

**IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)**

**THE FLORIDA BAR,**

**Complainant,**

**v.**

**JERRY ARTHUR RIGGS, SR.,**

**Respondent.**

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**Supreme Court Case  
No. SC05-973**

**The Florida Bar File  
No. 2004-51,307(17B)**

**THE FLORIDA BAR'S ANSWER BRIEF**

**LORRAINE CHRISTINE HOFFMANN, #612669  
Bar Counsel  
The Florida Bar  
5900 N. Andrews Avenue, Suite 900  
Fort Lauderdale, FL 33309  
(954) 772-2245**

**JOHN ANTHONY BOGGS, #253847  
Staff Counsel  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, FL 32399-2300  
(850) 561-5600**

**JOHN F. HARKNESS, JR., #123390  
Executive Director  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, FL 32399-2300  
(850) 561-5600**

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## **PRELIMINARY STATEMENT**

Throughout this answer brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR \_\_\_\_ (indicating the referenced page number). The transcript of the final hearing held on August 19, 2005, will be designated as TT \_\_\_\_ (indicating the referenced page number). The transcript of the hearing held on April 15, 2005 (emergency suspension case) will be designated as TT2 \_\_\_\_ (indicating the referenced page number). The Florida Bar will be referred to as “the bar.” Jerry Arthur Riggs, Sr., will be referred to as “respondent.”

## **STATEMENT OF THE CASE AND FACTS**

In the interest of accuracy, and to ensure that the record is complete, The Florida Bar offers the following supplement to respondent's statement of the case and facts.

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Respondent represented Rafael and Maria Suncar ("Suncars") in a residential real estate transaction in Miami-Dade County, Florida on October 31, 2003 (RR 2). The Suncars purchased a home in foreclosure from the seller's lender, U.S. Bank, and obtained financing through Argent Mortgage (RR 2). Upon receipt of the proceeds from Argent Mortgage, respondent was obligated to satisfy the U.S. Bank mortgage, a second mortgage, and certain other obligations (RR2-3). Respondent, a member of The Attorney's Title Insurance Fund ("Fund"), wrote the title insurance for the Suncar transaction through the Fund (RR 3). As respondent failed to pay the U.S. Bank mortgage of approximately \$118,000, the Suncars did not receive a satisfaction of the U.S. Bank mortgage (RR 3). However, the Suncars did receive a satisfaction of mortgage on the second (\$9,000) mortgage, through American General Home Equity, in November 2003 (RR 3).

In February 2004, respondent learned that a third party bidder was attempting to purchase the Suncars' home in accordance with U.S. Bank's foreclosure proceedings (RR 3). Respondent contacted The Fund to advise them that he was no longer in possession of the Suncars' funds and therefore could not satisfy the U.S. Bank mortgage (RR 3). Respondent claimed that a dishonest employee, who had access to and was stealing from

his trust account, had victimized him (RR 3). After numerous court hearings, the Fund satisfied the U.S. Bank mortgage and dismissed the foreclosure on the Suncars' home (RR 3). Due to respondent's failure to satisfy the Suncars' mortgage, the Fund suspended respondent's authority to underwrite title insurance (RR 3). Respondent has yet to repay the Fund in full, but testified that he did repay approximately \$10,000 of the \$118,000 loss the fund sustained as a result of his misconduct (RR 3).

In a letter dated April 13, 2004, the bar requested respondent's records for his Bank of America trust account (entitled "Client Account," and identified as account number 003675220937) for the period January 1, 2002 through March 31, 2004 (RR 4).

When respondent failed and refused to produce the trust account records within the time allotted, the bar was forced to serve a subpoena duces tecum directly on Bank of America (RR 4). When Bank of America notified respondent of the bar's subpoena, respondent directed the bank to deny the bar's mandatory records request (RR 4). Shortly thereafter, respondent retained counsel, who delivered some of the requested trust account records to The Florida Bar on or about May 11, 2004, and persuaded his client to authorize Bank of America to comply fully with the bar's extant subpoena duces tecum (RR 4). As a result, the respondent produced some trust account records (consisting of bank statements, deposit slips, checks, and checkbook stubs) to the bar (RR 4). Because he did not provide deposit images, wire transfers, and additional checks, the bar was forced to and did obtain these records directly from Bank of America (RR 4).

Once all necessary trust account records were produced, both by respondent and Bank of America, the bar completed a trust account compliance audit, using the combined records (RR 4). The bar's audit revealed that respondent had several accounts with Bank of America including a real estate trust account (#003675220937), an IOTA trust account (#003661181514), a savings account (#003670860570), and an operating account (#003661181501) (RR 4). The bar's compliance audit included a reconstruction of the real estate trust account (#003675220937) for the period October 24, 2002 through December 31, 2003, as well as a review of both the IOTA trust account (#003661181514) and the savings account (#003670860570) (RR 5).

As of December 31, 2003, respondent had a liability of \$124,030.71 to the Suncars (RR 5). His real estate trust account (#003675220937), in which the Suncars' money should have been on deposit, had a reconciled balance of only \$15,194 on that date (RR 5). Thus, respondent had a trust account shortage of \$108,836 on December 31, 2003, based solely upon his liability to the Suncars (RR 5). In addition, respondent had failed to remit \$1,039.00 to Citizens Property Insurance and \$341.00 to the National Flood Programs for insurance premiums related to the Batista/Rutledge closing, which he had handled in December 2003 (RR 5). The bar was unable to determine the extent of respondent's other liabilities during this period due to his failure to provide additional necessary information (RR 5). During the audit period, respondent deposited several client checks into his trust account bearing the reference "Fee" or "Attorney Fees" (RR 5). Depositing earned fees into the trust account is a violation of the Rules Regulating



Trust Accounts (RR 5). Respondent deposited a State Farm Insurance check number 1917414572, payable to Jerry Riggs and Christine A. Riggs, into his real estate trust account (#003675220937) as well (RR 5). This check, which notes Jerry Riggs as the insured, appears to be a check for a personal insurance claim number 59-C872-87, for a loss to himself incurred on May 17, 2003 (RR 5). Accordingly, this check was improperly deposited in respondent's real estate trust account (RR 5). Respondent also refinanced his personal home in June 2003 and deposited these proceeds into his trust account (RR 5). The bar's audit revealed also that respondent paid personal expenses from his trust account (#003675220937) during the audit period (RR 5-6). These expenses included payments for employee salaries (Checks No. 1249 and 1269), furniture (Check No. 1333), office equipment (Check No. 1352), telephone, rent (Check No. 1423), automotive repairs (Check No. 1359), kitchen cabinets (Check No. 1647) and a monetary gift to a relative (Check No. 1144), and totaled \$18,959.42 (RR 6). During the audit period, respondent transferred and commingled funds between multiple accounts (RR 6). During the audit period, respondent also transferred a fee in the amount of \$4,000 on the "Murphy" case from his IOTA account (#003661181514) to his real estate trust account (#003675220937), without explanation (RR 6). Also, the audit revealed that respondent deposited client escrow funds from other clients (the Samersons) into his operating account (#003661181501) (RR 6). Respondent deposited escrow checks from still other clients (the Hyatts) into his savings account (RR 6). Additionally, respondent made numerous on-line banking transfers during the audit period (RR 6). The majority of

these transfers were made from the real estate trust account (#003675220937) to the operating account (#003661181501) (RR 6). Because the account transfers were not identified by client name or purpose, the bar's auditor was unable to identify the case or matter (if any) for which these outgoing transfers were made (RR 6).

Because of these unidentified on-line transfers and because respondent also deposited client funds into non-trust accounts and deposited checks from his operating account into his real estate trust account (#003675220937), the bar requested (in a letter dated August 17, 2004) that respondent identify the client names and matters so that all such transfers could be positively identified (RR 6-7). To date, respondent has failed and refused to provide The Florida Bar with a complete written response to its August 17, 2004 request (RR 7).

During the period of December 17, 2003 to March 31, 2004, when respondent should have been holding the Suncars' and Batistas' funds (at a minimum), respondent's trust account balance fell below the Batistas' liability on several dates (RR7). On December 17, 2003, respondent's bank balance was a negative <\$9, 738.17> (RR 7). His bank balance was negative again on February 13, 2004 and again on February 17, 2004 (RR 7). On February 19, 2004, respondent's bank balance was positive (\$1,786.87), but still insufficient to cover the \$1,380.00 insurance premiums plus the \$3,959.50 in fees owed to the Palm Beach County Clerk of Court for the Batistas' closing (RR 7). In March 2005, respondent remitted \$1,380.00 to the Batistas as a refund for the monies which should have been remitted to their insurance carriers in

December 2003 (RR 7). During February 2004, respondent's real estate trust account (#003675220937) was overdrawn on February 13<sup>th</sup> and February 17<sup>th</sup> (RR 7). As a result, 2 trust account checks were returned for insufficient funds (RR 7). The real estate trust account was assessed \$390 in overdraft fees (at \$30 per check) for the 13 checks that were presented and cleared during the overdraft period (RR 7). Respondent authorized and had overdraft protection on the real estate trust account (#003675220937), which he had caused to be linked to his savings account (#003670860570) (RR 7). Overdraft protection is prohibited by The Florida Bar Rules Regulating Trust Accounts (RR 7). Respondent was not in compliance with the rules applicable to lawyer trust accounts (RR 8). Moreover, respondent certified, on his 2001-2002 and 2003-2004 Florida Bar Annual Membership Fees Statement, that he had read and complied with the rules applicable to trust accounts, for each of the aforementioned years (RR 8).

At the final hearing in the instant case, respondent testified that his trust account was short, in part, because of an overpayment (of \$13,902.87) to Dr. Rex Allen in a real estate closing (RR 8, TT 116-118). Respondent maintains that the balance of his trust account shortage was caused by the malfeasance of a former employee, Tammy Campbell, who misappropriated funds on deposit in his trust account (RR 8, TT 132-136). Respondent handled the refinancing of Tammy Campbell's home in December 2003, approximately 1 month after the Suncar closing (RR 8, TT2 29-31). Ms. Campbell received \$79,152.26 as a result of her home refinancing (RR 8, TT2 31). Most of this money was deposited into respondent's trust account (RR 8). Respondent claims that

Ms. Campbell withdrew her own funds and misappropriated additional funds belonging to his clients, from his trust account (RR 8, TT2 33-49). Respondent also testified that he filed an incident report with the Hollywood Police Department on or about August 14, 2005 (shortly before the final hearing in this cause), charging Ms. Campbell with forgery and theft (RR 9, TT 134-135,143). The referee did not find that Ms. Campbell misappropriated funds from respondent's trust account (RR 2-9). He did find, however, that monies were misappropriated (RR 2-9). The referee also found that respondent failed to supervise Ms. Campbell adequately and failed to properly protect and maintain client monies held in trust in his trust account (RR 9).

## **SUMMARY OF THE ARGUMENT**

A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without record support. The party contesting the referee's findings of fact and conclusions as to guilt bears the burden of proving that the report of referee is erroneous, unlawful or unjustified. In order to prevail, an appellant must demonstrate either a lack of record evidence to support the referee's findings and conclusions, or evidence that the record clearly contradicts such findings and conclusions. The bar provided competent, substantial evidence in this case to support the referee's findings of fact and guilt. Respondent admitted that he regularly commingled his own funds with those of his clients, that he paid personal expenses from his trust account, that he failed to reconcile his trust account, that he had trust account shortages, and that he had overdraft protection on his trust account. Respondent denied misappropriating client funds. While he concedes the client money was misappropriated by someone, respondent argued that the money was stolen from him and from his clients by a non-lawyer employee who also hid banking errors from him, causing the trust account shortage identified by the bar audit. The referee in this cause did not find that the non-lawyer employee (who did not testify) stole funds from anyone, or that she caused or hid bank errors of any kind. The referee did find that there was a significant amount of money missing from respondent's trust account. The referee determined that if respondent did not intentionally misappropriate the trust funds himself, the misappropriation was caused by his failure to supervise his non-lawyer employee and his

failure to protect and maintain his trust account by following the mandatory trust accounting procedures required by The Florida Bar. Simply stated, the record evidence does not support respondent's version of events. The referee's findings of fact and conclusions as to guilt were based upon the competent, substantial evidence provided by the bar. Therefore, this Court should approve the referee's findings.

This Court has held that a bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently harsh so as to deter other attorneys from similar misconduct. Furthermore, the discipline must have a reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The recommendation by the referee in this case adheres to each and every one of the foregoing purposes and requirements. In addition, existing case law and The Florida Standards for Imposing Lawyer Sanctions support the referee's recommendation that an attorney who fails to follow trust accounting procedures, fails to keep minimum trust accounting records, and misappropriates (or allows the misappropriation of) client trust funds, should, at the very least, be given a long-term suspension. Given respondent's egregious conduct, the discipline imposed in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee in this case properly recommended a 3-year suspension.

## ARGUMENT

### **I. THE FLORIDA BAR PRESENTED COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS OF FACT REGARDING GUILT.**

A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without record support. The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000). This Court has the authority to review the record to determine whether "competent substantial evidence supports the referee's findings of fact and conclusions concerning guilt." The Florida Bar v. Cueto, 834 So. 2d 152 (Fla. 2002), *citing* The Florida Bar v. Jordan, 705 So. 2d 1387 (Fla. 1998). When this Court reviews the record, the party contesting the referee's findings of fact and conclusions as to guilt bears the burden of proving that the report of referee is erroneous, unlawful or unjustified. R. Regulating Fla. Bar 3-7.7(c)(5). In order to prevail, an appellant must demonstrate either a lack of record evidence to support the referee's findings and conclusions, or record evidence that clearly contradicts such findings and conclusions. The Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000), *quoting* The Florida Bar v. Sweeney, 730 So. 2d 1269, 1271 (Fla. 1998). In the instant case, The Florida Bar presented competent substantial evidence to support all of the referee's findings of guilt.

Respondent, in his initial brief, fails to demonstrate that the referee's report is erroneous, unlawful or unjustified. Instead, he bases his argument on his own testimony and documentary evidence, as presented at the final hearing. This argument is ineffective and insufficient, in that an appellant cannot meet his burden of proving clearly erroneous

findings by demonstrating that the record contains other evidence as well. The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004); The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000). That is because, in bar disciplinary cases, the referee is charged with the responsibility of assessing the credibility of witnesses, based on their demeanor and other factors. The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999); The Florida Bar v. Hayden, 583 So. 2d 1016 (Fla. 1991). In the case at bar, the referee listened carefully to the testimony presented, and scrutinized the documents offered and entered into evidence. Utilizing the discretion reserved unto him alone, the referee found the bar's evidence to be the more credible. Respondent may not vitiate the referee's determination, as to the weight and substance of that evidence, by arguing, simply, that other evidence (however unsupported) exists.

The bar provided the referee with the results of a compliance trust account audit that was based upon the reconstruction of respondent's accounts. The Florida Bar also presented the testimony of Branch Staff Auditor William Luongo, CPA, who conducted the compliance audit. Based upon this clear and convincing evidence, the referee determined that The Florida Bar was able to support and substantiate its allegations against respondent. (TT 21-101). The bar's audit and its auditor's testimony demonstrated, by clear and convincing evidence satisfactory to the trier of fact, that respondent is guilty of causing serious shortages in his trust account, commingling his funds with those of his clients, paying personal expenses from his trust account (with client funds), and bouncing 2 checks, due to insufficient funds, in February 2004 (RR 7, TT 21-101). The referee also



found that respondent had arranged for overdraft protection on his trust account, thereby preventing The Florida Bar from knowing if or when he overdrew his trust account. Such overdraft protection is violative of the Rules Regulating Florida Bar (TT2 88). The referee based his finding on clear and convincing evidence: The Florida Bar's audit of respondent's trust account revealed that respondent had a trust account shortage of \$108,836 as of December 31, 2003 (RR 5). Respondent himself admitted that he had regularly commingled his own funds with those of his clients, paid personal expenses from his trust account, failed to reconcile his trust account, had trust account shortages, and had overdraft protection on his trust account (TT2 46-51, 54-59, 88-89, 90-95, 99,104). Indeed, even respondent's counsel admitted, at trial, that respondent had violated the Rules Regulating The Florida Bar and deserved the imposition of bar discipline (TT2 139).

Despite the significant and admitted shortages in his trust account, respondent denies having misappropriated client funds. Instead, he argues, the money was stolen from him and from his clients by his real estate paralegal, Tammy Campbell. Respondent also claims that Ms. Campbell hid banking errors from him, causing the shortage identified by the bar audit (TT2 22-49). In considering this argument on appeal, it is important to note that the referee did not find that Ms. Campbell (who did not testify) stole funds from anyone. Similarly, the referee did not find that the absent Ms. Campbell caused or hid bank errors of any kind. What the referee did find is that there was a significant amount of money missing from respondent's trust account. And, if respondent did not intentionally misappropriate the trust funds himself, the misappropriation was caused by his failure to

adequately supervise Ms. Campbell and/or his failure to protect and maintain his trust account by following mandatory trust accounting procedures. Either way, the referee determined, respondent is solely responsible for the misappropriated client monies.

In advancing his appeal, respondent does not direct the Court's attention to a specific claim of error, in law or in fact. Instead, he points a finger at Ms. Campbell, and asks this Court to substitute its judgment for that of the referee and find, without evidence or record support, that Ms. Campbell stole the missing client funds. Respondent's appeal is based wholly on the strength of this argument, by which he hopes to be absolved of all accountability and fault. Yet, respondent did not call Ms. Campbell as a witness at the final hearing. He presented no evidence to support his allegations against her. And, most incredibly, he failed even to file a police report against her, until a few days before the final hearing (RR 9). Respondent has vitiated his legal argument, on appeal, by his own action—and inaction.

Putting the red herring of Ms. Campbell aside, the bar proved, by clear and convincing evidence, that respondent did not maintain proper trust account procedures and records, and that significant shortages existed in his trust account. Furthermore, the bar provided competent, substantial evidence to support the referee's findings that respondent is responsible for the misappropriation of client money from his trust account, however that occurred. The bar also provided competent, substantial evidence to prove that respondent failed to adequately supervise Ms. Campbell (to whom he gave access to his trust account) and that he failed to properly maintain his trust account. Respondent cannot

willfully fail to follow the mandatory trust accounting rules set forth in the Rules Regulating The Florida Bar, and then advance the defense that Ms. Campbell (or anyone else) is responsible for monies misappropriated from his trust account. That argument did not convince the referee, who heard and evaluated each witness, and it must not convince this Court. For these reasons, and because respondent has failed to demonstrate that the referee's findings are erroneous, unlawful or unjustified, the referee's findings should not be disturbed.

**II. RESPONDENT'S FAILURE TO FOLLOW TRUST ACCOUNTING PROCEDURES, FAILURE TO KEEP MINIMUM TRUST ACCOUNTING RECORDS, AND MISAPPROPRIATION OF CLIENT TRUST FUNDS, EVEN IF UNINTENTIONAL, WARRANT THE 3-YEAR SUSPENSION RECOMMENDED BY THE REFEREE.**

While a referee's findings of fact should be upheld unless clearly erroneous,<sup>1</sup> the Court has complete discretion on the subject of sanctions. The Florida Bar v. Rue, 643 So. 2d 1080 (Fla. 1994). This is because the Court has the ultimate authority to determine the appropriate sanction. The Florida Bar v. Grief, 701 So. 2d 555 (Fla. 1997); The Florida Bar v. Wilson, 643 So. 2d 1063 (Fla. 1994). In The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), this Court held that three purposes must be served by bar

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<sup>1</sup> The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986).

discipline: the judgment must be fair to society, the judgment must be fair to the attorney, and the judgment must be severe enough to deter others attorneys from similar misconduct. This Court has further stated that a referee's recommended discipline must have a reasonable basis in existing case law or the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Sweeney, 730 So. 2d 1269 (Fla. 1998); The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997). In the instant case, the referee's recommendation of a 3-year suspension is supported by existing case law

as well as by the Standards for Imposing Lawyer Sanctions. Finally, it conforms exactly to the Court's stated purpose for lawyer discipline.

This Court has stated that the misuse of client funds is unquestionably one of the most serious offenses a lawyer can commit. The Florida Bar v. Porter, 684 So. 2d 810 (Fla. 1996). This Court also has held that a rehabilitative suspension is the appropriate discipline when an attorney unintentionally misappropriates client funds. The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988); The Florida Bar v. Mason, 826 So. 2d 985 (Fla. 2002); The Florida Bar v. Whitlock, 426 So. 2d 955 (Fla. 1983); The Florida Bar v. Anderson, 395 So. 2d 551 (Fla. 1981). Although, in this case, respondent alleged (but did not prove) that an employee misappropriated the client funds, respondent remains responsible for the actions of his staff and the security of all client funds entrusted to him. The Florida Bar v. Arango, 720 So. 2d 248, 253 (Fla. 1998); The Florida Bar v. Morrison, 496 So.2d 820, 821 (Fla. 1986). Thus, respondent is subject to a long-term suspension

for the misappropriation of client funds, even if he were able to prove that his employee committed the actual misappropriation, because respondent willfully failed to utilize minimum trust accounting procedures, willfully failed to keep minimum trust accounting records, willfully commingled his personal funds with client trust funds, and willfully failed to supervise his staff—at least one of whom, he claims, had unfettered access to client monies. This element of respondent’s willful misconduct is especially problematic, in the instant case, because respondent knew that Ms. Campbell (the employee whom he alleges misappropriated the missing trust funds) had a serious problem with alcohol and financial irresponsibility. Yet, even with this knowledge, the respondent allowed Ms. Campbell access to his trust account, without supervision (TT2 80-84,107-108,125-126). Therefore, even assuming respondent’s defense to be true (without benefit of evidence of any kind), respondent’s negligent handling of his trust account was the proximate cause of the shortages in his trust account. This Court held, in The Florida Bar v. Simring, 612 So. 2d 561, 566 (Fla. 1993), that Mr. Simring’s shortages in his trust account, constant use of trust account funds to pay personal obligations, and his “intentionally sloppy and improper trust account procedures” were sufficient to construe an intent to misappropriate client funds. In the instant case, as in Simring, respondent’s sloppy and *intentionally* improper trust accounting procedures cannot be used as a shield to deflect responsibility for misappropriated trust funds. In the instant case, unlike Simring, the referee did not find that respondent intentionally misappropriated client funds. But after hearing and weighing all of the evidence, the referee did find that respondent was responsible for the shortages in

his trust account—if not due to his failure to supervise a dishonest non-lawyer employee, then due to his gross negligence and complete failure to properly maintain and protect his trust account.

Based on the clear and convincing evidence before him, the referee found that respondent had either misappropriated client funds, or allowed such funds to be misappropriated, through his own willful action, and inaction. The referee did not recommend disbarment because he did not find that respondent misappropriated client monies (if he did so, at all), with the intent necessary to support such a sanction. This determination, however, does not limit this Court's authority to disbar respondent, under the Simring standard, should the Court find that respondent's gross negligence (regarding his trust account records) was sufficient to establish intent. At the very least, however, the Court should uphold the referee's recommendation that respondent receive a 3-year suspension. This sanction is well supported by both case law and the Florida Standards for Imposing Lawyer Sanctions (the Standards).

In The Florida Bar v. Whitlock, 426 So. 2d 955 (Fla. 1982), an attorney handled a real estate closing and the purchaser sent the attorney money to pay for the maintenance on the condominium she was in the process of purchasing. The attorney sent a check to the condominium association, in an amount less than what was due. When the error was discovered, the association contacted the attorney and his employees on numerous occasions, but the attorney failed to pay the additional money due. Had the attorney completed the required reconciliations of his trust account, he would have discovered the

mistake in his account as well as the mistake in his payment to the association. The attorney did not maintain adequate trust account records, he did not complete required trust accounting procedures, he wrote checks from his trust account to cover business expenses, he did not supervise his employees properly (so that overpayments were made from the trust account), and he commingled personal funds with trust funds. Furthermore, the attorney had shortages in his trust account and he allowed his non-lawyer employee to manage and control his trust and general accounts, without adequate supervision or control. This Court suspended respondent for 3 years (instead of disbaring him) because the attorney reimbursed his trust account for the shortages, he caused no economic loss to anyone, and he cooperated fully with the bar. Respondent's conduct in the instant case was far more egregious, in that his shortages caused actual losses to clients and others.

In The Florida Bar v. Mason, 826 So. 2d 985 (Fla. 2002), an attorney represented a client in a claim for damages against the manufacturer of breast implants. The attorney settled the claim for \$50,000, which was paid in 3 installments of \$5,000, \$22,500, and \$22,500. The attorney withheld some fees and costs from each installment and forwarded the balance to the client. The client was dissatisfied and filed a complaint with The Florida Bar. The bar conducted an audit of the attorney's trust account and discovered a total shortage of at least \$37,987.88 and 82 transfers from the attorney's trust account to her operating account, totaling \$252,000 in transfers without reference to client or matter. That referee recommended, and this Court imposed, a 2-year suspension. In so doing, the court relied on in the referee's findings that the attorney's errors were due to mistakes in

accounting practices and not an attempt to steal from her clients. Furthermore, there was no evidence that her clients ultimately sustained any loss. Again, this is not so in the case at bar, where respondent's conduct cannot be construed as error and his clients did suffer financial loss.

In The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988), an attorney was on probation and failed to submit his quarterly reconciliations. The Bar audited his trust accounts, which revealed overdrafts, returned checks (for insufficient funds), mathematical errors on client ledger cards, a lack of monthly reconciliations, and commingling. The attorney also had a shortage in his trust account. However, none of the attorney's clients complained to the Bar. The attorney admitted all of the allegations and the referee recommended a 3-year suspension, restitution, and a prohibition against opening or using a trust account, once respondent was reinstated. This Court held that although there was gross negligence in respondent's management of his trust account, he did not willfully misappropriate client funds. Therefore, this Court approved the referee's recommended discipline of a 3-year suspension.

The facts of the instant case are most similar to those presented in Whitlock. In the case at bar, respondent failed to satisfy a mortgage on his client's home, causing the client to be subjected to foreclosure proceedings. The attorney in Whitlock failed to pay the full amount of the purchaser's maintenance fees, after the purchaser had entrusted these fees to the attorney. The attorney in Whitlock failed to reconcile his trust account (as required) and failed to complete the reconciliations that would have revealed his trust accounting



mistake. In the instant case, respondent also failed to maintain proper trust accounting procedures and records. Both respondents failed to supervise employees (which may have caused their trust account errors), commingled personal funds with client trust funds, had trust account shortages, and authorized their non-lawyer employees to manage and control their attorney's trust account, without adequate supervision. In the case at bar, respondent alleges that an employee stole client trust funds and hid bank account errors from him, but provides no conclusive evidence to support his claim. Indeed, he did not even bring the alleged theft to the attention of the police until shortly before his bar disciplinary hearing. Further, respondent admitted that he gave trust account authority to this female non-lawyer employee, whom respondent knew to have a serious drinking problem and serious financial difficulties. Respondent further admitted that he compounded the problem by failing to supervise this employee. Given the foregoing conduct, all supported in the referee's findings, the instant case exceeds the culpability demonstrated by the Whitlock respondent. Unless this Court elects to impose a greater sanction under the Simring standard, it should uphold the referee's recommendation of a 3-year suspension.

The Florida Standards for Imposing Lawyer Sanctions provides additional guidance and support for the referee's recommended sanction. Standard 4.1 deals with the proper sanctions for an attorney failing to preserve client property and Standard 4.12 establishes that suspension is the appropriate discipline for a lawyer who knows, or should know, that he is dealing improperly with client property, and causes injury or potential injury to a client.

When considering discipline under the criteria of The Florida Standards for Imposing Lawyer Sanctions, applicable mitigating and aggravating factors should be considered. The referee in the instant case found the following mitigating factors: respondent's character or reputation, imposition of other penalties or sanctions, and remorse. In aggravation, the referee found dishonest or selfish motive and respondent's substantial experience in the practice of law.

Based on the case law and the Florida Standards for Imposing Lawyer Sanctions, the Court should accept the referee's recommendation of a 3-year suspension. Respondent has advanced no argument, on appeal, to demonstrate that the referee committed legal error, or that his recommendation is unlawful or unjustified. Accordingly, the referee's findings should not be disturbed and his recommendations as to sanctions should be accepted and implemented by this Court. Therefore, this Court should approve the referee's report in this case and suspend respondent for 3 years.

## **CONCLUSION**

The referee's findings of guilt are well supported by competent substantial evidence and the recommended discipline is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions. This Court should approve the referee's report in this case and suspend respondent for 3 years.

Respectfully submitted,

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LORRAINE CHRISTINE HOFFMANN, #612669  
Bar Counsel  
The Florida Bar  
5900 North Andrews Avenue, Suite 900  
Ft. Lauderdale, FL 33309  
(954) 772-2245

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY true and correct copies of The Florida Bar's Answer Brief have been furnished by regular U.S. mail to Kevin P. Tynan, counsel for respondent, 8142 North University Drive, Tamarac, Florida 33321 and Staff Counsel, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this \_\_\_\_\_ day of February, 2006.

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LORRAINE CHRISTINE HOFFMANN

**CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN**

Undersigned counsel hereby certifies The Florida Bar's Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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LORRAINE CHRISTINE HOFFMANN

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