IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DOMENIC L. MASSARI III,

Respondent.
_____/

Case No. SC01-724
TFB No. 2000-11,891(13F)

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, Domenic L. Massari III, will be referred to as "Respondent".

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC01-724 held on August 20 and 21, 2001.

The Report of Referee dated October 3, 2001 will be referred to as "RR".

"TFB Ex." will refer to exhibits presented by The Florida Bar and "R. Ex." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. SC01-724.

"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 FACTS AND OF THE CASE

The facts of this case arise out of a dispute over a construction contract between Ronald Martinez, a general contractor, and Dr. and Mrs. Steen. The Steens hired Mr. Martinez, who was also a residential designer, to design and build a single family home for them. TR19-21. Mr. Martinez executed a "cost plus" contract with the Steens on June 18, 1996. For the same single family home, the parties also executed a "fixed price" contract dated June 18, 1996. R.Ex. 3. The fixed price contract was submitted to the bank to secure financing because the bank would not accept the cost plus contract. TR95.

Mr. Martinez completed the Steens' home in 1997, and filed a lien for moneys he claimed were due under the "cost plus contract. The Steens filed a lawsuit against Mr. Martinez, claiming that he had filed a false mechanics lien against them, and that he was bound by the fixed price contract filed with the bank. Mr. Martinez hired Respondent to file a counterclaim against the Steens claiming that they failed to pay him in full for the work he had done. TR21,95. Mr. Martinez paid Respondent $7,000.00 in legal fees. TR9, TFB Ex.3. In connection with the litigation, Mr. Martinez signed a Contractor's Final Affidavit, dated September 25, 1997, stating that the Steens owed him $53,264.66. TFB Ex.1. The disputed funds were placed in escrow pending the resolution of the lawsuit. TR24.

Mr. Martinez had previously designed a new home for Respondent and his wife, and also had done a renovation of their existing home. TR24-25. During the Steen litigation, Mr. Martinez renovated a bathroom in Respondent's home. He agreed to do the work for $2,000.00, which was to be paid when the fee for the litigation was settled. TR25-26.

The lawsuit between Mr. Martinez and the Steens was settled at a mediation on February 14, 2000. Mr. Martinez had picked up Respondent at his office and they had driven together to the mediation in Pasco County, arriving about one o'clock. TR31-33. According to the settlement agreement, Ron Martinez was to receive $30,000.00 in return for executing a satisfaction and release of lien. TFB Ex.4. Respondent told him the balance of the legal fee would be $5,000.00. TR30. After the mediation, which lasted over five hours, Mr. Martinez drove Respondent back to his office in South Tampa. Mr. Martinez dropped Respondent off at his office about seven o'clock and did not get out of his truck. TR33-34.

Shortly after the mediation, the mediator faxed a copy of the Martinez-Steen settlement agreement to First American Title Company (First American). TR137. As a precondition for releasing any of the escrowed funds, the title company needed an original release of lien from Mr. Martinez. TR138. The Steens' law

firm, Moody and Shea, sent a blank Satisfaction and Release form to Respondent's office. TR281.

The week prior to March 13th, Respondent or a member of his staff called First American several times asking about the check. The callers were very persistent and wanted to come and pick up the funds as soon as possible, but Donna Durbin, the office manager at First American, was out of town at a business meeting and needed to review the documentation before releasing the funds. TR140. On March 13, 2000, Respondent personally delivered to the title company an original Satisfaction and Release of Lien purportedly containing Mr. Martinez' signature, and picked up a check for $30,000.00. TR139, TFB Ex. 12, 11. Respondent never indicated to Ms. Durbin that he had signed the release on Mr. Martinez' behalf. Neither he nor Mr. Martinez provided the title company with a power of attorney authorizing Respondent to sign documents for Mr. Martinez. TR146-47. Respondent did not inform Mr. Martinez that he had picked up the settlement check and deposited it. TR52.

The same day, March 13, 2000, Respondent endorsed the $30,000.00 check by signing Mr. Martinez' name and deposited it into his trust account. TFB Ex. 24. Respondent then disbursed $7,238.30 to his law firm, and three days later, on March 16, 2000, Respondent disbursed $4,500.00 to himself. On March 24, 2000,

Respondent transferred $9,711.70 from the Martinez' trust account to the account of another client to refund a fee paid to Respondent by that other client. On March 28, 2000, Respondent paid $7,800.00 to himself from the Martinez trust funds, and on March 30, 2000, he disbursed the final $750.00 to himself, zeroing out the account. TR420-24, TFB Ex. 25,26.

Mr. Martinez did not contact Respondent until about a month after the mediation, when he called Respondent to inquire about the settlement funds and signing of the release. TR34-35. Respondent told Mr. Martinez he was waiting on the judge to issue a court order authorizing Respondent to release the money. When Mr. Martinez called again two weeks later, Respondent told him he was still waiting on the judge's order. TR36. Mr. Martinez mentioned to his friend, attorney Larry Rardon, his concern about how long it was taking to receive the settlement funds. TR39-40. He told Mr. Rardon that Respondent had advised him that the judge was holding up the signing of the order. Mr. Rardon found that unusual because, in his experience as a trial attorney, the judge would not have to enter an order for a settlement agreement to take effect. TR231-32. Mr. Rardon advised Mr. Martinez to contact the Respondent, and to call the title company that was holding the funds. TR234.

Mr. Martinez took Mr. Rardon's advice and, on or about May 22, 2000, called First American Title Company. TR40, 168. He spoke with Kirby Harlow, an escrow assistant, and asked about the escrowed funds. She checked the computer and saw that there was a zero balance in the account. She told Mr. Martinez that a check had been cut to him in March. Mr. Martinez was shocked to learn that First American had cut a check and he had never received the money. Ms. Harlow told Mr. Martinez she would locate the file and get back to him. TR168.

On May 26, 2000, Mr. Martinez went to title company personally. TR143. Ms. Harlow had located the file and gave Mr. Martinez a copy of the canceled check. TR169-70. While Ms. Harlow was talking to Mr. Martinez, the office manager, Ms. Durbin, entered the room. TR170. Ms. Durbin stated that she knew all about that file, the funds having been disbursed a long time ago and the file closed. She was concerned when Mr. Martinez stated that he had not yet received his funds. TR141-42. While the three of them were reviewing the file, they came to the Satisfaction and Release of Lien, and Mr. Martinez looked at the document and stated that the signature on the release was not his signature. TR142,171. Mr. Martinez demonstrated signing his name to show that his signature was not the same as the signature on the release. TFB Ex. 5, TR172. Mr. Martinez was also

shown a copy of the check for $30,000.00, issued to Martinez Construction & Design, Inc., which Respondent had picked up on March 13, 2000. Respondent's handwritten notation on the check stub acknowledged his receipt of the check. TFB Ex.11. When shown a copy of the check, Mr. Martinez stated that the signature on the back of the check was not his. TR41. It was clear to Ms. Durbin that Mr. Martinez did not know that the title company had previously disbursed the funds to the Respondent. TR145.

At that point, Ms. Durbin called Respondent's office and spoke with him. Respondent told Ms. Durbin that he was still waiting for court approval to release the funds to Mr. Martinez. TR142. In fact, Respondent had already disbursed the funds to himself, and court approval was never required nor sought. Ms. Durbin was concerned that the title company may have issued the funds prematurely, so she called Susanna Shea, the Steens' attorney. TR143. At Ms. Shea's request, Ms. Durbin faxed to the law office of Moody and Shea copies of the release, the canceled check and the dismissal. TR143. On May 26, 2000, Mr. Moody and Ms. Shea wrote a letter to Sergeant Waters of the Tampa Police Department to inform him of what they had learned from the title company, and expressing their concern that Mr. Martinez' signature on the Satisfaction and Release of Lien and his

endorsement of the settlement check may have been forged. R. Ex. 7 (attachment).

Within a few days of his May 26, 2000, visit to the title company, Mr. Martinez received a call from an officer of the Tampa Police Department who was investigating the fraudulent signing of Mr. Martinez' name. Mr. Martinez told the police he did not wish to file a complaint against Respondent. TR58. Mr. Martinez did not contact Respondent right away concerning what he had learned, thinking that if he was patient, the Respondent would "do the right thing." TR56. About two weeks later, he delivered a note to Respondent's office requesting his money. TR56-57.

On June 8, 2000, Daniel Moody and Susanna Shea, attorneys for the Steens, filed a Complaint with The Florida Bar against the Respondent. Mr. Moody and Ms. Shea relayed what they had learned from Donna Durbin of First American Title Company, and again expressed concern that the Satisfaction and Release of Lien and the endorsement of the settlement check were forgeries. R.Ex.7.

On or about June 14, 2000, approximately a week after Mr. Martinez delivered the note requesting his money, Respondent called Mr. Martinez and told him he had a check for him. Mr. Martinez drove to Respondent's office and Respondent presented him with a check for $24,200.00 TR59. Respondent also

presented Mr. Martinez with a letter addressed to Sergeant Waters of the Tampa Police Department that he wanted him to sign. Mr. Martinez refused to sign the letter because most of the statements were not true. TR61. During the same meeting, Mr. Martinez reminded Respondent of the $2,000.00 that Respondent owed him for the bathroom renovation completed two years previously. TR60. Respondent indicated that he could not pay Mr. Martinez the full $2,000.00 because he did not have it at that time. Mr. Martinez understood that Respondent was experiencing some financial problems. TR68.

After receiving the check from Respondent, Mr. Martinez stopped by the title company to tell Ms. Kirby that he had received his funds. He also told her that, as far as he was concerned, that was his signature on the release of lien. TR119-20. Mr. Martinez testified that it was his intention to ratify the document even though he had not actually signed it. TR133.

On June 26, 2000, Mr. Martinez returned to Respondent's office to pick up a check for $1,000.00 in partial payment of the $2,000.00 Respondent owed him for the bathroom renovation. Respondent had a revised letter addressed to Sergeant Waters for Mr. Martinez to sign. Mr. Martinez signed the letter without reading it because it was late in the day and Respondent's notary public said she had to leave immediately. TR62. After reading the previously notarized letter, Mr. Martinez

was not comfortable with it, so he took it with him to re-read it. On the way back to his office, he stopped at Kinko's to make copies of the letter. He sat down and tried to revise the letter, but became frustrated with it and filed it away. He did not send the letter to Sergeant Waters. TR63, TFB Ex. 7,8,9.

About a week to 10 days after signing the June 26, 2000 letter to Sergeant Waters, Mr. Martinez visited Sergeant Waters. He wanted to let him know he had received his funds, and that if he were ever asked, he would say the signatures were his, even though they were not. Mr. Martinez again declined to file charges against the Respondent. TR68-69. From Mr. Martinez' perspective, the matter had ended when he received his settlement proceeds. TR81. Mr. Martinez left a copy of the June 26, 2000 letter with Sergeant Waters, but explained that it contained a lot of untruths. TR69-70. For example, the letter stated that "Mr. Massari was fully authorized to execute all documents necessary to conclude the settlement and to sign my name for me, if necessary." TFB Ex. 7. The letter also stated that Respondent "was specifically authorized to endorse and deposit the settlement check into his law firm account, deduct his fee and deliver the balance to me, which he did." TFB Ex. 7. These statements were untrue since Mr. Martinez never authorized Respondent to sign Mr. Martinez' name to documents or to endorse and deposit the settlement check. TR74. The letter also contained

the statement, "Please rest assured that there had been no forgery or unauthorized conduct. . . ." Mr. Martinez testified that this statement was not true. TR78.

On July 6, 2000, Respondent responded to the Bar concerning the complaint of Moody and Shea. Referencing Mr. Martinez' letter to Sergeant Waters, Respondent stated that he acted with the full authority of his client and that the settlement funds were disbursed in accordance with Mr. Martinez' instructions. TFB Ex. 21.

On October 3, 2000, as part of his response to the Bar complaint, Respondent and his attorney personally delivered to Bar counsel a copy of a document entitled "Martinez Escrow Instructions," dated February 14, 2000 and containing what was alleged to be the notarized signatures of Ronald Martinez and the Respondent. TR82, TFB Ex. 10. The document stated that Mr. Martinez wished to invest the settlement proceeds pursuant to discussions with a Mr. Brad Muller at Respondent's office that day. The document specifically authorized Respondent "to sign all papers, deposit checks and do anything else necessary with the settlement proceeds." The document also stated, "You have said you may be in need of temporarily using the funds personally and this is authorized, provided I have them back by June 30, 2000." TFB Ex. 10. The original of the "Martinez

Escrow Instructions" was never produced. Respondent claimed he had given the original to Mr. Martinez on February 14, 2000. TR364.

On December 12, 2000, Mr. Martinez gave a sworn statement to the Florida Bar. He related that he had not previously seen the "Martinez Escrow Instructions." TR84. Mr. Martinez testified that he never signed the document, had never met a Mr. Muller, and never agreed that Respondent could invest the settlement proceeds or use the settlement proceeds for his personal use. TR84-86.

SUMMARY OF THE ARGUMENT

There is competent substantial in the record to support the Referee's finding that Respondent, using a forged release, obtained his client's settlement funds from First American Title Company and deposited the funds into Respondent's trust account. Respondent did not disburse the funds to Mr. Martinez or even notify him that the funds were available. Instead, Respondent disbursed the entire $30,000.00 to himself. When Mr. Martinez went to the title company two months later to find out why he had not received the settlement money, he learned for the first time that the Respondent had picked up the funds. Only after the matter was brought to the attention of the Tampa Police Department did Respondent return Mr. Martinez' funds to the client's trust account. Months later, after the matter was being investigated by The Florida Bar, Respondent produced the document entitled "Martinez Escrow Instructions" which conveniently provided a defense for his actions. The "Martinez Escrow Instructions," the original of which was never produced, is a fraudulent document, containing the transposed signature of Ronald Martinez. Respondent's explanation that Mr. Martinez transposed his own signature to create problems for the Respondent is ludicrous. Respondent was the person with the motive to forge the signature on the exculpatory "Martinez Escrow Instructions."

After hearing two days of testimony, judging the credibility of the witnesses, and considering the totality of the evidence, the Referee found that Respondent obtained Mr. Martinez' trust funds using a forged release and used the money for his own benefit without Mr. Martinez' knowledge or authorization. The Referee specifically found that the "Martinez Escrow Instructions" document was fraudulent, and that the Respondent was the only person who had motive and reason for transposing the signatures. The record in this case contains competent, substantial evidence to support the Referee's findings of fact and recommendations of guilt, and they should be upheld.

The Referee recommended that the Respondent be disbarred from the practice of law for five years. Disbarment is the appropriate sanction for Respondent's fraudulently obtaining settlement funds, misappropriation of those trust funds, and further fraud when attempting to conceal his misconduct. The recommended sanction is well supported by existing case law and should be approved by this Court.

ARGUMENT

ISSUE I: COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE REFEREE'S FINDINGS THAT RESPONDENT MISAPPROPRIATED CLIENT TRUST FUNDS USING FRAUDULENT DOCUMENTS.

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) (quoting *Florida Bar v. Spann*, 682 So.2d 1070, 1073 (Fla. 1996)). "Where the referee's findings are supported by competent substantial evidence, 'this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.'" *Id*. (quoting *Florida Bar v. MacMillan*, 600 So.2d 457, 459 (Fla. 1992)). 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).

Respondent challenges the Referee's findings of fact as erroneous and unsupported by clear and convincing evidence. Respondent argues that the Referee's findings should be overturned because they are based entirely on the testimony of Ronald Martinez, and that Mr. Martinez is unworthy of belief.

Respondent's position is untenable. This Court has stated that "the referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *Florida Bar v. Fredericks*, 731 So.2d 1249, 1251 (Fla. 1999). It would be convenient for Respondent if he were the one to decide credibility, but he is not. The record in this case shows that the Referee's findings are supported by not only by the testimony of Ronald Martinez, but also by the testimony of Donna Durbin and Kirby Harlow of First American Title Company, attorney Larry Rardon, and hand writing expert Ray Green, as well as by extensive documentary evidence. It is the totality of the evidence, not isolated pieces, that prove Respondent's misdeeds. Respondent has not established that the record is wholly lacking in evidentiary support for the Referee's findings.

The Satisfaction and Release of Lien

The Referee found that, on March 13, 2000, Respondent personally delivered to First American Title Insurance Company a forged Satisfaction and Release of Lien. The Release was required before the title company could issue Mr. Martinez' settlement funds. The Referee specifically found that Ronald Martinez did not sign the Satisfaction and Release of Lien on March 8, 2000, and that someone else signed Mr. Martinez' name to the release. RR2.

Mr. Martinez testified that he did not go to Respondent's office on March 8, 2000 and did not sign the Satisfaction and Release. The first time he saw the release was on May 26, 2000 when he went to the title company to inquire about his settlement funds. TR51-52. First American escrow assistant Ms. Harlow and office manager Ms. Durbin attested to Mr. Martinez' surprised reaction upon discovering the Satisfaction and Release in the file. When he saw the document, he told them "that was not his signature on the release." TR142, 171. Respondent's secretary, Judith Hebert, was the only witness who testified that she saw Mr. Martinez sign the release. According to Ms. Hebert, Mr. Martinez came to Respondent's office on March 8, 2000 to sign the release. She testified that she brought the document out to him and he signed it while sitting on the couch in the lobby, using a magazine for support, and that she then notarized the document. TR263-64. When asked why she did not ask him to come into her office to sign the release, she replied that she had no chairs in the office. TR284. Respondent suggests that Mr. Martinez' signature on the release differed from his normal signature because he signed it on his lap, using a magazine for support.

Ray Green, a handwriting expert and examiner of questioned documents, testified at the final hearing. Mr. Green has examined over 250,000 documents since he became qualified as a document examiner in 1975 while working in that

capacity with the Tampa Police Department. He has been qualified as an expert document examiner in courts throughout the State, including Pinellas and Hillsborough counties, as well as in federal and military courts. TR175-79. Mr. Green testified that there was "no question" that the signature on the release of lien was a simulated signature. TR199. Mr. Green stated that, in his opinion, someone deliberately attempted to mimic Mr. Martinez' signature. TR198. He compared the signature on the release to known samples of Mr. Martinez' signature executed around the same time period as the date of the release, March 8, 2000. While Mr. Martinez has a highly identifiable "symbolic signature," executed freely, naturally, and rapidly, TR191, the signature on the release was executed slowly and hesitantly, with several lifts of the pen. TR193-96. Mr. Green acknowledged that if a person signed something in his lap without support, this might cause some variation in their signature. TR213. However, Mr. Green was adamant in his opinion that Mr. Martinez did not sign the Satisfaction and Release. TR198.

In concluding that Respondent obtained the settlement funds from First American without Mr. Martinez' knowledge or authorization by using a forged release, the Referee had an opportunity to weigh the testimony of Ronald Martinez, Ray Green, Kirby Harlow, and Donna Durbin, as well as that of Ms. Hebert, Respondent's long-time secretary. Given the totality of the witness testimony and

the documentary evidence, the Referee did not find Ms. Hebert's testimony regarding the signature of the release to be credible.

The Referee found that Mr. Martinez was entitled to receive his funds in March 2000, when Respondent received them. Not only did Respondent fail to notify Mr. Martinez that he had picked up the $30,000.00 settlement check on March 13, 2000, he never advised Mr. Martinez of the true facts surrounding his use and disbursement of the funds. RR2. Even after the matter came to light at the title company on May 26, 2000, Respondent failed to return Mr. Martinez' funds. Approximately one week after Mr. Martinez delivered a note to Respondent requesting his money, Respondent finally returned Mr. Martinez' funds to his trust account and wrote him a check. TR58-59.

The Martinez Escrow Instructions

Respondent admits endorsing the $30,000.00 settlement check, depositing it into his trust account, and disbursing the funds for his personal use. TR368. Respondent claims, however, that he acted pursuant to Mr. Martinez' authorization, as expressed in the "Martinez Escrow Instructions," a document he states was executed on February 14, 2000 after the mediation of the Steen litigation. TR397.

According to Respondent, "the crux of the Bar's case hinges on the validity of the escrow instructions." RB34. Respondent is incorrect. This self-serving document is simply the final link in a chain of evidence leading to the inescapable conclusion that Respondent committed forgery and misappropriated client trust funds. The Martinez Escrow Instructions demonstrates the lengths to which the Respondent would go in an attempt to cover up the fact that he had used a forged client signature in order to gain access to the settlement funds for his personal use. Respondent's attempted use of the forgery of Mr. Martinez' signature on the escrow instructions is not out of character for Respondent, given that he had previously used a forged Martinez' signature on the Satisfaction and Release of Lien to obtain the $30,000.00 proceeds check. The creation of the Martinez Escrow Instructions was a desperate and belated attempt to justify his earlier misconduct, at a time when Respondent faced investigation by the Bar and possible criminal prosecution.

The Referee found the "Martinez Escrow Instructions" to be fraudulent. RR3. Judge McGrady specifically found that Ronald Martinez did not sign the document on February 14, 2000, or on any other date, and that the signature of Mr. Martinez appearing on the escrow instructions was a transposition of his actual signature appearing on the Contractor's Final Affidavit. RR3. The Referee also

found that Respondent was the only person who had motive and reason for transposing the signatures. RR4.

The evidence in the record supports the Referee's finding that the escrow instructions were fraudulent. Handwriting expert Ray Green testified that the signature of Ronald Martinez on the escrow instructions was transposed from the Contractor's Final Affidavit signed by Mr. Martinez in 1997 in connection with the Steen litigation. TR201. A transposed signature is a digital or photomechanical reproduction of the signature, the most common method of transposing a signature from one document to another being "simply cut and paste." TR201. The thickened and serrated appearance of the transposed signature indicates that it had been digitized by a fax machine, computer scanner, or copy machine. TR203. In Mr. Green's opinion, "there is no way" that Mr. Martinez could have signed his name two different times three years apart and have it match the way that the two signatures match. TR202. It is significant that the original of the escrow instructions was never found. This is consistent with Mr. Green's testimony that the document was digitally or photomechanically produced, in which case no original would exist.

Mr. Martinez testified that he did not sign the escrow instructions. TR84. He dropped the Respondent off at his office on February 14, 2000 after the

mediation and did not get out of his vehicle. TR34. The first time Mr. Martinez became aware of the document entitled "Martinez Escrow Instructions," was on December 12, 2000 when he met with Bar counsel to give a sworn statement as part of the Bar investigation. TR84. In fact, the first time the document surfaced was on October 3, 2000 when Respondent and his attorney delivered it to Bar counsel. Respondent has never explained why he failed to produce this document when questions first arose at the title company, or in response to the Bar's June 22, 2000 inquiry into his conduct.

Respondent testified that he dictated the escrow instructions to his secretary, Judith Hebert, on February 14, 2000, then went over the escrow instructions with Mr. Martinez, and watched Mr. Martinez sign the document. He testified that Mr. Martinez walked the document out to Ms. Hebert, who notarized it. Respondent stated that he gave the original to Mr. Martinez and never saw the original again. TR362-65. Respondent's testimony was supported by that of Ms. Hebert, Brad Muller, and Brenda Terry, who all testified that they were present in Respondent's office the evening of February 14, 2000 and saw Mr. Martinez there. Respondent acknowledges in his brief that he and Ms. Hebert may have had a motive for testifying falsely, but opines that neither Ms. Terry nor Mr. Muller had any reason to lie. RB35-36. Ms. Hebert was employed as Respondent's legal secretary for

eight years and is a notary public licensed by the State of Florida. TR255. In addition to her loyalty to her long-time employer, Ms. Hebert had her own motive to lie. Her name is on both of the forged documents as a notary public. Had she not supported Respondent's version of events, she would have been admitting to notarial fraud, a criminal act.

Brad Muller also had a strong motive to help Respondent. Mr. Muller is an investor and hotelier who maintains office space in the same building as Respondent's law office. TR314. He has known the Respondent for 15 years. TR436. Mr. Muller was involved in numerous financial dealings with Respondent, including joint ownership of Massari-Muller Racing, Inc. TR320. Respondent testified that Mr. Muller lends money to Respondent's bankruptcy clients, and that Respondent refers investment opportunities to Mr. Muller. TR435. Mr. Muller invested $100,000 in Respondent's client, One Stop Auto, TR318, and $200,000 in another bankruptcy client, Medical Technology Systems. TR324. Mr. Muller testified that $200,000 to $300,000 was paid from a joint account with his mother to Respondent as legal fees to initiate bankruptcy proceedings for clients Brian and Eric Feinstein. TR317-18, 321-22. Respondent also testified that he owed Brad Muller $200,000, the balance of a loan from Mr. Muller in 1998 when Respondent was ill and unable to earn money. TR436-37. Contrary to Respondent's assertion,

Mr. Muller had ample motive to lie on behalf of Respondent with whom he had a very lucrative business relationship, who owed him money, and who was a continuing source of investment opportunities.

Brenda Terry was a client of Respondent and has maintained a social relationship with him since 1985. TR237. Notably, Ms. Terry's version of the events of February 14, 2000 differs significantly from that of the other witnesses. Ms. Terry testified that she stopped by Respondent's office around six o'clock to wish him a happy birthday and waited about 45 minutes for Respondent to arrive. She stated that Mr. Martinez was in the lobby when she arrived, and that she spoke with him while waiting. TR238,252. She said Mr. Martinez gave her one of his business cards with a handwritten notation on the back with his new address and phone number as of March 1, 2000. TR239, R.Ex.5. Respondent, on the other hand, testified that he and Mr. Martinez drove back to the office together after the mediation and that Mr. Martinez came into the office with him, where they spoke with Mr. Muller about an investment opportunity. TR360-61. It is apparent from the conflicting testimony that Ms. Terry and Respondent did not get their stories straight regarding the evening of February 14, 2000. Mr. Martinez testified that he had previously given Respondent the business card to inform him of his new address and phone number. TR470-71.

Respondent next suggests that Mr. Martinez transposed his own signature on the escrow instructions and then planted the fraudulent document in his file at Respondent's office. This theory is preposterous. The Referee found that, while there was no direct proof indicating who was responsible for concocting the document, the Respondent was the only person who had motive and reason for transposing the signatures. RR3-4. Respondent argues that Mr. Martinez planted the bogus document in an attempt to abrogate the agreement and gain access to his $30,000.00 at an earlier date. He fails, however, to provide any rational reason for Mr. Martinez to create an exact replication of his own signature if he were trying to make the document appear to be a forgery. Nor does he explain why, assuming he had access to the file, Martinez would concoct a forgery at all when he could simply remove the document from the file. Respondent's theory also flies in the face of the incontrovertible testimony of the First American Title employees who witnessed Mr. Martinez' shocked reaction upon learning that Respondent had picked up his settlement proceeds some two months earlier, and the testimony of Larry Rardon who received several calls from Mr. Martinez regarding his concern at not having received the settlement funds for so long.

Stretching credulity even further is Respondent's suggestion that Mr. Martinez' motive for creating the fraudulent escrow instructions was to get the

Respondent in trouble with the police and the Bar, and thereby cause the breakup of his marriage. Respondent relates that Mr. Martinez had several working lunches and breakfast meetings with Mrs. Massari concerning construction projects at the Massari home, TR104-05, and that Mr. Martinez was separated from his wife for two and one half years. Respondent also claims Mr. Martinez told Brad Muller that he wanted to date Rebecca Massari.

There is certainly nothing unusual in a contractor dealing with the woman of the household concerning a home renovation project. Respondent himself testified that he had a friendly relationship with Mr. Martinez, and that Mr. Martinez worked primarily with Respondent's wife on the construction projects. He trusted Mr. Martinez enough to give him a key to his house. TR353-54. Mr. Martinez specifically denied any desire to date Mrs. Massari, TR463, and denied knowing Brad Muller, TR466, or even having heard of Mr. Muller prior to December 2000.

The evidence supports the Referee's conclusion that Respondent was the only one with a motive for transposing the signatures on the escrow instructions. RR3-4. Respondent was under investigation for the forgery of the Satisfaction and Release, and for the unauthorized endorsement of the settlement check issued to Ronald Martinez. The forged Martinez Escrow Instructions conveniently provided a blanket authorization for all of Respondent's actions, by purportedly allowing

Respondent to "invest, use or disburse the settlement proceeds as [he saw] fit," and to "sign all papers, deposit checks and do anything else necessary with the settlement proceeds." TFB Ex.10. The document goes on to state, "You have said you may be in need of temporarily using the funds personally and this is authorized, provided I have them back by June 30, 2000." The escrow instructions therefore purportedly authorized Respondent's personal use of Mr. Martinez' money from March 13, 2000 when he deposited the check into his trust account and proceeded to disburse the funds to himself, until June 14, 2000 when he paid Mr. Martinez back. Interestingly, Respondent did not produce this critical document in May 2000 when the title company called to inform him that Mr. Martinez was looking for his funds. Nor did Respondent produce this purportedly exculpatory document when the police investigated the matter, or when he wrote a letter dated July 6, 2000 in response to an inquiry from the Florida Bar.

The evidence also demonstrates that Respondent had a financial motive for converting Mr. Martinez' funds to his own use. The record indicates that Respondent was experiencing financial problems in early 2000. On April 14, 2000, Respondent was ordered by the bankruptcy court to disgorge $1.8 million of fees he had received between July 1997 and March 31, 1998. TR437-38, 441. In September 1999, Respondent had been ordered to return $683,543, and in July

1998, Respondent had refunded $300,000. TR439. Respondent testified that the matter related to the April 14 order was settled at mediation, and that he was under no financial pressure as a result of the court orders. TR443-44.

In attacking Mr. Martinez' credibility, Respondent makes much of Mr. Martinez' filing a false construction contract with the bank. Mr. Martinez freely admitted at the final hearing that he filed the fixed price contract for the purpose of securing financing for the Steens, even though the actual agreement was cost plus. TR95-96. However, he testified that he and the Steens signed a cost plus contract for the construction of their home, and that he had previously built several houses financed by First of American Bank using cost plus contracts. He further testified that the Bank changed its policy to require a fixed price contract; the Steens requested Mr. Martinez to sign the fixed price contract so they could obtain financing, knowing that the agreement was actually going to be cost plus. TR469-70.

Respondent claims that Mr. Martinez' handling of the June 26, 2000 letter to Sergeant Waters and his inconsistent statements to the Bar are evidence of Mr. Martinez' lack of credibility. Respondent also points to Mr. Martinez' statement to First American Title personnel that, if anyone questioned his signature on the release, he would just say that the signature was his. The referee was aware of this

information when making his findings. All of these actions are consistent with Mr. Martinez' reluctance to press charges against the Respondent. Mr. Martinez explained that he just wanted his money, and when he finally received it, that was the end of the matter as far as he was concerned. TR81. Mr. Martinez did not want to file a complaint with the Tampa Police Department, and he did not file a grievance with the Bar. Mr. Martinez' actions in connection with the letter to Sergeant Waters show that, while he may have wanted to help the Respondent, he was uncomfortable about being asked to give the police a letter containing untruthful statements. He took the signed letter with him, made copies of it, and tried unsuccessfully to revise the letter. He finally submitted the signed letter to Sergeant Waters, explaining that much of the letter was untrue. TR69-70, TFB Ex. 7,8,9. Contrary to Respondent's assertion, Mr. Martinez did not lie when he told Sergeant Waters that the letter contained untruths. The letter **did** contain untruthful statements. For example, the statement in the letter that "there has been no forgery or unauthorized conduct" was not a true statement. TR78.

Respondent would like this Court to believe that the case before the Referee was "a swearing contest" between Respondent and Mr. Martinez. As the Bar has pointed out, the Referee's findings and conclusions are supported by substantial documentary evidence and the testimony of a number of witnesses in addition to

Mr. Martinez. This Court addressed the issue of conflicting testimony in *Florida Bar v. Stalnaker,* 485 So.2d 815, 816 (Fla. 1986), stating "the evidence presented before the referee boil[ed] down to a credibility contest" between the Respondent and his law partner. This Court stated, "The referee listened to and observed both of them, and, as our fact finder, resolved the conflicts in the evidence. Our review of the record discloses support for the referee's findings, and, therefore, we will not disturb them." *Id*. (citation omitted). The Referee weighed the credibility of the witnesses, as well as the documentary evidence. The record is replete with evidence supporting the Referee's findings and this Court should not disturb them.

ISSUE II: DISBARMENT IS THE PRESUMED SANCTION FOR MISUSE OF CLIENT FUNDS, THEREFORE, THE REFEREE'S RECOMMENDATION OF DISBARMENT SHOULD BE APPROVED.

The Referee recommended that Respondent be disbarred from the practice of law for five years. While this Court has the ultimate responsibility to order a disciplinary sanction, a referee's recommendation of discipline is to be afforded deference unless the recommendation is clearly erroneous or not supported by the evidence. *Florida Bar v. Niles*, 644 So.2d 504, 506-07 (Fla. 1994). "Therefore, the referee's disciplinary recommendation is presumptively correct and will be followed unless clearly off the mark." *Florida Bar v. Vining*, 707 So.2d 670, 673 (Fla. 1998).

Respondent argues that the Referee's recommendation has no "reasonable basis in existing case law" and should therefore be rejected by this Court. The Bar disagrees and maintains that disbarment is called for in a case involving the intentional misappropriation of client funds, especially where it is accomplished by forgery, fraud, and a misuse of the judicial system.

"[F]or decades this Court has routinely stated that the presumptive penalty for the misuse of client funds is disbarment." *Florida Bar v. Spears*, 786 So.2d 516, 519 (Fla. 2001). In *Florida Bar. v. Tillman*, 682 So.2d 542 (Fla. 1996), this Court disbarred the Respondent for misappropriating client funds and commingling

client funds with his own. Tillman paid personal expenses using trust funds, drew excessive fees and costs, and failed to pay clients' medical expenses with funds supplied to her to do so. Although Tillman had no prior disciplinary history and had been practicing only a short time, disbarment was appropriate because she had a dishonest or selfish motive, had engaged in a pattern of misconduct, including multiple offenses, she refused to acknowledge the wrongful nature of the misconduct, and lacked remorse. This Court found that the mitigation was not adequate to reduce the discipline and approved the Referee's recommendation of disbarment, stating, "'the misuse of client funds is one of the most serious offenses a lawyer can commit. Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment.'" *Id.* at 543 (quoting *Florida Bar v. Schiller*, 537 So.2d 992, 993 (Fla. 1989)). All of the factors in *Tillman* are present in the instant case, with the exception of practicing law for only a short period of time. Actually, the fact that Respondent has practiced law since 1973 is viewed as an aggravating factor, giving Respondent one more aggravating factor and one less mitigating factor than Tillman.

In *Florida Bar v. Korones*, 752 So.2d 586 (Fla. 2000), the respondent misappropriated funds from his uncle's estate, of which he was the personal representative, for his own use. He then submitted a false final accounting to the

other residual beneficiaries. The referee recommended a 90-day suspension, citing a number of mitigating factors, including personal and emotional problems, good faith effort to make restitution, full and free disclosure to the disciplinary board, cooperative attitude toward the proceedings, good character and reputation, mental or physical disability or impairment, and remorse. Aggravating factors were a dishonest or selfish motive and substantial experience in the practice of law. The respondent's disciplinary history consisted of two private reprimands which were not considered as aggravating factors because they were too remote in time. *Id*. at 589.

This Court found that a 90-day suspension was "far too lenient" and, instead, disbarred Korones for a period of five years. This Court stated that, in determining the discipline to be imposed in a case involving the misappropriation of funds, it is important to look at the circumstances surrounding the misappropriation:

> In the instant case, we are faced with a situation in which an attorney with an exemplary career has intentionally and wrongfully misappropriated money from clients and diverted it for his personal use. . . . Further, this attorney affirmatively filed a false accounting with the beneficiaries of his uncle's estate and paid his son so that he would not be reported to the Bar. The latter actions clearly indicate that the attorney was well aware of the wrongfulness of his conduct.

752 So.2d at 591.

Like Korones, the Respondent misappropriated client funds for his personal use, and then created a fraudulent document to cover up his misconduct. As the Referee stated in his report, the transposed signature appearing on the Martinez Escrow Instructions was "evidence of a deliberate and knowing act." RR4. Like Korones, Respondent has many years experience in the practice of law and no prior disciplinary record. Unlike Korones, Respondent did **not** display remorse or a cooperative attitude, and did **not** suffer from personal and health problems. Respondent's misconduct is similar to that of Korones and warrants disbarment.

The Referee found that Respondent presented a forged release to the title company to obtain his client's settlement funds. In *Florida Bar v. Roman*, 526 So.2d 60 (Fla. 1988), an attorney was disbarred for using fraudulent means to convert client funds to his own use. Roman, who served as personal representative of an estate, forged an affidavit portraying a Frank McColm as the deceased's nephew and sole heir. Roman filed the affidavit with the court who declared Mr. McColm the sole beneficiary of the estate. Roman then converted the assets of the estate to his own use. The respondent had no prior disciplinary record. The referee recommended a three-year suspension, citing as mitigating factors that Roman suffered from mental health problems and took prescription tranquilizers, had already been punished through the criminal justice system, was cooperative

and remorseful, and made restitution. *Id*. at 62. This Court disbarred Roman, finding especially egregious the fact that he used deceit to effectuate the theft, and stating, "either offense is sufficiently grave to justify disbarment." *Id*.

The facts of *Florida Bar v. Graham*, 605 So.2d 53 (Fla. 1992), are also analogous to the instant case. Graham misappropriated over $12,000.00 from a client's settlement proceeds, lied in a letter to the Bar about the disposition of the funds, testified falsely under oath at a disciplinary hearing, and violated trust account regulations by commingling trust funds. Despite Graham's lack of a prior disciplinary history and the fact that he had taken steps to correct the trust account shortages, this Court approved the referee's recommendation of disbarment, finding that "the mitigating factors . . . do not outweigh the presumption that disbarment is the appropriate discipline." *Id*. at 56.

While Respondent's misuse of client funds **alone** warrants disbarment, his creation and use of fraudulent documents also warrants disbarment. In *Florida Bar v. Kickliter*, 559 So.2d 1123 (Fla. 1990), this Court disbarred a lawyer who forged his client's signature on a will and submitted it for probate, notwithstanding the absence of a selfish or dishonest motive. Kickliter prepared a new will for his client, but the client died the next day, prior to seeing or signing the new will. In an attempt to effectuate his client's wishes, Kickliter signed his client's name on

the will, had two of his employees witness the forged signature, notarized it himself, and subsequently submitted the will for probate. The Referee recommended a three-year suspension, citing substantial mitigation, including absence of a dishonest or selfish motive, a cooperative attitude, good character and reputation, remorse, and the imposition of criminal penalties. This Court, applying the general rule of strict discipline against attorneys who deliberately and knowingly perpetrate a fraud on the court, disbarred Kickliter for five years. *Id*. at 1124. In contrast to Kickliter, who acted out of unselfish motives, the Respondent in this case was motivated entirely by self-interest. With the intent to deceive the title company, Respondent used a forged release to obtain his client's settlement funds which he disbursed to himself for personal use. He then manufactured the "Martinez Escrow Instructions" in an attempt to authorize his prior misconduct. The Bar submits that Respondent's misconduct is far more egregious than that of the attorney in Kickliter.

This Court has repeatedly recognized fraud and forgery as serious offenses, requiring the imposition of harsh punishment:

> Generally, the Court has imposed harsh punishment on lawyers who intentionally lie under oath, lie to the court, **or present false or forged documents**. Indeed, this Court has stated that no ethical violation is more damaging to the legal profession and process, and "[a]n officer of the court who knowingly and deliberately seeks to

> corrupt the legal process can logically expect to be excluded from that process."

Florida Bar v. Klausner, 721 So.2d 720, 721(Fla. 1998) (emphasis added) (quoting *Florida Bar v. Rightmyer*, 616 So.2d 953, 955 (Fla. 1993)). *See also Florida Bar v. Spann*, 682 So.2d 1070, 1074 (Fla. 1996) ("Authorizing the forging of a signature and the subsequent notarization of the signature, knowing it to be a forgery, constitute serious misconduct."); *Florida Bar v. Cramer*, 678 So.2d 1278, 1282 (Fla. 1996) (perpetrating fraud on financial institution by signing another's name on lease-purchase agreement for office equipment warrants disbarment).

Respondent points to several cases in which attorneys were suspended rather than disbarred for misappropriation of trust funds. In those cases, the Court found mitigating factors justifying an exception to the general rule of disbarment for misuse of client funds. Those factors are not present in the instant case. For example, in *Florida Bar v. Wolf*, 605 So.2d 461 (Fla. 1992), an attorney who misused client trust funds received a two-year suspension. Wolf fully cooperated with the Bar auditor and suffered from diminished capacity at the time of the misconduct. In *Florida Bar v. Schiller*, 537 So.2d 992 (Fla. 1989), Schiller used client trust funds for personal use and later covered the shortage. This Court suspended Schiller for three years, finding that the presumption of disbarment was overcome by the fact that no clients were damaged and Schiller "seemed to be

genuinely remorseful." *Id*. at 993. In *Florida Bar v. Stark*, 616 So.2d 41, 43 (Fla. 1993), the attorney showed "significant remorse." None of these attorneys used forged documents to obtain use of client funds. The only mitigating factor found by the Referee was Respondent's lack of prior discipline. RR5. That is insufficient mitigation to rebut the presumption of disbarment.

Respondent's reliance on *Florida Bar v. Borja*, 609 So.2d 21 (Fla. 1992), is similarly misplaced. Borja was found guilty of numerous trust accounting violations and failed to uncover his employees' theft of client funds. The Bar argued that Borja and/or his witnesses gave false and/or misleading testimony at the disciplinary proceeding. The referee found that Borja was so out of touch with Bar accounting procedures "that he did not KNOWINGLY provide false testimony during the disciplinary proceeding." *Id*. at 22 (emphasis in original). In aggravation, the referee considered Borja's extensive disciplinary history. In mitigation, the referee considered that no client was injured and there was no benefit to respondent. *Id*. at 23. This Court suspended Borja for one year. Respondent's conduct does not compare to that of Borja. Respondent did not unknowingly violate trust accounting rules. Rather, he knowingly misappropriated client funds for his own benefit and using a fraudulent document.

Respondent argues that "no lawyer should be disbarred on discredited evidence," quoting *State ex rel. Florida Bar v. Oxford*, 127 So.2d 107, 111 (Fla. 1960). In *Oxford*, the respondent was found guilty of submitting false pleadings in uncontested divorce cases based on the testimony of one witness, his secretary. The secretary had completely reversed her testimony during the disciplinary proceedings. The referee found that the witness "still lies about some things" and "exaggerates and colors her story because of her animosity to the respondent." *Id*. at 110. This Court disapproved the recommended sanction of disbarment, finding that the referee's comments about the witness completely discredited her testimony. *Id*. at 111. In the instant case, the Referee's findings were not supported by the sole testimony of a "discredited" witness. As discussed above, the Referee's findings were supported by the testimony of Mr. Martinez, Mr. Green, Mr. Rardon, Ms. Durbin, and Ms. Harlow. The record is also replete with documentary evidence which supports the Referee's findings.

Several of the Florida Standards for Imposing Lawyer Sanctions provide additional support for disbarment in this case. Standard 4.11 deals with the failure to preserve client property and states that "disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." Standard 4.6 sets forth appropriate sanctions in cases where the lawyer

engages in fraud, deceit, or misrepresentation directed toward a client. Standard 4.61 provides that "disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury to the client." Standard 6.11 states that "disbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document." Finally, Standard 7.1 provides that 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, Standard 9.22 lists aggravating factors that may justify an increase in the degree of discipline to be imposed. Judge McGrady found the following aggravating factors to be present in this case: dishonest or selfish motive; a pattern of misconduct; multiple offenses; the submission of false evidence, false statements, or other deceptive practices during the disciplinary process; a refusal to acknowledge the wrongful nature of conduct; and substantial experience in the practice of law. The sole mitigating factor was the absence of a prior disciplinary record. RR5.

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 sanction recommended by the Referee is too harsh, there is no basis for deviating from the presumption of disbarment. Respondent not only misused his client's funds, he obtained the funds by fraud, and then created a fraudulent document to justify his misconduct. The Referee's recommendation of disbarment should be approved.

CONCLUSION

This Court has not hesitated to impose disbarment for misconduct involving the misuse of client funds or the fabrication of fraudulent documents. The Referee's findings of fact are supported by clear and convincing evidence that the Respondent misappropriated client funds and engaged in fraudulent conduct. Respondent has committed acts of forgery and deceit which strike at the heart of a lawyer's moral and ethical obligations. This Court should approve the Referee's findings and recommendations and disbar the Respondent for a period of five years.

Dated this _____ day of January, 2002.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number 5061991270 to The Honorable Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to John A. Weiss, Respondent's Counsel, 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, FL 32308; and a copy by regular U. S. mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of January, 2002.

_____
Thomas Edward DeBerg
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE
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Undersigned counsel does hereby certify that this brief is submitted in WordPerfect 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.

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Thomas Edward DeBerg