IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	**Case No.:**	**SC07-863**
Complainant,	**TFB File No.:**	**2004-01,364(1B)**

v.

SHERRY GRANT HALL,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant, THE FLORIDA BAR, will be referred to as "The Florida Bar" or the "Bar."

Respondent, SHERRY GRANT HALL, will be referred to as "Respondent" or "Ms. Hall."

References to the Transcript of the Final Hearing held on October 20-21, 2008, will be designated as "TFH" with the appropriate volume and page number, i.e., "TFH-1, Vol. I or Vol. II."

References to the Transcript of the Penalty Hearing held on November 4, 2008, will be designated as "TPH" with the appropriate page number, i.e., "TPH-1."

References to the Rules Regulating The Florida Bar will be designated as "Rule" with the appropriate number, i.e., "Rule 4-8" or as "Rules."

References to the Florida Standards for Imposing Lawyer Sanctions will be designated as "Standard" or "Standards" with the appropriate number, i.e., "Standard 5.1."

References to the "Report of Referee" dated November 20, 2008, will be designated as "ROR" followed by the appropriate page number, i.e., "ROR-1"

References to The Florida Bar's exhibits will be designated as "TFB Exhibit" followed by the appropriate number, i.e., "TFB Exhibit-1."

References to Respondent's exhibits submitted at the final hearing will be designated as "R Exhibit" followed by the appropriate number, i.e., "R Exhibit-1."

References to Respondent's exhibits submitted at the penalty hearing will be designated as "RPH Exhibit" followed by the appropriate number, i.e., "RPH Exhibit-1."

References to The Florida Bar's Initial Brief will be designated as "TFB Initial Brief" followed by the appropriate page number, i.e., "TFB Initial Brief-1."

References to all other pleadings and documents will be designated by their appropriate title in the record, i.e., "Complaint," "Answer."

STATEMENT OF THE CASE

In accordance with Rule 9.210(c), Florida Rules of Appellate Procedure, the Statement of the Case has been omitted.

STATEMENT OF THE FACTS

In addition to the facts recited by The Florida Bar,[1] Respondent adds the following:

The Referee found that at no time did the Respondent represent the Godwins regarding the agreement at issue. No attorney-client relationship existed with regard to this matter. TFH-465-66, Vol. II; TPH-82. During both the final and penalty hearings, the Referee found that Respondent's actions were not in connection with the practice of law. TFH-465-66, Vol. II; TPH-79. The Referee specifically stated that Respondent "wasn't acting as a lawyer in these circumstances. She was acting as an individual that [sic] happened to be a lawyer." TPH-82.

[1] Although not dispositive of the Referee's recommendation, the Referee incorrectly states in the Report of Referee, and The Florida Bar repeats in its recitation of the Statement of Facts, that the date of the agreement was January 21, 2001. The correct date of the agreement between Respondent and the Godwins was January 31, 2001. TFB Exhibit-1.

SUMMARY OF ARGUMENT

The Referee's recommendation of a 90-day non-rehabilitative suspension should be upheld because it is supported by the record, the Standards, and existing case law and meets the purposes of discipline. Therefore, this Court should impose the Referee's recommended penalty.

The Referee considered the Bar's request for disbarment or a three-year suspension and properly declined to recommend same or even a rehabilitative suspension of any period. This Court should decline to order a three-year (or any rehabilitative) suspension, as The Florida Bar has not met its burden of establishing that the Referee's recommendation is not supported by the record and existing case law.

ARGUMENT

I. *ISSUE I*

THE COURT SHOULD UPHOLD THE REFEREE'S RECOMMENDED 90-DAY SUSPENSION AS AN APPROPRIATE SANCTION

A. 90-day Suspension is Appropriate

The Referee's recommended discipline of a 90-day suspension[2] is appropriate under the facts of this case and is supported by existing case law and the Standards. This Court should adopt the Referee's recommendation as to discipline.

1. Recommended Penalty has Basis in Existing Case Law

The Court's scope of review as to a referee's recommended discipline is broader than that afforded to a referee's findings of fact because the Court bears the ultimate responsibility of ordering the appropriate sanction. The Florida Bar v. Vining, 721 So. 2d 1164, 1169 (Fla. 1998).

This Court has repeatedly held that it will uphold the recommendation of a referee, if same has a basis in existing case law.

> [T]he referee in a Bar proceeding again occupies a favored vantage point for assessing key considerations – such as a respondent's degree of culpability, and his or her cooperation, forthrightness, remorse and rehabilitation (or potential for rehabilitation). Accordingly, we will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law.

[2] Plus the taxation of costs in the amount of $20,160.71.

The Florida Bar v. Lecznar, 690 So. 2d 1284, 1288 (Fla. 1997).

[A] referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not clearly off the mark." Vining, 721 So. 2d at 1169.

The Referee's recommendation of a 90-day non-rehabilitative suspension for **one** rule violation (Rule 4-8.4(c))[3] for a single incident (altering one agreement), related to personal conduct unconnected to the practice of law, is supported by cases which are similar to the case at bar.

a. Non-rehabilitative suspension for violations of Rule 4-8.4(c) unconnected with the practice of law

In The Florida Bar v. Siegel, 511 So. 2d 995 (Fla. 1987), Siegel and another attorney, whose conduct was unconnected with the practice of law, were found guilty of violating three rules (including the predecessor to Rule 4-8.4(c)), for making misrepresentations in the connection with the purchase of a building to be primarily used as law offices. The referee recommended that Siegel be suspended for two weeks. The Florida Bar appealed. This Court found that because the attorneys were found guilty of a deliberate scheme to misrepresent facts in order to

[3] Respondent was originally charged by The Florida Bar and proceeded to trial on nine rule violations, eight of which were found to be inapplicable to these facts.

secure full financing of their purchase, a two week suspension was inappropriate. However, this Court found that a 91-day suspension requiring proof of rehabilitation, as argued by The Florida Bar, was not warranted under the circumstances. This Court imposed a 90-day non-rehabilitative suspension.

Similar to the Siegel case, a suspension requiring proof of rehabilitation is neither appropriate nor mandated in the instant case. Respondent, like the attorneys in Siegel, engaged in an isolated incident in a personal transaction unconnected with the practice of law regarding the purchase of real property. At the penalty hearing, Respondent argued that this case did not mandate a rehabilitative sanction and the maximum sanction the Referee should impose in this case was a 90-day non-rehabilitative suspension. TPH-92; TPH-107-108. Respondent has significant mitigating factors. Respondent has been practicing since 1986 (approximately 22 years) without a prior disciplinary history, and Respondent "is well respected in her community as an honest, hard working loyal friend involved in numerous community and church activities to the betterment of others." ROR-10.

In The Florida Bar v. Schultz, 712 So. 2d 386 (Fla. 1998), Schultz was found guilty of three rule violations (including Rule 4-8.4(c)), by intentionally misrepresenting his intention to pay a travel agency for airplane tickets. When the attorney finally gave the travel agency a check to hold, the same day he issued a

stop payment on the check evidencing his willful intent. The referee recommended that Schultz be suspended for at least six months and be required to pay the costs of the action and make full restitution to the owner of the travel agency. In making its recommendation, the referee considered Schultz's prior public reprimand as one of four aggravators and found no mitigators. Schultz appealed, arguing that because his was an isolated incident not involving a client, a public reprimand was an appropriate sanction. The Bar argued that Schultz's conduct warranted disbarment. This Court, considering Schultz's previous public reprimand, imposed a 90-day suspension. In light of Schultz, a rehabilitative suspension would be too harsh of a punishment in Respondent's case, given her significant mitigating factors. Schultz also supports the Referee's recommendation of a non-rehabilitative suspension.

This Court may also look to The Florida Bar v. Rose, 607 So. 2d 394 (Fla. 1992) for support that a non-rehabilitative suspension is appropriate. Attorney Rose was found guilty of violating rule 1-102(B)(4) (conduct involving misrepresentation), for endorsing checks made payable to Rose's ex-wife, by signing Rose's ex-wife signature and using the funds from the check which were meant to be held in trust for his minor children for his own personal use. The referee recommended suspension of 30 days. Rose appealed, claiming that the 30-day suspension was too harsh, but this Supreme Court affirmed the referee's

recommendation.

Unlike Rose, there has been no finding that Respondent forged any signatures (although the Bar certainly tries to suggest that such a finding exists); the finding was that the document was fraudulently altered by the changing of the title and language. There is no clear evidence of who placed the signatures of the other parties on the agreement.

As this Court is aware, misconduct occurring outside the practice of law is to be evaluated differently and may warrant less severe sanctions than misconduct committed in the course of the practice of law. The Florida Bar v. Baker, 810 So. 2d 876, 881 (Fla. 2002).[4] Siegel, Schultz, and Rose support the Referee's recommendation of a 90-day suspension.

b. Non-rehabilitative suspension for violations of Rule 4-8.4(c) for conduct connected with the practice of

[4] Arguably, a public reprimand was also an appropriate sanction supported by existing case law for a violation of Rule 4-8.4(c); however, the referee ruled that out. See, The Florida Bar v. Bell, 493 So. 2d 457 (Fla. 1986) (attorney who falsely acknowledged and witnessed a deed and other legal documents); The Florida Bar v. Brake, 767 So. 2d 1163 (Fla. 2000) (Personal Representative who defrauded creditors in administration of estate); The Florida Bar v. Davis, 373 So. 2d 683 (Fla.1979) (attorney who personally schemed to obtain $35,000.00 from a fellow businessman); The Florida Bar v. Hosner, 520 So. 2d 567 (Fla.1988) (attorney failed, for 11 months, to deliver title to vehicle he had sold to a third-party because attorney was using the title as collateral for his own personal loans); and The Florida Bar v. Farinas, 608 So. 2d 22 (Fla. 1992) (attorney had clients' signatures on interrogatories notarized after the fact).

law

In The Florida Bar v. Walker, 672 So. 2d 21 (Fla. 1996), Walker, in connection with the practice of law, executed a doctor's lien letter to a chiropractor informing the chiropractor that he would be paid for his services once the client's case settled. Walker's office misrepresented the status of the case for two years to the chiropractor by advising the chiropractor that there was a case pending. The chiropractor filed a grievance with the Bar, and Walker misrepresented to the Bar that the case had not settled, when in actuality there was no case to settle, as the matter had been resolved by another attorney years before Walker had issued the lien letter. Walker was found guilty of two rule violations (including Rule 4-8.4(c)). Even though Walker had a prior disciplinary history (public reprimand/probation for neglect and improper trust accounting), this Court imposed a 30-day suspension.

In The Florida Bar v. Varner, 780 So. 2d 1 (Fla. 2001), the attorney placed a fictitious case number on a notice of voluntary dismissal (where no lawsuit had ever been filed) and forwarded the notice to an insurance company in order to induce the insurance company to send a settlement check. The referee recommended that Varner be found guilty of two rule violations (including Rule 4-8.4(c)), found no aggravating and three mitigating factors, and recommended Varner be suspended

for 30 days. The Bar appealed, arguing that Varner was guilty of additional rule violations and should receive a 91-day suspension. The Court, finding Varner guilty of the additional rule violations, declined to take the Bar's recommendation and imposed a 90-day suspension.

An attorney who was part of a scheme to fraudulently obtain 100% financing by misrepresenting the purchase price of condominium units, and who violated his obligations as a land trustee for the purchaser, when he closed a real estate transaction for the sellers, who were both his partners and clients, received a 90-day suspension. The Florida Bar v. Nuckolls, 521 So. 2d 1120 (Fla. 1988). The referee had recommended that Nuckolls be suspended for four months. Nuckolls appealed, arguing that a public reprimand was appropriate. In imposing a 90-day non-rehabilitative suspension, this Court took into account Nuckolls argument for mitigation, that he had been practicing for 17 years without prior incident, and that he had served in the Florida House of Representatives for 10 years. Nuckolls is similar to Siegel, in which both attorneys received 90-day suspensions.

Respondent's misconduct is less egregious than Nuckolls'. Respondent's conduct violated only one rule and was not part of a scheme to defraud. Respondent's misconduct was unrelated to the practice of law, whereas Nuckolls' was related. Nuckolls supports the Referee's recommendation that a non-

rehabilitative suspension is appropriate in Respondent's case.

The imposition of a three-year suspension would be unduly harsh, when comparing Respondent's case with Varner, Walker and Nuckolls, all of which merited a 90-day suspension for fraud, deceit, dishonesty or misrepresentation in connection with the practice of law.

2. Recommended Penalty is Supported by Standards for Imposing Lawyer Sanctions

The Referee's application of Standard 7.2 (ROR-9[5]) is incorrect in this case; Standard 5.1 applies.

Standard 7.0, entitled "Violations of Other Duties Owed as a Professional," of which 7.2 is a subpart, provides:

> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unlicensed practice of law, improper withdrawal from representation, or failure to report professional misconduct.

[5] In its Initial Brief, The Florida Bar properly recites in its Statement of Facts that the Referee relied on Standard 7.2 (suspension) when recommending sanctions. TFB Initial Brief-11. However, The Florida Bar improperly states in its Summary of Argument that the Referee applied Standard 7.1 (disbarment). TFB Initial Brief-12. Respondent's counsel assumes that references to Standard 7.1, in this regard, is a typographical error or an oversight by The Florida Bar.

Standard 7.0 and its subparts are applicable to violations of duties *connected with the practice of law*. The title of the Standard sets forth same– "Duties Owed as a Professional." At both the final hearing and the penalty hearing, the Referee found that Respondent's misconduct was in her individual capacity and not in her professional capacity. TFH-465-66, Vol. II.; TPH-79; TPH-82. The Referee stated Respondent "wasn't acting as a lawyer in these circumstances. She was acting as an individual that [sic] happened to be a lawyer." TPH-82. Even counsel for The Florida Bar admitted at the penalty hearing that "[Respondent] wasn't representing a client." TPH-82.

A review of transcript reveals that the Bar, only after arguing the applicability of Standard 5.1, tried to force Standard 7.0 to fit into the disbarment argument it was then proposing. TPH-67-68. The Florida Bar argued that Standard 7.1 was "involved" in this case, "even though the things they talk about in the first paragraph are different." TPH-67. The first paragraph is 7.0 which sets forth what types of misconduct should be considered under this standard. Essentially, the Bar said 'forget about what kind of misconduct Standard 7.0 states that this is applicable to, apply it anyway.' Respondent's counsel even pointed out to the Referee that the Bar had admitted the inapplicability of Standard 7.0, et. seq. TPH-93-94. When this Court reviews this matter under the Standards, Standard

7.2[6] should not be applied in this case, as Respondent's misconduct did not occur in the practice of law, and the types of cases listed in Standard 7.0 – misleading communication about the lawyer or the lawyer's services or fields of practice, improper solicitation, unreasonable or improper fees, unlicensed practice of law, improper withdrawal from representation, or failure to report professional misconduct – are wholly dissimilar to the case at bar.

However, both The Florida Bar and Respondent argued at the penalty hearing that Standard 5.1 and its subparts should be considered in this case. TPH-64-65; TPH-94.

Standard 5.1, "Failure to Maintain Personal Integrity," provides as follows:

> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, **or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation**. (Emphasis added).

Respondent was found guilty of fraud, deceit, dishonesty or misrepresentation in her *personal* capacity and unconnected with the practice of law, in violation of Rule

[6] Standard 7.2 provides: "Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a *professional* and causes injury or potential injury to a client, the public or the legal system" (emphasis added).

4-8.4(c). This is a failure to maintain personal integrity, as set forth in the title of the Standard.

The applicable Standard is 5.13 which provides: "Public reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." However, the Referee ruled out a public reprimand as an appropriate penalty and found that a suspension was more appropriate. Standard 5.12 provides for suspension under the Standard 5.1 for failure to maintain personal integrity, Standard 5.12 states: "Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11[7] and that seriously adversely reflects on the lawyer's

[7] Standard 5.11 provides:

> Disbarment is appropriate when:
> a. a lawyer is convicted of a felony under applicable law; or
> b. a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or
> c. a lawyer engages in the sale, distribution or importation of controlled substances; or
> d. a lawyer engages in the intentional killing of another; or
> e. a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a)-(d); or
> f. 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 law.

fitness to practice." Respondent was not charged by the Bar with having engaged in criminal conduct and the Bar did not offer any proof that Respondent knowingly engaged in any criminal conduct, so as to make this Standard inapplicable. However, the Referee factored in aggravating and mitigating factors and found that a 90-day suspension was appropriate for Respondent's conduct.

In the Report of Referee, the Referee stated that even though the Bar suggested disbarment in this case, taking into consideration aggravation and mitigation, the Referee was recommending a 90-day period of suspension. ROR-9. Respondent's counsel also argued at the penalty hearing that there was nothing about this case that mandated a rehabilitative suspension, and argued that the maximum that should be imposed in this case was a non-rehabilitative suspension. TPH-92; TPH-107-108. The Florida Bar was given an opportunity to rebut Respondent's arguments regarding the inappropriateness of a rehabilitative suspension, however, The Florida Bar was silent on this issue. TPH-112. The Referee then considered aggravation and mitigation and determined that a non-rehabilitative suspension was appropriate in this case.[8] If the Referee had applied

[8] In its initial brief, The Florida Bar misstates that the Referee mitigated a recommended sanction under Standard 7.1 (disbarment) to a non-rehabilitative 90-day suspension. TFB Initial Brief-12. The Referee's reference was to Standard 7.2 (suspension).

Standard 5.12, there is nothing in the record to indicate that the Referee's recommendation regarding the appropriate sanction would be any different. Considering the fact that the Referee recommended that Respondent be found guilty of **one** rule violation for fraud, outside the practice of law, and that the Referee took into consideration both aggravation and mitigation, a 90-day non-rehabilitative sanction is supported by the case law and the Standards.

3. Recommended Penalty Meets Purposes of Discipline

The purposes of discipline are well established. The punishment must be: 1) fair to the public, in protecting the public from an unethical attorney and in not denying the public access to a qualified attorney; 2) fair to the attorney, sufficient to punish a breach yet encourage rehabilitation; and 3) sufficient to discourage other attorneys from committing the same type of conduct. The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

The Referee recommended that Respondent be found guilty of violating **one** rule (Rule 4-8.4(c) (fraud, deceit, dishonesty or misrepresentation), in one transaction, unconnected with the practice of law. Respondent has no prior disciplinary history, and "is well respected in her community as an honest, hard working loyal friend involved in numerous community and church activities to the betterment of others." ROR-10. The misconduct in this case is an aberration of an

otherwise unblemished career which justifies much less than a rehabilitative suspension. The 90-day suspension recommended by the Referee meets the three-prong criteria for punishment, as the public will be protected and yet will not be denied access to a qualified attorney; the recommended penalty is fair to the attorney; and the penalty serves to deter others from being involved in similar misconduct. The 90-day recommended suspension meets all three purposes of the penalty criteria and should be adopted as an appropriate sanction by this Court.

B. Three-year Suspension is Not Appropriate

1. Bar's Cited Cases Not Applicable

The burden is on The Florida Bar to demonstrate that the Report of Referee is erroneous, unlawful or unjustified. See Rule 3-7.7(c)(5). The Florida Bar has failed to meet its burden. The Referee considered whether imposition of a three-year suspension was an appropriate sanction, after having been provided with The Florida Bar v. Klausner, 721 So. 2d 720 (Fla. 1998), by The Florida Bar during the penalty hearing. TPH-70-71. Klausner is again one of the cases cited by The Florida Bar in support of its current argument for a three-year suspension. The Referee, having considered a three-year suspension, ruled it out when she recommended the 90-day suspension. Her decision in this regard should be upheld.

The cases cited by the Bar are distinguishable from the instant case and are,

therefore, inapposite.

The Florida Bar v. Massari, 832 So. 2d 701 (Fla. 2002) involves the theft of client trust funds, by use of forgery to obtain those funds, resulting in disbarment. Massari, in connection with the practice of law, submitted a satisfaction and release of lien, which contained a forged signature of his client's that was notarized by Massari's longtime secretary, to a trust company so he could receive a $30,000.00 settlement check meant for his client. Massari then endorsed the check (without any authority to do so) and placed the check in his trust account. Massari did not tell his client that he had received the check and then proceeded to convert the entirety of the $30,000.00 for his own use. The client discovered what Massari had done, and the police were contacted. Massari paid back the $30,000.00 (minus attorney's fees) and convinced his client to sign a letter that the client did not wish to prosecute because he had received the money. During the investigation of the case, Massari produced yet another document containing the forged and notarized signature of his client, supposedly showing that the client had granted Massari authority to receive, possess and use the client's funds.

Massari was found guilty of six rule violations (4-1.4(b), 4-1.15(a), 4-1.15(b), 4-3.4(b), 4-8.4(a), and 4-8.4(c)). Additionally the referee found six aggravating factors (dishonest or selfish motive; pattern of misconduct; multiple

offenses; submission of false evidence, false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge wrongful nature of conduct; and substantial experience in the practice of law) and only one mitigating factor (absence of prior disciplinary record). This Court upheld the referee's recommendation of disbarment, stressing that the Court would not tolerate the misappropriation of client funds.

Nothing about Massari is comparable to the case at bar. Respondent's actions did not involve the misappropriation of client funds. Respondent did not forge any signatures or commit notary fraud.

In The Florida Bar v. Gold, 203 So. 2d 342 (Fla. 1967), Gold, in connection with the practice of law, forged names to a satisfaction of mortgage, witnessed the forgery and caused another to witness the forgery, took the acknowledgment and had the satisfaction filed in the public records of the county. As a result of the forgery, Gold obtained approximately $5,000.00 which he converted to his own use. The referee found that Gold admitted the forgery, uttering a forged instrument, and making a false certificate of a notary public. Gold was found guilty of eight different rule violations and was disbarred.

Again, the Bar's citation to a case involving misuse of client funds is misplaced. Further, Respondent has not been found guilty of, nor has The Florida

Bar charged her with forgery. The Referee has recommended that Respondent be found guilty of fraudulently altering a document pursuant to Rule 4-8.4(c). While the Bar wants to suggest that Respondent has committed forgery of a person's signature, the Referee made the following findings:

> Although there is no proof beyond a reasonable doubt that the Respondent Hall actually forged the signature, there is no doubt that her signature is genuine and this is a factor to be considered. A fraud was committed when the name of the document was changed and the language was changed from the original document.

ROR-9.

The Florida Bar's citation to The Florida Bar v. Forbes, 596 So. 2d 1051 (Fla. 1992) is inappropriate, as it involves an attorney convicted of felony bank fraud. Forbes was indicted by a federal grand jury for filing false information on a loan application for a condominium he was developing. Forbes was indicted with one count of conspiracy, one count of fraud and 10 counts of bank fraud. Forbes pled guilty to one count of bank fraud, was convicted of a felony, and sentenced to two years in prison with the condition that he serve six months in confinement. As part of the plea agreement, Forbes admitted knowingly making a materially false statement in the construction contract submitted to the bank in an effort to obtain financing, and misrepresenting the amount of the contract sum upon which the bank relied in approving his loan. The referee found Forbes guilty of four rule violations

(including rule 4-8.4(c)), found three mitigators, and recommended disbarment. This Court opined that a felony conviction justified disbarment.

In The Florida Bar v. Kickliter, 559 So. 2d 1123 (Fla. 1990), the attorney forged his deceased client's signature on a will and submitted the will to probate. As a result of the forgery, Kickliter was convicted of three third degree felonies: forgery, uttering a forged instrument, and taking false acknowledgment. This Court disbarred Kickliter for five years. Kickliter is another case of felony conviction involving forgery, which simply does not apply to Respondent's case.

The Florida Bar also cites to The Florida Bar v. Zinzell, 387 So. 2d 346 (Fla. 1980). Zinzell, in connection with the practice of law, prepared a trust for a client which named himself as the trustee. The client thought the document was a will, but it was actually a trust. Zinzell, in his capacity as trustee, transferred the client's properties to a company owned by Zinzell, and then mortgaged the properties (presumably using the money from the mortgages for his own use) and allowed the mortgages to go into foreclosure. Zinzell's client did not authorize the conveyance or the mortgage. The client's family spent approximately $70,000.00 to redeem the mortgages. Zinzell's client was 77 years old at the time of the misconduct and was under a voluntary guardianship when she executed the trust. Zinzell made no restitution and did not appear at the grievance committee or the referee hearing,

despite receiving notice. This Court disbarred Zinzell.

The Bar's application of Zinzell to the case at bar is misplaced. If the Bar is suggesting that Respondent took advantage of an elderly person, such theory is disabused by the Referee's finding at the final hearing found that Ms. Godwin was obviously an intelligent person, and that the Referee was not "going to go on and on about her advanced age." TFH-467, Vol. II. Although The Florida Bar argued Ms. Godwin's vulnerability during the penalty hearing as an aggravating factor, the Referee clearly disagreed with The Florida Bar in this regard. TPH-77. Once again, the Bar fails to acknowledge that Respondent's conduct did not involve her clients and was unconnected to her practice of law. Unlike Zinzell, Respondent has actively participated in these proceedings.

As it did at the penalty hearing, the Bar suggests that The Florida Bar v. Klausner, 721 So. 2d 720 (Fla. 1998) is applicable and provides the only support for its request for imposition of a three-year suspension. The felony conviction and facts of Klausner make in inapposite as well. Klausner, in connection with the practice of law, recreated existing stipulations, signed the debtors' names without their knowledge, and submitted them to the court during two separate abatement hearings in order to avoid abatement. Klausner lied to a judge when he was questioned about the signatures, and also lied to the state attorney about signing the

documents. Klausner eventually admitted that he forged the documents and was charged with felony and misdemeanor charges (scheming to defraud, two counts of forgery, uttering a forged instrument, perjury when not in an official proceeding, and making a false official statement). Klausner pled nolo contendere to the felony charges, and no contest to the misdemeanor charges; Klausner was adjudicated guilty of the misdemeanors, and sentenced to one day in jail for time served. In regard to the felonies, adjudication of guilt was withheld, and Klausner received three years of probation. The referee found Klausner guilty of six rule violations and took into consideration Klausner's age, his date of bar admittance, and lack of prior discipline when recommending a three-year suspension. This Court found that the cases relied upon by the referee formed a reasonable basis for the referee's recommendation, and adopted the referee's recommended three-year suspension sanction.

Respondent has not been convicted of any felonies or misdemeanors in connection with her violation of Rule 4-8.4(c). She has not lied to the court or to the bar investigators about altering the documents in question (despite the Bar's desperate attempts to convince the Referee of such. TFH 432-434; TPH 74-75)). As set forth above, Respondent has neither been charged with nor been found guilty of, forgery. Klausner, the only case cited by The Florida Bar in which a three-year

suspension was imposed, does not support the Bar's proposition that this Court should disregard the Referee's recommendation of a non-rehabilitative sanction in favor of a three-year rehabilitative suspension.

Lastly, the Florida Bar relies on The Florida Bar v. Baker, 810 So. 2d 876 (Fla. 2002). Baker forged his then wife's signature on several documents in connection with the sale of their property. Baker caused his secretary to unlawfully notarize two of the forged signatures and sent the forged documents to his attorney for use in closing on the sale of the property. Baker purportedly sold the home to avoid foreclosure and used the proceeds from the sale to pay marital debt.

The referee found Baker guilty of three rule violations – 4-8.4(a), 4-8.4(b), and 4-8.4(c) – and recommended disbarment for a minimum of five years. Baker appealed, and this Court found that Baker's case did not warrant disbarment. This Court found Baker's case more analogous to The Florida Bar v. Rose, 607 So. 2d 394 (Fla. 1992), cited *supra,* in which Rose received a 30-day suspension for forging his wife's signature. However, the Court found that a 91-day suspension was warranted in Baker's case, because Baker furthered the forgery by corrupting a notary, affected title to real property and used a forgery to negotiate a check. This Court took into consideration the referee's findings that Baker had committed three criminally punishable forgeries on legal documents, had the signature notarized and

witnessed by two persons, and submitted forged documents for use in real estate closing, when imposing the 91-day suspension. The Baker court did not find any mitigating factors.

Again, *Respondent has not been found guilty of forgery*. Respondent did not sign any one else's name to the agreement at issue. She was found to have altered the language and the title of the document. The Court's reasoning in Baker supports Respondent's position that a non-rehabilitative suspension is appropriate. As recognized by the Baker court, "Although lawyers may be disciplined for conduct that is not related to the practice of law, this Court has recognized that misconduct not connected with the practice of law is to be evaluated differently and may warrant less severe sanctions than misconduct committed in the course of the practice of law." Id. at 881.

Baker's actions in corrupting a notary, affecting title to real property, and negotiating a check obtained by his forgery put him in the category of rehabilitative suspension. Additionally, this Court took into consideration the referee's specific findings that Baker's forgeries were criminally punishable. Unlike Baker, and similar to Rose, Respondent has not corrupted a notary by her misconduct. Unlike Baker, Respondent did not negotiate a check in relation to her misconduct. Additionally, in Respondent's case, the Referee has not made any findings that

Respondent's misconduct is criminally punishable.

If Respondent affected the title of real property by her misconduct, such had been cured by Respondent before the Bar filed its complaint, because Respondent filed a release of the sales portion of the agreement that was recorded in the public records so as to remove any cloud on the title that might have been caused by Respondent recording the document. RPH-5; TPH-94-95. Respondent eventually executed a quit claim deed which released the lease portion of the agreement as well, ensuring that any sale of the Godwins' property would not be subject to her lease. The property is free-and-clear of any claim by Respondent, and could be sold by Mrs. Godwin, if she chose to do so. TFH-250. In Baker, the cloud remained on the title because the attorney had forged his wife's signature in order to sell the property. Baker would be unable to remove the cloud on the property in his circumstances without a separate legal action.

The Referee's finding of the significant mitigating factors including no prior disciplinary history in her 22 years of practicing law and that she is "well respected in her community as an honest, hard working loyal friend involved in numerous community and church activities to the betterment of others" (ROR-10) also distinguish this case from Baker, in which no mitigators were found.

Respondent's case is much more analogous to Rose, as the Referee has

recommended that Respondent be found guilty of one rule violation not related to the practice of law, in which a non-rehabilitative suspension was imposed. In applying the reasoning of the Baker court, a non-rehabilitative suspension is appropriate in Respondent's case.

The Bar has cited to a total of seven cases in support of its argument that a three-year suspension is appropriate; however, in only one of the cases did this Court impose a three-year suspension. Five of the seven cases support disbarment and one case is for a 91-day suspension. Three of the cases involve the misuse of client trust funds and three of the cases involve the conviction of a felony. In five of the seven cases, the misconduct occurred in connection with the practice of law. Of the two cases in which the misconduct occurred outside the practice of law, one resulted in disbarment and the other in a 91-day suspension. Six of these seven cases were considered by the Referee at the penalty hearing and rejected. The Bar cannot even come up with more than one case to support its request for a three-year suspension and it was the same case (Klausner) given to the Referee at the penalty hearing, at which time the Referee rejected such a penalty. If the Bar's suggestion is that this case merits a downward departure from disbarment, based upon the findings of mitigation, then it should present this Court with some cases involving one incident of misconduct under Rule 4-8.4(c) unconnected to the practice of law

which does not involve misuse of client funds or felony convictions. The Bar has not yet done so because no such cases exist.

2. Rehabilitative Suspension Not Appropriate

The Referee considered and excluded the potential sanction of a rehabilitative suspension. At the penalty hearing, Respondent's counsel argued that this is an isolated incident regarding Respondent's personal conduct unrelated to the practice of law, and that there was nothing about this case that mandates a rehabilitative suspension. TPH-92. The Florida Bar was given ample opportunity to rebut Respondent's argument that a rehabilitative suspension was not mandated in this case, however, The Florida Bar was silent on this issue. TPH-112.

Respondent has done everything she can to make the situation right. Before the bar complaint or any criminal action was filed against Respondent, she executed a release of the sales portion of the agreement to ensure that there was no cloud on the title of the property. RPH Exhibit-5. Respondent completed the pre-trial diversion requirements in less than three weeks' time. RPH Exhibit-7. Any rehabilitation to be done has been done. Respondent could not in the future establish any further rehabilitation than what she can today. With no set parameters of rehabilitation, Respondent may be kept from the practice of law indefinitely, based on an isolated incident, occurring outside the practice of law, if a

rehabilitative suspension is imposed. The Siegel, Schultz, Varner and Nuckolls cases, in which the Bar sought rehabilitative suspensions which recommendations were rejected by this Court and the Rose and Walker cases, support the Referee's recommendation that a non-rehabilitative suspension is appropriate in this case.

3. Three- year suspension does not meet purposes of discipline

Given the three-prong test set forth in Pahules, *supra*, a three-year suspension would be an unduly harsh punishment in the instant case. First, this was an isolated incident involving one couple in a personal transaction; the "public" does not need protection from Respondent. Imposition of the three-year suspension would deprive the public of access to an ethical attorney who made a mistake in her personal conduct. This is an attorney who is "well respected in her community as an honest, hard working loyal friend involved in numerous community and church activities to the betterment of others." ROR-10. Such a penalty would do more harm to the public than good.

Additionally, a three-year suspension would be unfair to Respondent, as a rehabilitative suspension is not warranted in the instant case. While a three-year suspension certainly would serve to deter others from committing similar misconduct, a three-year suspension would not meet the first two purposes of the penalty criteria. It is the three-year suspension suggested by the Bar that does not

meet the three-fold purposes for penalty sanctions in the instant case.

CONCLUSION

The Florida Bar has failed to establish that the Referee's recommended sanction is not supported by existing case law. Moreover, the Bar has failed to establish that the cases it cited in support of its request for a three-year suspension are in any way applicable to the facts and conclusions at bar. Respondent urges this Court to uphold the Referee's recommendation of a 90-day non-rehabilitative suspension, as the proposed discipline is supported by existing case law (Siegel, Schultz, Rose, Nuckolls, Varner and Walker), the Standards, and adequately meets the three purposes of disciplinary sanctions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of _____, 2009, a true and correct copy of the foregoing Answer Brief was furnished via U.S. Mail to: Olivia Paiva Klein, Bar Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300.

_____

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

Undersigned counsel hereby certifies that the Respondent's Answer Brief is submitted in 14 point proportionally spaced Times New Roman font, and that the Answer Brief has been filed by e-mail in accordance with the Court's Order of September 13, 2004 (AO SC04-84). Undersigned counsel does hereby further certify that the electronically filed version of this Answer Brief has been scanned and found to be free of viruses, by ZoneAlarm Security Suite.

_____

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