IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	**Supreme Court Case No. SC08-2297**
Complainant,	
v.	
SHARI NICOLE HINES,	**The Florida Bar File No. 2008-51,148(17A)**
Respondent.	
_____/	

THE FLORIDA BAR'S INITIAL BRIEF

ON APPEAL FROM A REPORT OF REFEREE

LORRAINE CHRISTINE HOFFMANN, #612669
Bar Counsel
The Florida Bar
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, Florida 33323
(954) 835-0233

KENNETH LAWRENCE MARVIN, #200999
Staff Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

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

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Florida Bar is seeking review of a Report of Referee recommending that respondent be found not guilty of the charges advanced in The Florida Bar's complaint. Throughout this Initial 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 two-volume transcript of the final hearing conducted on May 7, 2009 will be designated as TT1 or TT2 (indicating transcript volume number), followed by ___ (indicating the referenced page number). [By example, a reference to transcript volume 1 on page 38 will be set forth as TT1, 38.] The Florida Bar will be referred to "the Bar." Respondent Shari Nicole Hines will be referred to as "respondent."

THE STANDARD OF REVIEW

As to the facts in a Bar disciplinary case, the referee's findings are presumed to be correct unless the appellant demonstrates clear error or a lack of evidentiary support. Absent such evidence, the Court will not reweigh the evidence or substitute its judgment for that of the referee. The Florida Bar v. Rose, 823 So. 2d 727, 729 (Fla. 2002). The Court has more latitude with regard to the recommended discipline, however, and may disregard a referee's determination if the sanction recommended has no reasonable basis in the case law or in the *Florida Standards for Imposing Lawyer Sanctions.* The Florida Bar v. Mason, 826 So. 985, 987 (Fla. 2002).

STATEMENT OF THE CASE

At a duly constituted meeting of Seventeenth Judicial Circuit Grievance Committee "A," respondent appeared and gave testimony regarding her conduct in this cause. [TT2, 213.] After evaluating her testimony and the other evidence before it, the grievance committee found probable cause to believe that respondent's conduct violated specific provisions of The Rules Regulating the Florida Bar.

Accordingly, The Florida Bar filed a Complaint against respondent, in the Supreme Court of Florida, on December 10, 2008. Respondent filed an answer and the matter was thereafter assigned to The Honorable Diana Lewis, sitting as referee. Judge Lewis was charged with conducting the trial of the matter, and making recommendations to the Supreme Court of Florida. The final hearing occurred on May 7, 2009. [RR, 1.] At the conclusion of the hearing, on the day of the hearing, Judge Lewis announced her findings of fact and recommended that respondent be found not guilty of all charges advanced by The Florida Bar. She also recommended that each party bear its own costs. [RR 11-12.]

STATEMENT OF THE FACTS

Respondent is a lawyer who, at the time of trial, had nearly 10 years of practice experience. During those years, she owned and ran her own title agency and acquired significant experience in real estate practice. She was also a member of Attorney's Title Insurance Fund (hereinafter "The Fund"). Respondent closed her title agency in 2005. [TT1, 51-52.] By November 2007, respondent's business was slow and she had to move to a smaller office. [TT1, 50.] Through her courier, she met John Mohan (hereinafter "Mohan"), a non-lawyer real estate broker. Mohan told respondent that he was looking for a title company to refer business to because the attorney he had worked with in the past was no longer working with him. Although respondent questioned Mohan about this failed relationship repeatedly, Mohan would not explain himself. Respondent did not press for an explanation. [TT1, 55-56.] Instead, respondent agreed to conduct closings for Mohan's business, Paramount Lending Group (hereinafter "Paramount"). Mohan offered to pay respondent $300 per closing, and promised respondent about thirty closings per month. Respondent accepted. [TT1, 58-59, 61.] Based on these figures, she could expect an annual income of approximately $108,000 — just from the real estate closings she did for John Mohan and Paramount. Shortly thereafter, respondent relocated her law office to the same building as Paramount

and became a tenant of Paramount. She also opened a new escrow account for her transactions with Paramount, and offered Mohan shared authority over this account. [RR, 3; TT1, 70-71, 79.] Respondent testified that she did this so that, if "simultaneous closings" were scheduled on the same day, Mohan would have access to the escrowed funds and be able to make all necessary disbursements [TT1, 80]. Respondent also testified that her escrow account checks were kept under lock and key in her own, separate office — where Mohan had no access to them. [TT2, 208.] The shared authority over the escrow account that respondent conferred upon Mohan allowed him complete and unfettered access to and control over all of the funds in respondent's escrow account, up to a "certain" amount which respondent could not recall at trial — but which she believed to be "maybe $250,000." [TT1, 71; TT2, 214.] Respondent (a Fund member under obligation to exert exclusive control over all closing proceeds)[1] recognized the inherent danger of allowing a non-lawyer access to an escrow account maintained in her name. [RR, 3.] Further, respondent testified that she was uncomfortable about Mohan, and felt "weird" about entering into a business relationship with him. But she also testified that her feelings of discomfort changed after her first business transaction

[1] TT1, 187-188.

with him. [TT1, 64-65.] That first closing went forward without incident, and respondent received her $300 fee. [TT1, 66.]

Respondent's next closing for Paramount was the sale of a home in Deltona, Florida owned by Alyce and Frederick Droege. The Droeges were selling the property to George Melendez. [TT1, 66, 93; RR, 3.] As the Droeges' friend and regular real estate contact had retired and sold his business, they were referred to John Mohan and Paramount. [TT1, 99.] The Droeges are both elderly, and have been married for more than fifty years. [TT1, 93.] To ensure financial security in their final years, the Droeges invested in real property. They owned three rental homes which they knew they could sell, if necessary, to use as a "financial savior" if they "ran into trouble anywhere along the way." [TT1, 96-97.] Unfortunately, they did run into trouble: Alyce Droege developed liver cancer, and is need of a liver transplant. Frederick Droege is a cardiac patient, and required open-heart surgery. [TT1, 95.]

Because of mounting medical bills, the Droeges began to fall behind in their mortgage payments. [TT1, 23, 25.] They also had to marshall funds to cover a liver transplant – as Mrs. Droege could not get the transplant until (and unless) she had the necessary funds in hand to pay for the surgery. [TT1, 98.] Accordingly, the Droeges resolved to sell their Deltona house. They needed $200,000 for

Mrs. Droege's transplant, and their home sold for (slightly) more than that. The sale of that house was going to be, in Alyce Droege's words, "my liver." [TT1, 99.]

Mohan and Paramount employed Ida Ocasio (hereinafter "Ocasio") as a non-lawyer title processor. [RR, 2.] Ocasio was to handle the Droeges' closing, which had been scheduled for the afternoon of December 17, 2007. On that date, the Droeges appeared in Ocasio's Orlando-area office[2] at about 2 pm. Mrs. Droege was between surgeries and in poor health, yet she waited in Ocasio's office all afternoon, and until 10 pm that night. [TT1, 100.] Ocasio did not close on the Droeges' house on December 17, 2007. Instead, she directed the Droeges and their buyer to meet her at a local Dennys' restaurant the next day, for the closing. The Droeges agreed to this unorthodox plan, as they had noted respondent's name on the closing documents and felt secure knowing that the matter was being supervised by a Florida lawyer. [TT1, 100-102, 117, 130.]

Prior to December 17, 2007, respondent had reviewed the title commitment on the Droege transaction, and signed off on it. She never received or reviewed the closing documents [TT1, 67], but knew that the buyer's funds had been wired into her Paramount escrow account. [TT2, 199.] Respondent testified that she

[2] TT1, 70.

contacted Ocasio repeatedly, and asked Ocasio to send her the closing documents to review before the closing. Respondent testified that Ocasio "kept delaying," and "kept saying they were coming by fax, they were coming by e-mail, they were coming by fax, they were coming by e-mail," but respondent never received them. Respondent testified that she kept asking Ocasio for the closing documents because she knew it was her obligation to make sure that the closing went forward correctly. [TT1, 68-69.]

Late in the evening on December 17, 2007, while the Droeges were waiting in her office to close on their house, Ocasio telephoned respondent's Broward County office, and asked her to send her ten blank but signed escrow account checks, to be used for the Droege closing. Ocasio told respondent that the lender had directed that the closing take place that day, and asked respondent to send the blank, signed escrow account checks to her via Federal Express (overnight mail). [TT1, 69.] Respondent testified that she signed the ten blank escrow account checks, and sent them to Ocasio via Federal Express, because she did not want to "kill the deal." [TT1, 72.] Respondent's conduct, in sending Ocasio the ten signed but blank escrow account checks, violated respondent's duties as a member of The Fund. [TT1, 187.]

The next afternoon, December 18, 2007, the Droeges and their buyer met Ocasio at a Dennys' restaurant for their closing. [TT1, 100-102.] They reviewed and signed the necessary documents, understood that Ocasio was sending a pay-off check to their mortgage company (in the amount of $35,293.30),[3] and received from Ocasio a check made payable to them, in the amount of $128,802.68, for their sale proceeds. [TT1, 102, 176.]

By the time of the closing on their rental property, the Droeges' financial situation had become worse. They had pressing financial obligations and Mrs. Droege needed to deposit and access their sale proceeds immediately. As soon as her bank opened the next day (December 19, 2007), Mrs. Droege deposited the check that Ocasio had given to her and made arrangements with her bank to "use ten thousand of it immediately." She wrote checks against that $10,000 immediate credit that very day. Because she expected the check to clear within a three to four day period, Mrs. Droege also began to write checks against the rest of her sale proceeds. [TT1, 103-104.] Shortly thereafter, Mrs. Droege received a call from her bank, informing her that her checks, drawn against the check she had received from Paramount and Ocasio, "were all bouncing." Mrs. Droege was summoned to her bank, and learned that John Mohan had "withdrawn" her funds.

[3] TT1, 188.

She also learned that her checks were "bouncing everywhere," and that she was incurring "lots" of fees and penalties. Mrs. Droege repeatedly tried to call respondent, without success. [TT1, 104-105.]

A representative from the Droeges' bank telephoned and spoke with respondent on December 24, 2007. [TT1, 77, 80.] During that call, respondent learned that Mohan had put a stop-payment on the Droeges' check. [TT1, 77.] Respondent did not call the Droeges [TT1, 80-81], and she did not call The Fund. [TT1, 87.] Instead, she went into her office and checked her escrow account, online. All of the Droeges' funds were still in the account. Respondent testified that she did not take steps to "freeze" the account that day, to stop Mohan's actual access to the Droeges' funds, because she "would have had to go into the bank" to freeze the account. [TT1, 82.] Instead, respondent waited until "after the holidays" and then called her escrow bank and "asked them to stop any transactions that had [Mohan's] name or initials or anything attached to it." [TT1, 80.] She also tried to find Mohan.

By the time respondent reached Mohan two or three days later, Mohan had already wired the Droeges' funds into his own, personal accounts. [TT1, 84.] Respondent did not call the Droeges or The Fund. [TT1, 87.] Instead, she accompanied Mohan to his office, where they viewed Mohan's personal bank

accounts, online. Respondent saw that Mohan had $10,800 of the Droeges' money remaining in one of his personal accounts, and $15,000 of their funds remaining in another of his personal accounts. [Respondent later learned that Mohan had made two wire transfers from the escrow account into his personal accounts: one in the amount of $60,000 and the other in the amount of $88,600. *See* TT2, 216.] Respondent caused Mohan to transfer the $25,800 back into her escrow account, and forwarded this money to the Droeges, with some residual funds Mohan had left in respondent's escrow account. [TT1, 85; TT2, 216.] At this point, respondent was able to send the Droeges an escrow account check in the amount of $45,000. [TT1, 180.] Respondent did not then know that Mohan and Ocasio had also failed to pay off the Droeges' mortgage. [TT1, 85, 176.] Between December 24, 2007 and December 31, 2007, respondent learned that the Droeges' mortgage had not been paid. She continued in her efforts to obtain the missing funds from Mohan. [TT1, 87.] Although she knew that she had lost all control of the Droeges' sale proceeds and mortgage pay-off monies, respondent still did not call the Droeges or their mortgage company, and she still did not call The Fund. [TT1, 87, 89.] Respondent did not call her mentor, Barry Sickles, Esq. [TT1, 141] Instead, respondent called her (friend and) lawyer, Kaye Ann Baxter, Esq. Ms. Baxter told respondent to call "the authorities." [TT1, 149.] Respondent testified that she

didn't realize that Mohan had stolen the Droeges' money until December 31, 2007, when she finally called the police. Respondent had no contact with The Fund until January 16, 2008, when she called and asked about filing a claim. She was directed to do so by letter. [TT1, 88.]

During the intervening month since their closing, the Droeges' financial predicament grew worse each day. [TT1, 30.] The Droeges were in poor health, and were growing worse. [TT1, 109-110.] In addition to their original financial problems, they were now dealing with snowballing bank fees and threatened foreclosure on their other rental properties. [TT1, 30, 39.] They also had to meet the continuing mortgage payment on the house they had sold. [TT1, 111-112.] By January 14, 2008, the Droeges had became overwhelmed by the situation [TT1, 41.], and were in "a state of crisis." [TT1, 25.] They retained Philip Bonus, Esq. (hereinafter "Bonus") to assist them. [TT1, 26, 37, 108.] Susanne McCabe, Esq. (hereinafter McCabe) was of counsel to Bonus' law firm, and assisted in the Droege matter, as well. [TT1, 22.]

McCabe contacted The Fund, on the Droeges' behalf, on January 20 or 22, 2008. She spoke with Margaret Williams, a supervisor. [TT1, 27.] Margaret Williams told McCabe that The Fund had not received any claim regarding the ongoing Droege problem. [TT1, 27, 33, 45.] Through the efforts of Bonus and

McCabe, the Droeges' claim was filed and investigated, and The Fund paid their claim on February 29, 2008 [TT1, 46.] The Fund paid off the Droeges' mortgage ($35,293.30), the remaining balance of their sale proceeds ($83,802.68), and the recording fees ($2,538.00). [TT1, 188.] Coming as it did more than two months after their botched closing, this satisfied claim did not make the Droeges' whole because it did not cover the "deficits" created by respondent's dishonored escrow account check. By the time The Fund paid their claim, one of the Droeges' rental properties had gone into foreclosure and the remaining one was in peril. [TT1, 123.] Although respondent had promised to "fix the problem" for the Droeges [TT1, 120], she did nothing. As a result, after selling their house to solve their financial problems, the Droeges had incurred so many fines, penalties, and bank charges that they were now further behind than they had been before — despite the fact that they were now one house poorer. And Alyce Droege still needed a liver transplant that she still could not afford. [TT1, 113.]

At trial, both parties attempted to present evidence in support of their respective claims of mitigation and aggravation, under the guidelines established by the *Florida Standards for Imposing Lawyer Sanctions.* In mitigation of her conduct, respondent presented the testimony of two character witnesses: Barry Sickles, Esq., and Kaye Ann Baxter, Esq. Both testified as to respondent's good

character [TT1, 135-136, 145], but both also testified that they themselves would never engage in the conduct demonstrated by respondent in the instant case. [TT1, 139, 153.] In order to prove aggravation (in the form of the harm that respondent caused the Droeges and The Fund), The Florida Bar attempted to present evidence of the losses sustained by both. The referee disallowed such evidence, and sustained a defense objection to The Florida Bar's Exhibit 5, which was not admitted into evidence. [TT1, 31, 42, TT2, 218.]

At trial, The Florida Bar made an ore tenus motion to amend the Bar's complaint to conform to the evidence adduced at trial. Because respondent advanced no objection and made no showing of prejudice, the Bar's motion was granted, pursuant to R. Regulating Fla. Bar 3-7.6(f)(1) and Fla.R.Civ.P. 1.190(b). [RR, 7.] After making this ruling, the referee found that The Florida Bar "failed to present by clear and convincing evidence of the rule violations plead [sic] in their complaint," and found respondent not guilty of all charges [RR, 6.] and deserving of no Bar discipline. [RR, 11.] The referee recommended that each side bear its own costs. [TT2, 257.]

In reaching her conclusions, the referee expressly relied upon Florida Bar Ethics Opinion 64-40 to support her finding that respondent bore no liability for her conduct in allowing Mohan unfettered access to her escrow account. [RR, 6.]

The referee noted that respondent's conduct in this case evidenced "a stupid mistake" which "cost some people some harm." [TT2, 250.] The referee found that respondent could not be held accountable for Mohan's conduct in the matter because respondent didn't order it, know about it or ratify it. The referee also stated that she was not persuaded by The Florida Bar's argument that respondent did nothing to protect the Droeges' funds after Mohan's stop-payment (respondent testified that she saw the Droege money still on deposit in her escrow account *after* Mohan placed the stop-payment order on the Droeges' checks — but did nothing to freeze or secure the account until after the holidays) because respondent may have been mistaken about what she saw online [TT2, 251.], and because it is "very difficult to. . . do much during the holidays." [TT2, 252.] In closing her post-trial remarks, the referee urged respondent to "still continue to be a role model by learning from [her] mistakes and advising young women as to how not to make mistakes in the future." [TT2, 255.]

SUMMARY OF ARGUMENT

By November 2007, respondent had practiced law for nearly ten years in the areas of personal injury representation and real estate. For about two years, she ran her own title agency. In late 2007, respondent had begun to experience financial difficulties caused by a lack of business. As a result, she was forced to relocate her office to a smaller space. So, when respondent's courier introduced her to John Mohan to discuss a business proposal, respondent was keenly interested in what Mohan had to say.

Mohan was a non-lawyer who engaged in real estate transactions through his company, Paramount Lending. Mohan told respondent that he was no longer doing business with the lawyer with whom he had worked in the past, and was looking for someone to replace him. This was respondent's *first warning* about Mohan's prospective behavior. Respondent recognized the warning and questioned Mohan repeatedly about the circumstances of the broken relationship. However, respondent's interest in Mohan's business opportunity overshadowed her sense of caution, and she allowed Mohan to dodge her questions about Mohan's severed relationship with his prior lawyer. Instead, respondent accepted Mohan's offer to pay her $300 for each closing she handled on behalf of Paramount. Mohan promised respondent about 30 closings a month, generating an annual income for

her of about $108,000 — exclusive of her law practice. In preparation for the profitable work she hoped would follow, respondent suggested that she and Mohan open a joint escrow account for the Paramount closings. In this way, both she and Mohan would have full access to the escrow account and would be able to handle simultaneous closings, or multiple closings in different places on the same day. Respondent acknowledged that she felt "weird" about this business relationship with Mohan, and testified that she put a very large cap (of about $250,000) on the amount of escrow funds that Mohan could access without her joint approval. However, she also testified that these misgivings abated after her first successful closing for Paramount — without problem or issue.

The next closing respondent handled for Paramount was the Droege to Melendez transaction, in the Orlando area. Respondent had reviewed the title commitment, but had not received the closing documents prepared by Mohan's non-lawyer associate, Ida Ocasio. Ocasio was to handle the closing in Central Florida, and had promised repeatedly to send the closing documents to respondent, for her review. Ocasio never sent the closing documents, but the closing proceeds were wired into respondent's escrow account in anticipation of a closing scheduled for December 17, 2007. When Ocasio called respondent late on the evening of December 17, 2007 and asked respondent to send her (by Federal Express) ten

blank but signed escrow checks for the Droege closing — despite the fact that Ocasio had not sent respondent the closing documents to review — respondent received a *second warning*. However, she put her financial concerns ahead of her ethical duty, and sent the signed blank checks to Ocasio, via overnight mail. Respondent either knew, or should have known, that this conduct was violative of her duties as a lawyer, as well as her obligation as a member of The Fund.

After she sent the signed, blank checks to Ocasio, respondent did nothing more until she received a call from the seller's bank on Christmas Eve, complaining that the sellers' checks were bouncing because her check, for the seller's proceeds, had been stopped. Respondent knew that Mohan had done it, as no one else could have. This was her *third warning.* Respondent went to her office immediately, and checked the available balance, online. Despite the stop-payment, the Droeges' funds were still there. Despite this and the previous warnings, respondent failed to act swiftly and decisively. She did not bother to go to her bank, on Christmas Eve, to freeze the account and protect the seller's funds. She did not call the police, or The Fund, or the sellers. She did not know whether the mortgage had been paid. Instead, she waited until after the holidays to contact her bank, and waited to speak with Mohan. When she did, he promised to put the money back, even as he was transferring it out — into his own personal accounts.

Respondent had lost control of the seller's money, and there was little she could do, at that point, to reclaim or repossess it.

As a result of respondent's poor judgment and inaction (motivated by self-interest), the sellers' world was turned upside down. Both in their seventies, one was a septic, post-operative cancer patient awaiting a liver transplant, and the other was a cardiac patient recovering from open-heart surgery. They had medical bills and financial pressures that far exceeded respondent's slow business problems. To meet their financial obligations and fund the hoped-for liver transplant, the Droeges had been forced to sell one of their income-producing rental properties. When the transaction didn't close by 10 pm on the night of December 17, 2007, the Droeges had been willing to go to a Dennys' restaurant the next afternoon for a closing. They knew that a Florida lawyer was responsible for the transaction, and they trusted that lawyer to see that everything was done correctly. And now, all of their checks, drawn on the lawyer's check, were bouncing.

Clearly, the Droeges' trust in respondent, as a Florida lawyer, was misplaced. Respondent knew that Ocasio was proceeding with an unsupervised closing on December 18, 2007, but did nothing to stop her for fear of "killing the deal." After the deal, respondent did no follow up and did not oversee or check Mohan's unfettered access to the Droeges' funds. Indeed, even when she knew that

he had put a stop-payment on the Droeges' proceeds check, respondent took no immediate steps to protect their funds still on deposit in her escrow account — but waited until after the holidays, and until she could discuss the matter with Mohan. Finally, even after the funds were gone, respondent took no protective action for days. She didn't even file a police report until December 31, 2008, and didn't contact The Fund for nearly a month. As a result of her self-serving and unethical conduct, respondent caused irreparable harm to two elderly and gravely ill people in great need — whose only mistake was to trust a Florida lawyer.

Contrary to respondent's own testimony, her conduct was not a "silly mistake." Contrary to the referee's findings, respondent's conduct was not even a "stupid mistake." Instead, respondent's conduct was unethical and unprofessional, selfish and self-serving — and unacceptable under any standard of competent representation. Given the foregoing, the referee erred in holding respondent up as a "role model." Respondent's conduct cannot be celebrated and should not be condoned. Given the significant harm she caused in order to pursue her own personal gain, respondent should be suspended from the practice of law for 91-days, and compelled to pay The Florida Bar's costs in bringing this action against her.

ARGUMENT

ISSUE I

THE REFEREE ERRED IN FAILING TO FIND THAT RESPONDENT VIOLATED THE RULES REGULATING THE FLORIDA BAR CHARGED IN THE FLORIDA BAR'S COMPLAINT.

A referee's finding of fact regarding guilt carries a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000). Accordingly, 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 that occurs, the party contesting the referee's findings of fact and conclusions as to guilt must demonstrate either a lack of record evidence to support such findings and conclusions, or evidence to establish that the record 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 case at bar, the referee made a number of errors in her factual findings. First, the referee stated that, "[a]t the core of the Bar's presentation was the fact that the Respondent has 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 rejected The Florida Bar's argument and evidence on this point, and stated that she "was presented with no evidence or case law indicating that it was unethical for an attorney to have a non-lawyer signatory on an escrow account." In support of this position, the referee referenced Florida Bar Ethics Opinion 64-40, as offered by respondent. Respectfully, the referee has misapplied both the evidence and the referenced ethics opinion.

With regard to respondent's conduct in allowing Mohan unrestricted access to her escrow account, the referee failed to consider important and competent evidence presented at trial. First, while the referee acknowledged that respondent "recognized the inherent danger of allowing a non-lawyer access to an escrow account maintained in her name" and that she also "placed caps on the amounts of money that Mohan could access and/or control in the escrow account" [RR, 3], she failed to recognize and reconcile the fact that respondent's protective cap (of approximately $250,000) was too high to prevent the "inherent danger" that was actually realized in the instant case. The referee ignored the testimony of lawyers Kaye Ann Baxter and Barry Sickles, both of whom testified (under cross-examination) that they would never do what respondent had done. Notably, Sickles

stated that he would not allow a non-lawyer access to his escrow or trust account because, if something were to go amiss, he knows that he would be "responsible." [TT1, 140.] The referee also ignored the testimony of Philip Bonus, Esq., who testified that respondent was the proximate cause of all of the damages sustained by the Droeges. [TT1, 41.] She also disregarded the similar testimony of The Fund's legal counsel, Michele S. Primeau, who testified that respondent's conduct in this matter constituted a Fund violation, and was the cause of all of the damages sustained. [TT1, 189.] Finally, the referee blatantly ignored respondent's own testimony, wherein she admitted that she knew that she had lost control of the Droeges' money [TT1, 87] and that she had been "remiss" in allowing Mohan unfettered access to her escrow account. [TT2, 213.]

All of the foregoing provided the referee with competent, record evidence to find that respondent had violated the ethical rules with which she had been charged. While the referee correctly noted that respondent herself did not steal the Droeges' money, she failed to recognize and accept the record evidence demonstrating that respondent's conduct made it possible for Mohan to steal it. Without respondent's incompetent controls and lack of supervision over both Mohan and Ocasio, Mohan could not have accessed the Droeges' money at all. But for respondent's conduct in allowing Mohan nearly unlimited access, he

certainly could not have stolen the Droeges' funds so swiftly and so effortlessly. So, even though respondent may not have intended or foreseen Mohan's theft, she rolled the first snowball that grew and grew as it traveled faster and faster, until it rolled right over the elderly and financially frail Droeges, and crushed them.

The referee made additional factual errors. There is no competent record evidence to support the referee's determination that the Droeges' funds may not have been in the escrow account on the date when respondent first learned of Mohan's stop-payment of their check. There is competent record evidence (respondent's own testimony) to support a contrary finding: that the funds *were* on deposit on that date, and that respondent had available to her the means to keep them there — were she willing to take the time, on Christmas Eve, to do so. [TT1, 82.] This competent record evidence clearly challenges two other referee findings: that respondent did not have the benefit of any "red flags" [TT2, 249], and that she "did her best." [TT2, 250.] Indeed, all of the record evidence is contrary to these two factual findings.

The referee made additional errors in her findings regarding mitigation and aggravation. While she made findings without any supporting evidence whatsoever in support of mitigation ["I believe respondent is truly remorseful," and "I find her testimony credible with regard to her feeling terrible about having this happen to

this couple." *See* TT2, 248.], the referee rejected and thwarted The Florida Bar's continuing efforts to prove aggravation through evidence of the quantified financial harm that she caused Alyce and Frederick Droege.

Based on the foregoing competent, record evidence, respondent failed to demonstrate competence (R. Regulating Fla. Bar 4-1.1), and failed to exercise sufficient control over Mohan (R. Regulating Fla. Bar 4-5.3(b) and (c)). Because respondent's conduct was intentional at every turn, respondent acted in her own self-interest and in contradiction to R. Regulating Fla. Bar 4-8.4(a). And, because of the grave financial harm that respondent's conduct caused the Droeges and The Fund, respondent also violated R. Regulating Fla. Bar 4-8.4(d), by engaging in conduct that was prejudicial to the administration of justice.

Finally, while the referee objected to The Florida Bar's Memorandum of Law in support of its sanctions argument [TT2, 219], she has relied on a non-controlling ethics opinion to support her finding of not guilty in the instant case. [RR, 6.] This constitutes error for two reasons. First, it is axiomatic that Florida Bar ethics opinions are advisory only and "shall not be the basis for action by grievance committees, referees, or the board of governors except upon application of the respondent in disciplinary proceedings." This application is intended only where a respondent has relied upon an ethics opinion in determining his own

conduct. *See* Florida Bar Procedures for Ruling on Questions of Ethics, Rule 1. This is inapposite to the case at bar. Second, the ethics opinion offered by respondent, and relied upon by the referee [TT2, 231] is out-of-date, and has been reissued — with significant alteration and clarification. The original Ethics Opinion 64-40 (as issued on July 8, 1964) *allowed* the conduct referenced by the referee in her report. However, this opinion was reconsidered and reconstructed on May 1, 1987. Ethics Opinion 64-40 (Reconsideration) states that while "it is permissible for properly authorized and supervised non-lawyer employees to be signatories on lawyers' trust accounts, it is the lawyers who are *ultimately responsible* for compliance with the rules relating to trust accounts and client funds." [Emphasis provided.] Clearly, the reconsidered rule now supports The Florida Bar's argument in support of respondent's liability, and guilt.

ISSUE II

THE REFEREE ERRED IN FAILING TO RECOMMEND THAT RESPONDENT SHOULD BE SANCTIONED, AND COMPELLED TO PAY THE FLORIDA BAR'S COSTS.

Respondent entered into a business arrangement with two non-attorneys about whom she knew nothing. She met Mohan through a courier, and Ocasio through Mohan. Notwithstanding a complete lack of background information about either one of them, and motivated by the prospect of profit in a hot real estate market, respondent agreed to function as title attorney and closing agent for real estate transactions that Mohan would bring to her. Respondent understood that Mohan was using her credentials as a Fund member and a Florida lawyer to affect closings and to bring a sense of trust and security to such closings. Respondent knew that her name and bar status would appear on the resulting closing statements. Respondent was willing to lend her credentials to Mohan's closings, for $300 per closing. Mohan promised a high volume of business, and respondent was motivated by the significant profits she hoped to realize, for herself.

To facilitate her new business arrangement with Mohan, respondent opened an escrow account and allowed Mohan unfettered access to and control over it. She also allowed Ocasio to handle the Droeges' closing, with no supervision or control — and even sent her blank, signed escrow checks with which to do so.

Because of this gross lack of supervision, and because respondent allowed Mohan complete control over monies she accepted and held as a closing attorney, Mohan was able to steal the Droeges' money, easily and swiftly.

While the Supreme Court of Florida has ordered a public reprimand for failure to properly supervise one's staff (*see* The Florida Bar v. Armas, 518 So. 2d 919 (Fla. 1988) where the Court held that a public reprimand was an appropriate sanction for a respondent's failure to supervise an office manager who mishandled client funds), most cases involving an attorney's failure to supervise non-lawyer staff or other associated personnel have resulted in a suspension. *See* The Florida Bar v. Abrams, 919 So. 2d 425 (Fla. 2006) [1 year suspension where attorney failed to provide competent representation to a client, knowingly allowed a non-lawyer to have total control of client files and misrepresented his status as "Managing Attorney."]; The Florida Bar v. Flowers, 672 So. 2d 526 (Fla. 1996) [91-day suspension ordered when an attorney allowed a client to believe that she was hiring him as an attorney in an immigration matter. In truth, the lawyer allowed a non-lawyer total control over the client's case.]; The Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994) [90-day suspension appropriate when respondent failed to properly supervise a paralegal.].

Respondent's misconduct in the instant case is much more akin to the suspension cases than the public reprimand case. This is so because, in addition to failure to supervise, this case involves the theft of funds. Despite having agreed to act as the closing agent for the Droege closing, respondent allowed the closing to go forward without reviewing the documents prepared by Mohan and/or Ocasio, and without supervising either of them, in any way. Respondent gave Mohan independent authority over the escrow account opened to handle all closings she transacted with Paramount Lending, and failed to exercise any supervision of Mohan with regard to his conduct relating to monies deposited into or distributed from this account. She was the proximate cause of the Droeges' loss, as well as the loss ultimately suffered by The Fund.

Because of the Droeges' dire financial and medical circumstances at the time of the closing on their house, the financial losses they sustained (as a result of respondent's dishonored escrow check) were of grave consequence to their health and their well-being. For Alyce Droege, for whom the sale represented a liver transplant, the consequences were immeasurable. There can be no doubt that respondent's misconduct in this matter caused real and sustained harm to extremely vulnerable victims. Similarly, there can be no doubt that respondent's misconduct in this matter was motivated by self-interest. Respondent's actions

took place during a hot real estate market, when the volume and profitability of real estate closings were at an all-time, historic high. Due to her own financial distress, respondent's desire to work with Mohan and reap some of the profits being made in the real estate market, was intense. She hoped to collect many $300 fees, from many, many closings. With this profit motive in mind, respondent allowed Ida Ocasio to handle all aspects of the Droege closing, without oversight or supervision. And while she may have asked to see the closing documents before the closing was finalized, it is abundantly clear that respondent took no steps to ***stop*** the closing — until she had an opportunity to review and approve Ocasio's documents. Instead, respondent sent the unsupervised Ocasio ten blank, signed escrow checks, via Federal Express, to ***allow*** the closing to take place.

In addition to the ample case law supporting a rehabilitative suspension, the referee also neglected to examine all of the aggravating and/or mitigating factors that are present and applicable to a sanctions determination. The respondent expressed remorse for her misconduct, and the referee found this to be a mitigating factor — even though there is no competent record evidence to support respondent's expression. Similarly, the referee noted that respondent cooperated with law enforcement efforts, and found this mitigating as well — despite the fact that respondent failed to even file a police report for a full week after she learned

of Mohan's stop-payment order. Yet, the referee failed to take into her consideration the aggravating factors necessary to a thoughtful sanction determination. All references are to Standard 9.22, *Florida Standards for Imposing Lawyer Sanctions:*

9.22 Aggravating Factors
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(h) vulnerability of victim.

The *Florida Standards for Imposing Lawyer Sanctions* also support suspension as the appropriate discipline in this case. Standard 4.42 states that suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client. Standard 7.2 states that 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. Respondent's actions in this case caused injury to all three categories of victims: the Droeges, the public (including the buyer, who never got a signed warranty deed until The Fund resolved this matter), and the legal system. Respondent's complete neglect of the Droeges' case, coupled with her total failure to supervise her non-lawyer business associates, caused great harm to the Droeges and to The Fund. Her misconduct also tarnished the integrity of the legal profession. If the public cannot rely on a Florida lawyer to ensure the

safety of their funds during a real estate transaction, then lawyers everywhere are harmed and diminished.

The Florida Bar submits that respondent's misconduct, taken as a whole, calls into serious question her ability to understand and follow the fundamental principles of the practice of law. Instead of focusing on the ethical and professional aspects of her practice, respondent allowed herself to focus solely upon its commercial goals. This misdirected focus caused real harm to those who trusted her (the Droeges) and those who trusted *in* her (The Fund). Respondent has engaged in "an attitude or course of conduct wholly inconsistent with approved professional standards," [The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970) *quoting* State ex rel. The Florida Bar v. Murrell, 74 So. 2d 221, 223 (Fla. 1954)], and for this reason, she must be sanctioned with a rehabilitative suspension of at least 91 days, and be compelled to pay The Florida Bar's costs.

CONCLUSION

Through a series of mistakes and missteps motivated by self-interest, respondent engaged in a pattern of intentional misconduct that resulted in the theft of closing proceeds belonging to the sellers in a real estate transaction for which she was responsible. While respondent herself did not steal the funds, and was not complicit in the theft, she created the context and circumstances through which the theft was accomplished. And once she learned of the theft, respondent moved slowly and deliberately in order to protect herself — at the considerable expense of the two sick and elderly people whose funds were stolen and whose lives were thrown into chaos. The referee erred. What happened to the Droeges was not "unfortunate" [TT2, 256]; it was catastrophic. And respondent is not a "role model" [TT2, 255] — she is the proximate cause of all of the harm that resulted. She should not be sent forth without sanction, as the referee has recommended, to learn from her mistake. Her mistake is too grave, and the consequences too wounding. Under applicable case law, respondent may not be fined, and she may not be required to pay civil or equitable damages to the Droeges. The only remedy available to this Court is a sanction. Respondent should be compelled to pay The Florida Bar's costs, and suspended from the practice of law for 91 days, until she demonstrates fitness to return to the ethical practice of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Florida Bar's Initial Brief regarding Supreme Court Case No. SC08-2297, The Florida Bar File No. 2008-51,148(17A) was e-filed and furnished by regular U.S. Mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1927 and a true and correct copy has been mailed by regular U.S. mail to Kevin P. Tynan, counsel for respondent, 8142 N. University Drive, Tamarac, FL 33321, on this _____ day of September, 2009.

_____
LORRAINE CHRISTINE HOFFMANN
Attorney Bar No. 612669
Bar Counsel
The Florida Bar
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, Florida 33323
(954) 835-0233

Copy provided to:
Kenneth Lawrence Marvin, Staff Counsel

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

LORRAINE CHRISTINE HOFFMANN
Bar Counsel

J:\users\DMACHA\BRIEF\Hines initial brief.doc