IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NO. SC01-724
TFB NO. 2000-11,891(13F)

DOMENIC L. MASSARI, III,

Respondent.
_____/

RESPONDENT'S CORRECTED INITIAL BRIEF

John A. Weiss
WEISS & ETKIN
Attorney Number 0185229
2937 B-2 Kerry Forest Parkway
Tallahassee, Florida 32308
(850) 893-5854
COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Appellant, DOMENIC L. MASSARI, III, will be referred to throughout this brief as either Respondent or Mr. Massari. Appellee, The Florida Bar, will be referred to as such or as the Bar.

References to the transcript of the final hearing will be by the symbol "TR" followed by the appropriate page number. References to the Bar's exhibits will be by the symbol "B.Ex." References to the Respondent's exhibits will be by the symbol "R.Ex.". References to the Report of Referee will be by the symbol "RR".

JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Article V, Section 15 of the Constitution of the State of Florida.

STATEMENT OF THE CASE AND FACTS

The referee below concluded that Respondent violated rules 4-1.4(b), 4-1.15(a) and (b), 4-3.4(b) and 4-8.4(a) and (c) of the Rules of Discipline. He concluded that Respondent did not violate rules 4-3.3(a), 4-4.1(a) and 4-8.4(b). He recommended that Respondent be disbarred. Respondent seeks review of the referee's factual findings leading to his conclusion that the rule violations occurred. Respondent further seeks review of the recommendation that he be disbarred.

The referee's findings of fact, while disputed by Respondent, are set forth below:

> Respondent represented Ronald D. Martinez and his Florida corporation, Martinez Constructionand Design, Inc., in a civil case

involving a contract dispute over monies owed for a residence that Mr. Martinez' corporation had built for a Dr. And Mrs. Steen. In September, 1997, Mr. Martinez executed a document titled "Contractor's Final Affidavit" pursuant to the litigation. (Bar's Exhibit 1.) Prior to the case settling, Mr. Martinez has paid Respondent $7,000.00 in fees. On February 14, 2000, the case settled at mediation. The Steens agreed that Mr. Martinez' company would receive $30,000.00, from funds held in escrow by First American Title Insurance Company. Mr. Martinez and Respondent agreed that, upon receipt of the $30,000.00, Respondent would receive an additional $5,000.00 in legal fees, plus costs (if any), to conclude the representation. For his part, Mr. Martinez agreed to release the claim of lien that his corporation had placed on the Steens' real property. The Steens' counsel, Moody & Shea, P.A., provided Respondent with a blank form Satisfaction and Release of Lien, to effectuate this aspect of the agreement.

Someone other than Ronald Martinez signed Mr. Martinez's name to the Satisfaction and Release of Lien. Respondent's longtime secretary, Judith Herbert, notarized the document, attesting that Mr. Martinez has indeed affixed his signature to it on March 8, 2000. On March 13, 2000, Respondent traveled to First American Title Insurance Company and presented the forged Satisfaction and Release of Lien to Donna Durbin, the office manager. The undersigned specifically finds that Ronald A. Martinez did not sign the Satisfaction and Release of Lien on March 8, 2000; moreover, at no time did Mr. Martinez grant any power of attorney to Respondent, nor did he otherwise authorize Respondent to sign any legal document in his stead. Ms. Durbin accepted the document Respondent presented and she gave Respondent a check for $30,000.000, made payable to Martinez Construction and Design, Inc.

Though the check did not identify him as a payee, Respondent indorsed and negotiated the check and deposited the funds into his client

trust account on the day he received it, March 13, 2000. Respondent did not notify Mr. Martinez of his receipt of the funds into his trust account, nor did he inform Mr. Martinez generally of the true facts surrounding how and when he obtained the funds. Within a short time, Respondent made five separate disbursements encompassing the entire $30,000.00, for his own purposes. The disbursements were as follows: 1) On March 13, 2000, Respondent disbursed $7,238.30 as his "fee" for the Martinez representation; 2) on March 16, 2000, Respondent disbursed $4.500.00 to himself; 3) on March 24, 2000, Respondent disbursed $9,711.70 from the Martinez ledger account to another client ledger account, ostensibly to refund fees paid to him previously by another client; 4) on March 28, 2000, Respondent disbursed $7,800.00 to himself; and 5) on March 30, 2000, Respondent disbursed the remaining $750.00 to himself. Respondent admits that these disbursements were made for his own personal use or benefit. Respondent failed to advise Mr. Martinez of the true facts surrounding his use and disbursement of the funds, at any time. The undersigned finds that Mr. Martinez was entitled to receive the funds in March, 2000, when Respondent received them.

When Mr. Martinez did not receive his settlement proceeds in a timely manner, he asked Respondent about it, but did not receive a satisfactory response. Then sometime in May, 2000, Mr. Martinez expressed his concerns to an attorney-friend of his, Larry Rardon, who suggested that he contact the title company holding the money. Acting on this suggestion, Mr. Martinez called First American Title Insurance Company in Tampa, Florida. The escrow assistant, Kirby Harlow, told Mr. Martinez that his account showed a zero balance, and that his proceeds had been disbursed back in March. Mr. Martinez then traveled to the title company, on or about May 26, 2000, and met with the office manager, Ms. Durbin, and Ms. Harlow. They showed him the Satisfaction and Release of Lien that Respondent had delivered to the title company (and which the title company had caused to be recorded in

the official records). Mr. Martinez told Ms. Durbin and Ms. Harlow that the notarized signature on the document was not his. They also showed Mr. Martinez the negotiated check, and he declared that he had not indorsed or negotiated the check. Mr. Durbin then notified the Steens' legal counsel, Moody & Shea, P.A., regarding Mr. Martinez' declarations. Moody & Shea, P.A. contacted the Tampa Police Department and The Florida Bar, both of which initiated investigations.

On June 13, 2000, Respondent deposited $24,200.00 back into the client ledger account of Martinez Construction & Design, Inc. On that same day, Respondent paid $24,200.00 to Mr. Martinez, thus retaining $5,800.00 as his fee. Respondent and/or his staff prepared a letter addressed to Sergeant C.J. Waters of the Tampa Police Department, which Respondent wanted Mr. Martinez to sign. The evidence is in dispute regarding the intent of the letter. In any event, Mr. Martinez, satisfied to have received his money, did not wish to see criminal charges pressed against Respondent, and so informed the police, which ultimately did not pursue the matter either.

On October 3, 2000, pursuant to the Bar investigation, Respondent and his counsel met with assistant staff counsel, Brett A. Geer of The Florida Bar, at the Bar offices in Tampa. Respondent presented Mr. Geer with a document titled "Martinez Escrow Instructions." (Bar Exhibit 10.) That document contains a notarized signature of Ronald A. Martinez, as well as Respondent's notarized signature. Respondent attempted to rely on this notarized documents as a sort of grant of authority from Mr. Martinez himself, to explain his conduct involving his receipt, possession, and use of Mr. Martinez' proceeds. The "Martinez Escrow Instructions" recites that the document was signed on February 14, 2000; however, the undersigned specifically finds that Mr. Martinez did not sign that document on that date, or on any other. The signature of Ronald A. Martinez appearing on the "Martinez Escrow Instructions" is a

> transposition of his actual signature appearing on Bar's Exhibit 1, the Contractor's Final Affidavit. As such, it must be concluded that the "Martinez Escrow Instructions" document is fraudulent. Though no direct proof was adduced showing who was responsible for concocting the document, the undersigned finds that Respondent is the only person who had motive and reason for transposing the signatures. The fact that the transposed signature appears on the document is evidence of a deliberate and knowing fact.

The referee based his factual findings on the testimony of nine witnesses and numerous exhibits tendered by the parties at final hearing. A summary of the testimony of the witnesses follows:

Ronald D. Martinez

Mr. Martinez has been a licensed certified general contractor since September 1972. He has designed over 1,000 homes and has built at least 80. He received a degree in building construction from the University of Florida in June 1972. TR19,20,93.

Mr. Martinez met Respondent some years prior to the initiation of the Steen litigation when he was referred to the Massaris by a fellow builder to design renovations for the Massari home. Although the Massaris paid for it, the renovation was never done. Subsequently, Mr. Martinez designed a new home for the Massaris and was paid for that work also. It, too, was never built. TR24,25,96,97.

In 1998 Mr. Martinez renovated the bathroom in the Massari household. On direct he testified that he "just charged them for labor and material . . . .," including the labor of two of his

brothers, and that his charges amounted to approximately $2,000.00. Mr. Martinez testified that there was an agreement that they would settle up his charges when his litigation against the Steens was completed and that he never submitted a bill to the Massaris. TR26. Mr. Martinez acknowledged that the Massaris paid the subcontractors and the material contractors themselves. TR97.

Mr. Martinez testified that he first billed the Massaris for the renovation in June 2000. He did not keep a copy of the bill. TR98. Mr. Massari denied receiving the bill.

Mr. Massari was retained by Mr. Martinez in 1997 to represent him in litigation against Dr. and Mrs. Steen surrounding the construction of their home. The Steens alleged in the suit that they filed against Mr. Martinez that he had filed a false affidavit because he was bound by a fixed price contract dated June 18, 1996 that Mr. Martinez had filed with the bank. R.Ex.3. Mr. Martinez filed a counter claim based on a cost-plus contract allegedly agreed to by the parties bearing the same date. Mr. Martinez testified that the parties agreed to a cost-plus arrangement and that they only filed the fixed price contract with the bank for the purpose of securing financing for the Steens. Mr. Martinez testified that "the bank would not accept the cost-plus" contract. TR95. When asked if he "filed a false document with the bank for financial gain" Mr. Martinez answered "yes." TR96.

Mr. Martinez also testified that the fixed price contract, although dated June 18, 1996, was not signed until "at least two weeks . . . ." after that date. It was signed solely to make the bank think the project was a fixed price contract rather than a cost-plus (which the bank would not accept) project. TR129.

During rebuttal, Mr. Martinez testified that both contracts were on file with the bank. He did not, however, testify that anybody at the bank knew that the fixed price contract was a ruse. TR469,470.

Mr. Martinez acknowledged that his litigation with the Steens was settled after mediation on February 14, 2000. He was to receive $30,000.00 of the disputed funds that was held in escrow prior to that date. He testified that he had paid $7,000.00 to Mr. Massari prior to mediation. Mr. Martinez testified that Mr. Massari told him the fees coming out of the $30,000.00 settlement would be $5,000.00. TR29,30.

The mediation on February 14, 2000 began about 1:00 p.m. (TR31, 32) and lasted "five hours plus." TR33. Mr. Martinez drove his truck and took Mr. Massari with him. Mr. Martinez testified that they returned to Mr. Massari's office after dark and that Mr. Massari just "hopped out" of his truck and that Mr. Martinez drove off. TR34.

Mr. Martinez testified that he waited about 30 days after the mediation and, having heard nothing from Mr. Massari, called him two or three times. Mr. Massari returned the third call and allegedly

said that the settlement proceeds were being held up because the parties were waiting on the judge. TR34,36. About two weeks later Mr. Martinez again spoke to Mr. Massari and allegedly was told the same thing. TR36.

Mr. Martinez testified that he had paid some of the subcontractors on the job approximately $15,000.00 out of his own pocket, because he didn't want "to ruin my rapport with them . . . ." TR37,39. Mr. Martinez acknowledged on cross examination, however, that he did not pay any of the subcontractors out of the $24,200.00 that he received from Mr. Massari on June 13, 2000. TR100.

Mr. Martinez testified that he spoke to a "attorney friend", Larry Rardon, about his not receiving the settlement proceeds from his mediation. Based on Mr. Rardon's suggestion, Mr. Martinez called First American Title Company and spoke to employee Kirby Harlow. TR39,40. Mr. Martinez testified that it was during this conversation in late May that he first learned that First American had received a signed release of lien and had disbursed the $30,000.00 held in escrow. TR40,41. Subsequent to the initial telephone conversation, Mr. Martinez visited the First American Title Company's offices on May 26, 2000 and saw, he claims, for the first time the release of lien and the check disbursing the funds. He advised First American employees that it was not his signature on the release of lien and that he had not endorsed the check. TR40,41.

The release of lien was dated March 8, 2000 and was notarized by Judith Hebert, Mr. Massari's secretary. Mr. Martinez testified that he did not sign the release of lien, that he was not in Mr. Massari's office on March 8th and he said that he had never seen the release of lien prior to being shown it in the title company's office. TR51.

While at First American's offices on May 26th, Mr. Martinez overheard Ms. Durbin's end of the telephone conversation with Mr. Massari. Ms. Durbin told Mr. Martinez that Mr. Massari said that he was still waiting on the judge to approve the release of the funds. TR52,54. Mr. Martinez testified that Ms. Durbin did not indicate to Mr. Massari that Mr. Martinez was in the room when they were speaking. TR56,107.

Mr. Martinez said that two weeks after visiting the title company he delivered a hand written one or two paragraph letter to Mr. Massari that supposedly stated that Mr. Martinez "needed to get paid" and that if he didn't receive his money "by X day, then I would start charging interest." He hand-delivered the letter but did not retain a copy of it for his records. TR56,57.

Shortly after his May 26, 2000 visit to First American Title Company, Mr. Martinez received a telephone call from a police office investigating the allegedly fraudulent signature on the release of lien. Mr. Martinez stated that he told the police that he did not want to file a complaint. TR58.

According to Mr. Martinez, he was paid $24,200.00 by Mr. Massari on either June 13 or June 14, 2000. Mr. Martinez testified that the additional $800.00 over the $5,000.00 that he expected to pay to Mr. Massari was the result of Mr. Massari allegedly charging him half of the $1,600.00 in litigation expenses that were outstanding. TR58,59. Mr. Martinez stated that he reminded Mr. Massari of the outstanding bill for $2,000.00 on that date. Mr. Massari allegedly said he could not deduct the $2,000.00 from his fees because the bathroom renovation was personal and the fees being paid to Mr. Massari were business. TR60.

According to Mr. Martinez, the June 26, 2000 letter (B.Ex.7) was the second letter to the Bar that Mr. Massari had asked him to sign. He signed the second letter after being called by Mr. Massari and being told that the latter had a partial check on the $2,000.00 for Mr. Martinez. Mr. Martinez said that he arrived at the end of the day, that a notary public was about to leave and that it had to be signed immediately. Mr. Martinez stated that he signed it without being given time to read it. Notwithstanding that statement, Mr. Martinez took the original letter with him because "I wanted to proofread it." TR63. The letter was addressed to Sergeant Waters at the TPD. Mr. Martinez stopped by a copy store to photocopy the letter and made various changes on the copies. On July 10, 2000, Mr. Martinez delivered the letter to Sergeant Waters without revisions.

TR68. Mr. Martinez handed the letter to Sergeant Waters but told him there were "a lot of untruths in it." TR70.

Mr. Martinez also testified that once he received the proceeds from the Steen litigation, that he stopped by the title company to let them know that he had received his funds and to tell them that if anybody ever asked, he would say that it was his signature on the March 8, 2000 release given to the title company. TR69.

Mr. Martinez did specifically remember telling Mr. Massari to do whatever he needed to do to settle the litigation. TR73.

During direct examination, Mr. Martinez stated that the sentence in paragraph five of his letter to Sergeant Waters that stated "There has been no forgery or unauthorized conduct" was not a true statement. TR78. Mr. Martinez did acknowledge, however, that when he signed the June 26, 2000 letter before notary public Skinner, that she had him raise his hand and swear an oath prior to her attesting to his signature. TR79.

When presented with a copy of the February 14, 2000 escrow instructions, B.Ex.10, Mr. Martinez acknowledged that his signature appeared on the document but he claimed that he did not sign it. TR84. He testified that the first time that he saw that document was when it was shown to him by Bar Counsel on December 12, 2000. TR84. (The parties stipulated that the Bar received a copy of the February 14, 2000 escrow instructions when it was handed to Bar Counsel on October 3, 2000. TR82.)

Mr. Martinez denied virtually every statement in that agreement: he denied meeting Mr. Muller, he denied discussing investment opportunities with either Mr. Muller or Mr. Massari; he denied knowing that his bill for fees and costs in the Steen litigation was $7, 238.30; and he denied that he agreed to any investments being made with the Steen proceeds at a return of 1% per week. Finally, Mr. Martinez denied ever telling Mr. Massari that he did not want Mr. Massari discussing his financial affairs with any of Mr. Martinez's creditors or other parties. TR85-87.

During cross examination Mr. Martinez acknowledged that although he gave an affidavit to the Florida Bar regarding his dealings with Mr. Massari in August 2000 and a sworn statement to the Bar on December 12, 2000, he never mentioned the $1000.00 that he received from Mr. Massari on June 26, 2000, the date that he signed the Sergeant Waters' letter under oath before a notary. TR98. Mr. Martinez did not mention to Sergeant Waters that he had demanded $2000.00 from Mr. Massari and had received $1000.00 of that sum at the time he signed that letter. TR99.

Mr. Martinez also testified to the referee that he used none of the $24,200.00 that he received from Mr. Massari on June 13, 2000 to pay any of the subcontractors that had not been paid for the Steen house. TR100.

Mr. Martinez specifically recalled having breakfast meetings with Mr. and Mrs. Massari on Saturday mornings while doing work for them, meetings at which Mr. Massari usually left early, then having two or three working lunches alone with Mrs. Massari. TR104,105. Mr. Martinez also testified that he and his wife had been separated for two and one half years at the time of the final hearing. TR131.

When questioned during cross examination when he learned that Mr. Massari was being investigated by the TPD, Mr. Martinez could not remember whether it was before or after he received his $24,200.00 from Mr. Massari. TR109. Mr. Martinez did acknowledge, however, that Mr. Massari never told him that he could not have the $24,200.00 if he did not sign any document for to the TPD. TR113,114.

Mr. Martinez did acknowledge that it was July 10, 2000 when he hand-delivered the unmarked June 26, 2000 to Sergeant Waters. TR118.

On page 119 of the transcript of the testimony of final hearing, the following questions and answers took place:

> Q. Okay. So you gave a police officer in the course of a criminal investigation a letter that you signed under oath that you knew was untrue?
> A. Yes.
> Q. Okay. And this was some twelve or fourteen days after you signed the letter, correct?
> A. Yes.
> Q. Okay. I'd like to have those back, please. Mr. Martinez, did I understand you to testify this morning that you told Mrs. Kirby that if anybody asked you about whether you actually signed the satisfaction and release, that you would just say that you had signed it?
> A. If I received my check, I would tell people–I would say that was my signature. Yes.

Mr. Martinez also acknowledged that Mr. Massari's June 26, 2000 $1,000.00 check had cleared prior to the time that he went to see Sergeant Waters. TR120.

Mr. Martinez was questioned during cross examination about his December 12, 2000 statement to the Bar. He acknowledged specifically telling Bar Counsel and the grievance committee investigator that he had not delivered the June 26, 2000 letter to Sergeant Waters at the TPD. He specifically remembered testifying that the letter "should not have been sent,..." TR123,124.

Mr. Martinez testified that on the evening that he made those statements, he suddenly remembered that he had delivered the June 26, 2000 letter to Sergeant Waters. He then wrote Bar Counsel a hand written letter dated December 12, 2000 stating "I now remember giving Sgt. Waters a copy of the letter. . . ." TR126. R.Ex.2

In essence, Mr. Martinez testified that he had forgotten about providing Sergeant Waters with the letter at the time that he testified but that he remembered several hours later. Mr. Martinez's lack of recollection took place even though he admitted that he had never before had occasion to talk to law enforcement officials about someone forging his name. TR123. Mr. Geer did not receive Mr. Martinez's letter dated December 12, 2000 until December 22, 2000. TR126.

During rebuttal, Mr. Martinez denied ever meeting Brenda Rona Terry. TR 462. He denied ever wanting to date Mrs. Massari or

making statements to that effect. He once again denied giving Mr. Massari authority to use the Steen settlement proceeds.

Mr. Martinez testified that Mr. Massari asked for Respondent's Exhibit 1, the August 15, 2000 confidentiality instructions signed by Mr. Martinez as a result of the Tampa Police Department investigation and not because The Florida Bar was seeking his trust accounting records. He denied ever asking Mr. Massari to keep confidential his financial records. TR 465.

Mr. Martinez once again denied during rebuttal knowing Brad Muller and he denied ever asking Ms. Hebert for Mr. Muller's telephone number. He further denied knowing anything about One Stop Auto Parts. He said that he had no desire to invest the proceeds of the Steen settlement funds. TR 466, 467.

Mr. Martinez acknowledged that he wrote the note on the back of Respondent's Exhibit 5, the card that Ms. Terry said she received from Mr. Martinez. He denied giving it to her though.

Donna Durbin

Ms. Durbin is the branch manager at First American Title. She has been employed in that capacity since September, 1996. She was the individual responsible for handling the Steen matter at all times relevant to this case. She testified that they received the Steen escrow funds in 1997 and that they were disbursed on March 13, 2000. TR137, 139. $30,000 of the funds were disbursed for the benefit of Mr. Martinez. TR 138. Ms. Durbin testified that she could not

release the funds until she received a satisfaction and release from Mr. Martinez. She received the release on March 13, 2000 and disbursed on that date. Ms. Durbin also testified that she was out of the office for a period prior to the 13th and that Mr. Massari's office was very persistent about coming by and picking up the funds as soon as they were available. TR140.

Ms. Durbin testified that Mr. Martinez came to her office on May 26, 2000, TR143, after speaking to one of her assistants, Kirby Harlow. Mr. Martinez told Ms. Durbin that he had not yet received his portion of the Steen funds and that he had not signed the satisfaction in her file. TR142. Ms. Durbin conceded, however, that she did not know whether Mr. Martinez was telling her the truth or not. TR154.

In Mr. Martinez's presence, Ms. Durbin called Mr. Massari who said that he was waiting for court approval before releasing the funds to Mr. Martinez. TR142.

Ms. Durbin initially testified that she believed both Mr. Martinez and she spoke to Mr. Massari on May 26th. On cross examination, however, she acknowledged that she was not sure that Mr. Martinez spoke to Mr. Massari or that Mr. Massari knew that Mr. Martinez was in the room. TR153.

Ms. Durbin also testified that she spoke to counsel for the Steens, Susanna Shea and relayed to her the statements made by Mr. Martinez to Durbin. TR143.

No substitute satisfaction and release was ever provided to Ms. Durbin by Mr. Martinez. TR155.

Kirby Harlow

Ms. Harlow has worked at First American since November 1997. She testified that she first spoke to Mr. Martinez about the Steen matter on May 19th or May 22, 2000. Mr. Martinez indicated to Ms. Harlow that he had never received the Steen proceeds. TR168. While she basically turned the matter over to Ms. Durbin when Mr. Martinez personally came by the office, she was present when he looked at the company's copy of the satisfaction and release of lien, and that Mr. Martinez said that it was not his signature on the release. TR171.

On cross examination Ms. Harlow acknowledged that she took no independent steps to verify that the statements Mr. Martinez made to her were the truth. TR 172.

Ray Green

Ray Green is an examiner of questioned documents. He has been in private practice as a document examiner since July 1978. Prior to that he was employed by the Tampa Police Department for twenty years, starting in 1958. In 1963, he developed an interest in handwriting examination. During the '70's, he completed various schools on document examination. He estimated that he testified as an expert witness in court in excess of 275 times and that in deposition approximately 400 times. TR175-177.

Mr. Green testified that he was a high school graduate with one semester's college attendance at Furman University. He has taken no courses in document examination at any university or community college. He is not certified by the American Board of Forensic Document Examiners. He is, however, a member of American Board of Forensic Examiners and of the American College of Forensic Examiners. TR182, 180.

Respondent did not stipulate to Mr. Green's qualifications. The court found him to be an expert in the area of questionable documents. TR184.

Mr. Green testified that he found the signature on the March 8, 2000 release to be "a simulated drawing or copying of Mr. Ronald Martinez's signature." TR198. He was not able to determine who simulated, if indeed it was simulated, Mr. Martinez's signature. TR207.

Mr. Green also opined that the signature of Mr. Martinez that appears on exhibit 10, the escrow instructions, was one that been transposed from the September 25, 1997 contractor's final affidavit. TR201. He was not able to determine who made the alleged transposition, or the means in which the signature was transposed. TR207, 214.

Mr. Green based his opinion that Mr. Martinez's signature was forged on the satisfaction and release after examining several checks that Mr. Martinez had signed in the approximate same time period. He

ignored the fact that Mr. Martinez signed his signature in different ways, TR209. He dismissed as irrelevant numerous Home Depot invoices, R.Ex.4, shown to him. He completely disregarded the inconsistencies in the checks that he did examine, for example, checks 6990 and 6992. TR211. Mr. Green did acknowledge, however, that the type of paper on which a signature is placed, the position that the individual is in when signing the document, whether there is any support under the document when it is signed and whether that support is soft or hard, and the circumstances under which a document a signed (e.g. whether the individual is in a hurry) are all factors that could influence the nature of one's signature. TR212-214.

Larry Rardon

Mr. Rardon is a lawyer who had had various business dealings with Mr. Martinez. He testified that Mr. Martinez approached him some months after mediation about Mr. Martinez's failure to get the Steen proceeds. Mr. Martinez told Mr. Rardon that Mr. Massari had stated that the judge was holding up the signing of the order releasing the Steen proceeds. TR231. Mr. Rardon suggested that Mr. Massari contact the title insurance company and inquire about the status of the escrow funds. TR234.

Brenda Rona Terry

Ms. Terry, a homemaker, known Mr. Massari since 1984 or 1985 in both a social and a professional capacity. He has represented her as

a lawyer and she has socialized with Mr. and Mrs. Massari on one or two occasions. TR236, 237.

Ms. Terry contradicted Mr. Martinez's testimony to the effect that he did not come in to Mr. Massari's office after the mediation on February 14, 2000. Ms. Terry specifically remembers meeting Mr. Martinez in Mr. Massari's lobby on that date. She was positive of the date because February 14, Valentine's Day, is Mr. Massari's birthday and she dropped by to give him a birthday card. TR237, 239. She clearly remembered speaking to Mr. Martinez in Mr. Massari's lobby at approximately 6:00 pm and that he gave her a business card. TR238, 239. R.Ex.5. The back of the card contained handwriting that indicated that effective March 1, 2000, Mr. Martinez would have a new telephone number. TR240. Mr. Martinez gave Ms. Terry his card because the Terrys were contemplating building a home at that time.

Judith Hebert

Ms. Hebert has been Mr. Massari's secretary for eight years. She has been a legal secretary in Tampa for 32 years and has been a notary public since the early '70's. TR255, 256.

Ms. Hebert testified that she will not notarize an individual's signature unless it is signed in her presence or unless the individual ratifies it in her presence. TR257.

Ms. Hebert remembered preparing the February 14, 2000 escrow instructions. B.Ex.10. She remembered the date because February 14t

is Valentine's Day, Mr. Massari's birthday and the anniversary of her marriage to her husband. TR257, 258.

Ms. Hebert testified that the Escrow agreement was prepared pursuant to Mr. Massari's oral dictation while she was in her office. She gave the completed document to Mr. Massari in his office and Mr. Martinez signed it there. Mr. Martinez did, however, come out to Ms. Hebert's office, ratify his signature and ask her to notarize it. TR258, 259. She gave the original document back to Mr. Martinez. TR259.

Ms. Hebert also testified that she, Brad Muller and Brenda Rona Terry were all waiting to celebrate Mr. Massari's birthday. She said that Mr. Martinez spent some of the time there that evening out in the lobby. TR258, 260.

On two separate occasions subsequent to the mediation, the first perhaps being the date of the mediation, Ms. Hebert gave Mr. Martinez his original file to take home. TR261. She indicates that she only does that for people who "have been clients for a long, long time or are personal friends,..." TR261.

Ms. Hebert testified that she observed Mr. Martinez sign the release of lien, B. Ex. 12, on March 8, 2000 in the lobby of Mr. Massari's office. TR263. Mr. Martinez signed the document sitting on the couch in the lobby. TR264.

Ms. Hebert testified that she opens all mail received in Mr. Massari's office and that the first knowledge she had of either a Bar

inquiry or a criminal investigation was when she opened the Bar's June 22, 2000 letter of inquiry. TR265, R.Ex.7. She stated that Mr. Massari appeared "flabbergasted" when he opened it.

Ms. Hebert also contradicted Mr. Martinez's testimony about there being a first letter drafted to Sergeant Waters prior to the June 22, 2000 letter. No such letter was typed or drafted by her. TR269. The June 26, 2000 letter to Sergeant Waters, B.Ex.7, was prepared subsequent to her receiving the Bar's June 26, 2000 letter of inquiry. Mr. Massari drafted that letter while meeting with Mr. Martinez. Later, Mr. Martinez came into her office and he made changes to the letter which Ms. Hebert accomplished. She then gave him the original letter. TR267, 268.

Mr. Martinez's June 26, 2000 letter to Sergeant Waters was notarized by Trini Skinner on that date, TR266, because Ms. Hebert felt the Bar was questioning her "notary abilities." TR269. The document was notarized by Ms. Skinner prior to 4:30 pm because Ms. Skinner's work day ended at that time. TR270.

Contrary to Mr. Martinez's testimony that he never met Brad Muller, Ms. Hebert testified that she remembered giving Mr. Muller's telephone number to Mr. Martinez at the latter's request. TR270,271.

Brad Henry Muller

Mr. Muller is an investor and a hotelier. He owns an interest in a Marriott Courtyard in Jensen Beach, a Holiday Inn Suites in Port St. Lucie and a Springhill Suites by Marriott in Tampa. While Mr.

Muller's business address is at his home, he does have an office in the same building in which Mr. Massari's office is located. TR301,302.

Mr. Muller contradicted Mr. Martinez's testimony that the two had never met. He remembers meeting Mr. Martinez on the evening of Mr. Massari's birthday, February 14, 2000. TR302,303.

Mr. Martinez and Mr. Muller were introduced by Mr. Massari for the purpose of discussing an investment opportunity in One Stop Auto. Mr. Muller testified that he invested $100, 000.00 in the venture, an inventory consignment deal, and the return was about 1% per week. On February 14, 2000, there was an opportunity to invest an additional $25,000.00 in One Stop and Mr. Muller was not sure that he and his brothers were going to do it. Mr. Martinez evinced a great interest in the project. Ultimately, Mr. Muller invested the additional $25,000.00. TR303-305.

Mr. Muller also had a "truly bizarre" telephone conversation with Mr. Martinez on September 18, 2000. The call was initiated by Mr. Martinez and he "was obviously extremely distraught" and repeatedly "apologized for hurting Dom." Mr. Muller also indicated on a contemporaneous memo that Mr. Martinez would like to date Rebecca Massari, Mr. Massari's wife. R.Ex.6,TR305,309. At the time, Mr. Massari and his wife were separated and he was living in a Marriott Courtyard. TR310,311.

Mr. Muller chastised Judy Hebert for giving his telephone number to Mr. Martinez. TR311.

As to the February 14, 2000 escrow instructions, Mr. Muller specifically remembered Mr. Martinez signing it in his and Mr. Massari's presence in the latter's office on that date. TR312, 313. Mr. Muller was present when Mr. Massari read the escrow instructions to Mr. Martinez. Mr. Martinez "was excited about getting the possibility of a 1% return a week." TR335.

Domenic L. Massari, III

Mr. Massari is forty-eight years old and was admitted to The Florida Bar in October, 1973. He has no prior disciplinary record. RR5.

Ron Martinez and Mr. Massari met in the late 1980's "in connection with the renovation of a home that Mr. and Mrs. Massari owned on Longfellow Street. Mr. Massari characterized the relationship as a friendly one. The two would see each other when Mr. Martinez worked on the projects that the Massaris hired him for. Mr. Massari testified that Mr. Martinez had a key to the house and he worked basically through Mrs. Massari. TR353,354.

When the Steen dispute arose, Mr. Martinez initially contacted Mrs. Massari, also a lawyer, for representation. Because Mrs. Massari does not do litigation work, she referred the case to Mr. Massari's firm. He, in turn, assigned it to his associate, Carol Delano, for handling. Although the case involved the construction of

the Steen house, it was primarily a contract dispute. Specifically, whether there was a cost-plus contract as claimed by Mr. Martinez, or whether the fixed price contract filed with the bank in order to obtain financing governed the price of the home. The Steens sued Mr. Martinez in 1997, claiming that he filed a false mechanic's lien against their property. TR354,355,359.

On February 14, 2000, the parties mediated their dispute and it was settled pursuant to a hand-written mediation agreement. B.Ex.4. Mr. Martinez was to receive $30,000.00 of the funds held in escrow by First American Title. TR360.

Mr. Martinez and Mr. Massari traveled to the mediation in Mr. Martinez's truck. Returning from the mediation, Mr. Martinez asked Mr. Massari about any investments available for his proceeds. Mr. Martinez indicated that, prior to receiving the funds from the Steen litigation, he wanted to try to discount the amount of money that he owed to certain creditors. Mr. Massari had previously mentioned to Mr. Martinez that Mr. Martinez had a client, Brad Muller, who was about to make an investment that would generate 1% interest per week. Mr. Martinez indicated interest in the proposition, and Mr. Massari introduced him to Brad Muller upon their return to Mr. Massari's office on February 14th. TR360,361.

Later on that evening, Mr. Martinez authorized Mr. Massari to invest his money in the 1% deal with One Stop Auto, or if that was not available, in a prefab housing matter or in any other investment

that would return 1% per week. B.Ex.10, TR362. Mr. Massari dictated the agreement, went over it with Mr. Martinez in Mr. Muller's presence, and Mr. Martinez signed the agreement in Mr. Massari's presence. TR362,363. Mr. Massari gave the original escrow instructions to Mr. Martinez. TR364.

When Mr. Martinez left that night, he took the original file with him. TR362.

In approximately the second week of March, 2000, the loose ends on the Steen litigation had been wrapped up and Mr. Massari asked Ms. Hebert to obtain Mr. Martinez's signature on the satisfaction and release of lien drafted by Moody and Shea, the Steens' lawyers. TR365. Mr. Massari was not present when Mr. Martinez signed the release. The latter, however, never denied to Massari that he signed it. TR367.

On March 13, 2000, Mr. Massari received a $30,000.00 check from First American Title. Pursuant to the instructions that he received from Mr. Martinez, Mr. Massari endorsed the check and deposited it into his trust account. The One Stop investment and the prefab housing project investment were not available by the time that Mr. Massari received the $30,000. TR368. Mr. Massari called Mr. Martinez and advised him that he had received the check from the title company. TR369.

In mid-April, Mr. Martinez called Mr. Massari, expressing concern that no "order had been entered approving the mediated

settlement." Mr. Massari had originally told Mr. Martinez that they might be able to obtain a "order" but had decided that a notice of voluntary dismissal without prejudice would have the same effect. During the mid-April conversation and again in mid-May, Mr. Martinez continued to insist upon an "order". Mr. Massari told him that such an order could be obtained but that it might delay the ultimate settlement of the case. TR369,370.

Mr. Massari testified that in early May, his conversations with Mr. Martinez "became more threatening and more demanding.". TR371. He not only insisted on a court order, but he demanded that the funds that he placed with Mr. Massari for investment pursuant to the February 14, 2000 escrow instructions be returned to him prior to the June 30, 2000 due date. Mr. Massari, who had already disbursed the funds, was not able at that point in time to return the funds. At no point during their conversations did Mr. Martinez deny the validity of the escrow instructions. TR371.

Mr. Massari remembered the conversation with Ms. Durbin on May 26, 2000. He did not know that Mr. Martinez was in the room with Ms. Durbin when she called. Pursuant to his prior conversations with Mr. Martinez, Mr. Massari told Ms. Durbin that Mr. Martinez wanted a court order prior to receiving his funds. Mr. Massari made no mention to Ms. Durbin of the escrow instructions due to Mr. Martinez's insistence on confidentiality. TR372-374.

Sometime after his conversation with Ms. Durbin, Mr. Massari was called by Mr. Martinez. Apparently, the latter had left the title company. Mr. Martinez said something to the effect that Mr. Massari was "going to end up getting in trouble..." if Mr. Martinez did not get his "court order and [his] money." TR374.

On June 13th, Mr. Massari called Mr. Martinez to tell him that Mr. Massari had the funds available to pay to Mr. Martinez. Mr. Martinez agreed to a 21% return on his funds for twelve weeks or so. Mr. Massari put $24,200.00 into his trust account and the next day remitted $24,200.00 to Mr. Martinez. TR376. At the time that he wrote the $24,200.00 check, Mr. Massari had not been contacted by anybody from the TPD and he had no idea that he was being investigated by the Bar or by the police department. TR377. Mr. Massari specifically denied drafting any letter to the TPD for Mr. Martinez's signature on or about June 13, 2000. TR377.

A few days after June 22, 2000, Mr. Massari received a letter of inquiry bearing that date from The Florida Bar. R.Ex.7. Prior to his receipt of that letter, he had no idea that the Bar was investigating him or that the TPD had been contacted regarding the Steen litigation. He was "upset" upon receipt of the letter. TR379.

Immediately upon receiving the Bar's June 22nd letter, he called Mr. Martinez. The latter came in several days afterwards. After speaking with Mr. Martinez, and in his presence, Mr. Massari dictated a letter to Sgt. Waters at the TPD (attached to the Bar's letter of

inquiry was a May 26, 2000 letter from Moody and Shea to Sgt. Waters). Ultimately, Mr. Martinez dictated a redraft of the letter to Ms. Hebert, signed it before a notary, and gave a copy of the letter to Mr. Massari. TR380, 381.

On June 26, 2000, Mr. Martinez for the first time told Mr. Massari that he owed Mr. Martinez $2,000.00 for the bathroom renovation project. Mr. Martinez insisted on payment of at least $1,000.00, so Mr. Massari wrote him a check for that amount. Mr. Massari did not know whether Mr. Martinez would refuse to give the letter to Sgt. Waters if the money was not paid, but Mr. Massari "felt held up by him..." and "didn't feel it was a good time to argue with him about it." TR382.

When Mr. Massari wrote his response to The Florida Bar's June 22, 2000 letter of inquiry, B.Ex.21, on July 6, 2000, he was under the impression that Mr. Martinez had already delivered the June 26, 2000 letter to Sgt. Waters. (Mr. Martinez did not deliver it until July 10, 2000).

Sometime after July 12, 2000, Mr. Massari received a second letter of inquiry from The Florida Bar. R.Ex.8. Attached to that letter was a memo from TPD Officer K. K. Clark, dated June 19, 2000. In her memo, Officer Clark indicated that they interviewed the only alleged victim, Ronald Martinez, and were told that he did not wish to prosecute the case. The TPD indicated that they could not locate Mr. Massari's secretary. Mr. Massari assumed the June 26, 2000

letter from Mr. Martinez to Sgt. Waters had taken care of that and responded to the Bar's second letter of inquiry by advising them that he had received no contacts from the TPD regarding their inability to contact Ms. Hebert.

Mr. Massari stated that Respondent's Exhibit 1, the August 15, 2000 letter from Mr. Martinez, was prepared after Mr. Massari received a Bar subpoena demanding all records in connection with his representation of Mr. Martinez. This was consistent with Mr. Martinez's prior instructions to Mr. Massari to keep his financial matters secret. TR389.

The next, and last, time that Mr. Massari spoke to Mr. Martinez was in mid-September, 2000. Mr. Massari had received a call from a grievance committee member who indicated that Mr. Martinez had signed an affidavit regarding the Bar investigation. Mr. Massari immediately called Mr. Martinez and was told that nothing in the affidavit would hurt Mr. Massari. Sometime later, Mr. Massari received a copy of the affidavit. TR390, 391.

Mr. Massari also testified about Respondent's Exhibit 6, a contemporaneously-made memo written by Brad Muller on September 18, 2000. At that point in time, Mr. Massari was living at a Marriott Courtyard Hotel because his wife had asked him to leave the house after the Bar sought an emergency suspension (which was never granted). At that point in time, Mr. Martinez was also separated from his wife. TR393-395.

Mr. Massari unequivocally denied transposing Mr. Martinez's signature onto the escrow instructions. He unequivocally denied forging Mr. Martinez's name to the March 8th satisfaction and release. Nor did he ask anybody to do any such transposition or forgery. Finally, Mr. Massari did not indicate either directly or indirectly to anybody that it would be beneficial to him if any such transposition or forgery were done. TR396,397.

Mr. Massari was adamant during his testimony to the referee that he did not use Mr. Martinez's money without authorization and consent. TR397.

During cross-examination, Mr. Massari acknowledged receiving the $30,000.00 from the title company on March 13, 2000 and depositing those funds into his trust account that same day. He endorsed the check, pursuant to the escrow instructions, "pay to the Massaris Law Group" "by Domenic Massari" and signed Mr. Martinez's name. TR420, 396. On that same day, Mr. Massari disbursed $7,238.30 to himself as fees and costs. TR420,432,396.

On March 16th, Mr. Massari disbursed $4,500.00 to himself. On March 24th, he transferred approximately $9,700.00 into another account within his trust account to use the funds as a refund of a retainer that Mr. Massari had received from another client. On March 28th, Mr. Massari disbursed $7,800.00 to himself and two days later, disbursed $750.00 to himself. In essence, that "zeroed out" the funds received on Mr. Martinez's behalf. TR 423, 424.

On June 13, 2000, Mr. Massari transferred $24,200.00 into Mr. Martinez's trust account.

During cross-examination, Bar Counsel inquired about Mr. Massari's relationship with Brad Muller. Mr. Muller sometimes lends money to Mr. Massari's clients. At other times, Mr. Muller invests in projects of Mr. Massari's clients. Mr. Massari has known Mr. Muller approximately fifteen years and at the time of final hearing, owed Mr. Muller about $200,000.00. TR435,436.

SUMMARY OF ARGUMENT

Respondent argues in Point I that the Bar has not met the burden imposed on it by this court of a proving misconduct by clear and convincing evidence. *The Florida Bar v. Rayman* 238 So. 2d 594 (Fla. 1970). The Bar predicates its entire case on the testimony of Ronald Martinez. Mr. Martinez, however, is a person unworthy of belief. For example, he admitted filing a fraudulent contract with a bank for his own financial gain.

Mr. Martinez's credibility is so suspect that his word cannot be taken over that of Respondent's, a practitioner of 28 years without blemish. Because Mr. Martinez has no credibility, the Bar cannot prove its case by clear and convincing evidence.

Should this court find misconduct, disbarment, the ultimate penalty, should not be assessed. Based on the cases cited in point II, the appropriate sanction is a two year suspension.

POINT I

THE REFEREE'S FINDINGS WERE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE BECAUSE THE ONLY DIRECT EVIDENCE SUPPORTING THE BAR'S ALLEGATIONS CAME FROM RESPONDENT'S CLIENT, RONALD MARTINEZ, WHOSE TESTIMONY WAS UNWORTHY OF BELIEF.

Respondent submits that The Florida Bar did not meet its burden of proving misconduct by clear and convincing evidence. *The Florida Bar v. Rayman* 238 So. 2d 594 (Fla. 1970). That standard was defined by the court on page 596 of *Rayman* as follows:

> We recognize that a disciplinary proceeding against an attorney is not a criminal trial; and, therefore, the quantum of proof necessary to disbar need not be the classical "beyond and to the exclusion of a reasonable doubt" standard. Yet the quantum of proof suggested by a mere "preponderance of the evidence" as is the case in ordinary civil proceedings does not seem to wholly satisfy the requirements of a proceedings such as this.

As was true in *Rayman,* Mr. Massari argues

> that the evidence in the record when taken in its entirety does not constitute sufficient proof of the acts and motives ascribed to [him] to justify the judgment against [him.] id.596

The *Rayman* standard was not a novel concept in 1970. As set forth on page 596 on that opinion, this court has long adhered to the clear and convincing standard. While elaborating on the standard, the court stated:

> More recently in *State ex.rel. Florida Bar v. Bass* (1958) 106 So. 2d 77, (sic) we stated that the power to disbar should be exercised only in a clear case for weighty reasons and on clear proof. In *Bass,* the court discussing the evidence of deceit charged to the respondent reversed stating that the evidence was not

> "sufficiently clear and convincing to justify the Board in overturning the findings of fact of the referee made on the basis of conflicting evidence" at page 78. In *State ex.rel. The Florida Bar v. Junkin*, 89 So. 2d 481 (Fla. 1956), we held that evasive and inconclusive evidence which was given by the complaining witness was insufficient to sustain the disbarment judgment recommended by the Referee.

The evidence in the instant case is not "sufficiently clear and convincing to justify" disbarment. In essence, the case before the referee was a swearing contest between Mr. Massari and Mr. Martinez. Mr. Martinez, however, is not a person to be believed. For example, he boldly admitted filing a fraudulent contract with a bank solely for his personal financial gain. TR96. The testimony of such an individual is suspect and cannot be the basis for disbarring a lawyer who has practiced for 28 years without discipline.

The crux of the Bar's case hinges on the validity of the escrow instructions. B.Ex.10. Mr. Massari said that Mr. Martinez signed a document captioned escrow instructions on February 14, 2000. So do Ms. Hebert and Mr. Muller.

Mr. Martinez testified that he did not sign the February 14, 2000 escrow instructions. B.Ex.10. Indeed, he testified that he did not even go into Mr. Massari's office after the mediation that occurred earlier that day. Four witnesses, however, emphatically contradicted Mr. Martinez's testimony. Mr. Massari, his secretary, Judy Hebert, Brad Muller and Brenda Rona Terry all clearly remembered Mr. Martinez being in Mr. Massari's office on the evening of February 14, 2000.

The date stuck in all of their minds because it was Valentine's Day and, coincidentally, was Mr. Massari's birthday.

Ms. Terry testified that during her visit to Mr. Massari's office that night Mr. Martinez gave her his business card, R.Ex.5, because she was contemplating building a house. Mr. Martinez admitted that the handwriting on the back of the card was his. TR470. He denied, however, meeting Ms. Terry or handing her the card.

Brad Muller remembered meeting Mr. Martinez and the two of them discussing investment opportunities with a potential of a one percent return per week. Mr. Muller clearly remembered Mr. Massari and Mr. Martinez discussing the escrow instructions and Mr. Martinez agreeing to them.

Not only did Mr. Muller testify that he meet Mr. Martinez on February 14, 2000, but he remembered a "bizarre" telephone conversation they had on September 18, 2000 as evidenced by a contemporaneous memo written by Mr. Muller on that date. R.Ex.6.

Finally, both Mr. Massari and Ms. Herbert were adamant that Mr. Martinez came into Mr. Massari's office and executed the escrow agreements on February 14, 2000.

The Bar was able to show no motive for Mr. Muller or Ms. Terry to lie to a referee under oath about their meeting with Mr. Martinez on the evening of February 14, 2000. Their testimony absolutely corroborates the testimony of Mr. Massari and Ms. Hebert that Mr. Martinez came into Mr. Massari's office that night. In so doing, they

contradicted beyond question Mr. Martinez's assertions that he did not go into the office after hours. The evidence is clear and convincing that Mr. Martinez lied when he said he was not in Mr. Massari's office. If he lied about that, he cannot be believed when he said he did not sign escrow instructions. That coupled with his willingness to engage in bank fraud brands him a liar and an individual whose word cannot be considered "clear and convincing" proof in disciplinary proceedings.

Mr. Martinez denied signing any escrow instructions on February 14, 2000. Mr. Massari, Ms. Hebert and Mr. Muller all testified to the contrary. While Mr. Massari and Ms. Hebert may have had a motive for testifying falsely, and respondent asserts that both told the truth, there is no reason for Mr. Muller's stepping into a courtroom and lying about Mr. Martinez's conduct.

The referee found that the copy of the escrow instructions entered into evidence bore a transposed signature. Such may be the case. Ms. Hebert testified, however, on two occasions, including February 14, 2000, Mr. Martinez took his file from Mr. Massari's office. Mr. Martinez, who was willing to file a fraudulent contract for financial gain, could easily have substituted a fraudulent document for the first escrow instructions in the file. It would be easy for him to do so. He was a draftsman who had designed over 1,000 houses. Transposing signatures would be a snap for him.

The referee found that Mr. Martinez had no motive for such an act. Mr. Massari respectfully disagrees. There were two possible motives for Mr. Martinez's chicanery. First, Mr. Martinez may have been trying to abrogate the agreement that he reached with Mr. Massari regarding his portion of the $30,000.00 received from the Steens so that he could get the money back sooner. Second, he may have been trying to drive a wedge between Mr. Massari and his wife, Rebecca Massari.

Mr. Massari testified that Mr. Martinez demanded a return of his funds in contravention of the escrow agreement in May. Once Mr. Massari told him that he was bound by the agreement, Mr. Martinez could have easily taken care of that impediment by putting a bogus document and then claiming to his lawyer friend Larry Rardon and the individuals at First American Title that he did not know what happened to his money. What he did not count on was the lawyers for the Steens contacting the Tampa Police Department and initiating a criminal investigation. Then, to make matters, worse, The Florida Bar started investigating also. Once he started weaving his webs of deceit, Mr. Martinez had no alternative but to stay the course. Having stated to Ms. Durbin that he never agreed to Mr. Massari's using the money, Mr. Martinez could not back off that claim once that statement was reported to the TPD. Of course, he succeeded in his ruse; he got his money, with interest, early.

The second possible motive for Mr. Martinez's lying is his desire to date Rebecca Massari. He acknowledged working primarily with Mrs. Massari on the three projects that he had done for the Massari household. He acknowledged breakfast meetings and working lunches with Mrs. Massari in the past. Finally, he had been separated from his wife for two and one half years at the time of final hearing. Perhaps, being attracted to Mrs. Massari, Mr. Martinez was seeking a new relationship. Respondent submits that it was significant that when the Steen dispute arose, Mr. Martinez first contacted Mrs. Massari, not her husband, for representation.

While Mr. Martinez denied wanting any relationship with Mrs. Massari, Mr. Muller's testimony and his contemporaneously made memo on September 18, 2000, R.Ex.6, belie Mr. Martinez' position. Mr. Muller specifically remembered a distraught and an apologetic Mr. Martinez discussing in a "bizarre" telephone conversation on September 18, 2000, his remorse for what he had done to Mr. Massari. During that conversation, Mr. Martinez indicated that he wanted to date Rebecca.

At the time of the conversation with Mr. Muller, Mr. and Mrs. Massari were temporarily separated. The Bar had sought an emergency suspension of Mr. Massari (which was not granted) and the strain of that action had resulted in the Massaris separating. Mr. Martinez almost succeeded, however, in causing a split between Respondent and his wife.

The Bar can show no motive for Mr. Muller's lying about his conversation with Mr. Martinez on September 18, 2000. It beggars the imagination to think that Mr. Muller would fabricate a document and lie on the stand under oath to a judge just to help Mr. Massari. He was unshakable in his testimony regarding meeting Mr. Martinez on February 14, 2000 and receiving the telephone call on September 18, 2000. Ms. Terry, Ms. Hebert and Respondent all corroborated the former; Ms. Hebert corroborated the latter when she testified that Mr. Martinez asked her for Mr. Muller's telephone number.

Mr. Martinez also denied signing the satisfaction and release prepared by Moody & Shea B.Ex.12. There is no reason why Mr. Martinez would not have signed the document. It was necessary to complete the Steen litigation. Ms. Hebert specifically remembered Mr. Martinez signing the release on March 8, 2000 and she notarized his signature. She specifically remembered Mr. Martinez signing the document while sitting on the couch in the lobby and with no support under the document.

The Bar's hand writing expert opined that Mr. Martinez did not sign the release. The only basis for his opinion was his examination of several checks signed by Mr. Martinez in that same time period. Mr. Green ignored inconsistencies in Mr. Martinez's signature on those checks, such as his not using his initial at times. As proven by Respondent's Exhibit 4, various invoices that Mr. Martinez signed for construction projects, Mr. Martinez's signature varies greatly.

Respondent submits that if there are any irregularities in Mr. Martinez's signature on the release, it can be explained by the circumstances under which Mr. Martinez signed it, i.e., sitting on a couch without sufficient support under it. Mr. Green acknowledged that such circumstances could alter a signature.

In assessing Mr. Martinez's credibility, this court should not limit itself to Mr. Martinez's bank fraud or his insisting that he did not go into Mr. Massaris office on February 14, 2000 when four other witnesses testify otherwise. There are numerous other irregularities in his conduct that cast grave suspicion on his credibility. Perhaps the most serious related to the June 26, 2000 letter that he delivered to Sergeant Waters at the TPD on July 10, 2000. Mr. Martinez signed that letter under oath before a notary public on or about June 26 or 27, 2000. Yet, he claimed that he had reservations about the letter and took it home and tried to rework it. He asserted to the referee that he finally gave up trying to rewrite the letter and then handed it to Sergeant Waters on July 10, 2000 while claiming that his notarized, and therefore sworn, statement contained untruths.

Either Mr. Martinez lied under oath when he signed the June 26th letter or he lied to Sergeant Waters when he handed the letter to him and said that the letter was untrue. His duplicity is aggravated by the fact that he knew when he filed the June 26, 2000 statement that it was received by Sergeant Waters as part of a criminal investigation. In other words, Mr. Martinez lied to law enforcement

officials during a criminal investigation by either giving them a false notarized statement or by telling Sergeant Waters that it was untrue.

Mr. Martinez made a material misrepresentation to the Bar when he gave them a sworn statement on December 12, 2000. During that statement he swore that he had not given the June 26, 2000 letter to Sergeant Waters and that it should not have been given to Sergeant Waters. Mr. Martinez testified at hearing that he forgot that he gave the letter to Sergeant Waters. Such a statement is preposterous. Mr. Martinez acknowledged that he had never before been involved in a criminal investigation involving his forged signature. That an individual would "forget" giving such a letter to the police a mere five months earlier is simply unbelievable.

Apparently, Mr. Martinez had second thoughts about his statements to the Bar. On December 22, 2000, he delivered a hand written letter dated December 12, 2000, to bar counsel recanting his December 12, 2000 testimony. R.Ex.2. Mr. Martinez's starts off with the statement "I now remember giving Sergeant Waters a copy of the letter. . . ." He then stated that he "tried to make revisions to it, but became frustrated with it." Mr. Martinez never adequately explained why he did not simply refuse to give the letter to Sergeant Waters.

Another instance of Mr. Martinez's duplicity is his failure to tell The Florida Bar and Sergeant Waters that he received $1,000.00 from Mr. Massari on June 26, 2000, the date that Mr. Massari signed

the letter to Sergeant Waters. Mr. Martinez stated that he did not tell those authorities about the $1,000.00 because it was "personal." Apparently, Mr. Martinez likes to keep his financial matters confidential. (Which is entirely consistent with his August 15, 2000 letter to Mr. Massari, R.Ex.1). Perhaps, Mr. Martinez did not mention the $1,000.00 to the Bar or to Sergeant Waters because he was afraid that they might think he was trying to extort money from Mr. Massari in return for his signing the letter. Regardless of Mr. Martinez's reason for his omission, his failure to divulge his receipt of the $1,000.00, and his waiting for the check from Mr. Massari to clear before presenting the letter to Sergeant Waters, shows he lacks candor.

That Mr. Martinez would lie is also made evident by the fact that he told representatives at First American Title that once he received his money, if anybody questions his signature on the release that had been filed in court he would just lie and say that the signature was his. TR119.

Another instance of Mr. Martinez's dishonest nature is his failure to use the Steen proceeds to pay off unpaid subcontractors from that project. TR 100.

Respondent submits that Mr. Martinez's bank fraud alone should give this court pause about accepting his testimony. Mr. Martinez testified that the bank would not accept a cost plus contract so he and the Steens filed a fixed price contract with the bank sometime

later. Although both contracts were dated June 18, 2000, the fixed price contract was actually entered into subsequent to that date. Mr. Martinez submitted the fixed price contract with the intention that the parties would not adhere to it but would be governed by the cost plus contract. Apparently, the Steens did not feel the same way; they sued Mr. Martinez for filing a fraudulent mechanics lien against their house. Even if, as Mr. Martinez intimates, the bank knew that the agreement between the Steens and Mr. Martinez was for a cost plus arrangement, he nonetheless filed a fraudulent contract in an attempt to secure financing from a federal lending institution. Any individual who would do that, admittedly for his own financial gain, is not an individual worthy of belief. His testimony should not be accepted over that of a lawyer who practiced for 28 years without blemish. Certainly, his words should not be taken over that of neutral witnesses such as Ms. Terry and Mr. Muller.

Mr. Martinez's testimony is entirely unreliable. It cannot be held to be sufficient to meet the clear and convincing burden set forth by *Rayman.*

Respondent is aware that this court is not prone towards reversing a referee's finding of facts when they are supported by competent substantial evidence. See e.g. *The Florida Bar v. Jordan* 705 So. 2d 1387, 1390 (Fla. 1998). However, as this court stated in its recent decision in *The Florida Bar v. Bailey*, 26 FLW S787 (Fla. 2001) at page 789:

> Nevertheless, in any Bar disciplinary case, and in particular a case where the recommendation is disbarment, the most severe penalty we can administer to an attorney, we engage in a careful and thorough review of the record.

Respondent submits that a "careful and thorough of the record. . . ." will result in this court's taking the unusual, but not unheard of, step of refusing to accept the referee's findings. Simply put, the evidence in this case is not "clear and convincing evidence free of substantial doubts or inconsistences." *Rayman, supra,* at 597.

This court has not hesitated to acquit a lawyer of misconduct if the key witness against him is a person lacking credibility. See e.g. *The Florida Bar v. Thomson* 271 So. 2d 758 (Fla. 1972) (the witness's "admitted penchant for perjury).

Even where evidence of misconduct exists, this court will examine it carefully to see whether is justifies the extreme sanction of disbarment. For example, in *The Florida Bar v. Wendel* 254 So. 2d 199 (Fla. 1971) this court refused because

> The evidence in the record is not as clear and convincing to us of misconduct on respondent's part to the degree the referee found it. p.201

Once Mr. Martinez's testimony is disregarded, the Bar's case consists entirely of circumstantial evidence.

> However, in order to be legally sufficient evidence of guilt, circumstantial evidence must be inconsistent with any reasonable hypothesis of innocence.

The Florida Bar v. Marable 645 So. 2d 438 (Fla. 1994) at 443. The circumstantial evidence adduced by the Bar in this case does not meet that criteria. This court's pronouncements in the *Rayman* case at p.598 is as true for the instant case as it was for *Rayman*. There, the court stated:

> While we cannot say that there was no evidence to support the referee's findings, we are constrained to the view that much of the supportive testimony is itself evasive and inconclusive so that when it is considered together with the above recited inconsistencies, the evidence does not establish the charges with that degree of certainty that should be present in order to justify a finding of guilt on charges as serious as those made against [respondent].
>
> • • •
>
> We conclude that the evidence does not present that degree of proof necessary to warrant the findings of guilt and consequent disbarment.

Similarly, in the case at bar, "the evidence does not present that degree of proof necessary to find Mr. Massari guilty of the charges made and to justify disbarment.

POINT II

UNDER THE CIRCUMSTANCES OF THIS CASE DISBARMENT IS NOT THE APPROPRIATE DISCIPLINE TO IMPOSE.

This Court has wisely delegated to itself the power to reverse a referee's legal conclusions and recommendations "if we find it erroneous." *The Florida Bar in Re: Inglis,* 471 So.2d 38 (Fla. 1985). Specifically, in regard to the discipline recommended by a referee,

this Court stated in *The Florida Bar v. Anderson,* 538 So.2d 852 (Fla. 1989) that:

> In reviewing a referee's recommendations for discipline, our scope of review is somewhat broader than that afforded to findings of fact because, ultimately, it is our responsibility to order an appropriate punishment.

In determining the discipline to be imposed, this Court in *The Florida Bar v. Pahules,* 233 So.2d 130 (Fla. 1970) set forth three purposes. On page 132 of that decision, this Court stated:

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. First the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become like violations.

This Court has adhered to this philosophy without variation since *Pahules.*

In addition to the three considerations listed above, this Court has also stated that disciplinary proceedings are remedial, and not punitive, in nature. *DeBock v. State*, 512 So. 2d 164,167 (Fla. 1987). 167.

The referee in the case at bar, notwithstanding the fact that Respondent has practiced for 28 years without prior disciplinary record, recommended disbarment in these proceedings. That

recommendation has no "reasonable basis in existing case law.", *The Florida Bar v. Lecznar,* 690 So. 2d 1284, 1288 (Fla. 1997) and should therefore be rejected by this Court. The referee's recommendation that Respondent should be disbarred is a recommendation that focuses on retribution, rather than rehabilitation and is punitive in nature. *The Florida Bar v. Pincus*, 300 So. 2d 16 (Fla. 1974); *DeBock v. State, supra.*

This Court has "repeatedly stated that disbarment is an extreme form of discipline and should be reserved for the most egregious misconduct." *The Florida Bar v. Summers,* 728 So. 2d 739, 742 (Fla. 1999); accord, *The Florida Bar v. Kassier,* 711 So. 2d 515, 517 (Fla. 1998). As this Court said in *The Florida Bar v. Hirsch,* 342 So. 2d 970, 971 (Fla. 1977):

> We cannot say that the record here establishes that this respondent is one that has been demonstrated within that class of lawyers "unworthy to practice law in this state" as provided in Integration Rule 11.02. Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the latter in these proceedings as the death penalty in criminal proceedings.

The record before this Court does not establish that Mr. Massari has been shown to fall "within that class of lawyers "unworthy to practice law in this state . . . ." The evidence before this Court shows, at worst, a single instance of misuse of trust funds, the only time it has been shown to happen in 28 years of practice, and one in

which restitution with interest was made within 90 days prior to the initiation of criminal or grievance proceedings.

There are numerous cases in which this Court has imposed suspension rather than disbarment for a lawyer's misuse of trust funds. For example, in *The Florida Bar v. Wolf,* 605 So. 2d 461 (Fla. 1992) the respondent was suspended for two years for misappropriation of estate funds and for substantial shortages in the lawyer's trust account and for bounced trust account fund checks. She was be guilty of a "lack of candor in her testimony as to the reasons for her improper use of trust funds." Unlike the case at bar, Ms. Wolf had a prior disciplinary history, a public reprimand.

In *The Florida Bar v. Borja*, 609 So. 2d 21 (Fla. 1992), despite the Board's demand for disbarment, a lawyer received but a one year suspension for numerous violations, including misuse of trust funds, dishonesty, fraud and misrepresentation and failure to abide by trust accounting rules. Mr. Borja, unlike Mr. Massari, had been previously been disciplined on four separate occasions. He had received a private reprimand in 1998 and had received three public reprimands in 1990 and 1991.

Cases analogous to the one at bar in which lawyers received suspensions rather than disbarment include *The Florida Bar v. Pellegrini,* 714 So. 2d 448 (Fla. 1998)(three years suspension for misappropriation of trust funds and for violating the terms of an emergency suspension order); *The Florida Bar v. Stark,* 616 So. 2d 41

(Fla. 1993)(three years suspension for misappropriating trust funds, for bouncing trust account checks, and for practicing after temporally suspended); and *The Florida Bar v. Schiller,* 537 So. 2d 992 (Fla. 1989)(three suspension for misappropriation of trust funds despite the fact that complete restitution had not yet been made).

This Court has stated that "no lawyer should be disbarred on discredited evidence." *State ex rel. The Florida Bar v. Oxford*, 127 So. 2d 107 (Fla. 1960) at 111. The only direct testimony against respondent in this case regarding the improper use of trust funds came from Mr. Martinez. As argued in point I on appeal, his veracity is suspect. Where, as here, the evidence does not conclusively demonstrate that Respondent should never be before the Bar again, a sanction less than disbarment should be imposed. A two year suspension will meet the goals set forth by *Pahules.*

CONCLUSION

The Florida Bar has failed to prove misconduct by clear and convincing evidence. The referee's findings of fact are predicated on the testimony of a suspect witness. As such, his findings do not meet the clear and convincing burden required for discipline and, therefore, should not be accepted by this court.

Should this court accept the referee's findings, the appropriate discipline for Mr. Massari is a two year suspension, not disbarment.

Respectfully Submitted,

WEISS & ETKIN

John A. Weiss
Attorney Number 0185229
2937 Kerry Forest Parkway
Suite B-2
Tallahassee, Florida 32308
(850) 893-5854
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of Respondent's Corrected Initial Brief were delivered by hand to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927 and that copies were sent to Susan Bloemendaal, Bar Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607 and to John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 3RD day of January, 2002.

John A. Weiss

CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that Respondent's Corrected Initial Brief is submitted in 12 point proportionately spaced Courier New Font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

John A. Weiss