IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ELIZABETH MARTINEZ-GENOVA,

Respondent.
_____/

Supreme Court Case
No. SC04-2365

The Florida Bar File
Nos. 2003-70,374(11D)
2004-70,316(11D)
2005-70,067(11D)
2005-70,269(11D)

The Florida Bar's Initial Brief on Appeal

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SYMBOLS AND REFERENCES

For the purpose of this Initial Brief on Appeal, The Florida Bar will be referred to as The Florida Bar, the Bar, or TFB. Elizabeth Martinez-Genova will be referred to as either Respondent or R. Other persons will be referred to by their respective surnames.

References to the transcript of the final hearing will be set forth as T and page number. References to the Report of Referee will be set forth as ROR and page number.

STATEMENT OF THE CASE AND OF THE FACTS

This matter was heard by Judge Caryn C. Schwartz, serving as referee. The Bar and the Respondent stipulated to a significant portion of the factual background. The final hearing was held on June 9, 2005; June 10, 2005; June 20, 2005; and August 16, 2005. The parties stipulated to the following facts:

1. Respondent is and was at all time material herein a member of The Florida Bar, albeit suspended by an order of emergency suspension dated October 20, 2004, and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

As to Count I of The Florida Bar's Complaint

2. The Miami Branch Staff Auditor of The Florida Bar conducted an examination of Respondent's Operating Account maintained at SunTrust account #1000000846781 ("SunTrust Account"), for the period of June 21, 2003, to August 23, 2004.

3. The audit was predicated upon the complaint of Richard M. Brenner, Esquire, on behalf of three (3) clients identified as Juan Armendia and Eduardo Solares (as principals), and Nikita Investment Corporation ("Nikita Investments") (collectively "complainants"). Nikita Investments was involved with Charter One Group, Inc. ("Charter One") to obtain $35 Million to fund the acquisition of a pulp plant and saw mill in Guatemala ("the Loan").

4. On February 12, 2004, the complainants sent $8,000.00 to Respondent's SunTrust Account.

5. On February 14, 2004, Charter One issued a Conditional Loan Commitment to obtain the Loan which was signed by Nikita Investment and Gary Wyckle, President of Charter One. Paragraph 13 of the agreement stated, among other things, that the borrowers would deliver $60,000.00 to Charter One's attorney to be held in trust and credited to loan fees at closing. Respondent did not sign this agreement; however, Respondent represented Charter One in this transaction.

6. On February 19, 2004, the complainants sent $52,000.00 to Respondent's SunTrust Account, for a total sent to Respondent of $60,000.00 by complainants.

7. The lender did not fund the loan. On April 16, 2004, complainants demanded Respondent and Gary Wyckle to refund the escrowed funds. Respondent failed to respond to complainants' request.

8. On May 26, 2004, there was a release agreement signed by complainants and Gary Wyckle which was never consummated.

9. On August 28, 2004, complainants' attorney, Richard Brenner, filed a complaint with The Florida Bar.

10. Respondent was incarcerated on June 5, 2004 and remained in custody until she was transferred to St. Luke's Addiction Recovery Center, an in-patient drug treatment facility, in July, 2004. Respondent remained in St. Luke's until successfully discharged in September, 2004.[1]

11. On August 31, 2004, a *subpoena duces tecum* was served on SunTrust Bank to produce copies of all documents pertaining to Respondent's SunTrust Account and any trust accounts in which Elizabeth (Martinez) Genova had signatory capacity, bank statements, canceled checks, items deposited with its corresponding deposit slips, wire transfers, cashier's checks issued with supporting documentation, and any debits or credits posted to the above referenced account(s), for the period of July 1, 2003 to August 31, 2004.

12. SunTrust Bank delivered Respondent's bank records to The Florida Bar. The branch auditor's review of the bank records are detailed in the following paragraphs:

A. On October 24, 2003, Respondent received in her SunTrust account a wire transfer in the amount of $15,000.00 from an individual identified as John Gavin, a client from Valdosta, Georgia. From those funds Respondent transferred $6,700.00 to Gary Wyckle, the president of Charter One, withdrew

[1] After 3 weeks in treatment, St. Luke's may approve passes outside its facility.

$8,100.00 in cash, paid $55.00 in bank charges, and $145.00 was withdrawn by Respondent through over-the-counter withdrawals.

B. On February 13, 2004, Respondent received the first wire transfer from complainants in the amount of $8,000.00. Respondent used some of the funds through the ATM machine and on February 17, 2004, withdrew $7,700.00 in cash depleting the funds deposited. The balance in the account on February 17, 2004 was $18.82.

C. On February 20, 2004, Respondent received another wire transfer from complainants in the amount of $52,000.00. These funds were used in the following manner:

02-23-04	Wire Transfer to Gavin & Associates	$ 15,103.00
02-23-04	Withdrawal by Respondent	4,500.00
02-23-04	Withdrawal by Respondent	8,000.00
02-25-04	Wire Transfer to Arrowhead Golf Club	5,000.00
02-27-04	Wire Transfer to Charter One Group	6,000.00
02-27-04	Withdrawal by Respondent	6,050.00
02-27-04	Withdrawal by Respondent	6,600.00

D. Respondent used the rest of the money for things such as: withdrawals, Walgreens, Hair Cuttery, Eckerd, Sally Beauty, Royal Budabar, UPS,

etc. The balance in Respondent's operating account on February 27, 2004 was $327.50.

E. During the period of May 13, 2004, to August 13, 2004, Respondent received funds from the following individuals:

a)	05-13-04	Intercontinental Petroleum	$ 15,000.00
b)	05-26-04	Acero Industrial	10,000.00
c)	07-15-04	Marco Martinez Manzueta	15,000.00
d)	08-11-04	Francesco Filippone	10,000.00
e)	08-13-04	WMB Seattle	9,800.00[2]
		T o t a l	$ 59,800.00

F. From these funds, Respondent transferred a total of $53,850.00 to American Escrow Company LLC, owned by Gary Wyckle, $139.00 was used to pay bank charges, and the balance of $5,811.00 was withdrawn by Respondent in cash.

13. The registered address of American Escrow Company is a box in a UPS store.

14. On September 22, 2004, a subpoena was duly served and executed upon Respondent commanding her to appear before the branch auditor on October 4, 2004 at 10:00 A.M. at The Florida Bar offices and produce the bank records

[2] This is the return of a prior wire transfer.

listed in the subpoena issued on August 31, 2004, and in addition, the original files related to the following transactions:

A. John Gavin, Valdosta Ga., $15,000.00 received on October 24, 2003.

B. Helicopteros del Norte, La Lima, $8,000.00 received on February 13, 2004.

C. Juan Aramendia, Guatemala, $52,000.00 received on February 20, 2004.

D. Gavin & Associates, Ga., $15,103.00 transferred on February 23, 2004.

E. Arrowhead Golf Club, Caro MI., $5,000.00 transferred February 25, 2004.

F. Charter One Group, $6,000.00 transferred February 27, 2004.

G. Intercontinental Petroleum, Allen TX, $15,000.00 received on May 13, 2004.

H. Acero Industrial, Santiago D.R., $10,000.00 received on May 26, 2004.

I. Marcos Martinez Manzueta, Santiago D.R., $15,000.00 received on July 15, 2004.

J. Francesco Filippone, La Julia, $10,000.00 received on August 11, 2004.

K. WMB, Seattle, WA, $9,800.00 received on 08/13/04, and $9,750.00 on 08/24/04.

L. American Escrow Company, transferred $34,400.00 on 07/28/04, $9,800.00 on 08/13/04, $9,750.00 on 08/24/04, and $9,650.00 on 08/26/04.

15. On October 4, 2004 at 10:00 A.M., Respondent called the branch auditor and advised that she did not have any of the records listed in the subpoena. However, the branch auditor told Respondent to appear to discuss the matter.

16. Respondent appeared at 11:00 A.M. on that same date, and produced nothing. Respondent told the branch auditor that all the money except for her three percent fee was given to her client.

As to Count II of The Florida Bar's Complaint

17. On or about June 20, 2002 at approximately 3:00 A.M., Respondent was arrested as a result of traffic violations.

18. Respondent was searched incident to her arrest. Police discovered that Respondent had in her possession a baggie containing cocaine, marijuana, and drug paraphernalia.

19. As a result of the occurrences of June 20, 2002, *State v. Elizabeth Martinez-Genova*, case no. F02-18047, was filed in Miami-Dade Circuit Court on July 11, 2002, charging Respondent with one count of cocaine possession, one count of cannabis possession (0-20), and one count of possession of drug paraphernalia.

20. Contained in the court file for case no. F02-18047 are two handwritten notes signed by Respondent.

21. In both notes, Respondent requests Judge Rosinek to allow her to be placed in a drug program and in one of the notes Respondent admits to a "drug use" problem.

22. On or about July 3, 2002, Respondent was arrested for sale of cocaine to a confidential informant that occurred on or about May 2 and 22, 2002. Once arrested, police searched Respondent and discovered a small baggie that contained cocaine.

23. As a result of the occurrences set forth in paragraph 22 above, *State v. Elizabeth Martinez-Genova*, case no. F02-19437B was filed in Miami-Dade Circuit Court on August 2, 2002, charging Respondent with two counts of possession of cocaine with intent to sell/deliver, and one count of cocaine possession. Respondent admits to the purchase and possession of cocaine, but not the sale of cocaine.

24. On June 4, 2004, the police went to Respondent's residence. Once inside, the police observed baggies containing cocaine residue.

25. As a result of the occurrences of June 4, 2004 and while cases F02-18047 and F02-19437B were still pending, Respondent was again arrested and charged with one count of possession of cocaine and possession of drug paraphernalia resulting in the case of *State v. Elizabeth Martinez-Genova*, case no. F04-17146.

26. Case nos. F02-18047 and F02-19437B remain pending. Case no. F04-17146 was dismissed on December 3, 2004. These cases are still pending in drug court.

27. Based upon the foregoing, Respondent has 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) of the Rules of Professional Conduct.

28. Respondent is genuinely remorseful.

In addition to the foregoing stipulations, the following evidence and testimony was presented:

Eduardo Solares, one of the owners of Nikita, testified that he entrusted Respondent with $60,000 because he felt the money would be safe. (T. 40, 41). While Mr. Solares never met Respondent, his trust in her was furthered through

correspondence exchanged between them. (T. 30-31). Mr. Solares would have never agreed to send the $60,000.00 directly to Charter One because he did not know them. (T. 40-41). Wyckle recommended that Mr. Solares send the money to Respondent, who was Charter One's attorney. (T. 41). Mr. Solares did not know Respondent personally, but relied on the fact that she was an attorney. (T. 40-41). Mr. Solares felt more comfortable because there was an attorney involved in the transaction. (T. 40). Mr. Solares specifically stated "because here as in any part of the world, when one has an attorney, one feels safer and more comfortable." (T. 41). He also stated, "well, when there's an attorney in the middle of any type of business, one feels more comfortable and for the good development of business -- developing the business because when there's an attorney in the middle, you feel more comfortable." (T. 40). Mr. Solares received a letter dated February 11, 2004, signed by Respondent, confirming the terms of the verbal agreement, and requesting an $8,000.00 deposit to Respondent's bank account. (T. 30-31, TFB Ex. 1). The loan commitment agreement was signed on February 15, 2004. (TFB Ex. 2). Paragraph 13 of that loan commitment agreement specifically sets forth that the $60,000.00 sent to Respondent would be held in trust by her. (TFB Ex. 2). Although Respondent did not sign the loan commitment agreement, she referred to it in the letters she sent to Nikita. (TFB Ex. 1, 2, 3). Mr. Solares received a letter dated February 19, 2004, signed by Respondent requesting Nikita to wire transfer

$52,000.00 into Respondent's bank account. This letter also confirmed the terms of the loan commitment agreement. (T. 41, TFB Ex. 3). Mr. Solares' understanding was that Respondent would hold the $60,000 in trust. (T. 94, 95). A couple of months after transferring the money to Respondent, Mr. Solares wrote Respondent and Wyckle demanding the return of the $60,000.00 because the terms of the agreement had not been met. (T.45, TFB Ex. 6). During cross examination, Respondent's counsel asked whether Charter One, through its agent, Mr. Wyckle, had timely offered Nikita a standby letter of credit. (T. 83). Mr. Solares testified that the standby letter of credit provided by Mr.Wyckle could not be verified by any bank. (T. 83-85). Additionally, there was a release agreement signed by Wyckle and Nikita which provided that from the $60,000.00, $45,000.00 would be refunded to Nikita Corporation if certain conditions were met. (T. 50, TFB Ex. 7). Although the conditions set forth in the release agreement were satisfied by Nikita, neither Respondent nor Mr. Wyckle ever returned $45,000. To this day no part of the $60,000.00 has ever been refunded. (T. 51).

The Bar called Branch Auditor, Carlos Ruga, who having reviewed Respondent's operating account opined that Respondent assisted in a fraud and in so doing she misappropriated money entrusted to her by third-parties. (T. 207, 210-216). Mr. Ruga attested to each financial item identified in the stipulation of the facts. (T. 188-205). He pointed out that the money transferred by third-parties

into Respondent's account would be disbursed or withdrawn by Respondent within a day or two of receipt. (T. 188-202, Stipulations). Mr. Ruga specifically addressed the funds transferred to Respondent's account by Respondent's client, Gavin & Associates ("Gavin"). Gavin wire transferred $15,000.00 on October 24, 2003 to Respondent. Respondent withdrew or disbursed those funds to herself, Charter One, or its designees practically on the same day. (T. 188, Stipulations). Another wire transfer came into Respondent's account from Nikita. Respondent used a portion of Nikita's funds to pay Gavin $15,103.00. (T. 191-192). Ruga testified that Respondent explained to him that she would give cash to Wyckle. (T. 205). Furthermore, the bank statements reflect that shortly after receiving the wire transfers from third-parties, Respondent simultaneously transferred money to Charter One and its designees, and also personally went to the bank and made cash withdrawls. (T. 188-205, Stipulations).

Ruga personally verified that American Escrow's listed address was in fact a mailbox in a UPS store. (T. 201). Research revealed that Respondent was the registered agent for both Charter One and American Escrow. (T. 201). Additionally, research revealed that Wyckle was convicted of a felony involving a similar type of fraud. (T. 216, TFB Comp. Ex. 9). Ruga opined that based on his experience and review of the facts, Respondent and Wyckle were defrauding these third-parties by misappropriating their funds. (T. 207, 210-216).

Gary Wyckle testified that he hired Respondent to provide him with legal services. (T. 301). Wyckle asked Respondent to receive third-party funds into her bank account and disburse them in accordance with his instructions. (T. 303). Wyckle explained that Respondent was acting like a disbursing agent for those third-parties. (T. 303). Although Wyckle and Charter One had a bank account, Respondent agreed to receive these third-party funds on their behalf. (T. 370-371). Wyckle admitted that he requested the third-parties to send money to Respondent as a marketing strategy. (T. 371).

Wyckle met the owners of Nikita in Guatemala. (T. 313-314). Respondent knew Wyckle was going to Guatemala and that Nikita would wire transfer money into her account. (T. 314). Wyckle prepared the February 11, 2004 letter to Nikita that Respondent signed. (T. 320, TFB Ex. 1). This letter instructed Nikita to wire transfer the money into Respondent's bank account in accordance with the loan commitment agreement. The loan commitment agreement which Wyckle prepared and entered into with Nikita provided that the money Nikita sent to Respondent should be held in trust by Respondent. (T. 369). Irrespective of this agreement, immediately after receiving the money, Respondent would personally go to the bank and withdraw the cash for herself, for Wyckle, for Charter One, and for

Wyckle's designees. (T. 378-381, Stipulations).[3] Wyckle also testified that Respondent would transfer money to Charter One and its designees. (T. 378-381, Stipulations). In response to questions regarding the cash withdrawls made by Respondent, Wyckle testified that he could not remember how much cash Respondent gave him. (T. 377). Wyckle, however, admitted that he would occasionally go with Respondent to the bank to withdraw money. (T. 377). During the time Respondent was incarcerated due to a drug problem, Wyckle incorporated American Escrow because Respondent was no longer "functional" as his disbursing agent. (T. 381).

Ultimately, Wyckle did not obtain the financing required in the loan commitment agreement and Nikita demanded their $60,000.00 be refunded. (T. 49, TFB Comp. Ex. 6). Further, Wyckle admitted to lying in an e-mail that he sent to one of Nikita's representatives. (T. 384-385, TFB ex. 10).

Wyckle agreed to return Nikita's money. (T. 50, TFB Ex. 7). Nonetheless, to date neither Respondent nor Wyckle have returned the money. (T. 51

Respondent testified that she went to law school in 1990 and got married in 1991. (T. 487, 489). In 1992, Respondent took a year off from law school due to depression. (T. 489-490). During this time Respondent admitted that she and her husband were using drugs. (T. 490). Respondent's husband had a severe alcohol

[3] This pattern can also be observed with other third-party funds received by Respondent. (TFB Comp. 8).

and drug problem. (T 492). In 1994, Respondent worked with her husband, an attorney. (T. 493). Respondent graduated from law school and served as Federal Magistrate Judge Turnoff's legal intern. (T. 492). In 1995, Respondent gave birth to a son, failed the bar exam, and was experiencing marital problems. (T. 494). Respondent testified that in 1995, she used drugs only on weekends. (T. 497). Respondent admitted that on weekends she and her husband would buy an "eight ball" of cocaine (three and half grams) and share it. (T. 563). Respondent worked for an attorney between 1996 and 1997. (T. 498). Based on a recommendation from her employer, Respondent went to see a psychiatrist. (T. 498). The psychiatrist prescribed medication for Respondent's depression. (T. 498).

Respondent concealed her habitual drug use during The Florida Bar admission process on at least two separate occasions: first, when she applied in 1995 and then again in February, 1999, when Respondent chose to conceal her habitual drug use on a supplemental Bar application she filed with The Florida Board of Bar Examiners. (T. 597-598). Respondent explained her failure to disclose her drug use in the Bar application by stating that she did not consider herself an addict. (T. 597-598). In 2004, Respondent told her drug counselors that she had been addicted to cocaine for the past ten years. (T. 139, 156, 566-567, 594).

Between 1994 and 1997, Respondent was dealing with her bar application. (T. 499). In 1997, the Florida Board of Bar Examiners required Respondent to attend an informal hearing. (T. 499). Respondent was required to be evaluated by a psychiatrist. (T. 499). One of the areas on which the psychiatrist focused was whether Respondent was forthright. (T. 500). As a result of the informal hearing, there were formal charges filed against Respondent as set forth in The Bar Specifications. (T. 501, R's Ex. G--sealed). Some of the specifications dealt with Respondent's bad credit. (T. 501). Also, there was an issue with the accuracy of her bar application. (T. 503, R's Ex. G--sealed). There was a supplemental specification that included Respondent's responsibility to keep her responses current. (T. 505). Respondent had her driver's license suspended, but did not notify the Bar. (T. 505, R's Ex. G--sealed). The matter was set for a formal hearing and Respondent and other witnesses testified. (T. 505). The Commission, after hearing the evidence, recommended Respondent's admission to the Bar. (T. 505). Respondent was admitted to the Bar in 2000. (T. 509).

In 2000, Respondent worked for an attorney for approximately four to five months, but was fired because of her heavy drug use. (T. 507-508). After being admitted to the Bar, Respondent started working for her husband again. (T. 509). Respondent filed a notice of appearance on the Pressman case - a case on which she had previously worked. (T. 509-510). Respondent also worked in her

brother's real estate company. (T. 510). In December, 2000, Respondent's brother fired her because of her drug use. (T. 510). Respondent would sometimes go to work high on drugs. (T. 511). Respondent admitted she and her husband were heavily using drugs during this time. (T. 511-512). In 2001, after her brother fired her, she worked primarily on the Pressman matter. (T. 511). The Pressman case involved research and writing. (T. 558). Respondent knew all of the details of the Pressman case and was able to describe to the judge how she was able to discover the fraud which ultimately won the case. (T. 560-561). Respondent's discovery of the fraud led her to conduct research for an ink expert who opined that the document had recently been created and was in fact a fraud. (T. 561).

In 2001, Respondent's husband was indicted and arrested. (T. 513). Respondent's husband was in jail from December, 2001 to January, 2003. (T. 515). Respondent's house was in foreclosure. (T. 513). In January, 2002, Respondent met Mr. Glasser, her attorney in the Bar matter and her current employer. (T. 516).

On June 18, 2002, Respondent was arrested for possession of cocaine. (T. 517, TFB Ex. 13). In July, 2002, Respondent was again arrested for sale and purchase of cocaine. (T. 519, TFB Ex. 13). Respondent stipulated to her purchase of cocaine. (T. 520). After Respondent's arrest, the Department of Children and

Family Services was contacted and Respondent's brother took custody of her child. (T. 521).

When Respondent met Wyckle in approximately March, 2003, Wyckle hired her to provide a variety of legal services. (T. 527-528). One of the services Wyckle required of Respondent was for her to receive third-party funds into her bank account. (T. 535). Respondent did not have a trust account and testified she did not know why third-parties would wire transfer money to her instead of directly to Wyckle or Charter One. (T. 535). Respondent admitted that Wyckle told her that sending money to her lended credibility to the transactions. (T. 535). Respondent testified she asked Wyckle if the transactions involved money laundering or drug money. (T. 574). Respondent claimed Wyckle answered "no" and she did not ask him any other questions. (T. 574). Wyckle explained to Respondent how the process of his commercial funding business worked. (T. 537). Respondent understood the business because she worked for her brother, a mortgage broker. (T. 538-539). Because of Respondent's real estate experience, she knew that escrow money should remain in trust. (T. 556-558).

On April 9, 2003, Respondent became the registered agent of Charter One. (T. 569). In May, 2004, Respondent helped prepare the Articles of Incorporation for American Escrow and was the designated registered agent. (T. 594). Respondent did not use client ledger cards or retainer agreements. (T. 571).

Respondent did not reconcile her checkbook. (T. 572). Respondent explained that Wyckle would call her and tell her he was expecting third-parties to wire funds into her bank account. (T. 539). Respondent would then call the bank and ask if the money had come in. (T. 540). Wyckle would provide instructions to Respondent as to how he wanted the money disbursed. (T. 541). Respondent testified that the money she received was Wyckle's money and not trust money. (T. 541-544). Respondent did not have contact information for these third-parties. (T. 545). Respondent testified her fee for these transactions was three percent. (T. 546). Respondent would tell Wyckle to drive her to the bank and she would wire transfer the funds to Charter One and give Wyckle cash without asking questions. (T. 576). Respondent did not have checks, did not order checks, and did not use counter checks, but rather withdrew cash and transferred money. (T. 577). Respondent did not have any cash receipts to show she gave Wyckle cash and did not keep a record of the fees she received for these transactions. (T. 577).

During the period of transactions, Respondent was still using and buying cocaine. (T. 578). Respondent testified that she did not pay rent for one year and had no real expenses. (T. 579). Respondent denied preparing the February 11th and 19th, 2004, letters, but admitted that she read both letters before she signed them. (T. 581, 586, 590). Even after reading the letters, Respondent did not ask Wyckle any questions about the money or the loan commitment agreement. (T. 581-582,

TFB Ex. 1, 3). Respondent testified that Wyckle would generate and prepare letters (including her letterhead) for her to read and sign. (T. 581). At the time of the Nikita transaction, Respondent knew that Wyckle was a convicted felon and had served time in federal prison. (T. 583). Despite Respondent's knowledge of Wyckle's felony conviction, she still did not ask him any questions about the money going into her bank account. (T. 583, 592). Respondent did no independent research to ascertain the nature of the funds or of the transaction. (T. 583). Respondent did no research to find out the nature of the charge of which Wyckle had been convicted. (T. 592). Respondent testified that time after time she would go to the bank with Wyckle and he would either wait in the car or go into the bank with her and she would give him the cash. (T. 584). Respondent testified she did not find Wyckle's requests strange nor did she find it odd to withdraw cash for him. (T. 584-585). Respondent's testimony confirmed her transgressions as set forth in the stipulations. (T. 574-596).

Several character witnesses testified on Respondent's behalf. Respondent represented Patricia Santiago's mother in July, 2003 on a pro bono basis traveling to Gainesville for a hearing. (T. 112-114). Santiago testified that her mother was satisfied with Respondent's work. (T. 114).

Arturo Alvarez, another attorney handling the Pressman case, testified that Respondent was very eager during the Pressman trial and instrumental in securing

the expert and conducting research. (T. 123-128). Alvarez testified that Respondent's judgment did not seem impaired. (T. 130).

Cindy Roberts, a therapist at St. Luke's Addiction Recovery Center, testified about the program and Respondent's progress in the program. (T. 131-132). Respondent first attended after her third arrest in July, 2004. (T. 594). Respondent was there for ninety days and did not test positive for drugs. (T. 138). Roberts explained Respondent's drug use history. (T. 139). Respondent's cocaine use became serious during her 20's. (T. 139, 156). Roberts observed an improvement in Respondent's behavior during treatment. (T. 143). At the beginning of the program Roberts described Respondent's addiction as "chronic." (T. 146). Roberts defined the term chronic to mean a disease that will never go away. (T. 146). Respondent successfully completed the program. (T. 145). Robert's testified the prognosis for Respondent depended on several factors including Respondent's continued compliance with the treatment plan. (T. 154).

Edward Baron from the Miami Behavioral Health Center testified. (T. 243). He was Respondent's therapist for three months. (T. 243). Baron took over the case for another therapist who was on maternity leave. (T. 244). Respondent was referred to that program on December 29, 2004, by Judge Rosinek (the Circuit Court judge presiding over Miami-Dade County's Drug Court). (T. 255). The Department of Children and Family Services was also involved. (T. 258-259).

Baron testified that Respondent's diagnosis was cocaine dependence, alcohol dependence, and depressive disorder. (T. 257). Baron did not see Respondent suffering from any impairments resulting from her depression and discussed her successful treatment plan. (T. 260-263, 276-283, R's Ex. D).

Rose Marie Dauginitis met Respondent at St. Luke's Treatment Center. (T. 288). Five years ago, Dauginitis was a patient herself at St. Luke's and became Respondent's sponsor and friend. (T. 289, 292). Dauginitis reported that Respondent attends the meetings and communicates with her. (T. 293).

Fanita Pressman testified telephonically. (T. 443). Pressman knew Respondent for approximately ten years. (T. 444). Once Respondent became a lawyer, Pressman became her client. (T. 445). Pressman discussed how Respondent was the one who found the expert who helped win her case. (T. 446). Pressman was very satisfied with Respondent's services. (T. 446).

Myer Cohen, the Executive Director of Florida Lawyer's Assistance, Inc. (F.L.A.) testified. (T. 162). Respondent voluntarily signed up with F.L.A. on August 26, 2004. (T. 166-167). Respondent's three-year contract requires her to attend ninety 12-step meetings. (T. 168). Cohen read seventeen reports prepared by Respondent's monitor describing Respondent's compliance. (T. 171-173). Cohen could not formulate an opinion as to Respondent's recovery given the short time that she had been in treatment. (T. 177). Cohen testified that in 2002, he tried

to reach out to Respondent. (T. 178). Respondent did not respond to Cohen's calls or letters. Respondent's husband and family unsuccessfully attempted to get Respondent help. (T. 178). Cohen stated that over the past six or eight months, there has been dramatic improvement. (T. 178).

Over the Bar's objection, Gary Glasser, Respondent's attorney and employer, testified as a character witness. Glasser met Respondent in January, 2002. (T. 451). Glasser did not see Respondent until after Respondent's third arrest in 2004. Glasser went to the jail and helped Respondent get into St Luke's. (T. 453). Glasser serves as a guardian for, and also attended, St. Luke's. (T. 454). Once Respondent was released from St. Luke's, Glasser hired Respondent to do computer work in his law office. (T. 455). Glasser testified that he fired Respondent because she could not arrive to work on time. (T. 464). Glasser rehired Respondent and she became responsible. (T. 465). Glasser trusted her with the keys to the office and felt she was competent in her work. (T. 466).

Following the final hearing, the Referee found Respondent guilty of the following Rules Regulating The Florida Bar:

As to Count I of The Florida Bar's Complaint: Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct; and Rule 5-1.1(a) (Nature of Money or Property Entrusted to Attorney), Rule 5-1.1(b) (Application of Trust Funds or

Property to Specific Purpose), Rule 5-1.1(e) (Notice of Receipt of Trust Funds; Delivery; Accounting), Rule 5-1.1(f) (Disputed Ownership of Trust Funds), Rule 5-1.2(b) (Minimum Trust Accounting Records), Rule 5-1.2(c) (Minimum Trust Accounting Procedures), and Rule 5-1.2(d) (Record Retention) of the Rules Regulating Trust Accounts.

As to Count II of The Florida Bar's Complaint: 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) of the Rules of Professional Conduct.

Specifically, the Referee found:

> Respondent is attempting to blame her drug addiction for impairing her judgment when in fact she willfully ignored, or claims to have ignored her responsibilities as an attorney during the period in which she misappropriated money from third-parties. Her serious drug addiction spans for a period of at least seven to ten years. Evidence was presented regarding the progressive nature of drug addiction, and the Referee finds that Respondent's active addiction to cocaine had progressed to the point that she was incapable of concentrating on little else other than maintaining her addiction – putting aside her responsibilities as an attorney, and as a mother. Respondent nevertheless knew what she was doing was wrong. The facts show that throughout this period, Respondent worked and paid her bills. Despite Respondent's drug addiction, she was able to pass The Florida Bar Examination. Additionally, she handled the Pressman matter, a complex litigation case that required the Respondent to pay attention to the most minute detail. One of Respondent's character witnesses testified that

> she handled very difficult issues in the Pressman case and that her judgment did not seem impaired. It is within this same time frame that Respondent said she used cocaine every day. Respondent did not seek help for her drug addiction until the courts got involved. In a period spanning from 2002 through 2004 Respondent was arrested three times: twice for possession of cocaine and one for sale and possession of cocaine.

ROR p. 12, Appendix A.

The Referee recommended the following discipline:

A. Suspension for a period of three (3) years, retroactive to the date of her emergency suspension, followed by a two (2) year probationary period, if she were to be reinstated.

B. Continued participation in the Florida Lawyer's Assistance, Inc. program during her period of suspension and probation, with mandatory urine tests to be administered twice a month; continued participation in the outpatient aftercare therapy at St. Luke's and Narcotics Anonymous (with same frequency as of date of this report) during her period of suspension and probation.

C. If reinstated, Respondent shall enroll in The Florida Bar sponsored LOMAS program regarding establishment, maintenance and proper operation of trust accounts.

D. If reinstated, Respondent's ability to practice concerning trust transactions should be restricted and monitored during the two year probationary

period by a suitable mentor and such terms as agreed upon between Respondent and The Florida Bar.

E. Payment of The Florida Bar's costs in these proceedings.

The Florida Bar seeks review of the Referee's recommendation of discipline and seeks Respondent's disbarment.

SUMMARY OF THE ARGUMENT

The appropriate discipline in this case is disbarment, rather than the three-year suspension recommended by the Referee. The Florida Bar's primary purpose in the disciplinary process is to assure confidence in legal professionals. Respondent violated this confidence and was found in violation of rules prohibiting misappropriation and conduct involving dishonesty, fraud, deceit, or misrepresentation. There is a presumption of disbarment in this case which Respondent has failed to overcome.

Respondent stipulated to the facts in the case. Respondent was entrusted with third-party funds and either participated in or facilitated the theft of those funds. The third-parties entrusted Respondent with the funds, in part, because of the fact that she was an attorney. Respondent received from third-parties and in concert with her client repeatedly withdrew large sums of third-party funds in order to pay for her personal expenses, which included the purchase of illegal drugs. The Referee rejected Respondent's assertion and argument that her actions were unintentional.

Respondent's willful blindness or intentional avoidance of the truth subject her to disbarment. Willful blindness, sometimes referred to as deliberate ignorance recognized under Florida and federal criminal law, has been applied by other states to support attorney rule violations and discipline. Respondent's deliberate

ignorance of a significant number of facts that should have aroused her suspicion -- large cash withdrawals, her client's felony conviction, her lack of knowledge of letters signed by her, her lack of records, and her failure to inquire about agreements controlling the release of funds -- are more than sufficient to impute knowledge and subject Respondent to disbarment. The Referee found that Respondent had a duty and should be held accountable to third-parties who entrusted her with their money. Respondent did so willfully and with knowledge.

The mitigating factors found by the Referee are insufficient to overcome the presumption of disbarment. This Court has repeatedly held that attorneys must be held accountable for their actions despite life problems and addictions. Evidence of substance abuse is insufficient to overcome said presumption where the attorney's impairment was selective and used to feed an addiction. Here, Respondent was able to function and handle complex legal matters throughout the period of her addiction.

In aggravation, the Referee found that Respondent made no attempt to pay any restitution, acted with a selfish motive, acted in a pattern of misconduct over a substantial period of time, and participated in a series of multiple offenses. In sum, Respondent has failed to provide evidence to overcome the presumption of disbarment. Accordingly, disbarment is the appropriate sanction.

ARGUMENT I

THE REFEREE ERRED BY FAILING TO DISBAR THE RESPONDENT FOR MISAPPROPRIATING THIRD-PARTY FUNDS.

This Court has held:

> The single most important concern of this Court in defining and regulating the practice of law is the protection of the public from incompetent, unethical, and irresponsible representation. The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980). The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence.

The Florida Bar v. Dancu, 490 So. 2d 40 (Fla. 1986) (Emphasis added).

Respondent violated that trust and in so doing compromised not only the individuals victimized in this case, but also the profession as a whole. Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner which will cause laymen, and the public generally, to have the highest respect for and confidence in the members of the legal profession. See The Florida Bar v. Wagner, 212 So. 2d 770 (Fla. 1968). Respondent's wilfull misconduct severely damaged the respect and confidence in the profession that its rule-abiding members strive for. Because this Court's scope of review of recommended discipline is broader than that of findings of fact due to its ultimate

responsibility to determine the appropriate sanction, this Court is urged to reject the Referee's recommendation of a three year suspension and instead, impose the sanction of disbarment. See The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000).

The Referee found Respondent in violation of all rules alleged in The Florida Bar's complaint. Most significantly, in Count I, the Referee found the respondent guilty of misappropriation [Rule 5-1.1(a) of the Rules Regulating Trust Accounts] and conduct involving dishonesty, fraud, deceit or misrepresentation [Rule 4-8.4(c) of the Rules of Professional Conduct]. The evidence resulting in all of the Referee's guilty findings, including Respondent's criminal conduct, is overwhelming.

For a period of ten months, Respondent received third-party funds into her bank account in connection with her representation of her client, Wyckle. (T. 188-205, 303, 370-371, 535; TFB Ex. 8A). During that ten-month period, in approximately fifty-three (53) transactions, Respondent either withdrew cash or disbursed those third-party funds, primarily at the direction of Wyckle, without asking any questions. (T. 535, 574-596). Respondent claimed in trial she made or kept no record of any of these transactions. (T. 578, 593). Of those fifty-three (53) transactions, nearly one-third of them were withdrawals of large sums of cash approximately amounting to $42,000.00. (TFB Ex. 8, Stipulations). She did so

indiscriminately. While it is unclear exactly how much cash Respondent retained for herself from these withdrawals and disbursements, it is clear that the funds were not used for their intended purpose. (ROR p. 14). Even after Respondent found out that Wyckle had been recently released from federal prison, she continued to blindly receive funds from third-parties and withdraw and disburse those funds in accordance with Wyckle's directives. (T. 575-576, 592). Respondent did not question Wyckle or investigate the nature of Wyckle's criminal conviction. (T. 592). Rather, she continued to receive third-party funds and withdraw large sums of cash. (ROR p. 14). Respondent knowingly continued to work for Wyckle so she could make money to pay for her personal expenses which included the purchase of illegal drugs. (T. 578, ROR p. 14). In fact, her drug use resulted in her multiple arrests and criminal charges. (T. 517, 519-520, 530, 551, Stipulations, TFB Ex. 13). As of today's date, Respondent has made no attempt to pay any restitution to those harmed by her actions. (T. 51, ROR p. 14).

Notwithstanding Respondent's attempt to convince the Referee that her actions were unintentional, the record is replete with evidence of Respondent's knowing and intentional unethical behavior. Respondent knowingly and intentionally concealed her drug use on her Bar application (T. 597-598); she knowingly and intentionally purchased cocaine (517, 519-520, 530, 551, Stipulations); she knowingly and intentionally accepted money from third-parties

(T. 537, 575-576); she knowingly and intentionally chose not to ask Wyckle questions (T. 580, 583); she knowingly and intentionally went to the bank on multiple occasions to withdraw cash belonging to third persons (T. 584); she knowingly and intentionally went to the bank to make wire transfers of those same third-party funds (T. 584-585, Stipulations, TFB Ex. 8); she knowingly and intentionally signed letters to Nikita-- the complainants (T. 581, 586, 590); and she knowingly and intentionally accepted money from Wyckle that she used to pay for her personal expenses and to purchase cocaine. (ROR p. 14). Respondent's testimony that her actions were unintentional simply do not square with the facts and were flatly rejected by the Referee. (ROR p. 12-14).

Respondent received two wire transfers, one on February 12, 2004, and another on February 19, 2004, totaling $60,000.00 to be held in escrow for the purchase of a pulp plant in Guatemala. (T. 580). Thereafter, in violation of the Conditional Loan Commitment, Respondent immediately disbursed these funds to herself and Wyckle. (T. 583, 586-587, Stipulations, TFB Ex. 13). Respondent's misappropriation of funds to be held by her in escrow is clear. Disbarment is the presumed appropriate sanction for misappropriation. See The Florida Bar v. Shanzer, 572 So. 2d 1382, 1383 (Fla. 1991). Respondent kept the third-party funds she withdrew in cash or she facilitated a theft by her own actions for her own benefit. She accepted the responsibility of having money entrusted to her. A trust

that was relied upon by third-parties. Specifically, Solares testified that the only reason he sent the $60,000.00 to Respondent was because she was an attorney and felt more comfortable knowing there was an attorney involved. Respondent then willfully violated that trust by withdrawing and improperly using money that was neither hers nor Wyckle's. To the extent that Respondent's professed ignorance was based on her willful blindness (an intentional avoidance of the truth), she should nevertheless be disbarred.

In Wetzler v. Florida, 455 So. 2d 511 (Fla. 1984),[4] this Court lays out specific language applicable to the instant case. See id. at 513. Although Wetzler involves the constructive possession of cannabis, a comparison to the instant case may be drawn. 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. See id. The doctrine of willful blindness (also called deliberate ignorance) is well established. See id. The rule is that if a party has their suspicion aroused, but then deliberately fails to make further inquiries because they wish to remain ignorant, then they are deemed to have knowledge. See id. The Court in Wetzler stated:

[4] In Wetzler, a guilty verdict rendered by a jury was affirmed on appeal upon finding that appellant's constructive possession of cannabis did in fact amount to guilt by way of willful blindness.

> The rule that willful blindness is equivalent to knowledge is essential, and is found throughout criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This and this alone, is willful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of willful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

Id. (emphasis added).

Although there are no Florida attorney discipline cases which specifically refer to willful blindness, several states have upheld lawyer sanctions under this approach.[5] For example, in New Jersey, lawyers are charged with knowing misappropriation under RPC 1.15. Under this rule,

> … in determining whether an attorney knowingly misappropriates client funds, the attorney's state of mind or motives are largely irrelevant; knowing misappropriation of client funds consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking."

In the Matter of Freimark, 702 A. 2d 1286 (N.J. 1997).

[5] Florida Bar disciplinary proceedings are neither civil nor criminal but quasi-judicial administrative proceedings. Rule 3-7.6(f)(1). The Standards for Imposing 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.

New Jersey, like Florida, requires knowledge to warrant disbarment. In New Jersey, willful blindness satisfies the knowledge requirement. See In the Matter of Irizarry, 661 A. 2d 275 (N.J. 1995). In Irizarry, the Supreme Court of New Jersey held that "a willfully blind respondent who is 'aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist,' is as culpable as the respondent who knowingly misappropriates." Id. citing In re Shevin, 517 A. 2d 852 (N.J. 1986). As in the criminal context, the justification behind this rule is that attorneys are deemed to have knowledge in order to bar any disingenuous claim of ignorance. See In re DiLieto, 665 A. 2d 1094 (N.J. 1995) ("the intentional and purposeful avoidance of knowledge . . . will not be deemed as a shield against proof of what would otherwise be a 'knowing misappropriation"); Tocci's Case, 663 A. 2d 88 (N.H. 1995) citing Woiccak's Case, 561 A. 2d 1049, 1052 (N.H. 1989) (stating that willful or negligent blindness does not constitute a mitigating factor).

Finding deliberate ignorance could be said to require an inquiry into the knowledge of the defendant. In fact, Courts have upheld the "willful blindness" instruction that allows juries to determine what knowledge may be imputed to the defendant. See United States v. Zimmerman, 832 F. 2d 454, 458 (9th Cir. 1987).

In order to show willful blindness, it is necessary to show (1) a high probability that a fact is true, and (2) that Respondent failed to investigate that fact.

Here, there was a high probability that the funds Respondent held in trust were not being used for the purpose for which they were entrusted to her. Respondent was aware that her client, Wyckle, had been in federal prison. (T. 583, TFB Ex. 9). She was aware of the letters sent to those third-parties which she herself signed. (T. 581, 586, 590). She was aware of the unusual nature of the receipt and disbursement of the third-party funds at issue. (T. 574-596). In light of the circumstances under which Respondent took possession of the third-party funds, she was under a duty to make inquiry so as not to be a participant in an ensuing fraud. Respondent could have inquired of her client as to his criminal history or researched it on her own. She did not. (T. 592). She could have conducted inquiry into the purpose for her receipt of the funds as opposed to having them remitted directly to Wyckle. She did not. (T. 575-576, 583). Having signed letters to Nikita which referenced the loan commitment agreement, she should have insisted on reviewing the agreement's terms. (T. 581, 586, 590). She claimed she did not. (T. 581-582). Instead, she willfully chose to continue assisting Wyckle by receiving and disbursing and using the third-party funds without asking any questions. Moreover, it is clear that Respondent retained some of those funds for her own personal use, in addition to directing funds to Wyckle. (T. 576-596, ROR p. 13-14).

Although the Referee felt that Respondent had diminished capacity because of her drug addiction, the Referee nonetheless found that Respondent willfully ignored her responsibilities as an attorney during the period in which she misappropriated money from third-parties. The Referee further found that Respondent knew that what she was doing was wrong, finding also that during the period of Respondent's drug addiction, Respondent was able to pass The Florida Bar exam, handle a complex litigation case, and work and pay her bills. (ROR p. 12 -13).

The stipulated facts and the facts adduced at trial show that Respondent is guilty of misappropriating third-party funds. Misuse of client or third-party funds is one of the most serious acts of misconduct that an attorney can commit.[6] Disbarment is the presumed appropriate sanction.[7] To overcome the presumption, the attorney's evidence of mitigation has to substantially outweigh the seriousness of the violations and the aggravating factors. The mitigation offered by the

[6] See The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996); The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992); The Florida Bar v. Knowles, 572 So. 2d 1373 (Fla. 1991); The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990).

[7] See The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996); The Florida Bar v. Weinstein, 635 So. 2d 21 (Fla. 1994); The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991); The Florida Bar v. Schiller, 537 So. 2d 992 (Fla. 1989).

Respondent and found by the Referee falls far short of overcoming the presumption.[8] Accordingly, disbarment is the appropriate sanction to be imposed.

The Referee found the following aggravating factors:

(1) Selfish motive (support of drug habit);

(2) A pattern of misconduct over a substantial period of time;

(3) Involvement in a series of improper transactions amounting to multiple offenses; and

(4) Actual harm to third-parties (and no restitution made to these third-parties).

The Referee found the following mitigating factors:

(1) Personal and Emotional Problems;

(2) Respondent ultimately cooperated fully with The Florida Bar during its investigation;

(3) Inexperience in the Practice of Law;

(4) Good Faith Effort to Rectify Misconduct in Count II;

(5) Character or Reputation;

(6) Mental Disability;

(7) Remorse;

(8) Interim Rehabilitation; and

[8] See The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992).

(9) Imposition of Other Penalties or Sanctions.

The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992), contains an analysis of the impact of mitigation on the presumption of disbarment in misappropriation cases. See id. at 56. There, the attorney had presented evidence of lack of a prior disciplinary history and steps taken by him to remedy trust account shortages. Additionally, the attorney presented evidence of personal and emotional problems including his father's death, his mother's illness, and financial obligations. The attorney argued that these factors had contributed to his emotional state and unethical conduct. In response, the Court stated that a lawyer's misappropriation of client funds, accompanied by misrepresentation in order to conceal the misappropriation, cannot be excused as a means to solve life's problems. See id.

Similarly, in Shanzer, 572 So. 2d at 1384, an attorney was disbarred for misappropriation despite evidence of his depression over marital and economic problems and the payment of restitution. See id. Accordingly, in the instant case, the Referee's findings of mitigation in the form of "personal and emotional problems . . . inexperience in the practice of law . . . good faith effort to rectify misconduct (in count two only) . . . character or reputation and remorse" are insufficient to overcome the presumption of disbarment for misappropriation of client funds. Although the Referee found that Respondent made a good faith effort to rectify misconduct involving her drug use, the Referee also found that

Respondent did not seek help for her drug addiction until the courts got involved. (ROR p. 13). Further, unlike Graham and Shanzer, in the instant case, Respondent made no attempt at restitution. (ROR p. 14).

With regard to mitigation for mental illness or substance abuse, the Court's views are set forth in The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990) and The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986). In Knowles, the attorney argued that given the role that alcoholism played in his acts of misconduct, disbarment for his misappropriation of client funds was unduly harsh. See id. The attorney pointed to the fact that at the time of discipline, he had not practiced law for three years and had been successful in his sobriety for the same period of time. In upholding the Referee's recommendation of disbarment, this Court acknowledged that alcoholism was the underlying cause of the attorney's misconduct, but nevertheless, concluded that it did not constitute a mitigating factor sufficient to reverse the sanction of disbarment. See id. at 142. The Court noted that Knowles had been involved in acts of misappropriation over a period of four (4) years during which time he continued to work regularly. Further, Knowles' income did not diminish as a result of his alcoholism, and the clients he stole from were ones who had placed significant trust in him. The Court was mindful that Knowles ceased drinking and his alcoholism was under control. The Court also considered that Knowles promptly made restitution. Despite these

mitigating factors, the Court concluded that disbarment was the appropriate sanction and Knowles was disbarred despite his subsequent rehabilitation, prompt payment of restitution to his victims, and lack of a prior disciplinary record. See id.

In the instant case, Respondent has shown little evidence of rehabilitation and has provided no restitution. Respondent did not seek help for her drug addiction until the courts got involved. (ROR p. 13). Respondent argued that because of her addiction, the Court should not find intent. Two of Respondent's character witnesses testified about the Pressman matter, a case that Respondent handled. They described Respondent's great attention to detail. One of the witnesses, attorney Alvarez testified that Respondent's judgment did not seem impaired. Throughout the period of Respondent's serious drug addiction, Respondent continued to work and pay her bills, passed the Bar exam, and worked on a complex litigation case. (ROR p. 13). The evidence shows that Respondent's impairment was selective and falls far short of what would be required to mitigate her rule violations and misuse of third-party funds entrusted to her.

In The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990), the Court reversed the Referee's recommendation of an 18 month suspension, imposing disbarment instead, despite mitigating evidence of drug addiction which included testimony of a board certified doctor as to a causal link between the drug addiction

and Shuminer's violations. The Court concluded that Shuminer failed to establish that his addiction rose to a sufficient level of impairment to outweigh the seriousness of his misconduct. See id. at 432. In the instant case, there is no such evidence of a causal connection between Respondent's addiction and her violations.

In Shuminer, as in Knowles, the attorney worked effectively during the period at issue despite his claims of addiction. See id. Similarly, in the instant case, Respondent handled at least one complex case during her period of habitual drug use. Additionally, she was able to pass the Bar exam and be admitted to The Florida Bar while at the same time concealing her addiction, as found by the Referee. (ROR p. 13).

The Court rendered a similar result in The Florida Bar v. Golub, 550 So. 2d 455 (Fla. 1989), where the attorney was disbarred despite his alcoholism, given his theft of approximately $24,000.00 from an estate in which he represented the personal representative. See id. at 456. In addition to his alcoholism, other mitigating factors included Golub's cooperation in the disciplinary proceedings, voluntary self-imposed suspension beginning three years prior to the Court's imposition of discipline, and the lack of a prior disciplinary record. In disbarring Golub, the Court weighed the extent of the mitigation against the seriousness of the misconduct concluding that the theft of "substantial sums of money over an

extended period of time from a client who had bestowed his trust upon the respondent to see that the client's beneficiaries were cared for after his death" warranted disbarment. Id.

In the instant case, like in Golub, this Court must weigh the seriousness of the misconduct against the questionable claims of impairment. Here, like in Golub, Respondent abused the trust that third-parties placed in her to safeguard her funds pursuant to the parties' agreements. Her misuse of third-party funds is not outweighed by her mitigating factors.

More recently, in The Florida Bar v. Gross, 896 So. 2d 742 (Fla. 2005), the Court held that "although Gross presented substantial evidence of substance abuse and rehabilitation, this Court has disbarred attorneys who misappropriated funds despite evidence of substance abuse and rehabilitation, finding that the mitigating evidence at issue was insufficient to overcome the seriousness of the misconduct." Id. at 746 (emphasis added).[9]

The Referee erroneously relied on The Florida Bar v. Mason, 826 So. 2d 985 (Fla. 2002). The facts of Mason are inapposite. The Court in Mason held that

[9] In Gross the Court relied on both Shuminer and Golub cited herein and on The Florida Bar v. Prevatt, 609 So. 2d 37 (Fla. 1992) (disbarring attorney for the use of client's funds as attorney's own and failure to repay the funds for over ten years despite evidence of alcoholism); The Florida Bar v. Rodriguez, 489 So. 726 (Fla. 1986) (disbarring attorney for the conversion of client funds and admitted commingling of clients' money despite mitigating evidence relating to alcoholism and rehabilitation).

transferring money from a trust account to cover operating shortages warranted a two-year suspension rather than disbarment. Mason, through accounting errors, inadvertently transferred proceeds to an operating account without proper records. See id. at 988. Once she became aware of the problems, she hired a part time bookkeeper. There was no evidence that clients ultimately sustained any loss. The Court weighed the attorney's exemplary conduct for fourteen years and her personal and family problems. See id. at 987. The Court also noted that the referee specifically stated that Respondent's rehabilitation was highly probable. See id. at 999.[10]

In the instant case, Respondent has not made any effort to pay any restitution. (T. 51, ROR p. 14). Additionally, she has not had exemplary conduct for the past five years. She was not forthright in her Bar application. (T. 597-598). She has been arrested three times within the last three years. (T. 517, 519-520, 530, 551, Stipulations, TFB Ex. 13). Most importantly, time after time, she has misused thirty-party funds entrusted to her. Based on the foregoing, the likelihood of her rehabilitation is unlikely. Respondent's misuse of third-party funds is due to her propensity to ignore the differences between right and wrong and not her impairment. In fact, the Referee found that Respondent's actions were willful and

[10] The majority in Mason also noted that they approved the referee's findings with regard to at least some intentional transfers from the trust to the operating account. This inconsistency is highlighted in the dissenting opinion by Justice Wells which is instructive in the instant case.

that despite her diminished capacity, Respondent knew that what she was doing was wrong.

The Referee also relied on The Florida Bar v. Tauler, 775 So. 2d 944 (Fla. 2000), where the Court held a three-year suspension was appropriate rather than disbarment in light of mitigating factors including severe financial circumstances brought on by the attorney's husband's health problems, the attorney's commitment to providing community service, and the isolated nature of the incident. See id. In Tauler, the attorney issued checks to herself from her trust account to satisfy her personal and business obligations which were unrelated to the clients for whom the funds were being held. However, Tauler made good faith and timely restitution to her clients. See id. at 946. Additionally, other mitigating factors included personal and emotional problems, positive character and reputation, full and free disclosure, and remorse. See id. at 945. The Court was mindful that Tauler's husband had recently lost his medical practice and had to file for bankruptcy. As a result they lost their home. See id. at 947. Significantly, the Court noted the referee's concern that Tauler's overbearing husband was the prime mover behind her wrongdoing. Tauler's husband would throw objects against the wall and brow beat her at the same time they were losing their home. See id. The Court also noted that Tauler's misappropriation included three instances throughout a five month period and considered Tauler's community service which

included dedicating hundreds of hours assisting poor people on a pro bono basis. See id . at 948.

In the instant case, Respondent has not made any effort to pay any restitution. (T. 51, ROR p. 14). Unlike Tauler's three instances of misappropriation, Respondent continued to misuse third-party funds over a ten-month period, in at least fifty-three transactions, until she was arrested for drug possession. In Tauler, the Court gave weight to Tauler's overbearing husband and the control he had over her, a fact wholly absent in the instant case. There was no evidence in the case at bar that Respondent was coerced in any way in her wrongdoings. While there was evidence of substance abuse and depression, same does not *per se* outweigh the presumption of disbarment.[11] Particular weight must be given to the Referee's finding that Respondent knew her actions were wrong and that her conduct was willful. (ROR p. 12).

Finally, The Florida Bar v. Ruskin, 232 So. 2d 13 (Fla. 1970) is persuasive in this matter. While Ruskin is distinguishable from the instant case in that he was convicted of a criminal offense involving the sale of securities, nonetheless, the Court's holding is enlightening. The Court stated:

[11] See Gross, 896 So. 2d at 72; Graham, 605 So. 2d at 53; Shanzer, 572 So. 2d at 1382; Shuminer, 567 So. 2d at 430; Knowles, 500 So. 2d at 140.

> The record shows that the respondent knowingly represented a corporation which made false inducements to investors concerning the economic standing of the corporation and the ability of its officers. Because of this misconduct on the part of respondent and his associates, many innocent persons lost money. This type of conduct cannot be condoned by this Court. Lawyers owe a special duty to be circumspect in their conduct when handling funds belonging to others. When any attorney is unable to withstand the temptation to misappropriate funds he should obviously not be allowed to continue in the practice of law.

Id. at 14.

The purpose of disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not, will not, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession. Florida Standards for Imposing Lawyer Sanctions serves as a system for determining sanctions appropriate to particular cases of lawyer misconduct.

Section 4.11 of the Sanctions provides that disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

Section 5.11(f) of the Sanctions provides that disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Section 7.1 of the Sanctions provides that disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with intent to obtain a benefit for the lawyer and potentially causes serious injury to a client, the public, or the legal system.

CONCLUSION

The practice of law is a privilege in which the public has a vital interest and which may be granted or withdrawn as the circumstances require. See Holland v. Flourney, 195 So. 138 (Fla. 1940). The privilege carries with it responsibilities as well as rights. See The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989). Mr. Solares stated he sent the money only because he was sending it to an attorney. He trusted and confided it would be held in trust. He specifically stated "because here as in any part of the world when one has an attorney, one feels more comfortable." The evidence has shown that Respondent willfully ignored her responsibilities and in so doing violated the privilege which had been bestowed upon her.

Respondent's mitigating evidence is insufficient to overcome the presumption of disbarment, the presumed sanction for acts of intentional misappropriation. Accordingly, The Florida Bar respectfully requests this Honorable Court reject the recommendation of its Referee and disbar Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief was forwarded via Federal Express to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Gary Steven Glasser, Attorney for Respondent, 19 West Flagler Street, Suite 1400, Miami, Florida 33130, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this _____ day of December, 2005.

_____
VIVIAN MARIA REYES
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Initial Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

_____
VIVIAN MARIA REYES
Bar Counsel

APPENDIX

A. Report of Referee dated October 6, 2005.