IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NO.: SC01-952
TFB FILE NO: 2001-70,370(11P)

OMAR JAVIER ARCIA,

Respondent.
_____/

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Respondent, Omar Javier Arcia, seeks review of the discipline recommended

by the Referee below. He asks this Court to substitute a suspension of six months or less for the three year suspension recommended by the Referee.

The Appellant will be referred to as Mr. Arcia or as Respondent throughout this brief. The Appellee, The Florida Bar, will be referred to as such or as the Bar. References to the transcript of final hearing will be by the designation TR followed by the appropriate page number. The Bar's exhibits will be designated by the symbol BX followed by the appropriate number. Similarly, Respondent's exhibits will be designated RX. References to the Report of Referee will be by the symbol RR followed by the appropriate page number.

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 OF THE FACTS

These proceedings were initiated as a result of a complaint brought against Omar J. Arcia by The Florida Bar. Shortly before final hearing in this cause, Mr. Arcia admitted all charges brought against him in the Bar's complaint. Final hearing was, in essence, a dispositional hearing to determine the disciplinary sanction to be imposed.

In his Report of Referee, the Referee recommended that Mr. Arcia be found

guilty of violating Rules 4-8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Conduct. RR11. The Referee recommended that Mr. Arcia be suspended for three years followed by three years of probation with various conditions. The Referee made extensive findings of fact. Unfortunately, under the guise of findings, the Referee also inserted various statements that make it difficult to separate his actual factual findings from mere conclusions or, in some cases suppositions. Respondent will attempt, therefore, to summarize the pertinent facts in this matter recognizing that the Referee's report is much more elaborate.

Mr. Arcia was admitted to The Florida Bar in 1995 and had been a salaried associate of Zarco and Pardo since his admission. He received an annual salary with discretionary bonuses at the end of each year.

In December 1998, Mr. Arcia established Omar J. Arcia, P.A. TR14. He testified that he established the P.A. because in late 1998 he was contemplating leaving the firm or opening up his own practice. TR192.

In mid to late 1999, Mr. Arcia began soliciting the firm's clients with a view towards receiving the fees earned on their work coming directly to him. Early on, he worked on just a few cases, but, by July or August 2000, his solicitation of firm

cases escalated. TR81,193,219-220. Mr. Arcia testified that his first diversion began in mid 1999 after a pro bono case he was working on for a family member ended up having fees awarded. TR193.

In the fall of 2000, Robert Zarco became concerned about the lack of referrals he received from a speech he gave to Dunkin Donuts franchise holders. He did not know at the time that Mr. Arcia was representing some of those franchises without the firm's knowledge. When asked, Mr. Arcia professed ignorance of the reason. TR24,43. Subsequently, Mr. Zarco learned of a $1,208.33 check made payable to Mr. Arcia from a firm client, Steven Inscore. When he asked Mr. Arcia about the check, the latter improperly indicated it was a mistake. TR19,44.

Subsequently, the firm initiated an investigation and learned of Mr. Arcia's P.A. being set up in December 1998. On September 8, 2000, the firm set up a meeting with Mr. Arcia to be attended by all of the partners. Prior to the meeting, the firm had filed suit against Mr. Arcia and unbeknownst to him obtained an injunction freezing all of his personal accounts, including his children's college accounts. At the September 8, 2000 meeting, Mr. Arcia was given two opportunities to voluntarily divulge his diverting funds and clients into his own P.A. When he failed to do so, he was directly confronted with his offenses and admitted them. His explanation for his misconduct at that time was "greed". TR49,50.

The next day, Mr. Arcia brought in all of his financial records and completely disclosed to the firm all diversions and his receipt of all funds. TR84. That meeting, on Saturday, September 9, 2000, lasted about four hours. During that meeting Mr. Arcia was advised that the firm was going to report his conduct to The Florida Bar and that all documentation he had turned over to the firm would be provided to the Bar. TR209.

Mr. Arcia admitted to the Bar's allegation that he diverted approximately $62,000.00 from the firm. The firm and Mr. Arcia, however, agreed on November 28, 2000 to a settlement of $60,000.00 to be paid in installments with the first installment of $35,000.00 due shortly after signing the agreement. On February 6, 2002, the day before final hearing in this cause, Mr. Arcia paid the balance of the $60,000.00 owed to the firm two years before he was required to do so under his agreement.

Mr. Zarco estimated that Mr. Arcia diverted 12 to 18 clients from the firm. TR30. The Referee estimated 10 to 20 clients were diverted. RR4.

SUMMARY OF ARGUMENT

The Referee's recommendation that Mr. Arcia receive a three year suspension is inconsistent with this Court's past disciplines for similar misconduct. In fact, the longest discipline meted out for analogous conduct is a one year suspension, one

third of that recommended by the Referee. The cases with fact patterns closest to Mr. Arcia's, *Florida Bar v. Cox*, 655 So. 2d 1122 (Fla. 1995) and *Florida Bar v. Gillin*, 484 So. 2d 1218 (Fla. 1986) resulted in 30 day and 6 month suspensions respectively.

The Referee did not give proper weight to numerous elements of mitigation. The most glaring example is his failure to acknowledge the sincerity of Mr. Arcia's remorse and contrition. The Referee also overlooked or gave little weight to Mr. Arcia's prompt restitution.

Finally, the Referee improperly found as aggravation several factors that had no support in the record. The most significant are his conclusions that Mr. Arcia impeded Bar disciplinary proceedings and that Mr. Arcia misled the lawyer that set up Mr. Arcia's professional association. Neither conclusion is warranted by the record before the Referee or this Court.

When the Referee's incorrect weighing of mitigation and aggravation are factored in with his disregard of this Court's past disciplines for similar conduct, it becomes apparent that his recommended discipline is inappropriate and that a six month suspension is the discipline that should be imposed in this case.

POINT ON APPEAL

A SUSPENSION OF AT MOST SIX MONTHS, RATHER THEN THE THREE YEARS RECOMMENDED BY THE REFEREE, IS THE APPROPRIATE DISCIPLINE FOR RESPONDENT'S CONDUCT IN THE CASE AT BAR

A. THIS COURT'S PAST DISCIPLINARY SANCTIONS OFANALOGOUS CONDUCT SUPPORTS A SUSPENSION OF SIX MONTHS AND IS CONTRARY TO THE THREE YEARS RECOMMENDED BY THE REFEREE.

Respondent urges this Court to follow its past decisions in similar cases and to reject the Referee's recommended that he be suspended for three years. Respondent argues that a six month suspension is the appropriate sanction for his conduct. This Court has stated on many occasions that it has broad discretion in reviewing a Referee's recommended discipline. See, e.g., *Florida Bar v. Poplack*, 599 So. 2d 116, 118 (Fla. 1992). A review of this Court's past decisions shows that the Referee's recommendation in this case is clearly off the mark and should not be followed.

Perhaps the case with a fact pattern most similar to that before the Court today is *Florida Bar v. Cox,* 655 So. 2d 1122 (Fla. 1995). Mr. Cox received a thirty day suspension for conduct virtually identical to that engaged in by Mr. Arcia. The Court summarized the facts of the *Cox* case on page 1122 of its opinion when it stated:

> Cox accepted cases without the knowledge or the consent of the firm, violating the firm policy against unauthorized outside legal employment. The complaint also alleged that Cox corresponded with clients on these matters and billed clients on firm stationery, and in several cases requested in writing that the clients make payment to him personally

> rather than to the firm. Further, Cox actually collected and kept some of these fees. Cox initially denied having done so, but when faced with documented evidence in each case, he admitted to having collected these fees.

This Court further noted on page 1123 that Mr. Cox admitted

> that he engaged in "moonlighting" while employed as an associate with the law firm, and that he initially denied the fact that he represented outside clients and collected legal fees from those clients.

Mr. Cox argued to the Referee that his representation of his outside clients did not result in any conflicts of interest. He also argued that it did not cause any "actual or potential injury" to any client.

Notwithstanding Mr. Cox's arguments, this Court approved the rule violations found by the Referee. As set forth in footnote one of the Court's opinion, those violations consisted of the following:

> (1) Rule 4-1.7(b) for representing clients without the knowledge and consent of the law firm for which he was working, which could have limited his exercise of independent professional judgment and the representation of those clients or which could have resulted in the law firm having a conflict of interest by accepting a case against an unknown client of Cox;
>
> (2) Rule 4-4.1(a) for representing clients without the knowledge or consent of the law firm for which he was working and for concealing the fact from that firm and in some cases denying such representation; and

> (3) Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation pertaining to his performance of work for clients without the consent or authorization of the law firm and attempting to conceal the representation of those clients.

This Court then went on to say on page 1123 of its opinion that the Referee's recommended 30 day suspension was "consistent with other disciplinary cases . . . ." citing *Florida Bar v. Stalnaker*, 485 So. 2d 815 (Fla. 1986), *Florida v. Childers*, 582 So. 2d 617 (Fla. 1991), *Florida Bar v. Bradham*, 446 So. 2d 96 (Fla. 1984) and *Florida Bar v. Herzog*, 521 So. 2d 1118 (Fla. 1988). Those four lawyers received suspensions for analogous conduct ranging from 10 days to 90 days.

This Court specifically noted in *Cox* that it considered the 30 days suspension "serious punishment." Specifically, the Court stated on page 1123 that

> Although Cox's conduct may not have caused serious harm to the clients or to the firm where he was employed, the facts reflect a pattern of intentional misconduct and deception which warrants serious punishment. Cox continued to engage in unauthorized legal employment even after he was specifically warned against it, and, even more importantly, willfully deceived the firm about his conduct. Consistent with the aforementioned cases, we believe a thirty day suspension is an appropriate discipline for Cox given his dishonesty and misrepresentation towards his employer and his clients, as well as his misconduct in diverting fees to his personal account.

Mr. Arcia's conduct in the case at bar was no worse than that engaged in by Mr.

Cox. Yet , the Referee chose to ignore the *Cox* decision and rather than imposing a discipline in line with this Court's past pronouncements, he recommended a three year suspension. Such a discipline completely disregards this Court's past decisions and is clearly one that ignores this Court's holding that disciplinary proceedings are remedial rather than punitive in nature. *DeBock v. State*, 512 So. 2d 164 (Fla. 1987).

It is obvious that the Referee completely disregarded this Court's decision in *Cox*. Mr. Cox was found guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. He accepted cases without his firm's knowledge, thereby violating that firm's policy against unauthorized outside legal employment. Mr. Cox billed his outside clients on firm stationery and asked those outside clients to "make payments to him personally rather than to the firm." When confronted with his conduct, Mr. Cox "initially denied having done so, ..." In fact, this Court noted that Mr. Cox engaged "in unauthorized legal employment even after he was specifically warned against it, ..." The Court found that he "willfully deceived" his employers about his conduct.

The facts in the *Cox* case are virtually identical to those at bar. Notwithstanding that fact, the Referee would have this Court suspend Mr. Arcia for a period 36 times longer than was meted out to Mr. Cox.

The four cases cited by the Supreme Court in the *Cox* decision also show that

the Referee's recommendation of a three suspension for Mr. Arcia is completely out of line. While all four cases are somewhat distinguishable, all of them contradict the Referee's recommendation.

The first case cited by the Court in *Cox* as precedent for a 30 day suspension was *Florida Bar v. Stalnaker*, 485 So. 2d 815 (Fla. 1986). Mr. Stalnaker was suspended by the Court for 90 days instead of the 12 months recommended by the Referee. Mr. Stalnaker was a long-term salaried associate lawyer in a firm with two partners. He also received annual bonuses based on the firm's net profits. The pertinent portions of the Referee's findings of fact were set forth on page 815 in a footnote to the Court's opinion. That footnote stated:

> 7. Sometime in 1979 or early 1980, the respondent altered his handling of fees and costs being generated by him for the professional association from his cases. Instead of turning all the monies received directly to the association's bookkeeper, on some cases respondent deposited the checks and cash he received directly into his personal bank account at the Barnett Bank of Altamonte Springs and later remitted a portion of those monies in cash to the association's bookkeeper. On other cases, respondent turned over the checks and some portion or all of the cash received directly to the association's bookkeeper. The association maintained its account at a different bank.
>
> 8. Respondent systematically diverted a portion of the legal fees being generated by him for the professional association from the association to his own personal bank account and use without informing the bookkeeper or

> principals, Jones and Morrison. Respondent followed this improper course of conduct without the permission or knowledge of either Messrs. Jones or Morrison until confronted in late August, 1981. Respondent then left the association.

The Referee also found that Mr. Stalnaker failed to report his excess income on his 1980 tax return (in all likelihood, such conduct constituted felonious tax fraud). The Referee found that the misconduct occurred over two years and constituted conduct involving dishonesty, fraud, deceit or misrepresentation as well as conduct adversely reflecting on Mr. Stalnaker's fitness to practice law.

The main distinguishing factor between Stalnaker and the case at bar is, as set out on page 816 of the opinion, the fact that Mr. Stalnaker had reason to believe he had permission from one of the partners to divert the funds in question. The Court then found that Mr. Stalnaker's actions fell short "of a deliberate attempt to steal from the association." The Court intimated on page 817 of its opinion that had Mr. Stalnaker been deliberately "stealing funds from [a] firm" the appropriate discipline would have been the six month suspension imposed in *Florida Bar v. Gillin*, 484 So. 2d 1218 (Fla. 1986).

Mr. Stalnaker's case is also distinguished somewhat from the case at bar because he was the main income-generating lawyer in the firm and carried a disproportionate amount of the workload amongst the three lawyers.

In *Cox*, the Court also cited *Florida Bar v. Childers*, 582 So. 2d 617 (Fla. 1991) as precedent for its decision. The Referee had recommended that Ms. Childers receive a 90 days suspension for depositing a $950.00 check belonging to the firm but made payable to her into her personal savings account. The Bar appealed and sought a three year suspension.

In suspending Ms. Childers for 90 days, this Court found that Ms. Childers's acknowledgment of her error, corporation with the Bar, her lack of a prior disciplinary record and her remorse were mitigating circumstances. The Court also noted that her conduct was "a one-time unexplainable aberration" and that no clients or the firm suffered any harm. While Ms. Childers' conduct only happened once, the facts between the two cases are not so disparate that Mr. Arcia deserves a three year suspension as opposed to the 90 days meted out to Ms. Childers.

The third case cited in *Cox*, *Florida Bar v. Bradham,* 446 So. 2d 96 (Fla. 1984) was a consent judgment for a 30 days suspension followed by two years probation and payment of costs. The facts in *Bradham* were not set forth in the opinion. Mr. Bradham was, however, found guilty of conduct involving dishonesty, fraud, deceit and misrepresentation. Two Justices dissented and would have rejected the consent judgment. They noted that the Bar's complaint charged Mr. Bradham "with dishonesty in his relations with his law partners." Whatever the fact situation, Mr.

Bradham engaged in conduct involving dishonesty, fraud, deceit and misrepresentation and received but a 30 day suspension. That is a far cry from the three years recommended by the Referee in the instant proceedings.

The last case cited in Cox was *Florida Bar v. Herzog*, 521 So. 2d 1118 (Fla. 1988). Mr. Herzog received a 10 day suspension for engaging in "deceptive billing practices" and that he "misrepresented to the clients what they were actually paying for." Id, page 1119. Apparently, Mr. Herzog "adjusted" the bills he sent to his clients so that they would not be "privy to the exorbitant costs" incurred by Mr. Herzog relative to his fees. And after the bill was paid, Mr. Herzog "readjusted" the bill so that the advanced costs would be covered. In essence, the Court pointed out that he falsified his bills to his clients.

The Referee in *Herzog* was unable to determine if his deceptive billing practices deprived his firm of any funds.

Mr. Herzog received but a 10 day suspension. While the facts in his case are clearly not on all fours with those of Mr. Arcia's case, they certainly do not stand for the proposition that Mr. Arcia should receive a suspension over a hundred times longer.

In *Stalnaker*, this Court alluded to *Florida Bar v. Gillin*, 484 So. 2d 1218 (Fla. 1986), pointing out that a six month suspension would be the appropriate discipline

for taking funds from a lawyer's firm. Mr. Gillin's conduct was most egregious. Since the facts pertaining to his misconduct were somewhat convoluted, the salient portion of the Court's opinion best describing his misconduct, starting on page 1218, is set out below:

> Gillin represented a client in a divorce in which the client's husband paid Gillin $5,000 in attorneys fees. This amount was placed in the account maintained by the firm in which Gillin was a partner. All fees which firm members collected were to be placed in the account for distribution pursuant to a fee distribution formula. As part of the property settlement, Gillin was to receive $75,000 in two equal installments which he was to forward to the client. At some point after the divorce, Gillin informed the client that she owed him $25,000 in fees, a claim to which she apparently acquiesced. Gillin then instructed his client that upon receipt of the first $37,500 payment he would pay $20,000 to her. She was then to provide him with a check for $12,250 made payable to Contemporary Cars, Inc., located in Orlando, Florida. Upon receipt of that check, Gillin would then pay to the client the balance of the funds from the first payment. The exchange of monies went as planned. Gillin used the check as a down payment on a 1984 Porsche automobile. The dealership returned all but $1,000 of the down payment so that Gillin could place the funds in a certificate of deposit in an account in his own name. Subsequently, Gillin rented a post office box. When he received the second installment of the property settlement in the amount of $37,500, he released $20,000 to the client and told her that he would pay her the balance upon receipt of a check, again made payable to Contemporary Cars, Inc., in the amount of $12,500. Gillin instructed her to send this check to his post office box. These arrangements dissatisfied the client and she began

> inquiries which culminated in a complaint to the Bar. After the Bar began its investigation, Gillin made restitution to the client, effectively retaining only the $5,000 the husband paid and a $500 retainer that the client had initially paid.

This Court on page 1219 affirmed the Referee's conclusion that Mr. Gillin intended to steal $25,000.00 from the firm by depriving them of fees. (The Court noted in a footnote that the Referee questioned the propriety of the fee that Mr. Gillin attempted to charge. But, because the Bar did not raise that issue through oversight in its complaint, such concerns were not a basis for the Court's suspension).

In suspending Mr. Gillin for six months, this Court noted that he had no prior discipline (having been admitted to the Bar, for apparently, about 10 years at the time of the misconduct) that "no parties suffered any real damage" due to Mr. Gillin's misconduct and that he had been active in church, civic and bar activities.

Respondent submits the discipline that he should receive should be no worse than that imposed by this Court on Mr. Gillin. Certainly *Gillin*, coupled with *Stalnaker*, *Childers*, *Bradham* and *Herzog* show that the three year suspension recommended by the Referee is completely out of line.

In the only two other cases the undersigned could locate in Florida disciplinary jurisprudence analogous to the case at bar, *Florida Bar v. Farver*, 506 So. 2d 1031 (Fla. 1987) and *Florida Bar v. Ward,* 599 So. 2d 650 (Fla. 1992), this Court imposed

one year suspensions. Mr. Farver was found to have engaged in misconduct involving dishonesty, fraud, deceit or misrepresentation, and conduct that adversely reflected on his fitness to practice law and in illegal conduct involving moral turpitude. Specifically, he was found to have "intentionally deprived his law firm of fees paid to him by the firm's clients." While the manner of the diversion and the amount of the diverted fees were not set forth in the opinion, the dissent noted that Mr. Farver was "arrested and charged with grand theft" and paid $6,671.00 in restitution. Apparently, he was a partner in the firm.

Mr. Farver's conduct was similar to that engaged in by Mr. Arcia except that apparently the former did not make restitution until he was arrested and charged with grand theft. Mr. Arcia, however, not long after being confronted entered into a settlement with the firm and paid them $35,000 shortly thereafter. The remaining $25,000 was paid off about one year later. TR 53, 54, 61-64, 180-181. The fact that Mr. Farver's restitution was not freely and promptly made distinguishes his case from that at bar and, Respondent argues, should result in Mr. Arcia's discipline being less than the one year imposed in Farver's case.

In *Ward*, the accused lawyer was suspended for one year for conduct also involving dishonesty, fraud, deceit or misrepresentation. The Court summarized his misconduct on page 651 as follows:

> Between March 15, 1989 and August 4, 1989, respondent used expense account draws to make unauthorized withdrawals of funds in excess of $12,000 from his law firm's operating account to repay debts and to purchase furniture for his home. After being confronted, respondent made full restitution for the unauthorized advances and was terminated from employment.

It appears that the expense account draws were bogus.

The Referee noted that

> upon being questions [*sic*] about one of the several transactions, the respondent initially denied his misconduct. At a later time on the same day, he made a complete admission. The respondent's conduct cannot be justified from the standpoint of necessity. His testimony that the thefts were committed to cover personal, unessential obligations is outrageous.

As mitigation, this Court noted that Mr. Ward had no prior disciplinary history, had made a good faith effort at restitution, cooperated with the Bar, had an outstanding reputation in the community, had made excellent professional adjustment and was remorseful.

Mr. Ward's conduct is more serious than that at bar. Unlike Mr. Arcia, who performed valuable legal services for the fees that he received, Mr. Ward apparently falsified his expense account draws to steal $12,000.00 from the firm. He did not *divert* funds; he falsified expense vouchers to steal money. Mr. Arcia's conduct does not warrant as stern a discipline as that meted out to Mr. Ward.

All of the cases discussed above support Mr. Arcia's position that he should be suspended for no more than six months. None of them come even close to supporting the Referee's recommendation of a three year suspension. The longest discipline imposed for diverting funds from a firm was the one year suspension imposed in *Ward* and *Farver*.

At final hearing, The Florida Bar relied on *Florida Bar v. Benchimol,* 681 So. 2d 663 (Fla. 1996) as support for a Draconian punishment. *Benchimol*, however, is distinguishable on its facts. Mr. Benchimol misappropriated trust funds from clients as well as taking fees that belonged to his former firm. As the Court pointed out on page 666 of the *Benchimol* opinion

> This case involves misappropriation of client trust funds, misappropriation of law firm funds, commingling of client and firm funds with personal funds, and a pattern of dishonesty and misrepresentation. The only mitigating factor that the referee found was no prior disciplinary history.

The Court in *Benchimol* also reaffirmed its holding in *Ward* that diverting law firm funds falls into a lower hierarchy of culpability then does the misappropriation of client funds.

Simply put, *Benchimol* is not pertinent to the case before the Court today.

While its holding is frequently ignored by the Bar in its recommendations to a

Referee and to this Court, this Court's philosophy is that

> disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts.

DeBock v. State, 512 So. 2d 164 (Fla. 1987) at 166. The fact that disciplinary proceedings are not penal, but are remedial, is a distinction that should not be glossed over. If disciplinary proceedings should cross the line from remedial to penal, the panoply of rights that come into play in punitive proceedings will become requirements in disciplinary proceedings also. For example, lawyers cannot invoke the fifth in Bar proceedings unless they have actual or potential criminal proceedings. They have no right to appointed counsel in Bar proceedings. Should disciplinary proceedings become purely penal in nature, such rights may have to be afforded to the accused.

The Referee's recommendation of a three year sentence focuses on retribution and punishment, not a remedial sanction with a view towards protecting the public and the integrity of the Courts. As this Court noted on page 167 of *DeBock*,

> the vast weight of judicial authority recognizes that bar discipline exists to protect the public, and not to "punish" the lawyer.

The six month suspension sought by Mr. Arcia complies with the above quote from *DeBock* and meets the three purposes of discipline as set forth in *Florida Bar v.*

Pahules, 233 So. 2d 130 (Fla. 1970), *Florida Bar v. Lord,* 433 So. 2d 983 (Fla. 1983) and their progeny. On page 132 of *Pahules*, this Court stated:

> In [disciplinary] 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 involved in like violations.

A six month suspension will meet all three of the purposes set forth in *Pahules.* First, there is no showing that the public needs to be protected from Mr. Arcia. Even if such were the case, he has started the road to proving rehabilitation (which will be required before he can again practice) by acknowledging his wrongdoing, by taking steps to rectify it and by clearly indicating that no such conduct will ever occur again.

The three years recommended by the Referee is a discipline constituting "undue harshness".

Most importantly, the six month suspension recommended by Respondent meets the second purpose set forth in *Pahules*: it is "sufficient to punish a breach of ethics" while at the same time encouraging "reformation and rehabilitation." A six month suspension will severely impact Mr. Arcia's career but will not destroy it. A

three year suspension, as demanded by the Referee, the longest discipline short of disbarment, will forever impact Mr. Arcia's career and will forever impact his family's well-being.

As noted above, a six month suspension requires proof of rehabilitation prior to reinstatement. Having to prove rehabilitation and having three years probation afterwards will insure public protection while at the same time encouraging reformation and rehabilitation by the Respondent.

Finally, a six month suspension will be severe enough to deter others engaged in like misconduct. A six month suspension, followed by the "six to nine months" average time that reinstatement proceedings take, *Florida Bar Re: Roth,* 500 So. 2d 117 (Fla. 1986), will have sufficient adverse financial impact to insure that nobody will embark on such conduct lightly. It will also result in the opprobrium of one's peers. Those factors alone should deter any such misconduct.

Perhaps the most important factor, though not specifically addressed by *Pahules*, that this Court should consider is consistency in imposing discipline. Simply put, the three year suspension recommended by the Referee is completely out of line with this Court's past decisions. In essence, the Referee is recommending that this Court triple the worst penalty imposed for similar misconduct in the past. Such is unreasonable, is unfair, and is not justified by the circumstances of this case.

The discipline recommended by the Referee in the instant case is equal to or longer than that imposed by this Court in some trust funds defalcation cases! For example, in *Florida Bar v. Wolf*, 605 So. 2d 461 (Fla. 1992), a lawyer was suspended for two years for misappropriation of estate funds and substantial shortages in her trust accounts. Ms. Wolf's misconduct continued even after she received notice that she had issued trust fund checks returned for insufficient funds. The Referee also found that she lacked candor in her testimony before him. Finally, Ms. Wolf filed a false accounting with the probate court in regards to $8,500.00 paid to herself. She also had a prior disciplinary history.

To suspend Mr. Arcia for three years when Ms. Wolf received but a two year suspension is unreasonable and unjust.

In *Florida Bar. Borja*, 609 So. 2d 21 (Fla. 1992), a lawyer who had been disciplined on four prior occasions received a one year suspension for misuse of trust funds, dishonesty, fraud and misrepresentation. He also misrepresented to the Bar the status of his trust account.

Instances where lawyers guilty of misappropriation of trust funds received the same discipline as that recommended for Mr. Arcia are *Florida Bar v. Tauler*, 775 So. 2d 944 (Fla. 2000); *Florida Bar v. Pellegrini*, 714 So. 2d 448 (Fla. 1998); *Florida Bar v. Stark*, 616 So. 2d 41 (Fla. 1993) and *Florida Bar v. Shiller*, 537 So. 2d 999 (Fla.

1989).

A suspension of at most six months is the appropriate discipline for Mr. Arcia's conduct in the case before the Court today.

B. THE REFEREE EITHER DISREGARDED OR MINIMIZED SUBSTANTIAL MITIGATING FACTORS PRESENT IN THIS CASE.

Perhaps, the Referee's inappropriate recommendation of discipline was the result of his ignoring or giving limited weight to important mitigating factors present in this case. Even where the Referee listed mitigation, it was very apparent that often it was grudgingly set forth in his report. For example, although the Referee gave Respondent credit for good character and reputation in the community, he minimized it by stating that Mr. Arcia had "a few attorney friends testify" on his behalf. Another example is while acknowledging that Respondent had made full restitution "on the eve of trial", the Referee ignored the fact that Respondent entered into an agreement for restitution less than three months after his misconduct was discovered and promptly paid to the firm $35,000 of the $60,000 agreed upon. The remaining $25,000 paid "on the eve of trial" was a full two years earlier than required by that agreement.

With the exception of the absence of a prior disciplinary record, every mitigating factor listed by the Referee was followed by a comment indicating it was grudgingly found.

The most glaring example of the Referee's ignoring the evidence of mitigation was the Referee's minimalization of Standard 9.32(l) Remorse. Rather than giving full faith and credit to the overwhelming evidence of remorse throughout the record, including testimony from partners in the firm, the Referee chose to state that he saw "little if no outward appearances of remorse or emotion". The Referee then briefly noted that Mr. Arcia "testified that he was remorseful and so did his friends." RR 13. No mention was made of the testimony of the firm's partners.

The Referee also concluded, completely contrary to the evidence before him, that Mr. Arcia thought he was "clever and 'slick'". This conclusion and his grudging acceptance of the mitigating factor of remorse are completely contrary to the record before this Court.

The instances of Mr. Arcia's acknowledgment of wrongdoing and regret of his conduct are legion. Perhaps the most notable instance is at the beginning of his testimony at final hearing. Beginning on page 173, and extending through 176, the following dialog took place:

> Q. Now, Mr. Arcia, I want to talk to you about some emotional – I'm sure – areas.
>
> First, are you sorry for what you did?
>
> A. I am deeply, deeply sorry to Mr. Zarco for what I did and I've expressed it to him on a number of occasions.

I have also shown it to him in insuring that I make full remuneration of all money that I owe him. I did it three and a half years ahead of time.

Q. Well, speak from your heart. Tell Judge Samuels how you feel about what you have done and then we'll get into your actions since then to rehabilitate yourself. Please tell the Judge how sorry you are and the effect that it's had.

A. I really – I come before this Court because I wanted to face this issue. I wanted to resolve this issue one way or another. I had to – for my family's sake, my children's sake, for my sake, I needed to face this issue and get some resolution on it. I didn't want to delay this matter any further. I am deeply embarrassed by everything that happened.

The day that we had our meeting at Zarco & Pardo where all the partners addressed me and indicated to me what had happened, what they knew, it was the absolute blackest day of my life.

That moment and shortly thereafter, I realized that for the last year, I had been on a pattern of irrational thinking for a number of circumstances that I just couldn't justify in my mind, and there is no justification for what I did. It was wrong.

I've come up with all kinds of theories as to why it could have happened, given my upbringing of being as ethical and moral and outstanding on everything I do; given the fact that I profess that ethical conduct and morality to those around me and my children.

I felt like I had about betrayed not Mr. Zarco but my family as well, and I'm very embarrassed that they're here listening to all this, but I feel that I need them here for their support and I'm glad that they're here for their support. They have supported me all the way through all my endeavors and I feel that in doing this, that I really betrayed them and that I –

I wanted to fess up to it. I'm not making any excuses. I never

have from the day that it was brought to my attention. I think that was the day where I had a – it was almost like a moment of clarity where I realized that what was I doing.

I know that over the last year and a half, it feels like I've matured 20 years. I've gone through many, many sleepless nights thinking about what I did, thinking about if there's any possible way that I can make it up to those around me.

My wife and I, we're on the verge of a divorce over everything that happened and everything that transpired. She lost a significant amount of trust in me. My family lost a significant amount of trust in me. It's been very, very difficult. Like I say, I basically – I come before this Court with my heart in my hands because I love what I do. I think I'm good at it. My clients think I'm good at it, and I think that that is my goal in this world, to serve in my advocate capacity, to serve people's needs in that respect, and that's what God put me on this earth to do. God has a purpose for all of us and that's what he had put me on this earth to do, and I'm going to do it to the best of my ability.

That was not the only instance of such declarations by Mr. Arcia. Other examples include:

Yes. I became very concerned about all those issues [his wife being pregnant and the decision being made in the year 2000 for her to quit work in May of that year], but the problem that I have and I think that I have learned to overcome to a great degree is that I have a tremendous amount of pride and not just in my work, but foolish pride and it leads me to make – or it led me at that point to make – some irrational decisions.

By pride, I mean basically that I'm too proud to have asked my boss for an additional raise or too proud to ask my parents for some financial assistance or too proud to admit to anyone around me that I couldn't Friday's (*sic*) manage my responsibility as a sole wage earner for that family.

> So in my mind, I irrationally and wrongly – in hindsight now – justified to myself that basically taking cases and earning money from cases as long as it didn't impact the work that I was doing – the other work that I was doing for Zarco – would satisfy my problem.
>
> Again in hindsight, I look at those irrational views and the justifications that I was making to myself in my head and it just doesn't make any sense to me but, I think under all the circumstances that were occurring at the time and my immaturity at the time, I just made a very foolish decision.

When asked if he could assure the Referee that he would conduct the rest of his life, both professionally and personally in an ethical and honest manner, Mr. Arcia replied:

> Absolutely. I had – I was very privileged in my upbringing to have very good moral and ethical standards given to me.
>
> Somewhere along the line there while I was with Zarco & Pardo, those clear ethical and moral standards became gray and I foolishly and immaturely took the opportunity to take them for my advantage...I'm certain that these types of incidents will not happen again. TR 188.

On the next page, Mr. Arcia clearly searching for words, stated

> The only – what I'd really like for this Court to understand is obviously, I can't reiterate enough how remorseful I am for everything I did. TR 189.

Mr. Arcia pleaded with the Court for leniency on page 189.

> I have come before this Court with my heart in my hands and asking the Court to be as lenient as possible in view of certain factors, those factors being the fact that I am the sole wage earner for my family. I have no other means of making a living other than my practice. I have forty-two to forty-five clients that rely on me and have relied on me for the past

year and a half to provide them with sound legal advice, that call me on a daily basis to provide them with that advice and need my services on a daily basis, to provide them with that advice.

During cross examination, Mr. Arcia frequently expressed his regret and contrition. Examples are:

> I'm not going to justify any of my behavior. It was wrong and it was improper and it was – it was wrong I mean, it's as simple is [*sic*] that. TR 195.
>
> . . .
>
> I think it was more serious than [simply a lapse of judgment] and I think I have made it clear to the Court that it was more serious than a mere lapse of judgment.
>
> I think that it was an irrational pattern of behavior...
>
> It was certainly a lapse of judgment, but it wasn't just a mere lapse of judgment. It was something that I – it's hard to explain, but in looking in hindsight, it was just – I was kind of deceiving myself into believing that it was right when it was absolutely not. TR 215, 216.
>
> . . .
>
> I think what I was doing was extremely wrong. I think what I was doing was betraying basically the people who had mentored me for the last five years over some very selfish needs that I didn't know how to cope with in the proper way and I don't know what I can attribute that to other than I was immature at the time. I didn't know how to cope with those issues. It was a very sobering experience. It's been a very sobering experience. TR 221.

The Referee completely ignored the testimony of managing partner Robert Einhorn regarding Mr. Arcia's remorse.

Mr. Einhorn testified that on Saturday, September 9, 2000, the day after Mr.

Arcia was confronted with and admitted to his misconduct, Mr. Arcia

> Came in on that Saturday. He was very forthright with his bank records and other documentation and the amounts that he owed the firm was calculated by him. TR 84.

Later on, when asked by the Referee what type of discipline Mr. Einhorn thought would be appropriate, he said

> Well, I think Mr. Arcia has expressed a lot of regret. I think now he understands what he did was wrong, and so I don't think that it would be appropriate for him to lose his license permanently. TR 90.

The Referee also, apparently, gave little weight to the testimony of all three of Mr. Arcia's character witnesses regarding his feelings about the wrongful nature of his conduct. For example, Juan Martinez testified at length regarding his discussions with Mr. Arcia about his misconduct. Apparently, Mr. Arcia called Mr. Martinez on the Friday that he learned that his misconduct had been discovered. TR 121, 122. Mr. Arcia met with Mr. Martinez that very weekend and

> His attitude was that he had made a serious mistake, that he obviously regretted what he had done, and that he wanted to try to do whatever he could to correct it. TR 123.

Mr. Martinez went on to say on that same page that Mr. Arcia was candid about his responsibility and made no excuses for his conduct. Mr. Arcia stated to Mr. Martinez

> Several times that he wanted to do whatever he could to fix the problem and restore the money to Robert Zarco's firm. TR 124.

Mr. Martinez emphasized that it "was very important to me" that Mr. Arcia was remorseful. Upon request, he elaborated upon that sentiment to the Referee by stating

> Well, it was very important to me because I did not obviously agree with what Mr. Arcia had done. I would not be happy if one of my associates did that.
>
> So had he sat in my office and told me that he did it because Mr. Zarco wasn't paying him enough or Mr. Zarco deserved it or Mr. Zarco this or Mr. Zarco that, that would have really left a bad taste in my mouth because I could then see one of my associates doing the same thing down the road.
>
> But that wasn't the response or – that wasn't the way he talked to me. He talked to me as if he had done the problem. He regretted it. He was sorry about it. It was his fault, and he wanted to do whatever he could to resolve it.
>
> Q. Why was that important to you?
>
> A. Because he opened up himself and he agreed that he was wrong and that's what it means to be – to take responsibility for what you did and when you do something wrong, you've got to face the music. TR 124, 125.

Mr. Martinez testified that he believed Mr. Arcia's conduct was an aberration. When asked by bar counsel whether he considered misconduct that occurred for a couple of years (in actuality, the testimony is clear that the diversion lasted but in the neighborhood of fifteen to seventeen months, beginning in mid to late 1999, TR 80, 193, until September 8, 2000), Mr. Martinez testified

> Regardless of how long it went on for, however, I have known Omar for

> much longer than even two years. I have known him now for about 10 years and as far as everything I know about his character, I do consider it to be way out of line with who he is, and that, to me, is an aberration. TR 128.

Manuel Lopez testified similarly. Mr. Lopez testified that Mr. Arcia told me that "he had committed a grave error in his life" and that "he was going to make amends." TR 144. Mr. Arcia was "very remorseful." and that "it was a lesson in his life that he would never, ever forget..." TR 144.

Mr. Lopez was initially uncertain about bringing Mr. Arcia into his office in light of Mr. Arcia's conduct at the Zarco firm. After he spoke to him, and "noticed the sincerity" Mr. Lopez gave Mr. Arcia a chance. TR 145. The risk paid off; Mr. Arcia has been "a very good associate in our firm..." TR 145. His work with the firm has been conducted with "the utmost integrity." TR 146. Notwithstanding his knowledge of the Zarco diversions, Mr. Lopez believes Mr. Arcia is "absolutely" an honest man. TR 148.

Gus Suarez also testified on Mr. Arcia's behalf. Mr. Suarez is also in the office in which Mr. Arcia currently works, Wilson, Suarez & Lopez. Mr. Suarez has been a member of The Florida Bar since 1986. TR 155.

Mr. Arcia has been in an office-sharing arrangement with the firm since approximately December, 2000, TR 157, and he has handled his financial obligations

in a timely fashion. TR 160.

Mr. Suarez, who sees the Respondent on a daily basis, noted that Mr. Arcia

> Really loves being a lawyer. He takes his profession to heart. He takes his cases to heart. He's a hard worker. He's very serious about his work. TR 160.

As to Mr. Arcia's integrity, Mr. Suarez observed that Mr. Arcia's dealings with the firm in the cases in which they have worked together have "never been anything but honest." and that he has no qualms or second thoughts about Mr. Arcia working in their office. TR 161.

Finally, Mr. Suarez agreed with prior testimony that the conduct engaged in by Mr. Arcia at the Zarco firm was

> Completely, completely out of character with the Omar Arcia that I know, absolutely. TR 161.

Simply put, while perhaps the Referee saw "no outward appearances of remorse or emotion.", the evidence overwhelmingly shows that this mitigating factor was present and deserving of great weight. The Referee's gratuitous comment, unsupported by any citations to the record that Mr. Arcia thinks he is clever and slick, was unwarranted, was unjustified, and has no factual basis in the record.

The Referee used as an example of Respondent's cleverness and slickness his testimony that what he thought he did was " simply "moonlighting". Respondent at

the outset of his testimony indicated he was not sure of the definition of moonlighting. TR216. The Referee's conclusion that Mr. Arcia was back peddling was an incorrect conclusion based, at best, on a faulty recollection of the facts. The Referee felt that Mr. Arcia's conduct did not fit the definition of moonlighting. Respondent, however, was adamant that

> All I know regardless of whether it's moonlighting or not is that it was wrong, that I fessed up to it. TR218.

The irony is that the phrase "moonlighting" does seem to be appropriate for the conduct engaged in by Mr. Arcia. See, for example, *Florida Bar v. Cox*, at 1123, *supra*.

The Referee also opines that Mr. Arcia led him to believe that he started his activities because his wife left her job. RR11. That, however, is a mischaracterization of Respondent's testimony. He never stated that the reason why he start his activities was because his wife left her job. In fact, his testimony was

> In actuality [it] started in mid 1999 when a Court awarded fees in a case that I was working pro bono for one of my family members. TR193.

Perhaps, the Referee was referring to Mr. Arcia's testimony regarding the acceleration of his diverting funds. Mr. Arcia testified that his wife became pregnant November or early December 1999 and that she was going to take a leave of absence

in May of 2000. TR182. He testified that they had substantial credit card debits, a substantial student loan, a mortgage and two motor vehicles and that he was concerned about how he could support the family "with a new baby coming" and "with the significant income be deleted from our income" as a result of Mrs. Arcia taking her leave of absence. TR182-183. If the Referee took that testimony as an attempt by Mr. Arcia to lead him to believe that Mrs. Arcia's pregnancy was one of the reasons why he started his activities, he simply misapprehended the testimony. There is no doubt that the diversions began before Mrs. Arcia became pregnant. See, e.g., TR193, 80.

The Referee's harsh recommendations of discipline was, apparently, based on his mistaken view, unsupported by the record, that Mr. Arcia did not truly regret his conduct and on the Referee's misapprehensions regarding Mr. Arcia's testimony about the reason for his beginning his diversions and the submantical discussion on whether his conduct constituted moonlighting or not. When Mr. Arcia's remorse, acceptance of responsibility, and intent to conduct himself honorably in the future is considered, the suspension of six months or less urged by Mr. Arcia is obviously the appropriate discipline to be imposed.

C. THE REFEREE IMPROPERLY CONSIDERED SOME FACTORS AS AGGRAVATING IN THE INSTANT DISCIPLINARY PROCEEDINGS.

The Referee improperly found as aggravation Standard 9.22(e). RR13. That rule allows the Referee to increase discipline for

> Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency

The Referee cites but one example of any conduct by Respondent that could fall within the penumbra of Sanction 9.22(e). That example was paragraph II-B in Respondent's September 28, 2000 settlement agreement to the effect that

> Neither Zarco and Pardo, P.A. nor any of its employees, shall initiate contact or provide any further evidence to the (*sic*) Florida Bar in connection with the Bar Complaint instituted against Omar J. Arcia for the allegations contained in the Subject Law suit, except as specifically required by law.

First, and most importantly, the above-cited clause cannot be considered an intentional failure to comply with rules or orders of the disciplinary agency. Neither the Referee nor the Bar points to any rule or order that the above clause failed to comply with or violated. Absent such a showing, discipline cannot be aggravated pursuant to Sanction 9.22(e).

Even if one assumes that a clause in a settlement agreement in separate, albeit related, civil proceedings could be considered an obstruction of the disciplinary process, the facts of this case show that there was no "bad faith obstruction of the

disciplinary proceeding." Paragraph II-B of the November 28, 2000 agreement permits the parties to communicate with the Bar "as specifically required by law." In other words, all the agreement requires is that evidence, testimony or other communications with the Bar be pursuant to its subpoena power. As Mr. Zarco testified, clause II-B "was a negotiated provision that we could all live with."

Bar proceedings had already commenced at the time that the settlement agreement was signed on November 28, 2000. Mr. Arcia was told on September 9, 2000 that all of the documents that he made available to the firm on that date were going to be duplicated and turned over to The Florida Bar. He was told unequivocally on that date that the firm was going to file a grievance against him. TR209. Mr. Zarco confirmed that the grievance had already been filed before settlement was reached on November 28, 2000. TR66.

That Bar disciplinary proceedings were not impeded by the settlement is made evident by the Bar's writing Mr. Arcia a letter of inquiry dated October 16, 2000. TR207.

The record is bereft of any evidence showing the clause II-B in anyway impeded the Bar's disciplinary proceeding. The grievance had already been filed and "the floodgates were already opened." TR213. The Bar already had initiated disciplinary proceedings and had in its possession copies of all the financial records

that Mr. Arcia had turned over to the firm on September 9, 2000.

While Mr. Arcia stated that the language in clause II-B was mutually agreed upon, he indicated part of the reason for the statement. As Mr. Arcia testified

> Mr. Zarco during our settlements discussions that led up to this settlement agreement made continuing reference to the Florida Bar investigation and that it would be in my interests to make sure that we entered into a settlement and quickly resolved this before the Bar's investigation goes any further. TR211.

This testimony was not rebutted by the Bar. It is not an illogical statement either. Mr. Zarco was clearly upset by Mr. Arcia's actions and it is not at all unlikely that he repeatedly referred to the Bar's disciplinary investigation during negotiations leading up to the settlement. Had Mr. Arcia's statement been untrue, the Bar could have easily called Mr. Zarco in to rebut it.

The Referee might have been alluding to Mr. Arcia's invocation of his Fifth Amendment privilege in his suggestion that Sanction 9.22(e) was an aggravating factor in these proceedings. Respondent hopes such is not the case. First, Mr. Arcia faced the very real possibility of criminal proceedings being brought against him when he claimed his Fifth Amendment privilege. In fact, the comment to Rule 4-8.4(g) of the Rules of Professional Conduct specifically allows a lawyer to "assert any available privilege" when asked to respond to an inquiry by a disciplinary agency. Rule 3-

7.6(g)(2) of the Rules of Procedure allows a lawyer to invoke "any proper privilege" in pleadings filed with a Referee.

Mr. Arcia's invocation of his Fifth Amendment privilege was based on the advice of counsel, TR222, and was pursuant to his Fifth Amendment rights. See *Spevack v. Klein,* 385 U.S. 511, 514-516 (1967). That case held that a lawyer could not be penalized nor could any sanction be imposed against him or her which would make the assertion of their Fifth Amendment privilege costly.

If the Referee felt that discipline should be aggravated for Mr. Arcia's failure to assist the Bar in proving up its case, his belief was misguided. In *Florida Bar v. Corbin*, 701 So. 2d 334 (Fla. 1997) at page 337 this Court noted in a footnote that a lawyer's claim of innocence, which can be interpreted to mean requiring the Bar to prove up its case, is improper. See also *Florida Bar v. Lipman*, 497 So. 2d 1165,1168 (Fla. 1986).

While the Referee did not cite it as a specifically aggravating factor, he improperly concluded in paragraph 67 of his report, RR10, that Mr. Arcia misled Gus Suarez as to the true purpose of the Omar J. Arcia, P.A. that he set up. The evidence is uncontroverted that the P.A. was established in December 1998. TR14. The evidence is further uncontroverted that Mr. Arcia did not begin soliciting or diverting firm clients until mid to late 1999, six to twelve months later. TR80,193. The

evidence is uncontroverted that Mr. Arcia's solicitation of firm clients did to begin to escalate until July or August of 2000. TR81,193.

Mr. Arcia testified that he did not mislead Mr. Suarez when he set up his P.A. in late 1998. He opened it preparatory to leaving the firm or opening up his own practice. TR192. He later changed his mind.

Consistent with Mr. Einhorn's testimony, TR80, Mr. Arcia testified that the first instance of diverting a case was in mid 1999 when a pro bono case he was handling for one of his family members resulted in the Court awarding fees to his client. TR193. Mr. Zarco testified that only 12-18 clients were solicited. And, as stated earlier, the bulk of them were solicited in the summer of 2000, over 18 months after the P.A. was formed.

There is nothing in the record to support the Referee's supposition that Mr. Arcia opened the P.A. in December 1998 with the sole purpose of diverting cases from the firm. If such were his intention, the diversions would have begun earlier than mid 1999. The Referee's conclusion that Mr. Arcia obstructed disciplinary proceedings, thereby invoking aggravating factor 9.22(e) was without basis. His opinion that Mr. Arcia deceived Gus Suarez is not supported by the record in any manner. Accordingly, these two aggravating factors, one formal and one informal, were improperly relied upon by the Referee. They should be disregarded by this

Court. Perhaps, the Referee's mistaken reliance on those two factors resulted in his grossly excessive discipline.

CONCLUSION

The Referee's recommended discipline is completely out of line with this Court's past pronouncements. The three year discipline recommended by the Referee is three times longer than any similar discipline and is at least two and one half years longer than the thirty days and six months suspensions imposed in the case with the fact situation closest to the one at bar, i.e., *Florida Bar v. Cox* and *Florida Bar v. Gillin.*

The Referee gave short shrift to Respondent's mitigating factors. He improperly relied on factors as aggravating circumstances also. The Referee's failure to give proper weight to mitigation, and his undue reliance on aggravating factors not supported by the record, might explain his Draconian recommendation.

The Referee's recommendation of a three year suspension followed by three years probation should be rejected by this Court. In lieu thereof, this Court should impose a suspension of six months or less, with proof of rehabilitation prior to reinstatement, followed by three years probation.

Respectfully Submitted,

WEISS & ETKIN

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of Respondent's Initial Brief were delivered by hand to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927 and copies were mailed to William Mulligan, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Miami, Florida 33131-

2404 and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 15th day of July, 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