IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SHARI NICOLE HINES,

Respondent.
_____/

Supreme Court Case
No. SC08-2297

The Florida Bar File
No. 2008-51,148(17A)

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the Bar" or "The Florida Bar." Shari Nicole Hines, Appellee, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __. Further, the symbol "PTS" will be used to designate the joint pretrial stipulation entered into by the parties.

STATEMENT OF CASE AND FACTS

The Florida Bar's statement of the case and facts is incomplete and contains matters not found supported by the Referee and as such the Respondent, Shari Nicole Hines, feels compelled to set forth a more accurate recitation of the case and facts.

On December 10, 2008, The Florida Bar filed a one count complaint against the Respondent and the case was assigned to Honorable Diana Lewis to serve as Referee in this matter. The final hearing was held on Thursday, May 7, 2009 and at the conclusion of the trial the Referee entered extensive factual findings wherein she found the Respondent not guilty of all rule violations alleged by The Florida Bar. See TT 247-258. This ruling was reduced to a Report of Referee which was served on June 5, 2009. Notwithstanding a specific finding that the Bar had failed to meet its burden of proof on any issue presented,[1] the Bar now seeks review of the not guilty finding and seeks to secure a ninety one day suspension for a lawyer who has never previously been disciplined.

[1] In fact on one charge the Referee specifically found that the Bar had presented **no** evidence at all. See RR at paragraph 26. On yet another charge the Referee pointedly found that there "was not a scintilla of evidence." See RR at paragraph 27.

The parties entered into a detailed pre-trial stipulation that encompassed the salient facts of the case. The Referee adopted these agreed facts into her Report of Referee and set them forth as follows:

> 1. Prior to November 2007, part of respondent's law practice included real estate transactions and she was introduced to a company known as Paramount Lending Group (hereinafter "Paramount").
>
> 2. The principal of Paramount was John Mohan (hereinafter "Mohan"), a nonlawyer. Ida Ocasio (hereinafter "Ocasio') was employed by Paramount as a non-lawyer title processor.
>
> 3. In late November 2007, the Respondent began accepting potential real estate closings from Paramount. During the course of the business relationship, the Respondent assumed responsibility for two closings that were generated by Paramount. The second of these closings was a transaction between Alyce and Frederick Droege (the sellers) and George Melendez (the buyer).
>
> 4. Prior to either of the above-mentioned real estate transactions, the Respondent had relocated her law office to the same building as Paramount and became a tenant of Paramount.
>
> 5. Prior to either of the above-mentioned real estate transactions, the Respondent opened a new escrow account for any and all transactions she would complete with Paramount. The Respondent gave Mohan shared signatory authority over this escrow account.
>
> 6. The Droege to Melendez transaction involved the sale of a home owned by the Droeges and located in Deltona, Florida.
>
> 7. On or about December 17, 2007, the Respondent was advised by Ocasio that the Droege to Melendez transaction needed to close that day in Orlando, Florida, pursuant to the closing instructions provided by the lender. As a result of this conversation, the

Respondent forwarded, via Fed Ex, 10 blank, signed escrow account checks, to be used for the closing.

8. On December 18, 2007, the closing was conducted by Ocasio, with all parties executing the required closing documents. The Respondent did not attend the closing.

9. Respondent did not see, review, or approve the closing documents before the closing.

10. The HUD-1 closing statement executed by all parties to the closing indicated that a mortgage held by Dovenmuehle Mortgage, Inc, in the amount of $34,714.10 was to be satisfied and that the Droeges were to be paid the sum of $128,802.68 as their proceeds from the sale.

11. After executing their closing documents the Droeges were given, by Ocasio, an escrow account check drawn in their favor in the amount of $128,802.68.

12. The Droeges deposited this $128,802.68 into their account at SunTrust, were advised by the bank that there would be a ten day hold on the check but that ten thousand dollars ($10,000.00) of that check would be credited immediately and available for use by the Droeges. The Droeges wrote checks against this $10,000.00.

13. On December 24, 2007, SunTrust advised the Droeges that the $128,802.68 was being dishonored because a stop payment order had been issued regarding said check.

14. It was subsequently determined that Mohan had placed a stop payment order on the $128,802.68 check and that he had misappropriated these funds, as well as the required mortgage pay-off in the amount of $34,714.10 to his own use by electronically transferring these funds to his own bank account.

15. The Respondent, through a SunTrust banking officer, was made aware of the stop payment order, on or about December 27, 2007.

16. The Respondent was able to recover the sum of $45,000.00 from Mohan, wired this sum to the Droeges on or about January 2, 2008.

17. After discovering that Mohan had misappropriated the aforementioned funds, the Respondent reported the matter to criminal authorities, who initiated a successful criminal action against Mohan.

18. The problems with the Droege to Melendez transaction were reported to respondent's underwriter, Attorney's Title Insurance Fund.

19. On February 28, 2008, the Fund, through its counsel, satisfied the Dovenmuehle mortgage and also sent the Droeges a check in the amount of $83,802.68. This check, when coupled with the $45,000.00 previously sent to them by the Respondent, completed the restitution owed to the Droeges as a result of Mohan's theft of the proceeds from their original escrow check. RR 2-5.

The foregoing factual recitation, also found verbatim in the party's joint pretrial stipulation, resolved all contested factual matters except two and they were: (1) whether the Respondent failed to supervise Ocasio regarding the Droege to Melendez transaction and (2) whether the Respondent unethically allowed Mohan, a nonlawyer, to be a signatory on her escrow account. All remaining issues that were listed by the parties as still in dispute prior to the trial was whether the Respondent had violated any of the rules set forth in the Bar's complaint and whether a disciplinary sanction should be imposed.

To resolve these remaining disputes the parties introduced certain exhibits and presented various witnesses. The Referee briefly summed up these witnesses as follows:

> During the final hearing I heard testimony from Alyce Droege, the seller of the property in question, Susan D. McCabe, Esq. and Phillip F. Bonus, Esq., who represented Alyce and Frederick Droege with their post closing problems, Michele Primeau, Esq., Shari Hines, Esq., the Respondent, Kaye Ann Baxter, Esq., who was primarily a character witness but she had represented the Respondent relative to the legal problems that arose because of the Droege closing and Barry M. Sickles, Esq., who was a character witness. RR para.20.

After considering the testimony of the various witnesses and the trial exhibits the Referee concluded that the Bar had failed to establish its case. The Referee succinctly summed up the Bar's case as follows:

> At the core of the Bar's presentation was the fact that the Respondent had placed a non-lawyer on her escrow account as a signatory and that this decision ultimately provided the vehicle by which Mr. Mohan engaged in criminal conduct. The referee was presented with no evidence that it was unethical for an attorney to have a non-lawyer signatory on a trust account. In fact, the Respondent pointed to a Florida Bar Ethics Opinion that specifically sanctioned such action. See Fla. Ethics Opinion 64-40. Furthermore the referee finds that at the time of her decision to make Mr. Mohan a signatory on the account, she had no reason not to trust him and there were no warning signs that he might engage in criminal activity until he had stolen the money. RR para.22.

The Referee then carefully analyzed each rule violation plead by the Bar and during her ruling even encouraged the Bar to make further argument on particular rules prior to entering her ruling. The Referee in her report resolves each of the alleged rule violations as follows:

> 24. As to R. Regulating Fla. Bar 4-1.1 [A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.], I find the

Respondent did not violate this rule as the Bar did not present clear and convincing evidence that this rule was violated.

25. The Referee finds that the Respondent did not violate R. Regulating Fla. Bar 4-1.15 [A lawyer shall comply with the rules Regulating Trust Accounts.] in that there was no evidence that merely having a lay person on an escrow account was unethical. The referee recognizes, as does the Respondent after the fact, that this was not necessarily a good business practice or the exercise of prudent judgment.

26. The Referee finds that the Respondent did not violate R. Regulating Fla. Bar 4-5.3(a) [A person who uses the title paralegal, legal assistant, or other similar term when offering or providing services to the public must work for or under the direction of or supervision of a lawyer or an authorized business entity as defined elsewhere in the Rules Regulating The Florida Bar.] as the Bar has presented no evidence that would form the basis for a violation of this rule. The referee recognizes that Respondent's efforts to review the closing documents prior to the closing were thwarted by Ocasio. when the closing documents were received they appeared to be in good order with the exception of a missing deed that may or may not have been available at the closing.

27. The Referee finds that the Respondent did not violate R. Regulating Fla. Bar 4-5.3(b) [With respect to a nonlawyer employed or retained by or associated with a lawyer or an authorized business entity as defined elsewhere in the Rules Regulating The Florida Bar: (1) as a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (2) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (3) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if (A) the lawyer orders or, with the knowledge of the specific conduct ratifies the conduct involved; or (B) the lawyer is a partner or

has comparable managerial authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated and fails to take reasonable remedial action.]. The Referee finds that the Respondent exercised poor judgment in forwarding blank pre-signed escrow account checks to the closing paralegal. However, they were written to the proper parties.[2] The Referee also finds that Respondent's attempt to place controls on the escrow account utilized by Mohan were unsuccessful. It was Mohan who committed the criminal act. The rule requires that a lawyer is responsible for the conduct of another person if they ordered it, ratified it or knew of the conduct at the time. There was not a scintilla of evidence to that effect.

28. The Referee finds that the Respondent did not violate R. Regulating Fla. Bar 4-5.3(c) [Although paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer shall review and be responsible for the work product of the paralegals or legal assistants.]. This rule makes a lawyer responsible for the work product of their paralegals and legal assistants. The only testimony was that the Respondent was making every effort to get the closing documents, before and after the closing, and that ultimately she secured the closing file and reviewed it. The Respondent testified that the only problem she saw with the closing file was that the original executed deed was missing but there is no evidence that the deed was actually missing at the time of the closing.

29. The Referee finds that the Respondent did not violate R. Regulating Fla. Bar 4-8.4(a) [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.] as the Referee finds that the Respondent had no knowledge of what Mr. Mohan was doing, until after it had occurred. The fact that the Respondent was initially misled by Mr. Mohan that it was just a "mistake" does not change the opinion of the Referee.

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[2] Further, the Bar has raised no argument that the checks were filled out in an incorrect amount. (footnote added by Respondent).

> 30. I find the Respondent not guilty of 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 . . .]. The conduct described in the testimony and evidence does not appear to fit the type of conduct specifically referenced in the rule. The Bar did not present clear and convincing evidence that the Respondent's conduct was prejudicial to the administration of justice. The Referee does not condone or endorse the decisions of the Respondent of allowing Mohan access to the escrow account. It is extremely unfortunate that the Droeges were harmed as a result of Mohan's criminal conduct.

Having found the Respondent not guilty of all charges, the Referee did not make a sanction recommendation and found that both sides should bear their own costs. The Bar has filed an appeal of the referee's findings of fact, her not guilty findings and seeks to impose a disciplinary sanction where none is warranted.

SUMMARY OF THE ARGUMENT

A Referee has found a lawyer not guilty of charges that were leveled against her by The Florida Bar. The Referee specifically found not only that the Bar had failed to prove its case by clear and convincing evidence, the Referee further found that the Bar had presented no evidence at all as to one alleged rule violation and as to another claim of ethical breach specifically found that there "was not a scintilla of evidence" relative to that charge. With this background in mind the Bar bears a heavy burden to demonstrate that the Referee's findings are clearly erroneous and lacking in evidentiary support. Not only has the Bar failed to meet its evidentiary burden at trial, it has failed to meet its burden on this appeal.

Rather than deal with the admitted facts in the parties joint pretrial stipulation, the Bar's brief focuses its commentary on the complainants and improperly attempts to bootstrap its failed factual arguments to the poor health and financial conditions of the complainants in an attempt to sway sympathy. Yes, the Droegues were selling an investment home because of their deteriorating financial conditions and did not deserve to have their real estate proceeds stolen by a third party. However, that third party was not the Respondent in this case and she can not be blamed for the criminal actions of this third party.

The Bar takes issue with the Respondent because she decided that a nonlawyer would be added as a signatory on one of her trust accounts. There is

nothing in the R. Regulating Fla. Bar that prohibit such action and in fact the Bar's own Ethic's Opinions confirm that it is not unethical to do so. The Bar attempts to use this fact, to then convince this Court that the Respondent should now be ethically responsible for the criminal conduct of a third party even though she did not order it, ratify it, or even know of the conduct at the time that it occurred, all of which are necessary elements to hold an attorney responsible for the misdeeds of a nonlawyer employed in any capacity by that lawyer. Accordingly, the Referee should be affirmed.

ARGUMENT

I. A LAWYER IS ONLY ETHICALLY RESPONSIBLE FOR THE MISDEEDS OF A NONLAWYER IF THE LAWYER ORDERS THE CONDUCT, RATIFIES IT OR KNOWS OF THE CONDUCT AT THE TIME AND FAILS TO PREVENT THE CONDUCT.

The Florida Bar, in this appeal, seeks to overturn a Referee's recommendation that an attorney was not guilty of all charges leveled by the Bar because the Bar had failed to prove its case by clear and convincing evidence and in fact on some of the charges presented no evidence whatsoever to support some of the rule violations alleged by the Bar in its Complaint. It is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." *The Florida Bar v. Canto*, 668 So.2d 583 (Fla. 1996); *The Florida Bar v. Porter*, 684 So.2d 810 (Fla. 1996). Just like it did at trial, The Florida Bar has failed to meet its burden.

The core facts of this case are not in dispute and were agreed to by the parties in a joint pretrial stipulation that was adopted by the Referee in her Report. RR 2-5. These non-disputed facts show that a lawyer, the Respondent, Shari Nicole Hines, practiced in the real estate field and was ultimately introduced to a man by the name of John Mohan and his company called Paramount Lending

Group ("Paramount"). The trial testimony showed that from all outward appearances Mohan and his company were legitimate and successful. TT 163-164.

In November 2007, the Respondent moved her office to the same building as Paramount and became a tenant of Paramount. RR 3. At this juncture, the Respondent was referred two closings by Paramount, where Paramount was the mortgage broker. RR 2. No problems arose regarding the first closing which was already completed at the time that the second closing, involving Alyce and Frederick Droege (the complainants) began to be processed.

Prior to relocating her office in November 2007, and at a time when she had agreed to accept referrals from Paramount but had not decided to establish her primary office at the same location as Paramount, the Respondent opened a new trust account for all Paramount transactions and gave Mohan shared signatory authority on this account only.[3] RR 3. As the Bar stipulated, the Respondent was cognizant of the inherent dangers of having a nonlawyer signatory on a trust account and therefore placed caps on the amounts of money that Mohan could access or control in the trust account. RR 3.

[3] The Respondent believed that it was necessary to have someone else available to sign checks on Paramount transactions if she was unable to personally attend to the matter due to the initial intention of her only maintaining a satellite presence in western Broward County while keeping her office in eastern Broward County.

On or about December 17, 2007, the Respondent was informed by Ida Ocasio, a Paramount employee, that the Droege transaction needed to close that day and that it would be closed in Orlando, Florida. RR 3. Previous to this conversation the Respondent was aware of the transaction and had in fact already prepared a title commitment for the transaction. See Resp. Ex 1 which is a copy of the commitment. As a direct result of her conversation with Ocasio, the Respondent signed 10 blank escrow account checks to be used for the closing and forwarded them to Ocasio via Federal Express. RR 3.

The closing was conducted on December 18, 2007, with such closing being attended by the seller (the Droeges) and the buyer. RR 3. The Respondent was not in attendance. RR 3. The Hud-1 closing statement indicated that a $34,714.10 mortgage needed to be satisfied and that the proceeds of the sale were to be made payable to the Droeges in the amount of $128,802.68. RR 4. After the closing documents were executed, Ocasio gave the Droeges their proceeds check in the amount of $128,802.68. RR 4.

The Droeges deposited their proceeds check and were advised by the bank that there would be a ten day hold on the check but that $10,000.00 would be immediately credited to the account for their use. RR 4. The Droeges issued checks against said $10,000.00. RR 4.

On Monday, December 24, 2007, the Droeges bank, SunTrust, advised that the $128,802.68 check was dishonored because a stop payment order had been issued.[4] RR 4. The Respondent was not advised of any problem with the closing or a dishonored check until Thursday, December 27, 2007. RR 5. She immediately attempted to find out what had occurred and had difficulty locating Mohan. TT82-83. However, she ultimately located Mohan, was lied to by Mohan about what had occurred but was able to recover $45,000.00 and wired said funds to the Droeges on January 2, 2008 which was 3 business days after the problem had been reported to her. RR 5. The remaining proceeds were sent to the Droeges on February 28, 2008 by the Attorney's Title Insurance Fund. RR 5. The Fund also satisfied the mortgage that should have been satisfied after the closing. RR 5. Ultimately, all dollars that were due to the Droeges or needed to be paid on their behalf were either received by the Droeges or paid on their behalf. RR 5.

During her attempts to recover the closing proceeds that were stolen by Mohan, the Respondent made a criminal complaint to the Sunrise Police Department on December 31, 2007. TT 26. The criminal authorities successfully prosecuted Mohan and secured a conviction for his misdeeds. RR 5.

Also as part of her attempts to correct the problems caused by Mohan, the Respondent did notify her underwriter, the Fund, by letter dated January 16, 2008.

[4] Subsequent investigation revealed that Mohan had placed this stop order. RR 4.

The Droeges lawyer also put a claim into the Fund and as is referenced above, the Fund made full restitution to the Droeges. RR 5.

The Bar in its brief focuses the great majority of its commentary on the health and financial well being of the Droeges.[5] While the Respondent does not take issue that there were significant health issues and that the family was already in financial distress (which was the reason they were selling this investment property), these facts are irrelevant to the major issues in this case – did the Respondent act unethically by making Mohan a signatory on the trust account that would be used for Paramount closings or did she fail to properly supervise Mohan or Ocasio, who conducted the closing. The Referee resolved both of these issues in the Respondent's favor.

The Bar, in its brief claims that the Respondent took no precautions regarding Mohan but the parties' pretrial stipulation (agreed to by Bar counsel prior to the final hearing) clearly explains that financial caps were placed on Mohan. See PTS para. 5. Further, the Respondent testified that she kept the

[5] The Bar's arguments are more properly addressed in the civil arena. See *The Florida Bar v. DellaDonna*, 583 So. 2d 307 (Fla. 1989); *The Florida Bar v. Neale*, 384 So. 2d 1264 (Fla. 1980). As such the Referee properly limited the Bar's attempts to secure detailed information on the attorney's fees paid the Droeges relative to their claim.

physical checks under her custody and control.[6] TT 165-166. The Bar also makes the claim that these alleged lack of controls allowed Mohan to steal trust funds. However, as the Referee points out it was the stop order that provided the vehicle to steal monies and that the Respondent "had no reason not to trust (Mohan) and there were no warning signs that he might engage in criminal activity until he had stolen the money." RR 7.

The Bar has also argued that forwarding blank checks to Occasio was reckless but as the Referee correctly points out each check was properly completed and forwarded to the appropriate person. RR 9. The Referee also specifically countered the Bar's argument regarding review of the closing documentation in that when the documentation was finally reviewed it appeared to be in good order. RR 8.

While the Bar seeks to secure a conviction for a lack of supervision, it never explains how the respondent ordered the conduct, ratified it or knew of the conduct at the time so it could have been prevented. The reason the Bar does not argue this point is that they can not prove any of these elements. It is evident that the Respondent's knowledge only comes after Mohan had placed the stop order on the check. The record is also clear that once she was informed that there was an issue with the check she made the appropriate inquiries, was admittedly initially

[6] That is why Mohan had to place a stop order and electronically transfer funds to his accounts.

misdirected by Mohan's lies, but ultimately was successful in recovering $45,000.00 from Mohan's bank account and then turning the case over to the criminal authorities for a successful criminal prosecution.

The last argument that needs to be addressed is the Bar's claim that the Referee placed too much reliance on an Ethic's Opinion provided to the lawyers of this state by The Florida Bar itself. Putting aside any claim of esttopel that might be present it is clear that the Ethic's Opinion only forms a partial basis of the Referee's conclusions in this case. However, this Ethics Opinion clearly opines that it is not unethical for a lawyer to have a nonlawyer signatory on a trust account. See Fla. Bar Ethics Opinion 64-40. While this Ethics Opinion was reconsidered in 1987, this reconsidered opinion also clearly states that it is "permissible for a trusted nonlawyer employee to draw checks on the trust account upon proper authorization and under appropriate supervision." At the time that Mohan was added as a signatory on the trust account that was going to be used solely for any closings related to his own clients, he was trusted and as the Referee pointed out the Respondent "had no reason not to trust him" until such time as it was discovered he had stolen money. RR 7. The Respondent has also readily conceded that the Ethics Opinion is not binding precedent and that the opinion also plainly states that the lawyer is still ultimately responsible to ensure that the correct trust accounting rules and regulations are followed. However, the Bar has

advanced no case law or other precedent to say that it is unethical to have nonlawyer's signatories on a trust account.[7] Further the Bar presented no expert testimony on this point and the best they can point to in the record was the testimony from two lawyer witnesses called by the Respondent that they would not have a nonlawyer signatory on their trust account. As the Referee properly found, this is not enough to sustain a conviction by clear and convincing evidence.

II. NO DISCIPLINARY SANCTION IS WARRANTED IN THIS CASE.

The Referee found the Respondent not guilty and did not enter any recommendations regarding sanction. However, the Bar seeks to overturn this finding and has requested this court to impose a 91 day suspension for a lawyer who has never previously been disciplined and for unexpected criminal conduct by a third party.

The Supreme Court in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. Also see The Standards for Imposing

[7] If this were true many a large or small law firm in the state would need to reconsider how their trust accounts are operated and managed through a professional bookkeeping department.

Lawyer Sanctions, Standard 1.1. The sanction proposed by the Bar does not meet these criteria.

In all cases it is important to discuss the mitigation and aggravation that is present. In terms of aggravation the Referee found none. The Referee also noted in her report that:

> Respondent is 37 years old and was admitted to The Florida Bar in July 1999. She is not a member of any other state bar. From May 2002 until January 2005, she ran and managed her own title agency, and supervised a staff of "between four and five." At the time of the incident charged in the Bar's complaint, Respondent's law practice focused primarily on personal injury and real estate law. Respondent is not currently practicing law, is no longer doing title work, and has gone on inactive status with The Attorney's Title Insurance Fund. Respondent also expressed remorse, and both Kaye Ann Baxter, Esq., and Barry M. Sickles, Esq., testified as to their good opinion of her character. Finally Respondent has no prior disciplinary record. See Florida Standards for Imposing Lawyer Sanctions, Standard 9.3, Mitigation.

The Bar ignores these findings in its sanction argument. Further, notwithstanding that the Bar seeks a 91 day suspension it advances no real authority for this position. Of the case law cited by the Bar only one case resulted in a 91 day suspension. *The Florida Bar v. Flowers*, 672 So. 2d 526 (Fla. 1996). In *Flowers* a lawyer had been found guilty of "ratifying misconduct of a non-lawyer associated with the lawyer," a lack of competence regarding one case and had also been found guilty of a variety of offenses relative to his neglect and mishandling of a guardianship. Not only are there two disciplinary cases being

resolved for this 91 day suspension the lawyer had a lengthy disciplinary history that consisted of a private reprimand, public reprimand, and a ten day suspension. Clearly, the *Flowers* case is factually distinguishable.

The Bar also points to a 90 days suspension case where a lawyer had an unethical relationship with a nonlawyer who he failed to supervise. *The Florida Bar v. Lawless*, 640 so. 2d 1098 (Fla. 1994). Not only was the conduct worse in *Lawless* the lawyer had two prior public reprimands and a private reprimand.

The Bar also cites to a one year suspension case where the lawyer assisted a nonlawyer in the unlicensed practice of law and failed to properly supervise that nonlawyer in any manner. *The Florida Bar v. Abrams*, 919 So. 2d 425 (So. 2d 425 (Fla. 2006). Factually, this case is not even close to the alleged lack of supervision of one closing and the failure to detect criminal activity before it occurred.

Lastly the Bar does cite to a public reprimand case, which reprimand was imposed because the lawyer failed to properly supervise an office manager relative to the handling of the firm's trust account. *The Florida Bar v. Armas*, 518 So. 2d 919 (Fla. 1988). Unfortunately, this was not a contested case on appeal and the facts are a bit sketchy, the opinion notes that the lawyer was found guilty of failing to properly maintain his trust account. Another similar case is *The Florida Bar v. Perez*, 608 So. 2d 777 (Fla. 1992). In *Perez* the lawyer was publicly reprimanded relative to the mishandling of trust money by a nonlawyer.

A 91 day suspension is not warranted in this case. The cases cited by the Bar to support this proposition are factually and significantly worse than the case at hand and these lawyers had extensive disciplinary history. At most, should the Court overturn the Referee's not guilty findings, this case would warrant a public reprimand.

Conclusion

The Referee carefully considered the parties joint pretrial stipulation, the testimony from a variety of witnesses, the exhibits introduced into evidence and the argument of counsel and reached the decision that the Respondent should be found not guilty of all the charges being raised by The Florida Bar. In this appeal the Bar needed to demonstrate that the Referee's findings were "clearly erroneous and lacking in evidentiary support" and they have failed to do so.

In this case the Bar seeks a disciplinary sanction based upon its mistaken belief that the lawyer should be held responsible for the criminal actions of a third party when the lawyer did not order, ratify or know of the conduct until after it was too late to stop it and when the lawyer found out what this third party had done, recovered what monies she could directly from that third party and then reported him to the criminal authorities who secured a conviction. Ultimately, the complainants were fully restituted for the check that was initially dishonored and their mortgage was satisfied. On these facts, there should be no finding of guilt.

WHEREFORE the Respondent, Shari Nicole Hines, respectfully requests that the Court uphold the Referee's finding of not guilty, impose no sanctions in this case, award the Respondent her costs in defending this appeal, and grant any other relief that this Court deems reasonable and just.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this ____ day of December, 2009 to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 and to Kenneth Marvin, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief or the e-mail forwarded to the Court has been scanned and found to be free of viruses, by McAfee.

Respectfully submitted,

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