets Retain At No Cost Lee Gross..." as an incentive for Sheets to sign the aforementioned retroactive "affidavit and authorization" in order to justify his use of the proceeds of the 1998 insurance settlement check that Respondent used for personal and/or business obligations unrelated to Sheets. Respondent failed to provide any services as he agreed to in "Tonya Sheets Retain At No Cost Lee Gross..." **ARR 5-6; 9-10.**

Mitigation Aspect

As noted in Respondent's initial brief, Respondent called a number of

witnesses at the final hearing to testify as to his substance abuse issues. Respondent has summed up the testimony of many of these witnesses. The Bar takes issue with some of these summations.

Contrary to Respondent's claims, neither Dr. Evan Zimmer nor Dr. Janice Wilmoth directly linked the misconduct which occurred in the subject Bar complaints with his substance abuse issues. Dr. Zimmer could not definitively say that Respondent's mental condition at the time he was actively using drugs and alcohol directly caused him to engage in the misconduct. **TR2 97.** As to Dr. Wilmoth, Respondent stretched the truth by claiming that Dr. Wilmoth found a direct correlation between his alcoholism and drug abuse and his misconduct. The pertinent question posed to Dr. Wilmoth and her answer are as follows:

> "Q. Would you consider that there is a correlation between the abuse of substances and some of the problems that he is experiencing in his life?
>
> A. Yes."

Additionally, neither Dr. Zimmer nor Dr. Wilmoth could testify as to the duration of Respondent's substance abuse. **TR2 105 and 151.**

Dr. Zimmer expressed his displeasure with Respondent's course of treatment when he testified, "I felt the fellow I was seeing in my office a year later

was an untreated addict and alcoholic at an early stage of abstinence and still had a long way to go..." **TR2 46.** Dr. Zimmer felt that it was very important that Respondent enter residential treatment. Respondent, however, balked at the idea of entering residential treatment when he initially contacted Florida Lawyer's Assistance, Inc. ("FLA"). **TR2 47 and TR3 82-83.** Furthermore, when asked to evaluate Respondent's chances of recovery within a reasonable degree of medical certainty, Dr. Zimmer testified, "I don't know what his chances are." **TR2 116.**

Throughout these proceedings, Respondent's candor has always been in question. When Respondent initially met with Dr. Wilmoth, he was not candid with her regarding payment of restitution to the clients he harmed. **TR2 146.** Additionally, when Respondent met with Dr. Zimmer approximately a year after first contacting FLA, he was not candid with him as Respondent advised that he did not forge the judge's signature. **TR2 74.** Both Dr. Zimmer and Dr. Wilmoth acknowledged that individuals who are in the early stages of recovery, like Respondent, have a tendency to be untruthful. **TR2 112 and 147.** Furthermore, neither Dr. Zimmer nor Dr. Wilmoth contacted outside corroborative sources or conducted any testing to evaluate the veracity of Respondent's claims **TR2 105, 106, and 150.**

As to compliance with his FLA contract, both Myer Cohen the Executive

Director of FLA and the Honorable Benjamin Usher, Respondent's monitor, testified that Respondent had violated his contract by not making a required formal contact in August 2002. **TR1 123-124 and 164-165.**

Additionally, in his initial brief, Respondent highlighted testimony reflecting that his drug problem escalated from 1995 until he was emergency suspended in May, 2002 and that he had difficulty functioning as an attorney. However, attorney Ari Mendelson worked for Respondent from approximately August 1999 - 2002 and he testified, "I saw Mr. Gross practice for quite a while and he was very successful in winning his cases for his clients." **TR1 129, 138 and 140.** Additionally, The Florida Bar's exhibit "10" in evidence, included a transcript of a court proceeding in November 2001, wherein the presiding judge commended Respondent on the effectiveness of his representation.

Finally, Respondent contends that the original and amended reports of referee did not even acknowledge the issue of addiction as a mitigating factor. A review of subsection IV (C) (D) and (E) and the second footnote of the Amended Report of Referee, clearly shows that the Referee considered Respondent's substance abuse issues in the process of making his decision. **ARR 12 -14.**

SUMMARY OF THE ARGUMENT

Respondent has not established that the Referee erred by recommending a five (5) year disbarment. The Referee's finding of a five (5) year disbarment is consistent with and in keeping with existing case law for similar fraudulent conduct. Respondent has provided evidence of abuse of drugs and alcohol, but did not provide clear and convincing evidence that it was the direct cause of his misconduct. Additionally, Respondent was unable to establish the duration of his

alcohol and drug abuse, and Dr. Zimmer testified at the final hearing that he was less than pleased with Respondent's course of treatment. Furthermore, the recommendation of disbarment is not in violation of the Americans with Disabilities Act pursuant to 42 U.S.C. section 12131. The Referee's findings of fact, including all mitigation and aggravation, are supported in the record and should not be disturbed by this Court. Accordingly, this Court should approve the Amended Report of Referee and impose at least a five (5) year disbarment.

ARGUMENT

Respondent has not established that the referee erred by recommending a five (5) year disbarment. Pursuant to Rule 3-7.7(c)(5) of the Rules Regulating The Florida Bar, "...the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful, or unjustified." This Court will not interfere with the discipline recommended by the referee if there is a reasonable basis in case law. See, Florida Bar v. Temmer, 753 So. 2d 555 (Fla. 1999).

The basic guidelines for determining appropriate discipline have been reiterated in case law numerous times. Those guidelines are (1) the judgment must be fair to society; (2) it must be fair to the attorney; and (3) it must sufficiently deter other attorneys from engaging in similar misconduct. The Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995).

Respondent presents the following issues in his initial brief:

1. Did Respondent's addiction rise to a level such that it is sufficient mitigation to overcome the presumption of disbarment for his substantial and egregious acts of misconduct?

2. Should the Amended Report of Referee be disapproved due to the fact it is clearly erroneous as a result of the Referee's failure to make

findings of fact and conduct an analysis regarding Respondent's addiction and rehabilitation as mitigation?

3. Does the disbarment of the Respondent violate the Americans with Disabilities Act pursuant to 42 U.S.C. section 12131?

4. Is the Respondent entitled to mitigation that overcomes the presumption of disbarment such that the appropriate discipline is a long term suspension?

In sum, Respondent's four (4) issues really boil down to the following:

> Did Respondent produce enough mitigation evidence to overcome the presumption of disbarment for the enormous amount of misconduct which occurred in the subject cases?

The remaining portions of this answer brief will examine the Florida Standards for Imposing Lawyer Sanctions and case law in the context of the cases at hand. In the process, it will address Respondent's issues and refute his contentions and clearly establish that at least a five (5) year disbarment should be imposed by this Court.

Florida Standards for Imposing Lawyer Sanctions

The Florida Standards for Imposing Lawyer Sanctions ("Standards") was drafted by the Board of Governors of The Florida Bar to assist in the determination

of the appropriate discipline in Bar disciplinary matters. Accordingly, there are numerous sections contained in the Standards that direct disbarment which individually support the Referee's findings and conclusions in the immediate proceeding including:

> 4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.
>
> 4.41 Disbarment is appropriate when:
> (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
> (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.
>
> 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 to the client.
>
> 5.11 Disbarment is appropriate when:
> (b) 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; or
> (f) 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.
>
> 6.11 Disbarment is appropriate when a lawyer:
> (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
>
> 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.

In addition, there are a number of applicable aggravating factors, as set forth in the Florida Standards for Imposing Lawyer Sanctions, which support the Referee's findings and conclusions in the immediate proceeding including:

A. 9.22(a) - prior disciplinary offenses;
On September 14, 2000 in Supreme Court case no. SC00-1573, Respondent was suspended for noncompliance with a Bar subpoena issued in September 1999 requesting his appearance and production of any and all trust account records. Said suspension was subsequently set aside on October 24, 2000, after Respondent produced documents verifying the sources of funds received by him and the reasons for payments from his trust account. It is important to note that, subsequently, the Bar discovered that Respondent failed to reveal the existence of one (1) of his trust accounts and in fact never complied with said subpoena. **TR3 28 and 29.** Also, on May 21, 2002 in Supreme Court case no. SC02-925, the Supreme Court issued an emergency suspension of Respondent due to much of the same misconduct before this Court.

B. 9.22(b) - dishonest or selfish motive;

Respondent's numerous cases are replete with misrepresentations due to selfish motivations.

C. 9.22(c) - a pattern of misconduct;

Respondent's cases contain numerous instances of fraud, theft, and misrepresentation over a period of seven (7) years.

D. 9.22(d) - multiple offenses;

Respondent’s cases involve numerous instances of trust account theft, forgeries, mortgage fraud, and serious client neglect.

E. 9.22(e) - bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

As noted above, the Supreme Court entered a suspension order due to Respondent’s failure to comply with a trust account subpoena. Additionally, the Bar issued subsequent subpoenas and Respondent failed to comply with any of them. **TR3 49.** Also, in case no. SC01-1403, the Referee orally issued an Order Deeming Matters Admitted due to Respondent’s failure to provide a timely response to the Bar’s Request for Admissions (this order was subsequently set aside due to agreement between the Bar and Respondent). Additionally, in case no. SC01-1403, the Referee had to issue two (2) written orders to compel due to Respondent’s continuing failure to provide complete answers to the Bar’s Request for Production and Interrogatories. Finally, as noted above, the Supreme Court entered an emergency suspension order due to much of the same misconduct before this Court.

F. 9.22(f) - submission of false evidence;

As noted above, the Bar discovered that Respondent failed to reveal one (1) of his trust accounts that existed during the subject time period for which the Bar issued a subpoena duces tecum requesting any and all trust account records. Additionally, Respondent has represented that no client suffered harm when in fact restitution has not been paid in full to all clients.

G. 9.22(h) - vulnerability of victim;

Respondent entered a written plea of guilty to a criminal offense on behalf of client, Tonya Sheets without notifying her (See The Florida Bar’s Exhibit “2"). Subsequently, Ms. Sheets spent time in jail partially due to Respondent’s actions. **TR1 84.**

H. 12.1(b) - Actual harm to clients or third parties;

Respondent has failed to make restitution in full to all clients, and as noted above, Ms. Sheets spent time in jail partially due to Respondent's actions.

Respondent has offered the following mitigating factors from the Florida Standards for Imposing Lawyer Sanctions:

A. 9.32(h) - physical or mental disability or impairment;
Respondent has provided evidence of abuse of drugs and alcohol, but did not provide clear and convincing evidence that it was the direct cause of his misconduct. **TR2 97.**

B. 9.32(j) - interim rehabilitation;

While Respondent presented testimony that he has been making progress, Dr. Evan Zimmer has been less than pleased with Respondent's course of recovery. **TR2 46.**

3) 9.32(l) - remorse;

Upon being emergency suspended, Respondent had no other choice than to be remorseful.

Cases in Support of Disbarment

In The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990), this Court disbarred Shuminer for misappropriating approximately twenty thousand dollars ($20,000.00) in client funds. The Court acknowledged Shuminer's extensive mitigation including:

1) Testimony of an M.D. who was a board certified Addictionologist who diagnosed Shuminer as chemically dependent on alcohol and cocaine at the time of his violations. Additionally, it was evidenced that Shuminer was a drug abuser since he was ten (10) years old. The doctor testified that he had been supervising Shuminer's medical care which consisted of detoxification, voluntary long term treatment including in-hospital extended treatment, supervised by FLA, and his participation in Alcoholic's Anonymous and Narcotics Anonymous. The doctor testified that addiction was the cause of Shuminer's disciplinary violations and that his prognosis for recovery was excellent.

2) The Staff Attorney for FLA testified that Shuminer was under contract with them, that they have been supervising him and that he was in full compliance. The program included: random drug testing, professional support groups, and Narcotics and Alcoholics Anonymous.

3) Two (2) Miami-Dade County Circuit Court Judges testified that Shuminer was an excellent attorney of good moral character.

4) Shuminer had no prior discipline.

5) He had great personal and emotional problems including his disease of addiction, his impairment, and family and other problems.

6) Shuminer made a timely and good faith effort at restitution to all his

clients. He still owed money to two (2) doctors, but he had arranged a plan of repayment.

7) Cooperation with the Bar in that Shuminer waived the requirement of a probable cause finding by the grievance committee and entered into an unconditional guilty plea in the Bar proceeding.

8) His inexperience in the practice of law (a total of one (1) year).

9) He was clearly mentally impaired due to his addiction.

10) He was seriously, productively, and successfully involved in rehabilitation for over one (1) year.

11) The referee found him to be genuinely remorseful.

In finding disbarment, this Court determined that Shuminer failed to establish that his addictions rose to a sufficient level of impairment to outweigh the seriousness of his offenses. This Court noted that Shuminer continued to work effectively during the period at issue and that he used a portion of the funds (approximately five thousand dollars ($5,000.00)) to purchase an automobile.

In comparison, the case at hand contains a substantially greater amount of misappropriation of client funds, for a significantly longer duration, involving many more clients, in conjunction with other violations including forgeries, serious neglect, and mortgage fraud, which on their own would warrant disbarment.

Furthermore, Respondent has failed to provide mitigating evidence to equal that of Shuminer as noted:

1. Neither Dr. Evan Zimmer nor Dr. Wilmoth could directly link Respondent's misconduct with his substance abuse.

2. Respondent declined to participate in residential treatment when it was recommended to him.

3. Neither Dr. Zimmer nor Dr. Wilmoth could testify as to the duration of Respondent's substance abuse.

4. Dr. Zimmer clearly expressed displeasure with Respondent's course of treatment.

5. Respondent was not candid in representations he made to Dr. Wilmoth and Dr. Zimmer.

6. Respondent was not in full compliance with his FLA contract.

7. Respondent has a prior disciplinary history.

While Respondent has claimed that his substance abuse issues were long standing, and that as time wore on, they prevented him from being able to adequately function as an attorney, he supplied contradictory evidence during the discovery process in Supreme Court case no. SC02-1592. On September 4, 2002, Respondent submitted his Amended Answers to The Florida Bar's First Set of

Interrogatories (The Florida Bar's exhibit "10" in evidence). As an attachment to said Amended Answers, Respondent included a transcript from a court proceeding in November 6, 2001 wherein the presiding judge commended Respondent on the effectiveness of his representation. By supplying this information, Respondent was "trying to have his cake and eat it too". Respondent is, in effect, arguing "selective impairment". When it benefits him, Respondent will conveniently argue that he had moments of brilliance during the turmoil. Unfortunately for Respondent, the evidence reveals, like Shuminer, he continued to work effectively during the period at issue. The testimony of Ari Mendelson further supports this position that Respondent continued to work effectively. Mr. Mendelson first met Respondent in August of 1999 and testified at the final hearing, "I saw Mr. Gross practice for quite a while and he was very successful in winning his cases for his clients. I thought in terms of winning his client's cases, he was more than competent." **TR1 140**.

When you compare Respondent's cases in their totality to Shuminer, one can only conclude that disbarment is the appropriate sanction for Respondent.

In The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989), this Court held that unauthorized removal of substantial sums of estate warrants disbarment, notwithstanding alcoholism defense. In Golub, the attorney misappropriated approximately twenty-three thousand six hundred eight dollars ($23,608.00) from

one client's estate funds. The misappropriation occurred over a three (3) year time frame and the funds were not replaced. Golub stipulated to the facts and waived a finding of probable cause. Golub argued his extreme alcoholism, his cooperation in the Bar proceedings, his voluntary self-imposed suspension since 1986,and the absence of any prior disciplinary record in mitigation. This Court determined that since Golub's misappropriation occurred over an extended period of time, he betrayed the client's trust, and he failed to repay the subject monies, disbarment was appropriate.

Once again, in the case at hand, the amount misappropriated was substantially greater, occurred for a period approximately twice as long as the misappropriation in Golub, and involved numerous clients, unlike Golub. Additionally, while Respondent may have repaid most of his clients, in many cases the repayment did not occur for a significant period of time. Also, Respondent failed to evidence that he made complete restitution to Dr. Frederick N. Herman
(Supreme Court Case No. SC01-1403) and Tanya Sheets (Supreme Court Case No. SC03-210). Respondent stipulated that he misappropriated thirty thousand one hundred eighty-five dollars and ninety-two cents ($30, 185.92) in client funds of Dr. Herman. **ARR 2**. At the final hearing, Respondent testified that he still had not made full repayment to Dr. Herman, over seven (7) years later. **TR3 99**.

Additionally, Respondent stipulated that he misappropriated seven thousand sixteen dollars and eighty cents ($7,016.80) in client funds from Ms. Sheets. **ARR 5**.

Once again, when you look at the totality of the circumstances, and consider that Respondent engaged in numerous other violations that were not part of the Golub case, that he was not cooperative in the Bar proceedings, that he has a prior disciplinary record, disbarment is the only reasonable discipline for Respondent's cases.

In The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988), this Court held that attorney's theft of client funds, which resulted through the use of fraud on the court, warranted disbarment regardless of the mitigating factors. Roman forged, caused to be forged, or assisted in the forging of an affidavit pertaining to an estate matter to cover a misrepresentation he made in a previous filing. Subsequently, Roman filed the forged affidavit along with other documents with the intent to deceive the court. The court was deceived by Roman's actions and as a result Roman was able to take possession of assets of the estate and convert them to his own use. Roman waived the requirement of a probable cause finding by the grievance committee and admitted to the allegations in the Bar's complaint. In mitigation, this Court considered that Roman had no prior disciplinary history, that at the time of the misconduct in this case, he was suffering from an acute anxiety reaction stemming

from severe domestic turmoil and was engaged in extensive psychotherapy. Moreover, although Roman was cooperative in the Bar proceedings, pled no contest to grand theft in criminal proceedings related to this misconduct, and made restitution, the Court concluded that, "This case involves not only theft, but fraud on the court which strikes at the very heart of a lawyer's ethical responsibility. Either offense is sufficiently grave to justify disbarment." Roman at 62.

In The Florida Bar v. Rodriguez, 489 So.2d 726 (Fla. 1986), this Court held that conversion of client funds and admitted commingling of clients' moneys warrants disbarment. It was determined that Rodriguez misappropriated three thousand two hundred fifty dollars ($3,250.00) in client funds. Further, he admitted he had used other clients' funds for his own personal use and paid them back. This Court found that Rodriguez had financial, alcohol and matrimonial problems. Additionally, there was testimony that Rodriguez had stopped drinking and started to rehabilitate himself.

In The Florida Bar v. Hardman, 516 So.2d 262 (Fla. 1987), this Court held that attorney's misconduct, including failure to disburse entrusted funds at the agreed time, failure to pay lawyer he had do work for client after attorney received fee from client, failure to attend defense of civil suit (resulting in entry of default judgment), failure to perform agreed legal services or refund entire amount of fees

received, and improper receipt of more than twelve thousand dollars ($12,000.00) in funds while he was employed as director of local development council warrants disbarment. This Court disbarred Hardman in spite of his attempts to rehabilitate his chemical dependency.

In The Florida Bar v. Setien, 530 So.2d 298 (Fla. 1988), this Court held that attorney's neglect of client matters, issuance of bad checks, and failure to notify clients of abandonment of law practice warranted disbarment. Setien stipulated to the facts at the final hearing. Setien argued that the referee ignored mitigation which included no prior disciplinary history, his drug and alcohol dependency (from which he is said to be recovering), his distinguished service as a police officer prior to becoming a lawyer, and his alleged lack of a dishonest or selfish motive (his apparent dishonesty being explained as a symptom of his addiction). This Court determined that many of Setien's allegations in mitigation explain his behavior, but they do not excuse it, and further noted that the referee either rejected this information or chose not to consider it sufficient when compared with the misconduct involved.

In The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991), this Court held that violating trust account record-keeping requirements, retaining interest on trust accounts for personal use, misappropriating funds, and causing shortages in trust

accounts warrants disbarment. Shanzer admitted to the allegations in an unconditional guilty plea, leaving only the question of discipline before the referee. In mitigation, Shanzer argued that his misconduct only occurred over a period of nine (9) months, he had fully cooperated with the Bar, was remorseful, was suffering from depression due to marital and economic problems during the term of his misconduct, and had obtained rehabilitation and paid restitution. In spite of the above, this Court found disbarment was the appropriate sanction.

In The Florida Bar v. Prevatt, 609 So.2d 37 (Fla. 1992), this Court held that use of client's funds as attorney's own and failure to repay the funds for over ten years warrants five (5) years' disbarment. Prevatt misappropriated one (1) client's funds through use of a power of attorney and joint savings account signature authorization in favor of Prevatt. Prevatt removed said client's funds for himself and for the use of his friends in the total amount of approximately thirty-nine thousand five hundred seventy-eight dollars ($39,578.00). Some of the loans remained unpaid until settlement was had in resolution of a civil suit over ten (10) years later. Disbarment was considered the appropriate sanction even though Prevatt offered his alcoholism in mitigation.

In The Florida Bar v. Travis, 765 So.2d 689 (Fla. 2000), this Court disbarred Travis for misappropriating approximately thirty-five thousand eight hundred fifty

dollars ($35,850.00) in client funds. Travis admitted to the Bar's charge in his Answer to the Complaint and the referee entered a summary judgment as to Travis' guilt. Subsequently, a hearing was held solely to determine the appropriate discipline. At the time of the final hearing, Travis had not returned the money and had not told his clients money was owed to them. Additionally, it was determined that Travis had made a payment from his trust account to his daughter for a trip. In mitigation, Travis had many witnesses testify on his behalf, including three (3) circuit court judges and several attorneys, regarding his character and fitness to practice law. Travis also produced witnesses who testified to his contribution to the legal profession and his community during his twenty-eight (28) year legal career. Finally, Travis' psychiatrist testified that he was suffering from depression during the subject period. In mitigation, the referee found that Travis had no disciplinary history, he had experienced personal or emotional problems, he cooperated during the proceedings, he provided twenty-eight (28) years of exceptional service to the profession of law and the community, and he served indigent clients for many years and established legal services for the poor. This Court noted, "In cases involving isolated incidents of misappropriation, this Court has found the presumption of disbarment rebutted when mitigation such as cooperation, restitution, and the absence of a past disciplinary record exist. See, Florida Bar v. Thomas, 698 So.2d

530 (Fla. 1997). Although these factors are necessary, they do not, in and of themselves serve to overcome the presumption of disbarment." Travis at 691. This Court noted that while Travis did not make restitution when he apparently could have, he since has begun to make restitution.

There are a substantial number of other cases where this Court has disbarred attorneys for misappropriation of funds notwithstanding the mitigating evidence presented .[1]

There are further misappropriation cases of varying amounts that support the position of disbarment for such offenses.[2]

Considering that Respondent engaged in misconduct that extends well beyond his initial misappropriation of client funds, it is worth noting other cases that address misdeeds similar to that of Respondent.

In The Florida Bar v. Gold, 203 So.2d 324 (Fla. 1967), this Court held that

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[1]The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986); The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992); The Florida Bar v. Simring, 612 So. 2d 561 (Fla. 1993); The Florida Bar v. Nunn, 596 So. 2d 1053 (Fla. 1992); The Florida Bar v. Maynard, 672 So. 2d 530 (Fla. 1996); The Florida Bar v. Benchimol, 681 So. 2d 663 (Fla. 1996); The Florida Bar v. Korones, 752 So. 2d 586 (Fla. 2000).

[2]The Florida Bar v. Mims, 532 So. 2d 671 (Fla 1988); The Florida Bar v. Gillis, 527 So. 2d 818 (Fla. 1988); The Florida Bar v. Porter, 684 So. 2d 810 (Fla. 1996); The Florida Bar v. Dubow, 636 So. 2d 1287 (Fla. 1994); The Florida Bar v. Weinstein, 635 So. 2d 21 (Fla. 1994); The Florida Bar v. Simons, 521 So. 2d 1089 (Fla. 1988); The Florida Bar v. Baker, 419 So. 2d 1054 (Fla. 1982).

forging names to satisfaction of mortgage, witnessing and causing another to witness forgery, taking acknowledgment and causing forgery to be recorded in public records of county, and converting funds justifies disbarment. This Court noted that Gold made partial restitution of the funds he misappropriated, which totaled approximately, $11,000.

In The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990), this Court held that forging client's signature on will and submitting same for probate, and resulting criminal convictions, warrant disbarment for five years, notwithstanding absence of dishonest or selfish motive. This Court acknowledged the referee's finding of substantial mitigation, including absence of a dishonest or selfish motive, a cooperative attitude, good character and reputation, remorse, and imposition of criminal penalties.

In The Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995), this Court held that disbarment was appropriate in a case involving misappropriation of two (2) clients' funds and that it did not violate Americans with Disabilities Act (ADA) despite attorney's alleged disability of bipolar mental condition, as referee's findings indicated that condition did not directly cause misconduct. As noted previously, Dr. Zimmer testified that he could not definitively say that Respondent's mental condition was the direct cause of Respondent's misconduct. **TR2 97**.

Accordingly, like Clement, Respondent's disbarment would not violate the ADA. In Respondent's initial brief, he unsuccessfully attempted to distinguish Clement from the case at bar by noting that Clement was suspended whereas Respondent received a recommendation of disbarment. Obviously, Respondent is mistaken as this Court did in fact disbar Clement.

Respondent's Cases

Respondent has cited various cases in his initial brief to support his position that a suspension and not disbarment is an appropriate disposition of his cases. The cases Respondent cited, however, do not track the totality of Respondent's numerous violations over an extended period of time. Upon review of all the cases cited by Respondent, there is not one case which encompasses all of the violations which are involved in Respondent's numerous cases including: 1) trust account theft in excess of $100,000; 2) serious neglect resulting in a client having to pay a judgment of $7,500; 3) forgeries of a client's signature (on check and written plea agreement) and of a judge's signature (on two (2) orders); and 4) mortgage fraud resulting in Respondent getting $17,000.00 and the use of a home for approximately one (1) year.

In The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987), the attorney pled nolo contendere to delivery of cocaine to a minor and possession of cocaine. This Court

held that a three (3) year suspension would be appropriate since the attorney had no prior disciplinary history, no clients were injured, misconduct was directly related to drug addiction, the attorney made efforts to rid himself of chemical dependency, and attorney was candid in accepting responsibility for his actions. Respondent's cases involve a litany of violations that are directly connected with his practice of law. Unlike Jahn, numerous clients were harmed significantly by Respondent's transgressions, Respondent was not candid in timely accepting responsibility for his actions, Respondent has a prior disciplinary history, and neither Dr. Zimmer nor Dr. Wilmoth could definitively say that Respondent's mental condition at the time he was actively using drugs and alcohol directly caused him to engage in the misconduct.

In The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991), the attorney received a three (3) year suspension for misappropriating approximately twenty-seven thousand dollars ($27,000.00). In recommending a suspension rather than disbarment, this Court considered the fact that McShirley replaced the misappropriated funds prior to commencement of the Bar proceedings, no client was harmed, and McShirley had a cooperative attitude towards the Bar proceedings. Clearly, Respondent's misconduct was much more egregious than that of McShirley considering that Respondent's total misappropriation was greater in duration and

amount and involved several separate and distinct violations of the Rules Regulating The Florida Bar. Additionally, unlike McShirley, there was significant client harm and Respondent did not have a cooperative attitude during the Bar proceedings.

In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), Breed received a two (2) year suspension for misappropriating approximately seven thousand eight hundred sixteen dollars ($7,816.00) of client funds (where no client suffered any loss), commingling client funds with his personal funds, his engagement in a check-kiting scheme, and his failure to keep adequate records or to reconcile escrow accounts. The amount of misappropriated funds in Respondent's cases dwarfs that of Breed. Additionally, the gravity of the other violations committed by Respondent further distinguishes his cases from Breed.

In The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990), Farbstein received a three (3) year suspension for misappropriation of client funds, failure to comply with trust account procedures, neglect of legal matters, and failure to adequately communicate with clients. Farbstein's misappropriations occurred over one and a half to two (1 ½ - 2) years whereas Respondent's misappropriations spanned six (6) years and Respondent misappropriated a much greater amount than Farbstein. This Court found a number of mitigating factors in Farbstein including: 1) Farbstein successfully sought psychological and medical assistance for alcohol

and narcotics prior to the Bar proceedings; 2) he demonstrated exemplary adherence to ANON-ANEW and Alcoholics and Narcotics Anonymous; 3) he attained recovered status from his addictions and had extended a helping hand to other addicts; 4) his practice of law was not affected by the misconduct; 5) he suffered a serious accident when he was thirteen (13) that almost resulted in the loss of his hand which caused serious self esteem issues; 6) he provided complete restitution; 7) he cooperated with the Bar by readily turning over records and hiring a CPA to ensure strict compliance with trust accounting procedures; and 8) he has shown significant remorse. In the immediate case, Respondent's violations were more egregious and he has failed to provide comparable mitigating evidence to justify a three (3) year suspension like Farbstein.

In The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986), Rosen was suspended for three (3) years for receiving a federal felony conviction for knowingly and intentionally possessing cocaine with intent to distribute. This Court considered in mitigation that Rosen had overcome addiction and was no longer engaging in illegal drug use. Of great significance is the fact that Rosen concluded the practice of law prior to the arrest and conviction and there was no misappropriation or client harm involved.

In The Florida Bar v. O'Malley, 534 So.2d 1159 (Fla. 1988), this Court held

that removing collateral given for criminal defendant's bond from safety deposit box, refusing to deliver it to defendant's attorney after defendant's acquittal, and lying under oath at a deposition about wrongfully removing collateral from the safety deposit box warranted a three (3) year suspension. Evidence was presented that O'Malley had experienced marital difficulties at the time, and had a serious alcohol problem. At the time of the misconduct, O'Malley had only been practicing for two and a half (2 ½) years, and there was no evidence presented of actual financial loss to anyone.

In The Florida Bar v. Tauler, 775 So.2d 944 (Fla. 2000), Tauler was suspended for three (3) years for issuing $56,628.45 checks to herself from client trust funds and for using the funds to satisfy her personal and business obligations, which were unrelated to the clients for whom the funds were being held. Tauler replaced all of the client funds within nine (9) months of the initial misappropriation. Tauler engaged in a total of three (3) instances of misappropriations over a five (5) month time frame; this Court distinguished these isolated instances of misconduct from continuing patterns of misappropriation seen in other cases. The referee found in mitigation that Tauler was suffering from personal and emotional distress at the time of the misconduct. The Court determined that Tauler took responsibility for her actions by voluntarily stopping the practice of law and decided that "without the

unique mitigating circumstances presented in the instant case and Tauler's clear commitment to providing legal assistance to those in need, we would not hesitate to disbar Tauler." Tauler at 949.

In The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982), this Court held that where professional misconduct stems totally from the effects of alcohol abuse, failing to appear at continuation of trial, neglecting legal matters entrusted and failing to carry out contracts with clients merits suspension for 91 days. Clearly, the misconduct in Larkin is minuscule in comparison to that of Respondent's cases.

In The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986), this Court held that misappropriation of client funds, failure to comply with trust accounting procedures, and prior disciplinary history (private reprimand for neglecting legal matter) warrants one (1) year suspension, followed by two (2) years of probation. The misconduct involved Tunsil's misappropriation of ten thousand five hundred dollars ($10,500.00) of client funds and his issuance of a check to a subpoenaed witness that was dishonored for insufficient funds. This Court found that Tunsil had repaid the misappropriated funds and made good on the "bounced" check. Additionally, this Court considered Tunsil's cooperation with the Bar and the effect of his alcoholism in mitigation.

In The Florida Bar v. Hochman, 815 So.2d 624 (Fla. 2002), this Court issued

a three (3) year suspension for a felony conviction of two counts of grand theft *nunc pro tunc* to a prior three (3) year suspension from the Bar involving the same misconduct regarding misappropriation of client funds. In 1997, Hochman voluntarily came forward and entered into a consent judgment with the Bar for misappropriating client trust funds due to a significant drug addiction. As a result, the Supreme Court issued a three (3) year suspension. Subsequently, in 1999, Hochman entered a guilty plea to two (2) felony counts of grand theft for misconduct involving the same underlying misappropriation as that in the consent judgment he entered into with the Bar in 1997. As a result of the felony convictions, the Bar filed a Notice of Judgment of Guilt for a three year suspension. Accordingly, the referee issued a three (3) year suspension *nunc pro tunc* to the date Hochman entered his plea in criminal court (October 7, 1999). This Court modified the referee's recommendation in that a three (3) year suspension was issued *nunc pro tunc* to the effective date of the consent judgment case (July 28, 1997). This Court found that Hochman suffered from drug addiction and alcoholism for five (5) years, and thereafter, admitted himself into a facility for treatment; upon completing treatment voluntarily entered into a guilty plea and consent judgment with the Bar. Hochman was required to continue rehabilitation and make restitution. Additionally, this Court found that he had been complying

with the terms of his consent judgment and entered into a contract with FLA and was attending numerous support meetings with both FLA and Alcoholics Anonymous. This Court placed a great deal of emphasis upon Hochman's cooperative efforts having specifically referenced the fact that,

> "...Hochman most likely would have been disbarred (or possibly suspended for two consecutive, instead of concurrent, three-year terms) had he not from the very beginning voluntarily come forward, entered into a guilty plea and consent judgment for discipline, and doggedly pursued meaningful rehabilitation." Hochman at 627.

Clearly, Respondent has in no way, exhibited such behavior in the instant case. If anything, his behavior has been antithetical to that of Hochman.

In The Florida Bar v. McFall, 863 So.2d 303 (Fla. 2003), this Court held that a three (3) year suspension of attorney for misappropriating client funds was appropriate where attorney had impaired judgment due to his medications and mental health, and the attorney had returned funds at issue. Most importantly, the referee found a number of mitigating factors that applied to McFall that were not present in the case at hand, including:

1) no prior disciplinary history; 2) restitution paid in full; 3) the amount of money misappropriated was small in comparison to the total amount entrusted to him; 4) the thefts were short in duration, isolated in time, and limited to one account; and 5) McFall admitted all violations and was cooperative with the Bar.

In The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1989), this Court held that participation in illegal drug activities leading to felony convictions warrants disbarment from practice of law, notwithstanding rehabilitation and extensive cooperation with authorities. Respondent cites Eisenberg to argue that the Referee did not properly consider mitigating evidence that he put forth. Respondent argues that the Referee "ignored the testimony of eleven witnesses...on the issue of addiction, impairment, personal and emotional problems, character and reputation, rehabilitation, and remorse". Clearly, this argument is without merit. In subsection IV (C) (D) and (E) and the second footnote of the Amended Report of Referee, it is obvious that the Referee considered the evidence provided by Respondent in mitigation. **ARR 12 - 14**.

Basically, it is the Respondent's contention that any evidence he provided in furtherance of mitigation was ignored simply because he was disbarred. However, Eisenberg does not support Respondent's position as noted below:

> "Although we agree with Eisenberg's position that referees should consider evidence in mitigation in recommending the appropriate discipline, we disagree with his contention that the referee failed to consider the mitigating evidence presented in this proceeding. The referee could have recommended disbarment without making the order effective *nunc pro tunc* the date of suspension. Under that circumstance, the disbarment would have commenced on the date our opinion was released. Further the referee could have recommended a longer period of disbarment before the respondent could seek readmission." Id. at 355.

Similar to Eisenberg, the Referee in the case at hand did consider the mitigating evidence, and this is shown by his recommendation of disbarment *nunc pro tunc* to the date of Respondent's emergency suspension from The Florida Bar (May 21, 2002).

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that the Amended Report of Referee be approved and that the Respondent receive at least a five (5) year disbarment with requirement of restitution prior to seeking readmission as recommended by the Referee in this cause.

____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's answer brief was forwarded via Federal Express (FedEx tracking no. 809685734790) to the Honorable **Thomas D. Hall**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399, and a true and correct copy was mailed to **Richard B. Marx,** Attorney for Respondent, at 66 West Flagler Street, Penthouse 2, Miami, Florida 33131, on this _____ day of _______________, 2004.

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WILLIAM MULLIGAN
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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

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WILLIAM MULLIGAN
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