IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant.

Supreme Court
Case NO.: SC02-111

v.

JEANETTE ELIZABETH SMITH,

Respondent.

_____/

RESPONDENT'S AMENDED INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the Bar".

The Report of Referee dated October 9, 2002, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____).

The trial transcript will be referred to as "TT" followed by the referenced page number(s). (TT at ___).

PRELIMINARY STATEMENT

This court granted Respondent extensions of time to file her initial brief on two occasions, with the last extension affording Respondent until March 31, 2003. On March 21, 2003 Respondent filed a third motion for extension of time, and sought an order compelling the court reporter to complete the transcription of the trial transcript forthwith.

On March 25, 2003 the Bar filed its Opposition to Respondent's Third Motion for Extension of Time. In as much as Respondent's petition for review was in jeopardy of being dismissed, Respondent elected to file the initial brief on March 28, 2003, without the trial transcript, and requested this Court to permit her to supplement the initial brief once the trial transcript was obtained.

The trial transcript was received March 28, 2003 after 5:00 p.m., after the Initial Brief was submitted. The initial brief was submitted without the benefit of a trial transcript, and Respondent would respectfully request that

she be permitted to amend the initial brief to allow for the filing of the trial transcript and proper reference to the record.

There is no prejudice to the Bar in as much as it has not filed an answer brief and in fact has filed a motion to dismiss Respondent's initial brief and has requested this Court to toll the time to file its answer brief.

STATEMENT OF THE CASE AND FACTS

On January 15, 2002 The Florida Bar filed a three-count complaint based upon complaints from clients Aslam and Qamar Munim (Count I), Liasse Kebbab (Count II), and Nationwide Collection Service (Count III). The final hearing took place September 17, 19 and 20, 2002. At the final hearing, The Florida Bar called two witnesses: Aslam Munim and Liasse Kebbab (the complainants as to Counts I and II). The Bar utilized the affidavit of Staff Auditor for The Florida Bar, Carlos Ruga. Respondent called five witnesses: Jeanette Hausler, Dean of Students at the University of Miami School of Law, Dian Osborn, Norberth Clark, Jubalani Tafari, and Nelson Ramirez.

(Count I)

On or about March 4, 1996 Aslam and Qamar Munim (hereinafter referred to as the "Munims") retained the services of Respondent to represent them in an immigration matter involving a labor certification process. The complaint alleges that the Munims "received little or no communication from Respondent until January 13, 2000…" (See paragraph 6 of the Bar Complaint); that they requested a refund of the filing fee and Respondent refused. This required the Munims to borrow money in order to

complete the immigration process (paragraphs 10, 11, 16). Additionally, Respondent only partially complied with the Bar's subpoena. Based upon these allegations the Bar charged the Respondent with violating the following Rules:

> 3-4.3 (misconduct);
> 4-1.1 (competence);
> 4-1.3 (diligence);
> 4-1.4(a) (communication);
> 4-1.15(a) (client's and third party funds to be held in trust);
> 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct);
> 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects);
> 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct; and
> 5-1.1(a) (nature of Money or property entrusted to attorney) of the Rules Regulating Trust Accounts.

The Munims met Respondent in January 1996 and hired her to represent them for the labor certification and residency. TT 29. She charged a fee of $4,500, paid over four installments. TT 29-30. The last installment was paid November 1999. The filing fee was $1,665 which was paid in December 1999, and Respondent advised her clients that the package containing the documents was mailed to INS in January 2000. TT31-32. In November 1999 Respondent requested another payment of the $1,665.00 for the specific purpose of "residency filing fees" which are required with

the submission of the labor certification packet. This is the fourth step in the process. The Munims paid this November 29, 1999. Respondent deposited the check in her operating account rather than her trust account on December 1, 1999. TT 176. Respondent completed the work and gave it to her secretary for mailing. Her secretary at the time was her sister who had not been working there very long. TT 145. The Munims requested proof of the filing, which Respondent was unable to provide. ROR at 5. Respondent contacted the Munims in May 2000 and informed them they would have to repay the entire filing fee and resubmit all documents. ROR at 5. The Munims requested a refund of the $1,665.00 filing fee by letters dated June 12 and 23, 2000 in order to complete the labor certification process on their own. Although the Referee's report states that the Munims incurred costs of $2,997.00, (ROR at 5) there was no direct testimony by Mr. Munim as to this amount. (TT 32-34). When the Munims did not receive the refund, they filed a complaint with The Florida Bar. TT 32. Respondent refunded the $1,665.00 in October 2000. ROR at 5.

Several problems occurred with tracking down the package with INS and in May 2000 Respondent advised the Munims that she was trying to track down the filing fee check issued to the INS. TT 32. Mr. Munim testified that he did not know whether or not Respondent filed the residency

package. TT 36. In this process an alien gains his or her permanent residency via employment since the alien is able to do a job that no United States worker is currently available to perform. ROR at 3. The first three steps took two and a half years to complete and the Munims were completely satisfied with the work and the communication with Respondent. TT 37-38. Respondent provided detailed billing statements, which comprised 37 pages, outlining everything done in the process. TT 39-42. It was only in the fourth step of the process that the problems arose. TT 37-39. This was precisely during the period of time when Respondent became ill, which illness began to interfere with her ability to practice law. TT 145-146, 163-171.

During the period of time involving the complaint regarding the Munims' residency package with the INS (November 1999 to May 2000), the Respondent was ill, however, the Munims did have communication with Respondent's office. TT 32.

(Count II)

On or about October 2000 Liasse Kebbab hired Respondent to represent him in an immigration matter. He needed to change his immigration status due to a recent marriage to an American citizen. The Bar charged that Respondent failed to communicate with Kebbab and neglected

his case and that as a result of that conduct she violated the the following Rules:

> 3-4.3 (misconduct);
> 4-1.1 (competence);
> 4-1.3 (diligence);
> 4-1.4(a) (communication);
> 4-1.15(a) (client's and third party funds to be held in trust);
> 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct);
> 4-8.4(b) (a lawyer shall not commit a criminal act that reflects fraud, deceit or misrepresentation) of the Rule of Professional Conduct.

Kebbab met Respondent sometime in 1995-1996 when he hired her to do immigration work for him. TT 46. He had retained Respondent for immigration work on two or three prior occasions. TT 46. The last time he hired Respondent was to remove the conditions on his residency status. He wanted to become a permanent resident and his status was due to expire December 30, 2000. TT 47. Kebbab testified that he had trouble communicating with Respondent and she had "disappeared" for 5 months, but he also testified that he was in touch with her office, and her brother did advise him as to the status of his case. 47-48. Although the Referee stated in her report that Respondent did not communicate with Kebbab for 12 months ROR at 7, his trial testimony stated that it was five months. TT 48.

Respondent explained that the delay in filing Kebbab's change of status papers was in part due to her health problems and in part due to the

fact that she questioned the validity of Kebbab's marriage to an American citizen. Respondent became suspicious of the marriage when she learned that they were not living together and she feared that submitting the application to INS for permanent residency based on a marriage to an American citizen would be fraudulent. TT 61-63. Respondent had a great deal of difficulty communicating with the wife (TT 89), and she also suspected that the wife's signature might be forged. TT 63-64. Additionally, Respondent received a message from the wife that she did not wish to go forward with the immigration papers and that she was seeking a divorce. TT 88. Mr. Kebbab knew that if it was determined that his marriage was a sham he would be violating the law. TT 66. Respondent testified that according to INS form I-751, if a couple is separated they cannot file a petition jointly for permanent residency. TT 90.

Respondent completed Kebbab's case successfully and obtained his green card. TT 67. Kebbab testified that Respondent was a "good lawyer", and even inquired about retaining her for additional services in obtaining his U.S. citizenship, even after he filed the Bar complaint. TT 66. Kebbab stated that, "Jeanette Smith is a very good lawyer. I never have no problem whatsoever with Jeanette Smith until like maybe the last year. I know she lost a baby, she have a lot of problems….it was not that Jeanette Smith is a

crooked lawyer or whatever. Jeanette Smith is a good lawyer. She knows what she's doing when she goes to INS. She knows how to file paper and everything." TT 66.

The parties met on July 27 and 29, 2001 to discuss these issues, and the following week Respondent went to INS to search for his application in the system. Immigration provided her a letter evidencing that his application was in the system. Respondent gave him the letter and he was able to travel to France to attend his sister's wedding. TT 93. Respondent later got another letter from Immigration stating that Kebbab's application did not exist in the system, and when she called Kebbab, he advised her that he had already received his green card and that everything was fine. TT 93. This is indicative of the problems inherent in working with Immigration, and their propensity for losing files, and it also lends credibility to Respondent's assertions as to Count I that she did in fact submit the Munims residency package to INS..

(Count III)

On or about August 10, 2000 Respondent issued a check for $100.00 to pay a bill for her answering service. The check was returned for insufficient funds. Although, respondent ultimately paid the $100.00, Nationwide, a collection agency, demand payment of $212.50. ROR at 8

and 9. The Bar charged that during this period of time, Respondent was financially irresponsible, and therefore violated Rule 4-8.4(c).

The Referee recommended that Respondent be found guilty of each and every rule violation. ROR at 11-12.

As to this count, the report of Grievance Committee investigator, Bryan Faulman, was introduced into evidence as part of the Bar's exhibits and his statement was read into the record, to wit:

> With the above being stated, it is my opinion that Ms. Smith did make the good faith effort to make good on the check once it was brought to her attention from NationWide Credit. I further believe that she made an attempt to resolve this in a professional manner but was unable to do so due to Mr. Berger's difficult disposition. I base this opinion on my experience with Mr. Berger in researching this case during which time I was treated very unprofessionally and was often offended by verbal abuse and inappropriate language. The behavior only made my investigation more difficult and time consuming. TT 226.

The events leading up to these complaints took place between 1999 and 2001. The thread that runs through all of the complaints was that she was overwhelmed in her law practice due to a combination of severe medical problems. ROR at 9. She also had a lack of support staff. TT 145-146.

Respondent suffered from several medical problems beginning in the late summer and fall of 1999. Due to low blood pressure, dehydration, and exhaustion, she eventually collapsed and required emergency treatment consisting of IV fluids for several weeks at a time in March and in August

2000. She also required continued bed rest. Respondent became progressively weaker and disoriented and in December 2000 she suffered another medical crisis due to a pregnancy. After being taken to the emergency room in extreme pain, the doctors determined the fetus she was carrying was dead, and probably had been for weeks. She was given medication to induce labor so as to avoid a surgical abortion, but she subsequently hemorrhaged and underwent an emergency procedure in January 2001. ROR at 6.

The Bar has acknowledged throughout the trial that Respondent was sick, that her illness was genuine and that the court ought to take it into consideration. TT 250.

The Referee found the following mitigating factors set forth in the Florida Standards for Imposing Lawyer Sanctions:

1. Absence of a dishonest or selfish motive. (Standard 9.32(b)). The Referee found that Respondent was not financially motivated. ROR 14.
2. Good character and reputation. (Standard 9.32 (g)). Dean Hausler praised respondent for her commitment to "the downtrodden" in our society, and described her as "not interested in making money". ROR at 2. Dian Osborn,

Norberth Clark, and Jubalani Tafari testified to respondent's "selfless dedication to helping the indigent and vulnerable, as well as to her integrity." ROR at 3.

3. Physical or mental disability or impairment (Standard 9.32 (h)). Respondent has suffered significant medical problems during the period of time spanning the complaints. ROR at 14.

4. Interim Rehabilitation. (Standard 9.32 (i)). Respondent has taken the following remedial measures:

   a. She has offered to refund the Munims for the last part of the certification process, although there was never an issue as to restitution as framed by the complaint.
   b. She voluntarily attended (again) the professionalism Seminar required for new lawyers.
   c. She has contacted LOMAS.
   d. She has contacted Florida Lawyers Assistance for a referral to a group for therapy in dealing with stress.
   e. She monitors her blood pressure bi-weekly to minimize any relapse of her original health problems.

1. Remorse. (Standard 9.32 (l)). Throughout her testimony Respondent seemed genuinely sorry that her actions(or lack of action) hurt her clients. TT 178, ROR at 10.

The Referee found the following aggravating factors as set forth in the Florida Standards for Imposing Lawyer Sanctions:

1. Pattern of misconduct (Standard 9.22 (c)).
2. Multiple offenses (Standard 9.22 (d)).

The Referee recommended the following discipline:

1. That Respondent be suspended from the practice of law for a period of two years, followed by two years probation.

2. During her probationary period Respondent should obtain the services of LOMAS and her account should be subject to quarterly audits.
3. She should be required to certify her good health/fitness to practice quarterly with documentation by her physician.
4. She should obtain a mentor attorney (or one should be appointed for her) to monitor her caseload and disposition of cases quarterly.
5. She should pay restitution to the Munims in the amount of $2,997. ROR at 12.

SUMMARY OF THE ARGUMENT

The Referee's recommendations as to discipline does not have any reasonable basis in existing case law nor in the Florida Standards for Imposing Lawyer Sanctions. This is not a case of misappropriation of client trust funds, but rather a case of client neglect as a result of serious and tragic medical problems experienced by Respondent. There has been no clear and convincing evidence that Respondent misappropriated client trust funds. The cases relied upon by the Referee to arrive at her recommended discipline all deal with misappropriation of client trust funds and are inapplicable to the case at bar. The Referee's findings of pattern of misconduct and multiple offenses as aggravating factors are not supported by the evidence, and the compelling mitigating factors presented were not given proper consideration according to the Florida Standards for Imposing Lawyer Sanctions.

ARGUMENT

THE REFEREE'S RECOMMENDATION AS TO DISCIPLINE DOES NOT HAVE ANY REASONABLE BASIS IN EXISTING

CASE LAW NOR IN THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

In arriving at the recommended discipline, the Referee relied on the cases of The Florida Bar v Farbstein, 570 So.2d 93 (Fla. 1990); The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1992); The Florida Bar v Kassier, 711 So.2d 515 (Fla. 1998); and The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986). ROR at 13. The Referee's reliance on these cases is misplaced. These cases all deal with misappropriation of client funds from trust accounts. There are no allegations in the four corners of the complaint, nor was any proof presented at the final hearing that Respondent misappropriated client funds from her trust account.

The Florida Bar v Farbstein, 570 So.2d 93 (Fla. 1990) involved misappropriation of client trust funds, failure to comply with trust accounting procedures, neglect of legal matters, and failure to adequately communicate with clients. An audit of Farbstein's trust account revealed shortages of $21,128.62 in May 30, 1988 and $13,143.44 in August 30, 1988. Farbstein was found to have misappropriated client funds from his trust account and was given a three suspension. Clearly, in the case at bar Respondent was not found guilty of misappropriation of client funds, and therefore the Farbstein case lends little guidance as to the discipline to be imposed. Additionally, the instant case did not involve trust account. The

issue involving the $100.00 check (Count III) which was made good shortly thereafter, involved Respondent's operating account.

The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1992) involved misappropriation of client trust funds in the amount of $29,000.00. Schiller was found guilty of misappropriation of client trust funds and given a three-year suspension.

The Florida Bar v. Kassier, 711 So.2d 515 (Fla. 1998) involved misappropriation of client trust funds, issuance of NSF trust account checks, failure to keep clients reasonably informed, failure to act with diligence and failure to respond to The Florida. Kassier was found guilty of misappropriation of client trust funds and given a one-year suspension followed by three-years probation.

The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986) involved the misappropriation of $10,5000.00 held in trust for a guardianship. Tunsil was found guilty of misappropriation of client funds and failure to comply with trust accounting procedures and given a one-year suspension followed by two years probation.

This case did not involve misappropriation of client funds. Although the Bar might argue that had Respondent deposited the funds for the Munims' filing fee in her trust account there would have been a

misappropriation of client trust funds, that issue was not raised nor argued at trial and to argue it now would be pure speculation. Additionally, this issue can not be raised for the first time on appeal. Respondent has acknowledged that mistakes were made in the way she handled the Munims' filing fee, and she did in fact refund the $1,665 filing. The cases relied upon do not support the discipline imposed in this case. The issue involving the $100 check (Count III) which was made good shortly after it was issued, dealt with Smith's operating account and had nothing to do with client trust funds.

It appears that the Referee considered the fact that the discipline in the above cited cases ranged from one to three-year suspensions and went down the middle and fashioned a two year suspension for Respondent without any meaningful analysis of Respondent's actual misconduct or the mitigating factors. The Referee acknowledged that the above cases were about "misconduct involving misappropriation of funds and diligence issues", but no where in the Report is there a finding that Respondent misappropriated client trust funds. The Referee commences her analysis by stating that, "disbarment is generally imposed when there has been a misappropriation of funds…" ROR 12. Based on Respondent's conduct, the Bar's complaint, and the testimony at trial, disbarment was never a consideration and Bar counsel never sought disbarment. Bar counsel made it clear to the court that

they were not asking for disbarment and that it was never a consideration. TT 253. This Court has stated in the past that the misuse of client funds is one of the most serious offenses a lawyer can commit, and when misappropriation is found, there is a presumption that disbarment is the appropriate remedy. Farbstein at 936 *citing* Schiller at 993. The Referee therefore prefaced her analysis on a faulty presumption which lead her to the severe and inappropriate penalty of a two year suspension that is not supported by the facts.

THE REFEREE'S FINDINGS AND RECOMMENDATION OF GUILT WAS CLEARLY ERRONEOUS AND LACKING IN EVIDENTIARY SUPPORT

This case is about client neglect resulting from Respondent's illness, it is not about misappropriation of client trust funds. There certainly was no clear and convincing evidence presented that Respondent misappropriated client trust funds. In fact, there was no evidence presented at all that Respondent misappropriated client trust funds. If the Referee's recommendation of guilt as to Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) in all three counts is based upon the mistaken presumption that Respondent misappropriated client trust funds, then the report is clearly erroneous and lacks in evidentiary support. The party seeking to overturn a referee's

findings and recommendation of guilt has the burden of showing that the referee's report is "clearly erroneous or lacking in evidentiary support". The Florida Bar v Wagner, 212 So.2d 770,772 (Fla. 1968): *accord* The Florida Bar v Lipman, 497 So.2d 1165 (Fla. 1986).

As will be shown below, the Referee's report is clearly erroneous and lacks in evidentiary support. The scope of review of a referee's recommended discipline is broader than that the afforded to findings of fact since this Court has the ultimate responsibility to determine the appropriate sanction. Kaisser at 517 *citing*The Florida v Niles, 644 So.2d 504-506 (Fla. 1994).

During the time period of these complaints Respondent was enduring tremendous pain, illness and personal tragedy. Her conduct was not intentional or deliberate or with improper motive. The Referee's findings however do not take into consideration Respondent's illness, or the fact that her conduct was the direct result of her medical condition. For example, in finding number 8 the Referee states that, "The Munims never received any of the requested proof of filing, nor does any appear to exist". The Referee ignores Respondent's testimony that she completed the work and gave it to her secretary for mailing. The fact that INS may not have received the package cannot be concluded from the testimony presented. As to finding

number 15, the Referee states that, "Ms. Smith offers no valid explanation for why she deposited the filing fee in the operating account rather than the trust account." This finding fails to take into consideration Respondent's mental and emotional condition as a result of her health issues.

This Court has recognized that, harsh and indurate punishments are self-defeating. In the case of The Florida Bar v Moran, 273 So.2d 379 (Fla. 1973) this court dealt with issues similar to the case at bar. This court held that neglect in prosecution of cases and misrepresentation of one self to be a court-appointed counsel for a client does not warrant suspension from the practice of law, but warrants public reprimand and probation with adequate supervision in view of the evidence of rehabilitation. Id. In Moran this court considered the fact that respondent was the victim of certain personal and medical difficulties, which in the past impaired respondent's performance as an attorney. This court held that it was "unnecessary and might in fact be harmful to respondent's apparent rehabilitation to suspend respondent from the practice of law." Id. at 380. The court in Moran placed considerable emphasis on the issue of rehabilitation. Those same concerns have been addressed by the Respondent in the case at bar through the remedial steps taken by her and to be taken in the future. Like Moran Respondent had become impaired in the performance of her duties as an

attorney as a result of her illness. Additionally, the Referee recognized that Respondent did not present as some one who is "financially motivated". The financial issues presented in the case were the product of "sloppiness and culpable negligence, rather than a truly nefarious intent." ROR at 9. Respondent's financial violations certainly cannot be characterized as intentional and the Report of Referee recognizes this fact repeatedly.

In The Florida Bar v. Cramer, 643 So.2d 1069 (Fla. 1994), an attorney encountered serious health problems as a result of having undergone open-heart surgery which required him to be away from the office for five months. His financial problems began to mount to the point where the IRS notified him that they intended to levy. As a result of these financial pressures he became delinquent in employee taxes amounting to $43,635.71, his office account showed numerous checks were returned for insufficient funds and negative balances existed on approximately nine occasions. He misappropriated $13,743.42 in client funds and later replaced it from his personal account. He failed to maintain minimum compliance with the Rules Regulating The Florida Bar regarding trust accounts. Id. at 1070. Clearly, when compared to the case at bar, Cramer's conduct was far more egregious. When analyzing the appropriate discipline in Cramer, the court noted that the factual findings were a result of negligence on the part of

Cramer, and he demonstrated substantial mitigating factors, primarily his heart condition and related medical problems which lead to many of Cramer's problems in his law practice and affected his conduct. Id. The appropriate discipline in Cramer was found to be a 90-day suspension.

In the instant case however, the Referee dismissed any consideration of the Moran and Cramer cases and concluded that they are, "inappropriate because they seem much less egregious". ROR 13. This conclusion makes no sense in light of the fact that Cramer misappropriated $13,743.42 in client trust funds. Id. This aspect was certainly more egregious than the case at bar.

In The Florida Bar v Musleh, 453 So.2d 794 (Fla. 1984) the attorney was indicted by a federal grand jury for conspiring to receive, to transport in interstate commerce and sell stolen securities. He was found incompetent to stand trial, was hospitalized for five weeks but continued a course of out-patient treatment consisting of drug and clinical therapy. He was later found competent to stand trial and found not guilty by reason of insanity. The Florida Bar then brought charges against him. The referee recommended that he be found guilty of all counts and suspended for six months. This court held that mental illness was properly considered as a mitigating factor and reduced the suspension to 90 days. Id.

These cases were certainly more applicable to the instant case as far as the facts and discipline involved than the cases relied upon by the Referee. Although the Referee mentions the Florida Standards for Imposing Lawyer Sanctions (ROR at 13 and 14) she does not give any consideration to the factors contained therein, nor conduct any meaningful analysis. The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions…The purpose of the Standards are to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanctions in individual cases; (2) consideration of appropriate weight of such factors in light of the stated goals of lawyer discipline; and (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions. Standard 1.3. When applied to the instant case, the level of discipline applied by the Referee did not consider all the relevant factors, nor consider the appropriate weight for such factors. Additionally, the reliance by the Referee on Farbstein, Kaisser and Tunsil, and her rejection of Moran and Cramer, does not provide consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

As to all three counts, the Referee found respondent guilty of having violated Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), despite the fact that she found that Respondent's conduct was, "the product of extraordinary sloppiness and culpable negligence, rather than a truly nefarious intent." ROR at 9. If Respondent's misconduct was the result of negligence, the violation of Rule 4-8.4(c) cannot stand. In order to find that an attorney has acted with dishonesty, misrepresentation, deceit, or fraud, intent must be proven by clear and convincing evidence. The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). In The Florida Bar v Dougherty, 541 So.2d 610 (Fla. 1989) and The Florida Bar v. Lumley, 517 So.2d 13 (Fla. 1987), the Supreme Court held that an attorney's lack of intent to deprive, defraud or misappropriate a client's funds supported a finding that the attorney's conduct did not constitute dishonesty, misrepresentation, deceit or fraud. The Referee's finding that Respondent violated Rule 4-8.4(c) is clearly erroneous and unsupported in the record.

The Referee erred in finding a "pattern of misconduct" and "multiple offenses" as aggravating factors because there is no evidence to support these findings. Respondent did not have any prior disciplinary history. Although the Referee found Respondent guilty of all rule violations charged,

it is clear that the Bar failed to prove by clear and convincing evidence the necessary intent required to establish dishonesty, misrepresentation, deceit, or fraud. There was no finding that Smith misappropriated client trust funds. The misconduct in the instant case is an isolated incident, which resulted from Respondent's severe and tragic health problems. This is a single incident of being physically and emotionally ill, which directly caused the misconduct in all three counts, and which took place during the same period of time. This does not constitute a pattern of multiple misconduct.

In The Florida Bar v Barley, 831 So.2d 163,170 (Fla. 2002) the analysis of "pattern of misconduct" and "multiple offenses" turned on prior disciplinary history of similar acts. The court found that Barley's misconduct was similar to the conduct leading to his sixty day suspension in 1989, which involved him making unauthorized withdrawals from his trust account. Id. Applied to the facts of the instant case, there was no such "pattern" here.

The referee erred in recommending that Respondent pay restitution to the Munims in the amount of $2,997. There was no testimony as to $2,997 being owed to the Munims. The issues as framed by the pleadings did not encompass restitution. The Referree inquired of Bar Counsel at the end of the trial as to, "What is the Florida Bar's position in terms of restitution, if

any?" TT 256. Bar Counsel candidly answered, "I don't know that restitution is called for in this case." The referee found that the Munims incurred costs in filing fees and additional costs totaling $2,997 and recommended restitution in that amount (ROR at page 5), but she also found that Respondent did in fact refund the $1,665 filing fee to the Munims. Any restitution recommended by the Referee should therefore be reduced by the filing fee paid to the Munims leaving a balance of $1,332.

Suspending Respondent for two years serves no legitimate purpose in light of the overwhelming mitigating factors present. Discipline for unethical conduct must serve three purposes: 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 of the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish the 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. *See* The Florida Bar v Lord, 433 So.2d 983, 986 (Fla. 1983).

The discipline recommended by the Referee is not fair to society. It denies a segment of the community, which is economically disadvantaged

from the services of a qualified and dedicated lawyer. It is not fair to Respondent because it is punishing her for having been ill. And, it does nothing by way of deterrence.

The Referee failed to take into consideration the compelling testimony as to Respondent's character and good reputation. Dean Jeanette Hausler, Associate Dean at the University of Miami School of Law, and past member of the Standing Committee of The Florida Bar on Professionalism for many years testified that she had known Respondent since she enrolled at the University of Miami School of Law in the Fall of 1989 and has kept in contact with her through the years. TT 218-220. Dean Hausler testified that she has never known Respondent "to be anything other than a very honest person, a forthright person, a person of integrity." TT 219. She stated that for one moment, Respondent's judgment was clouded by her illness, but that she, "has devoted all the years she has been an attorney to taking care of the indigent, the poor, the needy, the downtrodden." TT 220. Her practice assists the less fortunate in our society. TT 221.

The affidavit of Grievance Committee Chair for the 11th Circuit, Sarah Steinbaum, Esq., was stipulated to by Bar Counsel, which attested to Respondent's strong moral character and integrity in the community. TT 224.

Nelson Ramirez, a student from Belize, who has known Respondent for five years testified as to her reputation in the community as a competent and ethical practitioner. TT 108-119.

Norbeth Clark, a client and recording artist from Jamaica testified as to Respondent's health problems, as well as her good reputation and pro bono work to help the economically disadvantaged Hatian community with free legal services and education regarding their legal rights. TT 120-135. Mr. Clark stated that, "during the period that I know Ms. Smith, I have seen her to be a reputable individual, a person that has done beyond the scope of what an attorney client person should do for a client." TT 131.

Diane Osborne and Jabulani Tafari, both journalists involved with the Jamaican music industry testified that Respondent is well known throughout the Caribbean community in both Jamaica and the United States as a competent, caring and highly ethical practitioner, honest and truthful. TT 185-195.

In light of the compelling mitigating factors present in this case (ROR at 14), the discipline imposed bears no relation to the weight that should have been accorded those factors. Had the Standards been appropriately applied to the instant case, the penalty should have ranged from a reprimand

to a short-term suspension less than ninety (90) days. *See* Moran, Cramer and Musleh.

Respondent has been accused and found guilty by the Referee in all three counts of the complaint of having engaged in conduct involving criminal acts that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects (Rule 4-8.4(b), and conduct involving dishonesty, fraud, deceit, or misrepresentation (Rule 4-8.4(c)). The testimony at trial clearly did not establish these violations by required standard of clear and convincing evidence. *See* The Florida Bar v. Neu. The testimony of Respondent's character witnesses, which were un-rebutted and in fact corroborated by Bar Counsel, painted a completely different picture that has been ignored in the report. Witnesses such as Dean Hausler, who has known the Respondent for nearly 14 years describe the Respondent as "a very honest person, a forthright person, a person of integrity" (TT 219), who "has devoted all the years she has been an attorney to taking care of the indigent, the poor, the needy, the downtrodden" (TT 220), and that "her practice assists the less fortunate in our society". TT 221. The Grievance Committee Chair for the 11th Circuit, Sarah Steinbaum, Esq., submitted an affidavit in support of Respondent, which attested to her strong moral character and integrity in the community. Norbeth Clark spoke glowingly of

Respondent's good reputation and *pro bono* work to help the economically disadvantaged Haitian community with free legal services and education regarding their legal rights. Even Bar Counsel stated during the trial that, "this case has been particularly hard because I do honestly, sincerely believe that Ms. Smith is a good person. I don't believe the Court has had any opportunity to have me say otherwise. That is not our allegation. She has worked hard, she has served under privileged people. Her track record on that is clear." TT 245.

These admirable qualities of Respondent's characters are the same principles upon which The Florida Bar was founded, and which the Bar tries to instill in its members. The purpose of The Florida Bar is "to inculcate in its members the principles of duty and service to the public.." *See* Rule 1-2. Respondent represents a breath of fresh air in our legal community and a valuable resource to the poor and downtrodden who would not otherwise have a voice in our society.

Respondent did make mistakes, and she did neglect her clients, but these were unintentional isolated incidents which occurred during a period of illness and personal tragedy in her life, and which should be weighed heavily in mitigation. To suspend Respondent for two years would certainly be harsh and unnecessary, contrary to the facts established at trial, contrary

to the case law, contrary to the stated purpose for attorney discipline, contrary to the stated purpose of the Florida Standards for Imposing Lawyer Sanctions, and contrary to the stated purpose of The Florida Bar.

CONCLUSION

Based upon the foregoing arguments and authority, the Referee's Report and Recommendation should be rejected by this Court and it would appear to be appropriate to impose a reprimand, or a short-term suspension of less than 90 days, and eliminate restitution or reduce it to $1,332.

REQUEST FOR ORAL ARGUMENT

Respondent hereby requests oral argument before this Court, and submits that oral argument will assist the Court in its decision making process.

Respectfully submitted,

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RICHARD B. MARX
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven(7) copies of the foregoing motion have been sent via Federal Express, overnight delivery to Thomas D. Hall, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy of the foregoing was sent and regular U.S. Mail to: Carlos Leon, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this____day of April, 2003.

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COMPLIANCE WITH RULE 9.210(a)(2)

The undersigned hereby certifies that the foregoing Amended Initial Brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point proportionately spaced Times New Roman font and hereby files a 3.5” computer diskette containing said brief, which has been scanned and found to be free of viruses.

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RICHARD B. MARX
Attorney for Respondent
FBN 051075