IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STEVEN RAY BROWNSTEIN,

Respondent.
_____/

Supreme Court Case
No. SC04-2460

The Florida Bar File
No. 2004-71,265(11L)

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 or the Bar. Steven Ray Brownstein will be referred to as either Respondent or by name. 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. References to the exhibits introduced at trial will be set forth as TFB Ex. and its letter designation.

STATEMENT OF THE CASE AND OF THE FACTS

This matter was heard by Judge Jacqueline Schwartz, serving as referee. The final hearing was held on January 25, 2006 and February 1, 2006.

Stipulated Facts

The parties stipulated to the following facts:

1. Respondent is and was at all times material herein a member of The Florida Bar, albeit suspended by an order of emergency suspension dated November 8, 2004, and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. On or about August 26, 2004, a subpoena duces tecum was duly executed and served upon Steven Ray Brownstein commanding him to appear before The Florida Bar's staff auditor on September 14, 2004, at 10:00 a.m. at the offices of The Florida Bar and produce at that time original bank statements, canceled checks, check stubs, deposit slips, wire transfers, cashier's checks issued with supporting documentation, receipt and disbursement journals, client ledger cards, HUD-1 statements for all real estate transactions, closing statements from any personal injury case, bank and client reconciliations from the account identified as Steven R. Brownstein, maintained at Union Planters account #1400022665 (operating), and any trust account in which he has signatory capacity and any other account in which the funds pertaining to Mobilestop were placed, for

the period of January 1, 2003, to the present. In addition, a subpoena was also issued to the banking institution.

3. The request for an audit was predicated upon the complaint of James P. E. Roen, Esq., Respondent's partner in the firm of Levey, Airan, Brownstein, Shevin, Friedman, Roen & Kelso, LLP. Mr. Roen alleged that Respondent failed to disburse client's funds that were entrusted to him, specifically $20,000.00 from a settlement of $80,000.00 received by Respondent in October 2003, regarding a corporation identified as Strax.

4. In January, 2004, Respondent issued from the bank account identified as Steven R. Brownstein, maintained at Union Planters Bank account #1400022665 (operating), two checks in the amount of $10,000.00 each payable to Alan Goldberg Trustee and identified the disbursements as "Strax Settlement." Those two checks were dishonored by the bank due to non-sufficient funds.

5. On or about April 2, 2004, Alan L. Goldberg, Chapter 7 Trustee for the estates of Mobilestop Com, Inc., filed a "Motion of Alan L. Goldberg, Chapter 7 Trustee (I) To Compel Compliance With Settlement and Compromise or, in the Alternative, For Entry of Judgment Against Defendants for the Settlement Balance and (II) For Order to Show Cause as to Why Attorney Steven R. Brownstein Delivered Two Worthless Checks to the Trustee."

6. On September 14, 2004, Respondent failed to appear or produce to The Florida Bar any of the records identified in the Bar's subpoena.

7. On or about October 14, 2004, Union Planters Bank delivered the bank statements, canceled checks and items deposited from account #1400022665 (operating), for the period of January 1, 2003, to April 30, 2004, and the account identified as Steven R. Brownstein, Trust Account #1700020544 (trust), for the period of January 1, 2003, to July 31, 2004.

8. On October 15, 2003, the beginning balance in Respondent's trust account #1700020544 (trust), was $50.30. On the same day, Respondent deposited a check from Great American Insurance Companies in the amount of $40,000.00, payable to Steven R. Brownstein Trust, regarding the insured Strax Holdings, Inc.

9. These funds were used by Respondent in the following manner:

D A T E	CK #	P A Y E E	AMOUNT	R E F E R E N C E
10-16-03	889	Levey, Airan, Brownstein	$ 5,000.00	Strax
10-22-03	890	Steven Brownstein	6,500.00	No reference
10-22-03	891	Steven Brownstein	6,500.00	No reference
10-28-03	892	Steven Brownstein	2,600.00	No reference
10-31-03	893	Steven Brownstein	1,500.00	No reference
11-17-03	W/T	Levey, Airan, Brownstein	17,500.00	Ocean Bk
11-28-03	894	Steven R. Brownstein	212.00	Strax

10. On November 30, 2003, the balance in Respondent's trust account was $238.70. On December 15, 2003, Respondent issued another check in the amount of $238.00 to himself, leaving a balance in the trust account of $0.30. This was the last transaction recorded in this trust account.

11. Respondent was pressured by the Bankruptcy Trustee to repay $20,000.00 received on October 15, 2003, from the Strax settlement. On or about January 23, 2004, Respondent issued from account #1400022665 (operating), his check #8546 in the amount of $10,000.00 payable to Alan Goldberg, Trustee and identified the disbursement as pertaining to "Strax." On January 23, 2004, the balance in Respondent's account #1400022665 (operating) was an overdraft in the amount of $8,524.89.

12. On February 9, 2004, check #8546 in the amount of $10,000.00 was presented to the bank for payment and was dishonored due to insufficient funds. The balance in the account on February 9, 2004, was $184.82.

13. On or about January 30, 2004, Respondent issued from account #1400022665 (operating), his check #8547 in the amount of $10,000.00 payable to Alan Goldberg Trustee and identified the disbursement as pertaining to "Strax." On January 30, 2004, the balance in Respondent's account #1400022665 (operating) was $220.11.

14. On February 9, 2004, check #8547 was presented to the bank for payment and was dishonored due to insufficient funds. The balance in the account on February 9, 2004, was $184.82.

15. From March 10, 2003, to April 27, 2004, Respondent's bank account #1400022665 (operating) had checks presented 30 times to the bank and dishonored due to insufficient funds.

16. The following transactions between Respondent's two accounts revealed (the law firm of Levey Airan Brownstein et al is referred to "L.A.B."):

D A T E	T R A N S A C T I O N	DEPOSITS	PAYMENTS	BALANCE
01-07-04	Ck 8539 L.A.B.		$ 3,000.00	($3,315.63)
01-09-04	From L.A.B.	3,500.00		7.30
01-14-04	From L.A.B.	4,000.00		(2,637.89)
01-15-04	Ck 8545 L.A.B.		2,300.00	(5,266.89)
01-16-04	From L.A.B.	3,000.00		(2,324.89)
01-20-04	From L.A.B.	3,300.00		975.11
01-23-04	Ck 8549 L.A.B.		9,500.00	(8,524.89)
01-26-04	From L.A.B.	8,640.00		86.11
01-27-04	Ck 8550 L.A.B.		6,284.00	(6,197.89)
01-28-04	From L.A.B.	6,630.00		403.11
01-29-04	Ck 8551 L.A.B.		8,874.00	(8,470.89)
01-30-04	From L.A.B.	9,000.00		220.11
02-03-04	Ck 8557 L.A.B.		11,000.00	(12,545.15)
02-04-04	From L.A.B.	12,700.00		96.85
02-05-04	From L.A.B.	2,800.00		
02-05-04	Ck 8559 L.A.B.		14,000.00	(11,132.15)
02-06-04	From L.A.B.	14,500.00		438.85
02-10-04	Ck 8561 L.A.B.		14,788.00	
02-10-04	Bank dishonored check 8561	14,788.00		68.82
02-12-04	Ck 8562 L.A.B.		8,898.00	
02-12-04	Bank dishonored check 8562	8,898.00		39.82
02-19-04	Ck 8564 L.A.B.		9,500.00	
02-19-04	Bank dishonored check 8564	9,500.00		
02-19-04	Ck 8565 L.A.B.		3,500.00	
02-19-04	Bank dishonored check 8565	3,500.00		10.82

17. Every check issued or deposited from or to Levey, Airan Brownstein, et.al., was signed by Respondent. In February, 2004, Union Planters Bank dishonored checks issued by Respondent if the account did not have sufficient funds to cover it.

18. Based upon the foregoing, Respondent has violated 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 5-1.2(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.

Testimony and Evidence Presented at Trial

In addition to the foregoing stipulations, the following evidence and testimony were presented at trial:

The Bar's Staff Auditor's Investigation of Respondent's Misappropriation in 2003 and 2004

The Florida Bar's auditor, Carlos Ruga, testified at trial that he reviewed Respondent's trust and operating accounts which were obtained from Respondent's banks, and opined that Respondent misappropriated money entrusted to him by his client and was involved in check-kiting. (T. 119, 97- 101, 116-117). Mr. Ruga

testified that Respondent had commingled funds by depositing personal funds into his trust account during the period of January 1, 2003, to June 30, 2003. (T. 102, 108, 111). Mr. Ruga testified that during January and February of 2004, the evidence established that Respondent was check-kiting by using his operating account and another account, identified as Levey, Airan, Brownstein, Shevin, Friedman, Roen & Kelso, LLP, for which he had signatory capacity. (T. 97-101, 116-17). Mr. Ruga prepared a chart illustrating Respondent's check kiting. (T. 97, TFB Ex. H). Although Respondent stipulated to misappropriating $20,000.00 on the Strax matter, Mr. Ruga used the chart to show the Respondent's misappropriation. (T. 108-109, 114-119, TFB Ex H). Respondent later borrowed $20,000.00 from a friend in order to repay the Strax funds. (T. 112, 247). He knowingly repaid his friend with a worthless check. (T. 112, 248). Respondent never produced any document or record to The Bar, therefore, Mr. Ruga was unable to perform a complete audit. (T. 94-95, 114-115). However, based on the preliminary audit, Mr. Ruga determined that Respondent had misappropriated a portion of Strax's funds and was involved in a check-kiting scheme. (T. 96-117).

Respondent's Legal Career

The Respondent testified that he graduated from law school in 1974. (T. 174). Respondent worked for approximately ten years at different law firms and became a sole practitioner in 1984. (T. 175-76). Respondent served as "of

counsel" for Lewis Levey from 1999 until 2001 when he joined their firm. (T. 179). In 1997 and 1998 Respondent made $600,000.00 in income. (T. 220, 244). Respondent paid for his children's private college tuition and was a member of a country club. (T. 244, 45). Respondent testified he had a series of depressive episodes throughout different periods of his life. (T. 179-182). Respondent admitted his modus operandi was to avoid conflict and stressful situations. (T. 181). Respondent, however, did not go to any doctor to address these episodes until the Bar matter. (T. 203-205).

Additional Earlier Misappropriation

Respondent admitted that the first time he misappropriated trust funds was in the 1990's. (T. 189-190, 267-271). Respondent testified that he remembered taking and using clients' funds for a period of time and then putting the money back. (T. 269-271). Respondent was making substantial amount of money during the time of this misappropriation. (T. 177, 220, 244, 269). Respondent knew misappropriating this money was wrong, but blamed his behavior on having an episode of depression. (T. 269, 271).

From 2000 to 2004, Respondent made a yearly net income of $150,000 to $200,000.00 substantially less than the $600,000.00 he had made in previous years. (T. 220). While Respondent, whose wife was not working, had a high mortgage, credit card bills, and his children were in private colleges, he never told

his wife that he was making less money and they continued their same lifestyle. (T. 221, 246).

Respondent admitted that from 2000 through 2004, he used his trust account for his personal use. (T. 189, 192). During this period, Respondent misappropriated client's money and would use the fees or borrowed money to repay the funds. (T . 192, 215, 274). For example, Respondent would receive $5,000.00 in his trust account, he would use $1,000.00 for his personal use and then put it back. (T. 192). Another example given by Respondent is that during the period from 2000 through 2004, he would receive $3,000.00 from a client to be held in trust, then he would take $1,000.00 and use it for his personal use. (T. 274). Respondent would receive another $3,000.00 and use it to pay back the first client. (T. 274, 275). Respondent would continually take client's money and use it for his personal expenses. (T. 243).

Respondent offered no explanation why he took his clients' money, but knew that it was wrong when he did it. (T. 193, 246). Respondent could not tell the Court how many times he used clients' trust money for his personal use. (T. 192). Respondent admitted knowing that he shouldn't be taking his client's money, but it seemed to be the easiest way to avoid a problem. (T. 195). Respondent testified that the misappropriation occurred during an episode of depression. (T. 194). Respondent's clients never knew that he was

misappropriating their money. (T. 189, 246). Ultimately, Respondent had to borrow money on his home's equity or from friends to pay back the funds he misappropriated. (T. 215, 247-49).

Respondent's Four-Year Misappropriation Of Secretary's Social Security Withholding Tax

Ms. Sardinia, who was hired by the Respondent in early 2000 as his secretary, testified that when she began to work for the Respondent, he was upbeat, but then he slowly began to change. (T. 154-56). [1] In 2000, and every subsequent year for four years, Ms. Sardinia and Respondent would prepare her W-2's. (T. 161-62, 249-250). She used a website to calculate all of her withholdings and taxes based on her salary. (T. 162-63). While Respondent deducted the calculated amount from every one of her paychecks for four years—he failed to remit or report Ms. Sardinia's taxes. (T. 250). Every single week for four years, Respondent and Ms. Sardinia would calculate how much to deduct from her salary for her withholding, Social Security, et cetera. (T. 229-230). Respondent would withdraw withholding tax from every one of Ms. Sardinia's paychecks, but never gave the government that money. (T. 230-231, 250-51). Respondent kept this income for his personal use. (T. 250). Respondent has yet to report or pay these

[1] Ms. Sardinia testified that Respondent began to would come in later and ask her to hold his calls. (T. 155-56). Ms Sardinia testified that Respondent would lie down on his sofa. (T. 156). Ms. Sardinia was unclear exactly when Respondent's behavior changed. (T. 156-157).

outstanding payroll taxes. (T. 251). Ms. Sardinia contacted the Social Security Administration and was told that there was no record of any of her withholdings tax. (T. 165). When Ms. Sardinia confronted Respondent he misled Ms. Sardinia telling her not to worry that he would take care of it, but he never did. (T. 166, 251).

Respondent's Failure To Pay Federal Personal Income Taxes

Respondent also testified that starting from approximately the year 2000 to 2004 he failed to file or pay his own personal income tax returns because he could not bring himself to do it. (T. 229, 252, 264). For the next few years, it became convenient for Respondent to avoid preparing and paying his personal income taxes. (T. 264). Respondent did not want to sit down and analyze how much money he made or did not make, so he avoided it all together. (T. 266). Respondent knew he had an obligation to prepare, file and pay his personal income taxes, and that failure to do so may be a federal crime, but year after year he chose not to do it. (T. 252).

Strax Matter

In 2003, Respondent thought he had performed one of his greatest selling jobs with a client named "Strax." (T. 183). Respondent convinced the client that he and his firm had the ability to defend the case and was confident of his ability to handle the case. (T. 184-85). The Strax matter was a bankruptcy litigation case

where the Trustee was suing Strax and the Respondent was able to settle the case and get a favorable result for Strax. (T. 183-85). The case was settled for $80,000.00, the insurance company paid $40,000.00 and Strax paid the remaining $40,000.00. (T. 185). The insurance proceeds were deposited in Respondent's trust account. (T. 186). Respondent used $20,000.00 from those funds for his personal use and paid the Trustee the remaining funds and the $40,000.00 paid by Strax. (T. 187). There was still $20,000.00, however, that were due under the settlement. (T. 187). The Trustee and his attorney would call Respondent and Respondent would give them excuses for his non-payment. (T. 187). Finally, the Trustee through his attorney, had to file a motion in the Bankruptcy Court compelling payment. (T. 187). Respondent gave the Trustee two $10,000.00 checks from his personal account and both checks were returned for non-sufficient funds. (T. 187). The Trustee included the worthless check issue within its motion. (T. 187-188). As a result, Respondent borrowed $20,000.00 from a friend and used it to pay the Trustee. (T. 188). The Referee asked Respondent what was he thinking when he took $20,000.00 from his trust account instead of borrowing it from a friend. (T. 203). Respondent responded that his head was telling him to take the easy way out. (T. 203). Respondent further added that he did it because it caused no pain or conflict. (T. 203).

Check Kiting

In 2003, Respondent admitted that he intentionally would write checks between two of his accounts and knew that at the time he wrote the checks he did not have enough funds in either account to cover them. (T. 225-27, 252-53). The bank officers would call Respondent and tell him that he had an overdraft of "x" amount and to deposit money to cover it. (T. 252-253). Respondent testified that his only alternative was to write a check from another account that he knew had insufficient funds. (T. 253). Respondent denied that the bank officers knew he did not have enough money to cover these uncollected checks. (T. 253). Respondent offered the excuse that he was expecting money to come in. (T. 252-253). Respondent stopped his check-kiting because his bank officer told him that the bank could not give him approval for his check. (T. 255). Check-kiting is "the illegal practice of writing a check against a bank account with insufficient funds to cover the check, in the hope that the funds from a previously deposited check will reach the account before the bank debits the amount of the outstanding check." Black's Law Dictionary 231 (7th ed. 1999). (T. 242).

Respondent's Mental State

Respondent testified that he had episodes of depression throughout his life. (T. 179-182). The first time Respondent ever sought help for his condition was in December 2004, on his attorney, Mr. Baron's advice to go speak to Dr. Eustace.

(T. 30, 205). Respondent went five times for 12 hours to Dr. Eustace for a comprehensive evaluation in order to establish a diagnosis. (T. 29, 31-2). Dr. Eustace concluded that Respondent was suffering from major depressive disorder, recurrent. (T. 36, 77). According to Dr. Eustace, Respondent would have a very good prognosis if properly treated. (T. 67). Dr. Eustace based his diagnosis exclusively on Respondent's statements and did not interview anyone else or do any independent research before formulating his diagnosis. (T. 68-71). Dr. Eustace testified that Respondent had experienced three periods of depressions in his life: The first was when the Respondent was a law student; the second episode affected his family; the third episode affected the workplace. (T. 44-45). During cross examination, Dr. Eustace agreed that keeping a particular lifestyle is one of the major stressors for licensed professionals and used the medical model to opine that the nature of Respondent's stressor was clearly financial. (T. 87). Dr. Eustace testified that Respondent had not told him about keeping Ms. Sardinia's Social Security and withholding taxes. (T. 80). Dr. Eustace did not ask Respondent questions, but rather accepted anything Respondent told him. (T. 80). Dr. Eustace testified that all throughout Respondent's misappropriations and misdeeds he knew it was wrong. (T. 84). Respondent knew the difference between right and wrong. (T. 84). Dr. Eustace agreed that Respondent's condition could recur at any time there was an emergence of any psycho-social stressor. (T. 87).

During 2000 through 2004, Respondent still had income-producing clients. (T. 216). Respondent played golf during this period and handled the Strax matter. (T. 245). Respondent would often play golf with his friend of thirty-four years, Tod Aronovitz. (T. 136, 141). Mr. Aronovitz, Respondent's character witness, testified that he noticed Respondent more serious and melancholic but did not ask Respondent if anything was wrong. (T. 138, 142). Mr. Aronovitz loaned Respondent a large sum of money without asking what it was for. (T. 144).

Respondent's Non-Compliance

On October 25, 2004, Grievance Committee 11"L" found that Respondent violated Rule 5-1.2(g) of The Rules Regulating The Florida Bar by his failure to comply with a subpoena that was properly served upon him for trust account and other records. On October 26, 2004, The Florida Bar filed a Notice of Noncompliance with a Subpoena with the Supreme Court of Florida. As a result, on November 4, 2004, the Supreme of Court of Florida entered an order directing Respondent to show cause why he did not comply with The Florida Bar's subpoena. Respondent failed to respond and/or show cause for his failure. Consequently, on February 4, 2005, the Supreme Court of Florida, in Case No. SC04-2081, suspended Respondent from the practice of law for his non-compliance with a subpoena and his failure to respond.

Referee's Findings

Violations of Rules Governing the Florida Bar

At the close of the evidence, the Referee found Respondent guilty of the following Rules Regulating The Florida Bar:

Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, and misrepresentation), and Rule 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) 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.

Mitigation and Aggravation

The Referee found the following mitigating factors:

9.32 (a) – absence of a prior disciplinary record;

9.32 (b) – absence of a dishonest or selfish motive;

9.32 (d) – timely good faith effort to rectify consequences of misconduct;

9.32 (e) – full and free disclosure to disciplinary board and cooperative attitude towards proceeding;

9.32 (g) – otherwise good reputation and character;

9.32 (h) – mental impairment;

9.32 (j) – interim rehabilitation;

9.32 (k) – imposition of other penalties and sanctions; and

9.32 (l) – remorse.

The Referee found the following aggravating factors:

9.22 (b) – pattern of misconduct; and

9.22 (d) – multiple offenses.

Factual Omissions

The Referee **did not** find the following aggravating factors:

9.22 (c) dishonest or selfish motive;

9.22 (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

9.22 (i) substantial experience in the practice of law

The Referee also **did not** find the following evidence as aggravation:

- Misappropriation from a client in the 1990's;
- Misappropriation of client funds from 2000 through 2004;
- Failure to file and pay personal income taxes for a three or four year period;

- Failure to remit to the government an employee's withholding taxes for a four year period, personal use of those funds, failure to remit those funds to date, and misrepresentations to the employee concerning those withhold funds.

Recommended Discipline

The Florida Bar urged the Referee to recommend disbarment as the disciplinary sanction to be imposed and Respondent urged a three year suspension with probation. The Referee recommended the following discipline:

A. That Respondent be suspended for a period of three years, and thereafter without a suspension or until he proves rehabilitation;

B. That Respondent be placed on a minimum of five years probation and thereafter a period of probation until he proves rehabilitation. That during the probationary period Respondent shall;

1) be monitored by the Florida Lawyers Assistance Program at his sole cost and expense, and shall conform to the terms and conditions of any contract applicable by and between himself and the Florida Lawyers Assistance Program;

2) attend regular mental health counseling sessions with a licensed mental health physician acceptable to the director of the Florida Bar's Legal Assistance Program;

3) deliver monthly reports to the Florida Bar regarding the physician's evaluation and confirmation of Respondent's continued ability to engage in the active practice of law;

4) submit annually to an independent psychiatric evaluation (Multiaxial Examination) at Respondent's expense performed by a licensed psychiatrist of the Florida Bar's selection, and forward the evaluation report to the director of the Florida Legal Assistance Program for review as to mental impairment, current health conditions, improvement, competency, etc.; and

5) be directed to cooperate fully with any such evaluation otherwise requested by the Florida Bar or its authorized program directors.

SUMMARY OF THE ARGUMENT

A Referee's findings of fact may be reversed where they are shown to be erroneous or lacking in evidentiary support. The existence of aggravating and mitigating circumstances are considered factual determinations by a referee. The stipulated facts, the evidence presented at trial, and the Respondent's admissions, establish by clear and convincing evidence the existence of serious aggravating factors which should have been found by the Referee, but were not. They included Respondent's admitted misappropriation of client funds for a period of at least four years, failure to file personal income tax returns for several years, and theft of his secretary's withholding tax for four years. Additionally, the Referee failed to find Respondent's substantial experience in the law as an aggravator despite Respondent's thirty-one years of experience. The Referee also erroneously found Standard 9.32(b) "absence of a dishonest motive" as a mitigator, yet found the Respondent guilty of violating Rule 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, an obvious inconsistency. Moreover, the record is replete with evidence of the intentional nature of Respondent's dishonest acts. The Referee further failed to find that Respondent had engaged in a bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency and instead found the mitigating factor of 9.32(e), "full and free disclosure to

disciplinary board and cooperative attitude towards proceeding," when the record clearly established Respondent's failure to comply with a subpoena or to produce a single subpoenaed document. In fact, Respondent's failure to comply ultimately resulted in an order of his suspension. Finally, the evidence contradicts the Referee's finding that Respondent's check kiting was not intentional given his admission that he knowingly wrote checks with insufficient funds in order to cover deficits in other accounts.

This Court's review of disciplinary recommendations is broader than that of findings of fact because of the Court's ultimate responsibility to determine the appropriate sanction. The three-year suspension imposed by the Referee is not appropriate. The nature of Respondent's misconduct, to wit: misappropriation of client funds, is such that a presumption of disbarment is raised. Although Respondent offered some evidence of depression, he failed to overcome the presumption of disbarment given the egregious nature of misconduct, including misappropriation, a check kiting scheme, commingling funds, failure to file and pay personal income taxes, and misappropriation of his secretary's withholding taxes for four years.

The appropriate disciplinary sanction is disbarment.

ARGUMENT I

THE REFEREE'S FAILURE TO FIND THAT THERE WAS COMPTENT EVIDENCE AND/OR FACTS TO SUPPORT AGGRAVATING CIRCUMSTANCES AND INTENTIONAL CHECK-KITING IS CLEARLY ERRONEOUS.

A Referee's findings of fact and recommendations carry a presumption of correctness. The Florida Bar v. Sweeney, 730 So. 2d 1269, 1271 (Fla. 1998) [quoting The Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996)]. The party seeking review of such findings and/or recommendations carries the burden of showing that they are clearly erroneous or lacking in evidentiary support. See id. The party arguing that the Referee's findings of fact and conclusions as to guilt (or innocence) are erroneous, must demonstrate that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions made. Spann, 682 So.2d at 1073. In the absence of such a showing, the Referee's findings will be upheld. The Florida Bar v. Hayden, 583 So.2d 1016 (Fla. 1991); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983). The existence of aggravating and mitigating circumstances are considered factual determinations by the referee. The Florida Bar v. Wolis, 783 So. 2d 1057, 1059 (Fla. 2001). Indeed, when the Referee's findings ignore mitigation (and conversely aggravation), this Court will review the record in order to find evidence to support such factors. The Florida Bar v. McNamara, 634 So. 2d 166, 168 (Fla. 1994).

Florida Standard for Imposing Lawyer Sanctions 9.21 defines aggravation as any considerations or factors that may justify an increase in the degree of discipline to be imposed. In the instant case, the Referee's findings ignore the existence of evidence and multiple aggravating factors amply supported by the record. The Referee's failure to acknowledge or address the aggravating circumstances in her report is clearly erroneous. In addition to Standard 9.21, Standard 9.22(a) through (k) sets forth specific aggravating circumstances which should be considered in determining appropriate discipline. In this regard, the Referee, in her report, specifically found conduct by the Respondent that constitutes aggravation under Standard 9.22, yet failed to consider this aggravation in her disciplinary recommendation.

Standard 9.22(b) declares dishonest or selfish motive as an aggravating factor. The Referee, however, failed to find dishonest or selfish motive and instead found the absence of same as a mitigator. Yet, the Referee specifically found Respondent guilty of violating Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation (ROR 10), a necessary element of which is intent. See, The Florida Bar v. Brown, 905 So. 2d 76, 81 (Fla. 2005) ["in order to sustain a violation of Rule 4-8.4(c), the Bar must prove intent".] Despite this finding, the Referee inexplicably identifies Respondent's absence of dishonest and selfish motive as a mitigating factor. The Referee's findings in this regard are

clearly erroneous. Support for the aggravation of dishonest and/or selfish motive was demonstrated throughout the record as evidenced below.

With regard to the Strax matter, Respondent knowingly misappropriated his client's money for his personal use. (T. 186). On numerous occasions, Respondent deceived the bankruptcy trustee and his attorney by telling them that he had the Strax money and would send it when, in fact, he knew he had already misappropriated it for his own person use. (T. 186). Finally, Respondent's misconduct with regard to the Strax funds culminated when he knowingly issued two insufficient funds checks to the trustee. (T. 187-188). Respondent's conduct was intentional and knowing through out this period. He did it because it was the easy way out and cause no pain or conflict. (T. 203). Clearly, the motive was selfish, if not outright dishonest. There simply is no other explanation.

Similarly, the Referee's finding that Respondent's check-kiting was not an intentional scheme was clearly erroneous and unsupported by the record.[2]

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[2] On pages 6, 7 and 8 of the Report of Referee, the Referee concluded the following:

> The Respondent has admitted to writing the checks but denies that the writing of the checks were part of a check kiting scheme. From the testimony provided in mitigation this Court finds that although the Respondent did write the checks that it was not an intentional check kiting scheme.
>
> [I]n a typical check kiting scheme there is intent to defraud by multiple check deposits with the result being

The record is replete with facts that show systematic, continuous, and intentional check kiting which is defined as "the illegal practice of writing a check against a bank account with insufficient funds to cover the check, in the hope that the funds from a previously deposited check will reach the account before the bank debits the amount of the outstanding check." Black's Law Dictionary 231 (7th ed. 1999). (T. 242).

Carlos Ruga, the Bar's auditor, testified that during January and February of 2004, Respondent was check kiting by using his operating account and another account identified as Levey, Airan, Brownstein, Shevin, Friedman, Roen & Kelso, LLP, in which he had signatory capacity. (T. 97-101, 116-17). Most

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> some third party or bank finally defrauded by the schemer. Here there was no such intent.
>
> [T]herefore, as this was an isolated occurrence when the Respondent's legal and banking practice is viewed over a period of many years…
>
> [T]here was no victim or intended victim. As stated, if this was a check kiting scheme the Respondent was intended to defraud himself…
>
> (ROR 6-8).

> Here the evidence if viewed in a light most favorable to the Florida Bar would establish at most that the Respondent is guilty of an attempt to deceive but, in the opinion of the undersigned, he is not guilty of an attempt to defraud, and, as there was neither a client complaint nor a loss that occurred to a client, his sanction should reflect this distinction.
>
> (ROR 20).

significantly, Respondent admitted that he floated checks between these two accounts knowing that he did not have enough funds in either account to cover them. (T. 225-227, 252-253). Bank officers would call Respondent advising him of overdrafts in his account and the necessity for him to deposit money in the account to cover the shortages. (T. 252-253). Respondent testified that his only alternative was to deposit a check drawn on another one of his accounts, even though he knew he had insufficient funds at the time he wrote the check. (T. 253). Respondent denied that the bank officers knew he did not have enough money to cover these insufficient funds checks. (T. 253). Respondent admitted that he had to stop his check-kiting when his bank officer told him that the bank would not give him approval for one of his checks. (T. 255). He did not stop because of the wrongful nature of his acts. Rather, the kiting stopped because the bank put an end to it.

The evidence demonstrated that Respondent intentionally wrote checks knowing his accounts did not have sufficient funds. Respondent knew that he was temporarily depriving the banks of their money. The Referee, however, found that Respondent may have been guilty of an attempt to deceive, but not defraud and that there was no victim because the Respondent was only defrauding himself (ROR 8). These findings misunderstand the implications of check kiting as well as the aggravating factor of dishonest and selfish motive. Respondent repeatedly

utilized the float between banks to cover checks issued without sufficient funds. Check kiting is the fraudulent act of covering a monetary short fall with funds that do not exist and contrary to the Referee's findings, check kiting is not victimless—both the bank and the payees are potential, if not actual, real victims. Moreover, there is no support for the Referee's position that the Respondent defrauded only himself. He admitted that at the time he wrote those checks he knew he did not have sufficient funds to cover them. The inescapable conclusion from both the stipulated facts and those adduced at trial is that the Respondent intentionally defrauded real victims—the bank and payees. The fact that no individual nor institution was left holding the proverbial bag does not change the dishonest, selfish, nor intentional nature of Respondent's acts. The Referee's findings in this regard are not supported by competent substantial evidence.

Respondent's motive for his intentional web of deception was clearly his desire to continue the behavior unabated. Such a motive is clearly and unequivocally dishonest and selfish. Still, despite the overwhelming evidence and her own findings of fact and guilt, the Referee failed to find dishonest and selfish motive as an aggravator, instead concluding that there was an absence of such motive. The Referee's findings in this regard were clearly erroneous.

The Referee also failed to find other aggravating factors identified below despite the overwhelming record evidence.

Standard 9.22(e) unequivocally states that bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency is an aggravating circumstance. Yet, the Referee erroneously failed to find this aggravator and instead found that Respondent's cooperation was a mitigator. However, Respondent has never produced a single record to The Florida Bar despite being subpoenaed to do so. (T. 94-95, 114-115). In fact, this Court suspended Respondent on February 4, 2005 for his failure to show good cause why he did not comply with the Bar's subpoena. Thus, the Referee's failure to find the Respondent's conduct as aggravation was clearly erroneous.

Additionally, Respondent had been practicing law for 31 years. Yet, the Referee failed to find Standard 9.22(i), substantial experience in the practice of law, as an aggravator. Such omission was also clearly erroneous.

The following record evidence, although not mentioned at all by the Referee in her report, unquestionably qualifies as factors or considerations justifying an increase in the degree of discipline as defined in Standard 9.21 of the Florida Sanctions (aggravation):

- Respondent withheld taxes from his secretary's paychecks for four years and kept the money for his personal use. (T. 163, 165, 166).

- Respondent has never paid nor reported these withholding taxes to the federal government. (T. 230-231, 250-251).

- When confronted by his secretary, Respondent lied to her by telling her he would remit the withheld taxes to the government. (T. 166).

- To date, Respondent has not paid any of his secretary's withholding taxes to the government. (T. 166, 251).

- Respondent admitted that he failed to file and pay his own personal income taxes for a three to four year period. (T. 229).

- Respondent admitted that he misappropriated from a client in the 1990's. (T. 189-190, 267-271).

- Respondent admitted that he misappropriated from other clients during the years 2000 through 2004. (T 189, 192, 274-275).

At a minimum, the foregoing evidence before the Referee establishes dishonest or selfish motive, pattern of misconduct, multiple offenses, and arguably, vulnerability of victim and indifference to making restitution.

The Referee's failure to find or consider the foregoing aggravation is error which should be corrected by this Honorable Court.

The Bar submits that the Referee's failure to consider uncontroverted evidence as aggravation, accompanied by her failure to deem specifically found conduct as intentional and aggravating, was clearly erroneous. Such error should be remedied by the Court's conclusion that the identified misconduct by Respondent was both intentional and aggravating and worthy of consideration in increasing the degree of discipline to be imposed.

ARGUMENT II

DISBARMENT IS THE APPROPRIATE DISCPILINE

This Court's scope of review of recommended discipline is broader than that of findings of fact because of ultimate responsibility to determine the appropriate sanction. The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000).

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).

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. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968).

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 that Respondent violated all of the rules alleged in The Florida Bar's complaint. Most significantly, 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 Standards for Imposing Lawyer Sanctions guide us in the determination of the appropriate sanction for attorneys misconduct. Utilizing the Standards as a guide, the Florida Supreme Court has concluded that in all but exceptional cases, disbarment is the presumed appropriate sanction to be imposed on an attorney who steals from clients or third parties. See, The Florida Bar v. Barley, 831 So. 2d 163 (Fla. 2002); The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996); The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992).

Standard 4.11 states that:

> Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

Standard 5.11(f) states 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.

Standard 7.1 states that:

> Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system. In this case, Respondent was involved in a check kiting scheme and misappropriated client funds.

In addition to Respondent's misappropriation, check kiting, commingling of funds, and other rule violations, Respondent admitted to serious aggravating factors—aggravating factors not acknowledged in the Report of Referee.[3] Misuse of client or third-party funds is one of the most serious acts of misconduct that an attorney can commit.[4] Disbarment is the presumed appropriate sanction for such misconduct.[5] To overcome that presumption, evidence of mitigation must substantially outweigh the seriousness of the violations and the aggravating factors. The mitigation offered by the Respondent and found by the Referee falls far short

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[3] See Argument I *supra* for a detailed discussion on the aggravating factors present, but not factored into the disciplinary recommendation.

[4] 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).

[5] 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).

of overcoming the presumption.[6] Accordingly, disbarment is the appropriate sanction to be imposed.

Although the Referee found the Respondent guilty of all of the rule violations, and that Respondent showed a lack of judgment in his personal financial practices, nonetheless the Referee concluded that there was no intentional check-kiting scheme. (ROR 9) and that Respondent's misuse of client trust funds was not due to a dishonest motive, but rather to Respondent's mental disorder. (ROR 9). The Referee's findings and conclusions in this regard are negated by the record.

The evidence established that Respondent intentionally misappropriated the funds he received from Strax to settle the bankruptcy matter. Despite a court-approved settlement, the Respondent used the Strax funds for his own personal use. Such is obvious misconduct of the most fundamental kind. Months after having spent Strax's funds, Respondent issued two insufficient funds checks to the Bankruptcy Trustee to pay the Strax settlement, the very purpose for which the funds were entrusted. The Trustee was forced to hire an attorney to attempt collection of the funds. Having already misappropriated the Strax funds, Respondent was ultimately forced to borrow $20,000.00 to pay the Trustee. Respondent's actions were not the result of mistake or confusion, but were

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

intentional and self-motivated. He misappropriated the Strax funds for his own personal use in violation of the court- approved settlement agreement. (T. 185-187). Moreover, he admitted to doing so to pay for his living expenses which resulted from his decision to maintain a standard of living that he could no longer afford due to a substantial decline in his income. (T. 220-221, 246).

Similarly, Respondent engaged in check kiting in an intentional plan to cover up his misuse of client funds. He engaged in other acts of misconduct as well as evidenced by the testimony of Respondent concerning other acts of misuse of client funds through the years, as well as his dishonest and unlawful conduct regarding his secretary's and his own taxes. (See Argument I for a detailed discussion of same.)

Respondent attempts to justify or explain his theft and dishonesty by pointing to his depression. However, both Dr. Eustace (whom Respondent first consulted after the initiation of these disciplinary proceedings), and Respondent testified that Respondent knew the difference between right and wrong. (T. 84). They both also agreed that Respondent knew his actions were wrong while he was engaging in them. Moreover, the Respondent's depression appears to have been selective in that during these periods of alleged depression, he was able to handle the complex Strax matter with great success. (T. 183).

The Referee found only two aggravating factors, 9.22(c) pattern of misconduct and 9.22(d) multiple offenses, but found numerous mitigating factors, including:

9.32(a) – absence of a prior disciplinary record;

9.32(b) – absence of a dishonest or selfish motive;

9.32(d) – timely good faith effort to rectify consequences of misconduct;

9.32(e) – full and free disclosure to disciplinary board and cooperative attitude towards proceeding;

9.32(g) – otherwise good reputation and character;

9.32(h) – mental impairment;

9.32(j) – interim rehabilitation;

9.32(k) – imposition of other penalties and sanctions;

9.32(l) – remorse.

The Referee appears to have relied heavily on her findings of mitigation as support for her recommendation of three years suspension as opposed to disbarment. This seems particularly true regarding her finding of mental impairment. However, the mitigation fails to outweigh Respondent's admitted ongoing egregious misconduct and the Referee erred in deviating from the recognized presumption of disbarment as the appropriate sanction.

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 presented evidence of lack of a prior disciplinary history, as well as steps taken by him to remedy trust account shortages. Additionally, evidence was presented of personal and emotional problems including the attorney's father's death, his mother's illness, and his financial obligations. Graham 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. This is a statement which would seem particularly applicable in the instant case. Similarly, in Shanzer, 572 So. 2d at 1384, an attorney was disbarred for misappropriating client funds despite evidence of his depression over marital and economic problems and the payment of restitution.

In making her recommendation, the Referee sub judice mistakenly relied on The Florida Bar v. Mason, 826 So. 2d 985 (Fla. 2002). There this Court stated that "Mason's errors here were due to mistakes in accounting practices. She was not attempting to intentionally steal from her clients, and there is no evidence that clients ultimately sustained any loss." Id. at 988. Moreover, the facts of Mason are inopposite. In Mason, the attorney, through accounting errors, inadvertently

transferred proceeds to an operating account without proper records. Id. at 988. Once she became aware of the problems, she hired a part time bookkeeper. Id. Additionally, the Court factored in the attorney's exemplary conduct for fourteen years and her personal and family problems. Id. at 987. The Court also noted that the referee specifically stated that Respondent's rehabilitation was highly probable. Id. at 999. Primarily, however, the Court relied on accounting errors as foundation for the finding that Mason did not intend to steal from clients.[7]

In the instant case, Respondent's actions were not based on accounting errors, but were the direct result of Respondent's intentional taking of client funds on an "as needed" basis. Respondent misappropriated client funds and engaged in check kiting. Respondent's misconduct, by his own admission, occurred throughout a four-year period beginning in the year 2000. (T. 189, 192). Respondent also admitted to misappropriation in the 1990's. (T. 189-190, 267-271). Because of Respondent's failure to produce records as required by the Bar's subpoena, all of Respondent's financial misconduct was not alleged in the Bar's complaint. However, Respondent admitted to the long pattern of misappropriation. Nonetheless, until the Bar matter, Respondent never sought help or treatment for his depression. Based on the foregoing, Respondent's motives are suspect and the likelihood of his rehabilitation is questionable. Respondent's misuse of client

[7] In a dissenting opinion, Justice Wells highlights the inconsistencies in the majority's opinion.

funds is due to his penchant for ignoring the difference between right and wrong, despite knowing it, when same is necessary for his economic satisfaction. It is not due to his alleged impairment. Respondent's actions were intentional and his proposed mitigation does not overcome the presumption of disbarment.[8] The Florida Supreme Court has repeatedly held that disbarment is the presumed sanction for an attorney's misuse of client funds held in trust. See, The Florida Bar v. Travis, 765 So. 2d 689 (Fla. 2000); The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996); The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991).

The Referee also relied on The Florida Bar v. Kassier, 711 So.2d 515 (Fla. 1998). In Kassier, the Court suspended respondent for one year followed by three-year probation where the respondent issued insufficient funds checks, misappropriated client funds, failed to keep clients informed, failed to act with reasonable diligence, and failed to respond to The Bar. Kassier had been a public defender for nine years, began his private practice in 1990 and the misappropriation occurred during a short period of time. In the instant case,

[8] In The Florida Bar v. Condon, 632 So. 2d 70 (Fla. 1994), a 12 year old case, the court ruled that 18-month suspension was appropriate for misappropriation of trust funds where mental or substance abuse problems cast doubt on the intentional nature of the misconduct. By contrast, Respondent was deliberate and systematic in his long-term behavior that violated the Rules Regulating The Florida Bar both in the allegations contained in the complaint and the serious aggravating factors. Testimony presented by the Respondent regarding depression is insufficient to overcome his egregious behavior.

Respondent has admitted to misappropriation of client funds during a four-year period. There is also ample evidence of significant aggravation including other earlier instances of theft, as well as failure to remit an employee's withhold taxes for four years or to pay his own taxes. Even giving weight to the mitigation found by the Referee, it does not outweigh the presumption of disbarment. The Court sets a high bar for the use of depression, addiction, or other life problems as mitigation, a bar that the Respondent simply cannot reach.

The Court's views on the impact of substance abuse on discipline are set forth in The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986) and The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990).

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. 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. Id. In upholding the referee's recommendation of disbarment, the 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. Id. at 142. The Court noted that Knowles had been involved in acts of misappropriation over a period of four years during which time he continued to work regularly. Id.

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. Id. The Court was mindful that Knowles ceased drinking and his alcoholism was under control. Id. The Court also considered that Knowles promptly made restitution. Id. Despite these mitigating factors, the Court concluded that disbarment was the appropriate sanction. Id. Thus, the Court imposed the disbarment despite Knowles' subsequent rehabilitation, prompt payment of restitution to his victims, and lack of a prior disciplinary record. Id. Here, Respondent blames his depression for his misappropriation. Yet, the evidence showed that despite his depression, Respondent maintained a client base, was able to acquire Strax as a client, and was able to participate in and manage a check kiting schematic.

In The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990), this Court reversed the referee's recommendation of an 18-month suspension and disbarred the attorney despite evidence of his drug addiction concluding that he failed to establish that his addiction rose to a sufficient level of impairment to outweigh the seriousness of his misconduct. Id. at 432.

The Court reached 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. Id. at 456. In addition to Golub's alcoholism, other

mitigating factors included: his 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. Id. 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.

This Court has also considered the effect of depression as a mitigating factor in theft cases. In The Florida Bar v. Condon, 647 So.2d 823 (Fla. 1994), a three-year suspension was found to be the appropriate discipline for commingling funds and misappropriation of client funds despite the referee's recommendation of disbarment. Money given to Condon by a client to for mortgages were never accounted for. Condon did not know what happened to the money. Id. During the period of the commingling and misappropriation, Condon was suffering from depression and had stopped taking his medication causing him to suffer forgetfulness and emotional impairment. Id. Unlike Condon, there was no evidence that Respondent required medication to ward off his depression, nor was there long term effort by Respondent to seek help. Rather, Respondent first consulted Dr. Eustace after the Bar proceedings were initiated. There was no

testimony that Respondent suffered from forgetfulness. Moreover, the evidence which was presented was not reflective of a mental illness of the same magnitude as Condon's. Certainly, given Respondent's misappropriation, commingling of funds, check kiting, and egregious aggravation, it did not rise to a level to overcome the presumption of disbarment.

In The Florida Bar v. McFall , 863 So. 2d 303 (Fla. 2003), this court also addressed depression as a mitigating circumstance and imposed a three year suspension despite the misappropriation of client funds for the lawyer's personal use. In aggravation, the referee found dishonest and selfish motive, multiple offenses, and the intentional misleading of the Bar as to the whereabouts of funds. In mitigation, the referee found no prior discipline, that the attorney was a self starter, enjoyed a good reputation, suffered from medical problems including depression (since 1995) and chronic pain, had diminished capacity, behaved out of character, made restitution, misued small amounts of money compared to the amounts entrusted to him, and the thefts were of short duration, isolated in time and limited to one account. Id. at 306. McFall is distinguishable from the instant case for a number of reasons. First, he suffered from debilitating pain due to a form of neuropathy and had operations on his feet. Moreover, he had a documented history of clinical depression which required medication. Additionally, he was taking medication for two conditions. McFall did not act like

himself while taking the medication. It clouded his judgment. Id. at 308. The Court held that but for these unique facts and mitigating circumstances McFall would have been disbarred. Id. at 309.

In the instant case, Respondent did not seek out a doctor for his mental state until the pendency of the Bar matter. Respondent was not taking any medications nor suffering from any other medical problem. Respondent's transgressions were throughout a four year period. There was no evidence Respondent suffered from any debilitating condition or took any medication which clouded his judgment. Respondent's contention of his impairment falls far short of what is required in order to mitigate his misconduct.

In The Florida Bar v. Breed, 378 So. 2d 783 (Fla. 1979), the Court sounded the warning bell. There the Court reluctantly suspended Breed for two-years for check kiting, commingling and misappropriation of client funds. The Court, however, gave warning "to the legal profession of this state that henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client was injured." Disbarment is the appropriate discipline when an attorney engages in check kiting, misappropriation of client funds, and the issuance of worthless checks. See, The Florida Bar v. Dubow, 636 So. 2d 1287 (Fla. 1994).

The purpose of disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not, or are unlikely to properly

discharge their duties to clients, the public, the legal system, and the legal profession. The record before the Referee establishes by clear and convincing evidence that Respondent's conduct is precisely the type which brings most serious disrepute to the legal profession. Respondent's offerings of mitigation and the Referee's findings in this regard are insufficient to overcome the presumption that disbarment is the appropriate sanction for Respondent's misconduct.

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). The evidence has shown that Respondent willfully ignored his responsibilities and in so doing violated the privilege which had been bestowed upon him.

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 served on 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 Richard Baron, Attorney for Respondent, 501 N.E. First Avenue, Suite 201, Miami, Florida 33132-1960, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this _____ day of May, 2006.

_____
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 February 8, 2006.