IN THE SUPREME COURT OF FLORIDA

Case No. SC04-2365

THE FLORIDA BAR,

Petitioner/Appellant,

v.

ELIZABETH MARTINEZ-GENOVA,

Respondent/Appellee.

RESPONDENT=S ANSWER BRIEF ON APPEAL

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INTRODUCTION

The Florida Bar appeals from the Referee=s recommendation, on findings of guilt, that the Supreme Court should impose a three-year suspension (*nunc pro tunc* to

the date of her emergency suspension) on Respondent Elizabeth Martinez-Genova, followed by a two-year probationary period, if she were to be reinstated after the suspension (with other conditions and the payment of costs). Respondent does not counter-petition, but seeks only to affirm the Referee's recommendations. The parties are referred to as the Bar and Ms. Genova, respectively.

References to the Report of the Referee will be indicated by (R - [page number]). References to the hearing transcript will be indicated by (T - [page number]). References to the timeline (used as an aid before the Referee and reproduced in the Appendix hereto) will be indicated by (A -1).

STATEMENT OF THE CASE AND FACTS

Statement of the Case

Respondent Elizabeth Martinez-Genova (AMs. Genova@) was admitted to the Florida Bar in 2000. On October 20, 2004, the Court suspended Ms. Genova on an emergency basis, after the Miami Branch Staff Auditor conducted an examination of Ms. Genova=s operating account in August, 2004. (R 2)

A complaint was filed, charging Ms. Genova in two counts. Count 1 alleged that Ms. Genova had violated Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rules 5-1.1 and 5-1.2, relating to trust accounting and record-keeping.

Count 2 alleged that Ms. Genova violated Rule 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). Ms. Genova stipulated to the drug abuse that was the underlying basis for Count 2; she is enrolled in treatment programs under the supervision of Florida Lawyers= Assistance, Inc. (AFLA@), and had completed significant residential and other portions of her rehabilitation program by the time of the hearings.

The Referee, Honorable Caryn Schwartz, County Court Judge for Miami-Dade County, held hearings on June 9, 10, and 20 and August 16, 2005. (R 1) At the close of the hearings, the Referee received memoranda of law from the parties, and issued

her Report on October 6, 2005. (Exhibit A to the Florida Bar=s initial brief) The Referee found Ms. Genova guilty of both counts. However, the Referee recommended that, rather than the disbarment that was sought by the Florida Bar, the following discipline be imposed on Ms. Genova:

$ Suspension for three years, retroactive to the date of her emergency suspension, followed by a two-year probationary period, if she were to be reinstated. (R 21; VI. A.)

$ Continued participation in the FLA program, with twice-monthly mandatory urine tests and other conditions. (R 21; VI. B.)

$ If reinstated, Ms. Genova would be required to enroll in a LOMAS program regarding establishment, maintenance, and proper operation of trust accounts. (R 22; VI. C.)

$ If reinstated, Ms. Genova=s use of trust accounts would be restricted and monitored during the two-year probationary period, on terms agreed to by the Bar and Ms. Genova.

$ Payment of the Bar=s costs in the proceedings against Ms. Genova.

The Bar timely sought review of the Referee=s recommendations, seeking disbarment.

Statement of the Facts

Respondent accepts the factual stipulation set forth in the Florida Bar=s initial

brief, at pages 1-9 (numbered paragraphs 1-28). (R 2-10; para. 1-27) The rest of the Bar=s Statement of the Facts after that is argumentative, and fails to present a fair and accurate account of the testimony and the evidence in the record. A[I]t is essential that the facts be stated fairly and accurately. All of the relevant facts should be included, not just those facts that support the argument of the party writing the brief.@ Padovano, *Florida Appellate Practice,* '16.17 (Statement of the Facts).

Count 2: Drug and alcohol addiction. Ms. Genova had been firmly gripped by drug and alcohol addiction (intensified by untreated clinical depression) from at least 2001, although she testified that she did not know it. (A 1; T 597-598) (Ms. Genova had been diagnosed in 1992 with clinical depression. (T 489))

During her marriage,[1] her drug use (alcohol, cocaine, marijuana, and a variety of prescription medications (T 506-507)) steadily increased, beginning with occasional weekend recreational use, and progressing to daily abuse of drugs and/or alcohol. (T 496, 506-508) The fabric of her life (family, home, and work as an attorney) began to unravel in 2001, when her husband was indicted and pled guilty to federal charges, and the family home was lost to foreclosure. (T 513-514) Matters grew worse, however, after Ms. Genova=s husband was arrested on DUI charges while out on bond, his bond was revoked, and he went to federal prison for 13 months (December,

[1] Ms. Genova was married in 1991; her son was born in 1995, and she and her husband Anthony Genova were divorced in 2003. (A 1)

2001, through January, 2003). (T 514-515)

A few months later, in June, 2002, Ms. Genova herself was arrested for the first of three times, for drug possession. (T 517) The arrest and a lengthy recapitulation of the Genova family=s legal and drug-related troubles was prominently reported in Joan Fleishmann=s column in the Miami *Herald*. (T 518)

No support from Ms. Genova=s family was forthcoming: Ms. Genova=s mother responded to news of the arrest by sending her son over to beat Ms. Genova. (T 518) A second arrest, for purchasing cocaine, soon followed, in July, 2002. (T 519-520) On hearing of this arrest, Ms. Genova=s family attempted to snatch her son from her hands, and the police brought in the Florida Department of Children and Families (ADCF@), who took the boy (then seven years of age) and put him into the custody of Ms. Genova=s brother.[2] (T 521)

It was at this time **C** mid-2002 **C** that Florida Lawyers= Assistance, Inc. (AFLA@) first contacted Ms. Genova, responding to the prominent press coverage of her arrest. (T 177-178) Ms. Genova did attempt to get sober then: she enrolled in an out-patient program meeting four times a week, and she tested clean for drugs and alcohol in each of the random twice-a-week urine tests administered between July and

[2] The record does not reflect whether this brother is the same one who beat Ms. Genova, on their mother=s orders.

December, 2002. (T 524) DCF would only allow Ms. Genova to visit her son under supervision, and at a DCF facility. But in December, 2002, DCF cut her visits still further, to one hour, once a week, and prohibited any visits with him at Christmas. The spiral downward continued. (T 524; A-1) Depressed by the loss of her son and the impending doom of the criminal cases against her, Ms. Genova relapsed in December, 2002. (T 177-178, 524)

By the time her husband was released to a halfway house in January, 2003 (T 525-526), Ms. Genova was plainly deteriorating **C** she had little work (T 526), and the visits with her son had been reduced to a Atherapeutic session@ of 50 minutes, once a week. (T 526) Then, in October, 2003, the court ordered all her visitations with her son terminated. (T 526)

Ms. Genova had met Gary Wyckle through a friend in March, 2003. (T 527) Wyckle knew that Ms. Genova had a law license (T 527), but it was obvious that she had no viable practice. For one thing, she did not even have a checkbook. (T 554-555, 586, 599). As well, her addiction to drugs was a matter of recent and extremely public record. (T 178-179, T 518) Through Ms. Genova=s testimony before the Referee, the drug-laden fog she was in throughout the entire period in which she dealt with Wyckle was presented (*e.g.,* T 528: Ms. Genova was unsure, looking back, how or when Wyckle became her client). Her dealings with Wyckle occurred during the same period when her son was completely lost to her, her drug use was at its most

severe and about to bottom out, and she had two pending felony cases. Then she was arrested for the third time, in June, 2004 (for possession of cocaine). (T 526, 528, 530)

With this arrest, Ms. Genova was held in the Dade County Women=s Jail without a bond, where she remained for a month before she was allowed to transfer directly from the jail to St. Luke=s facility, where she remained a resident until September, 2004 (ninety days) (T 133), being treated for clinical depression, as well as for drug and alcohol addictions. (T 141, 148-149) Upon entry, Ms. Genova was diagnosed as suffering from a severe addiction, according to St. Luke=s clinical director, who testified before the Referee. (T 148-149) Ms. Genova was also Adistraught and anxious.@ (T 142) Her affect did not Abrighten@ (indicating emergence from the depression) until 60 days had passed in treatment (T 142-145), as the result of intensive (in-house, 30-day) treatment, followed by continued intensive in-house treatment and counseling, and the addition of attendance at Alcoholics Anonymous (AAA@) meetings in the community (on an Aearned pass@ basis). (T 144-145) Ms. Genova progressed from a fulltime resident, after 90 days, to an Aalumna@ who continued to attend meetings at St. Luke=s once a week (T 145), in addition to her participation in a program designed and directed by FLA. FLA=s pact with Ms. Genova mandated (as part of a three-year express written contract) attendance at 90 12-step meetings within 90 days, then 3-4 12-step meetings a week plus one FLA

support group meeting per week, weekly therapy one-on-one with an FLA-approved therapist (Dr. Penalver), and regular random drug testing. (T 167-168) Her FLA monitor reported full compliance (T 168-170), and all FLA-ordered drug tests from August, 2004, on were clean. (T 176-177)[3]

Throughout the events catalogued as Count 1 of The Florida Bar=s Complaint in para. 1-15 of the Referee=s report (R 2-8), Ms. Genova was also in the tightest grip of her Asevere@ drug addiction (T 148-149), at a time when she was also suffering from long-diagnosed but untreated clinical depression. (T 141, A 1, T 489) The timeline used as an aid before the Referee and reproduced in the Appendix to this brief shows, in summary form, how Ms. Genova was conned by Gary Wyckle at precisely the time when she had the least ability to discern the scam, or to guard against being victimized by this professional thief. (A 1)

Ms. Genova=s prognosis for recovery in the long term was reported as good **C** provided that she continues in the program of recovery. (T 154) Ms. Genova has continued her full compliance with all aspects of the treatment plan. (T 155, 170) At the time of the hearings before the Referee, Ms. Genova had successfully completed one year of sobriety, and she was actively involved in Drug Court, attending twice-

[3] The Referee declared that she did not require copies of the FLA records, because AI take very copious notes.@ (T 179)

weekly therapy at Miami Behavioral Institute, weekly meetings of FLA (with random drug testing), thrice-weekly 12-step meetings (AA and Narcotics Anonymous (ANA@)), and bringing meetings to other recovering addicts.

Count 1: Misappropriation of client funds. The Bar=s statement of facts with respect to Count 1 is argumentative and presents an unfair and/or inaccurate statement of those facts (other than those contained in the numbered paragraphs of the parties= stipulation). The following are numerous examples; references are to pages of the Bar=s brief, followed by the corrected fact(s):

Bar brief, page 10: AVictim@[4] Eduardo Solares testified that he believed his $60,000 Awould be safe@ because he believed the statements to that effect made to him by Gary Wyckle (a convicted felon), not on anything said or written by Ms. Genova, who (the Bar concedes) Solares never met or spoke to. (T 51)

Bar brief, page 10-11: Solares did not testify that Ahis trust in [Ms. Genova] was furthered through correspondence exchanged between them,@ because there was no such Aexchange.@ (T 30-31) Two letters sent to Solares (prepared by Wyckle and signed by Ms. Genova) provided wiring instructions only. (TFB Exhibits 1 and 3) Solares could not read English. (T 76)

Bar brief, page 11: Ms. Genova did not sign the Aloan commitment agreement@

[4] Gary Wyckle was Ms. Genova=s client, not Eduardo Solares. Solares, like Ms. Genova, was a mark who fell for Wyckle=s Aadvance fee scheme.@

(TFB Exhibit 2); indeed, she did not see it until the Bar showed it to her.

Bar brief, page 11: The Bar=s statement that Athis letter [from Ms. Genova; TFB Exhibit 3] also confirmed *the terms* of the loan commitment agreement@ is untrue. (Emphasis added) Both letters, TFB Exhibits 1 and 3, merely refer to that agreement.

Bar brief, page 12: Solares had the same opportunities to investigate Gary Wyckle as Ms. Genova, but much more motivation, as he was sending money to Wyckle, yet he did not even have his A10 lawyers@ review the Aloan commitment agreement.@ (T 62, 72, 73) Solares was unable to read it, as it was in English. (TFB Exhibit 2; T 76)

Bar brief, page 11, 12: The Referee sustained objections to the opinions of Bar auditor Carlos Ruga. (T 180-182; T 183) The Bar never attempted to elicit testimony as to any purported Aexpertise@ or Aqualifications@ that Ruga had. Although the Aloan commitment agreement@ and the documents examined by Ruga demonstrated that Wyckle=s scam was an Aadvance fee scheme,@ Ruga believed that Wyckle was conducting aAsmall Ponzi scheme,@ a very different scam. (T 223-224)

Bar brief, page 13: Gary Wyckle prepared the loan commitment agreement, not Ms. Genova; Solares could not read it, as he did not read English; he chose not to have any of his own attorneys involved in this transaction; all he knew was what Wyckle chose to tell him. (T 41, 62, 73,76, 91)

Bar brief, page 15: Ms. Genova testified that she did not herself believe that she was addicted to drugs when she completed her Bar applications in 1995 and 1999. (T 597-598)

Bar brief, page 18: Ms. Genova repeatedly told Wyckle that she did not have a trust account, and she repeatedly asked for and received assurances that her client, Wyckle, was not involved in either drugs or money laundering. (T 535, 536, 544, 545, 574, 581)

Bar brief, page 18: Ms. Genova equated Wyckle=s loan application fee with the practice, familiar to her from her experience with her brother=s mortgage broker business, of charging a non-refundable fee to prospective borrowers. (T 538-539) The charge (ranging from $200.00 to $500.00) is for putting documents together and for the broker=s time. (T 539) Wyckle told Ms. Genova that the monies were fees paid to him for his work on his clients= behalf. (T 545)

Bar brief, page 18: The letters (TFB Exhibits 1 and 3) refer to, but do not quote or otherwise reiterate, any information from the Aloan commitment agreement@ drafted by Wyckle and never seen by Ms. Genova; she never saw any contracts between Wyckle and his clients. (T 539)

Bar brief, page 19: Because of her escalating drug addiction, Ms. Genova, by 2004 (when the transactions under scrutiny all took place), was incapable of such simple tasks as ordering checks. (T 554-555; 586; 599)

Bar brief, page 19: Ms. Genova took no money for her own use; she only received the agreed total of $1,800 from Wyckle (3% of $60,000). (T 386; 555) Wyckle testified that she took no other money. (T 386) Ms. Genova testified that she paid all monies other than the agreed fee directly to Wyckle. (T 555) But if she had the funds to do so, she would pay $60,000 into the court registry, for the court to decide how to distribute. (T 555, 557)

Bar brief, page 20: Ms. Genova was candid and remorseful about what she did, accepting full responsibility for her own actions, including drug offenses. (T 549, 553)

Bar brief, page 20: The fax number on TFB Exhibit 1 (purporting to be Ms. Genova=s letterhead) is (940) 234-3238; that is not Ms. Genova=s fax number, or a Miami area code. (T 580-581) The faxes that Solares=s partner Juan Armendia sent to AMrs. Elizabeth Martinez Genova, Attorney at Law,@ demanding a return of the $60,000 were faxed to (940) 234-3238. (T 329: Respondent=s Exhibit F (these faxes bear Bates stamp number D-0395-96 and D-0397-98))

Bar brief, page 20: Ms. Genova gave Wyckle cash rather than checks because she had never ordered checks, not because Wyckle ever insisted on cash; at this point (2004), she was not really normal, as she was at the most severe period of her drug addiction. (T 584-585)

The Bar=s obligation to present a fair and accurate statement of the facts is

even more crucial in a case such as this, where the Bar is seeking reversal of the Referee=s recommendation. The Court is urged to affirm that recommendation.

SUMMARY OF ARGUMENT

Respondent was accused of holding Ain trust@ funds of a third party that were sent to her operating account in February, 2004, to be held while her client sought to obtain a loan for the third party=s $35-million pulp and papermill project. Those facts were stipulated to, although there is no dispute that Respondent had no knowledge of the contents of the Aloan commitment agreement@ entered into between the third party and Respondent=s client, who was (although not known to her at the time) a convicted conman.

There is also no dispute that Respondent was at all material times suffering deeply from drug addiction and depression and their physical and emotional effects, while simultaneously reeling from the indictment, arrest, and incarceration of her husband, foreclosure on the family home, and the removal of her small son from her custody (followed by termination of all her visitation rights).

The gravamen of the Bar=s argument on review is that Respondent acted intentionally, that she stole the funds, and that she acted for her own profit. Thus, the Bar contends, Respondent must be disbarred, rather than suspended for three years

(with significant additional conditions), as the Referee has recommended.

The Referee heard four days of testimony, and reviewed nearly two dozen exhibits, mostly from the Bar. As would be expected, the Referee=s recommendations with respect to discipline are based, not only on the bare recitation of the stipulated facts, but also on her assessment of the witnesses= testimony, especially their credibility. An important witness at the hearings was Respondent=s client, the perpetrator of the Aadvance fee scheme@ which bilked Guatemalan investors of $60,000, using the severely-addicted Respondent as the unknowing conduit, and her bank account as the vehicle, for that scam.

The Bar=s argument for disbarment urges the court to ignore the well-documented testimony which established that Respondent herself was a victim of a smooth and experienced criminal. The Bar castigates Respondent for failing to run a complete criminal background check on her client, although it points to no rule, case, or statute which would impose such a burden on a lawyer. Lawyers are obliged to exercise the same judgment in taking on a customer as any other businessperson, but that is all. A lawyer who did not know that she is a victim of a conman is in the same position as the other victims of his scam.

Another important witness for the Bar **C** and the person who caused the Bar to press for disbarment **C** was the Bar=s auditor, Carlos Ruga. No testimony was elicited from Mr. Ruga with reference to his qualifications to conduct an audit or issue an

opinion based on his findings. Neither his education nor his professional licenses or experience appear in the record. There is no evidence that he was qualified to give an opinion as to the existence or elements of financial fraud.

Indeed, Bar auditor Ruga wrongly concluded that Wyckle was operating a Asmall Ponzi scheme,@ when the evidence was that Wyckle was operating what is commonly known as an Aadvance fee scheme@: the Aborrower@ is always someone who cannot get lending from any traditional lender, such as a bank; the Alender@ (Wyckle) presents himself as one who can find investors for such hard-to-place loans, and cheerfully agrees that the fee for himself will be Apaid at closing.@ Of course, the Aborrower@ must front a Asmall@ fee **C** in this case, $60,000 **C** to cover Wyckle=s time and the documentation needed to obtain the loan. This Aadvance fee@ will (of course!) also be credited against the Alender=s@ fee Aat closing.@ Also, as the final bait that sets the hook, the borrower is assured that the Adeposit@ will be held until closing **C** only the terms vary **C** Ain trust@ or Ain escrow@ or Aby my attorney.@ Of course, the Aloan@ never closes **C** as in this case, it is always due to some default by the Aborrower@ **C** so the Adeposit@ is forfeited to Wyckle. (An additional Alegitimizing@ factor of this con is that legitimate mortgage brokers, such as Respondent=s brother, actually do charge an Aapplication fee@ of several hundred dollars, which is not refundable. Such a legitimate fee is easily confused, as Respondent confused it, with the Aadvance fee scheme,@ in which the Aadvance fee@ is thousands of dollars, and no loan is ever made.)

An additional factor which made this scheme an attractive one from Wyckle=s perspective was the probability that the bilked Guatemalan Aborrowers@ would never check his background, and would be unlikely to sue Wyckle in the U.S. (or report him to the police for grand theft). Indeed, the Aborrowers@ did not. Instead, they came after Respondent, the hapless lawyer who had no idea that any promises with respect to holding the funds Ain trust@ had been made (because she never saw the Aloan commitment agreement,@ either before or after it was signed; the Bar showed it to her months later).

Importantly, Respondent=s errors are in no way excused or minimized by the Referee=s recommendations, contrary to the Bar=s argument. Moreover, the three goals of lawyer discipline are plainly served by the Referee=s recommendations: (a) fairness to society (lengthy suspension, reinstatement only with proof of rehabilitation, and continued oversight, especially of client or third-party funds); (b) fairness to Respondent (proposed discipline is stringent but allows Respondent to retain hope of reinstatement and encourages wholehearted dedication to all aspects of rehabilitation); (c) proposed disciplinary provisions are deterrent in effect.

The Referee adhered to existing case law and the Florida Standards for Imposing Lawyer Sanctions when she concluded that, while a lengthy suspension and continuing oversight would be necessary, Respondent neither stole from her client (Wyckle) nor from the Ainvestors@ who paid Wyckle to get them a Aloan

commitment.@ The Court is thus urged to affirm the Referee=s Report and Recommendations, and to issue its order accordingly.

ARGUMENT AND CITATIONS TO AUTHORITIES

BECAUSE THE REFEREE=S RECOMMENDATION AS TO DISCIPLINE HAS A REASONABLE BASIS IN EXISTING CASE LAW AND THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, IT SHOULD BE APPROVED

Standard of review. While the scope of the Court=s review of a referee=s recommended discipline is broader than that afforded to the referee=s findings of fact, the Court Agenerally will not second-guess the referee=s recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.@ *See, e.g., Florida Bar v. Batista*, 846 So. 2d 479, 484 (Fla. 2003); *Florida Bar v. Temmer*, 753 So. 2d 555, 558 (Fla. 1999); *Florida Bar v. Mason*, 826 So. 2d 985, 987 (Fla. 2002).

* * *

The Bar bases its argument for disbarment solely on Gary Wyckle=s Aadvance fee scheme,@[5] as to which Ms. Genova was as much a victim as the actual

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[5] The auditor was incorrect in describing Wyckle=s scam as a Asmall Ponzi scheme,@ which involves paying large returns on the earlier investments, from the funds received from later investors. A Ponzi scheme collapses when the stream of Ainvestors@ dries up. Wyckle=s deals were not interdependent; in each case, he took a huge deposit, supposedly to cover the cost of finding loans, and claimed later that the Aborrower@ had defaulted, thus forfeiting the Adeposit@ **C** the Aadvance fee.@ (T 312-313) The refund to Gavin probably was a precautionary measure on Wyckle=s part: Gavin, alone among Wyckle=s victims, was an American located in Atlanta, close enough to pursue legal remedies and/or seek law enforcement assistance. Gavin=s satisfaction (and his silence) was further guaranteed by paying him a few dollars in

Aborrowers@ such as Eduardo Solares.[6] Ignoring contrary Florida precedent, the Bar urges the Court to disbar Ms. Genova, based on two irrelevant criminal cases[7] and a New Jersey disciplinary matter with entirely different facts (and which itself drew forth a vigorous eight-page dissent).[8]

A. AWillful blindness@ or Awillful ignorance@

The Bar is urging the Court to announce a new standard for lawyers, with respect to how much investigation of a client an attorney must perform in order to

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Ainterest@ on his refunded Adeposit.@ (T 574, T 586-588)

[6] Solares was the only Avictim@ who testified. The Bar=s auditor testified that he had telephone contact with another alleged Avictim,@ Manzueta, who had paid $25,000, but lost interest in him because he learned that Mr. Manzueta had no complaint to make. (T 205)

[7] *Wetzler v. State*, 455 So. 2d 511 (Fla. 1st DCA 1984) (defendant was in constructive possession of cannabis), and *U.S. v. Zimmerman*, 843 F. 2d 454 (8th Cir. 1987).

[8] *In the Matter of Irizarry*, 661 A. 2d 275 (N.J. 1995). Notably, none of

avoid being accused of, and disciplined for, what the Bar calls Awillful blindness@ or Awillful ignorance.@ The Bar admits that there is no precedent in Florida=s extensive disciplinary jurisprudence to support such a duty.

The cases the Bar cited in support of its position show that the concept of Awillful blindness@ has been accepted, with reluctance, in a tiny number of criminal cases, such as *Wetzler v. State*, 455 So. 2d 511 (Fla. 1st DCA 1984), which bear no factual or legal relationship to the present matter. Wetzler, for example, had only to look in the trailer attached to his truck (or maybe even sniff the ambient air) to detect the presence of a substantial quantity of cannabis, so his claim that he Adidn=t know@ was rejected by the jury, affirmed on appeal. Ms. Genova, in contrast, did ask her client Gary Wyckle if he was doing anything illegal, specifically drug-related or having to do with money laundering. (T 574 (Ms. Genova assured by Wyckle that funds were legitimate, and in particular, not involved in drugs or money laundering)) She also repeatedly told him that she would not hold any funds Ain trust,@ and not just because she did not have a trust account as such. (T 535, 536-537, 544-545, 589-590 (Ms. Genova told Wyckle and others that funds were not held Ain trust@))

Wyckle=s explanation, that the fee was legitimate and earned when received, was reasonable to her, based on her experience in her brother Julio Martinez=s

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the headnotes in *Irizarry*, mention Awillful blindness@ or Awillful ignorance.@

mortgage broker business, where the loan application fee was earned and paid up front. The amount of the fee was larger, but the loans sought were much larger (in the tens of millions), too. (T 538-539)

The criminal courts are reluctant to approve convictions based on Awillful blindness@ unless there is an Aissue of exclusive control or access@ which resolves any doubt, as there was in *Wetzler*. *See also, Brayton v. State*, 425 So. 2d 88 (Fla. 1st DCA 1982) (the probable cause for the deputy to open defendant=s trailer after defendant claimed ignorance of the contents was the smell of the 2,000 lbs. of cannabis, plainly detectable from outside the trailer; that factor, combined with the defendant=s exclusive control of the trailer, provided the requisite proof of Awillful ignorance@). The court in *Wetzler* expressly limited the doctrine of willful blindness to Aconstructive possession@ of contraband. *Wetzler* at 513. The court in *Wetzler* did not even suggest that Awillful blindness@ ought to be applied in other contexts; manifestly, the Bar misspoke when it declared:

> *Wetzler* weaves into criminal *and civil law* the concept of willful blindness; that is to say[,] that *a basic knowledge of fact is not necessary to commit a violation of law*. *Id.*

The Bar=s initial brief, at 33 (emphasis added). *Wetzler* did not discuss Acivil law@ at all. What the *Wetzler* court did do was to urge caution in applying this doctrine, precisely because Awillful blindness@ is Aan unstable rule,@ Avery limited [in] scope.@ *Wetzler* at 513, fn 2 (quoting G. Williams, *Criminal Law: The General Part*, '57 at

157 (2d ed. 1961)).

The other case cited by the Bar is also a criminal case. *See U.S. v. Zimmerman*, 832 F. 2d 454 (8th Cir. 1987). The opinion does not reveal why the court read a Awillful blindness@ jury instruction to the jury, but the instruction authorized such a finding only if the jury Afound, *beyond a reasonable doubt*, a conscious purpose to avoid enlightenment.@ Zimmerman formed a Achurch@ to avoid paying federal taxes to the IRS; he was subsequently charged with aiding in preparing and presenting fraudulent tax returns. Importantly, Abeyond a reasonable doubt@ is not the standard of proof in a Bar case, but the case is inapposite for other reasons too: there are no juries to instruct in a Bar case, the opinion in the nearly 20-year-old tax case is not from the Eleventh Circuit, and the Awillful blindness@ issue appears to have played little if any role in affirming the conviction (Awillful blindness@ was mentioned in the tenth of 14 headnotes).

The Bar=s desire to extend the concept of Awillful blindness@ to *any* lawyer disciplinary case is unsupportable, but even if some facts could be said to warrant such an extension, this case does not. Ms. Genova never argued that the money was not in her account, and she always acknowledged that it was wired there by Solares. The Referee decided, based on substantial competent evidence, that Ms. Genova did not

adequately safeguard the money, but not that she stole it.[9]

It is to urge adoption of this new Awillful blindness@ standard by the Court that the Bar turned to cases from outside Florida. In doing so, the Bar stated,

> The Standards for Imposing [Lawyer] Discipline themselves are designed to promote consistency among jurisdictions. Standards for Imposing Discipline 1.3. As such, Referees regularly consider case law from other jurisdictions.

Bar=s initial brief, at page 34, fn 5. The Bar cited no case or other authority in support of those global statements, choosing to ignore well-settled principles of *stare decisis* and comity. The Bar also disregarded the circumstance that the drafters of the Standards for Imposing Lawyer Sanctions drew heavily from Florida=s experience, precisely because Florida=s supreme court has a long tradition of writing opinions rather than issuing summary orders, and because Florida has long had the large membership numbers which make inevitable larger numbers of disciplinary cases arising from a broad assortment of factual contexts. *See* Standards, I.B.

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[9] The Bar repeatedly and erroneously implies that Ms. Genova kept some money other than her fee, which was a total of $1,800.00 (3% of $60,000). *See, e.g.*, Bar=s brief at page 36. Both Wyckle and Ms. Genova testified as to the amount of the fee, and that she did not obtain anything additional; there was no evidence to the contrary, and the Referee (who heard and saw them testify) believed them.

(Methodology; standards based in part on cases from eight jurisdictions including Florida which Apublished disciplinary cases from 1974 through June of 1984@).

Thus, the Bar=s proposal that the Court rely on cases decided in other states would lead the Court to disregard its own extensive body of precedents. For example, the Bar did not call the Court=s attention to *The Florida Bar v. Behrman*, 658 So. 2d 95 (Fla. 1995), a Florida lawyer-discipline case that is virtually identical to this one on its facts, yet the Arecommended discipline@ of a 90-day suspension was further ameliorated by the Court, *nunc pro tunc*, to the date of the respondent=s emergency suspension. Behrman was persuaded by a former client, a loan broker, to accept deposits into his Atrust account.@ The deposits were described as deposits from prospective borrowers to cover the cost of Athe broker=s applications for the letters of credit.@ *Id.* (This is precisely what occurred at bar.) But Behrman was also fully advised, unlike Ms. Genova, that if no loan was closed, Aat least 2/3 of the escrowed funds would be remitted [i.e., refunded] to each of the depositors and Behrman would get $1,000 for each transaction.@ *Id.* at 96. Despite this express knowledge, Behrman disbursed the funds of borrowers to the broker (and took his own $1,000 fee each), and, on being brought up on disciplinary charges by the Bar, he disingenuously claimed that all his files had suddenly gone missing, and that his Afaxes, mail, and telephone calls were frequently intercepted@ by the loan broker, a non-lawyer

(Behrman had allowed him to share his office). *Id.* In addition to Behrman=s far greater ability to fully inform himself, and proof of far more actual knowledge, the total loss in *Behrman* far exceeded that at bar, too, but this Court found a 90-day suspension more than adequate.

The *Behrman* precedent, less than ten years old, provides ample basis to support the Referee=s recommendations with respect to discipline.

As it did before the Referee, the Bar relies heavily on the New Jersey lawyer-discipline case of *In the Matter of Irizarry*, 661 A. 2d 275 (N.J. 1995). The Referee rejected *Irizarry* with good reason. It is important, first, to recognize an important difference between New Jersey procedures and those conducted by the Florida Bar. It is the New Jersey practice, when the auditors go in, to give the attorney an opportunity to clean up his trust accounts, and that is what happened to Irizarry. He ignored specific instructions to close his first trust account and open another, as he was told after the first audit; it was only after his trust accounts continued to deteriorate, and could not be straightened out by a CPA, that the New Jersey Office of Attorney Ethics (AOAE@) sought, and the court imposed, the ultimate punishment of disbarment. Of course, the record makes clear that no such Asecond chance@ was given to Ms. Genova; indeed, based on this case, that does not appear to be Florida practice.

There were other important dissimilarities between the New Jersey case and

this one: Irizarry had a trust account (Ms. Genova did not); Irizarry=s trust account was in Aconstant@ disarray over many months (Ms. Genova=s account had little activity, and all of it was completely transparent and easy to track); and the nature of Irizarry=s practice (real estate transactions) would necessarily and regularly expose his clients to danger (the scam which engulfed Ms. Genova was created by the client). Moreover, the court=s conclusion was that Irizarry Aissued trust account checks *to himself knowing* that he was out of trust and that he was invading trust funds.@ *Id.* at 277 (emphasis added). Plainly, in rejecting the Bar=s request for disbarment, the Referee recognized that no such theft occurred at bar.

That this Asecond chance@ after an audit is indeed a critical component of New Jersey=s disciplinary practice with respect to attorney trust accounts was further demonstrated in *In the Matter of Freimark*, 702 A. 2d 1286 (N.J. 1997), quoted at length by the Bar in its brief, at page 34. Freimark, like Irizarry, had a trust account that was in complete turmoil, and he had accumulated four separate counts of misappropriation over two years. He stole the clients= money, the court concluded, and his personal injury practice made it likely that more clients would be exposed to danger by his practices. As well, Freimark had been disciplined in New York for a similar violation. Even after all of this, Freimark was not suspended on an emergency basis (Ms. Genova was), and he was not disbarred until after he had been offered the Asecond chance@ audit, but failed or refused to mend his ways. *Freimark*. No such

opportunity was given to Ms. Genova; Bar auditor Ruga was plainly determined, from the outset, to have her disbarred.[10]

The other two cases found by Shepardizing *Irizarry* similarly rebut the Bar's position. One of these, also a New Jersey case, is *In the Matter of Pomerantz*, 714 A. 2d 241 (N.J. 1998), where the attorney was also disbarred, based on a pattern of theft of client funds. She was out of trust 28 times in one year; 15 different clients were affected, and she let the bookkeeper regularly sign trust account and other checks. *Pomerantz* at 242. Nothing remotely like this happened at bar; on the contrary, Ms. Genova's errors occurred because she was too attentive to her client's wishes, not careless of them.

The last case which cited *Irizarry* shows that, outside its narrow application under New Jersey's procedures, *Irizarry* does not stand for the rigid position taken by the Bar in this case. The Delaware lawyer in *In re Bailey*, 821 A. 2d 851 (Del. 2003), was suspended for six months and one day, requiring proof of rehabilitation before reinstatement, not disbarred. That was so even though the attorney was a managing

[10] In assessing whether Ruga's position was reasonable, the Court will recall that Ruga was not qualified by the Bar as an expert, and the record is devoid of any evidence as to his education or training as a financial fraud investigator, accountant, or something similar. As noted, Ruga never discerned the nature of Wyckle's scam.

partner of a law firm, and had taken over $26,000 out of the firm=s trust accounts to pay his own personal expenses. He tried to blame his bookkeeper and staff; it was in that context that Awillful blindness@ came up, citing *Irizarry*. The Bar failed to bring this case to the Court=s attention, even though the behavior which led to the discipline was more egregious than Ms. Genova=s, because the attorney was responsible for the entire firm=s trust accounts. The potential for loss to many, many clients was certainly a concern for the Delaware court, yet it nevertheless ordered a suspension and not disbarment.

B. Florida disciplinary cases

The Bar has relied chiefly on four Florida disciplinary cases, arguing at length that they mandate disbarment in this case. These cases, all decided between 1986 and 1992, are *Florida Bar v. Knowles*, 500 So. 2d 140 (Fla. 1986) (alcoholic attorney; decided before FLA program commenced; huge loss; the many clients affected were especially vulnerable as attorney held their powers of attorney; disbarment recommendation affirmed); *Florida Bar v. Shuminer*, 567 So. 2d 430 (Fla. 1990) (drug-addicted attorney, in practice less than a year, stole, *inter alia*, $5,000 from his trust account and used it for a down payment on a Jaguar; referee=s recommendation of 18-month suspension rejected; disbarment ordered); *Florida Bar v. Shanzer*, 572 So. 2d 1382 (Fla. 1991) (few facts in opinion, but attorney admitted allegations in seven-count complaint, including four counts of misappropriation of funds and trust

account shortages; referee=s recommendation of disbarment approved); and *Florida Bar v. Graham*, 605 So. 2d 53 (Fla. 1992) (attorney found guilty of 12 counts; pled guilty to eight counts of grand theft from client trust accounts; attorney falsely testified under oath at disciplinary hearing; referee=s recommendation of disbarment affirmed)

The Bar=s reason for relying on these four cases is that they resulted in disbarment. Otherwise, the differences between each of them and Ms. Genova=s are many and striking. In each case, the attorney had a trust account, and used it intentionally to defraud or steal from *clients*.

In addition, in every one of the foregoing cases, the disbarment was ordered because the actual offenses committed by the attorney involved a pattern of intentional larcenous activity, real and/or potential danger to numerous clients, and much more money than this case. Importantly, too, each case included objective evidence that the disciplined attorney had taken the money and used it for his personal benefit. *See*, *e.g.*, *Shuminer*: trust account funds withdrawn the same day and used for a down payment on a Jaguar motorcar; check introduced into evidence; *Knowles:* $197,000 stolen from trust account; pled guilty to eight counts of grand theft; money used for personal expenses over four years; *Graham:* attorney not only stole thousands, on a regular basis over many months, but he lied about it under oath at the disciplinary proceeding. Ms. Genova, in contrast, having lost her home to foreclosure, was living on the kindness of relatives and friends; she responded immediately to the bar

auditor=s summons, she frankly admitted that she did not have any records, and she showed up for the meeting with him, where she truthfully answered the auditor=s questions.

To distinguish the foregoing cases is not to underestimate the seriousness of Ms. Genova=s actual acts and omissions. Indeed, Ms. Genova has not sought to overturn the Referee=s very stringent recommendations, even though the facts and reasoning in *Florida Bar v. Behrman, supra,* plainly support a more lenient view as to Count 1, because Ms. Genova is aware that the three arrests for possession of controlled substances, arising from her drug addiction (the basis for Count 2 of the complaint), raised serious concerns. However, the Referee=s recommendation for the longest possible suspension, followed by reinstatement only upon proof of rehabilitation and compliance with FLA=s program, will operate to protect the public and deter others, while it does not underplay the gravity of the charges in this case, or remove all hope for reinstatement.

The Bar=s argument for disbarment simply ignores *Behrman,* yet that case is directly on point, and teaches that the attorney=s responsibility to third parties continues even though the attorney and third parties have both been conned by the client. The attorney=s responsibility mandates the imposition of discipline. That precedent also acknowledged the fact that the level of punishment imposed should take into account that the attorney was victimized by the client, a circumstance which

warrants mitigating the punishment.

As well, the Bar argued vehemently that the Court should not consider its recent opinion and reasoning in *Florida Bar v. Mason*, 826 So. 2d 985 (Fla. 2002), one of the cases on which the Referee relied in making her recommendation for discipline. And yet, if anything, the respondent in *Mason* was more culpable, because she was knowingly withdrawing client funds from her trust account to pay her own expenses, the amount of loss or potential loss was several times that involved here, and the pattern of misappropriation continued over an extensive period of time. Moreover, Mason=s letter to the Bar, claiming that the client=s funds were in her trust account on the day of the letter, proved to be false. Still, the Court was adhering to established principles when it declined toAsecond-guess@ the Referee on recommended discipline in *Mason*, and the Court is urged to do the same at bar.

The Court is urged to affirm the Referee=s Report and Recommendations, and to issue its order accordingly.

CONCLUSION

Because the Referee=s recommended discipline was squarely rooted in existing case law and the Florida Standards for Imposing Lawyer Sanctions, the Court is urged to impose the three-year suspension and other conditions that the Referee recommended, after a four-day hearing, the consideration of extensive testimony and documentary exhibits, and the receipt of legal memoranda from the parties. While there was extensive evidence with respect to mitigation (based on Respondent=s continued participation in FLA-approved treatment programs), the fact that Respondent was also a victim of her client=s scam, militates in favor of the recommendation, too. *See Florida Bar v. Behrman, supra.*

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed this _____ day of February, 2006, to Vivian Reyes, Esq., The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, and to J. Anthony Boggs, Esq., The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, and to Gary S. Glasser, Esq., Gary S. Glasser, P.A., 19 W. Flagler Street, Suite 1400, Miami, Florida 33130.

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CERTIFICATE OF COMPLIANCE

I certify that the typeface used in the foregoing brief is 14-point Times New Roman, in compliance with Florida Rule of Appellate Procedure 9.210(2)(a).

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