IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RONALD ROBERT TORRES,

Respondent.

______________________________/

Supreme Court Case
No. SC02-1801

The Florida Bar Case
No. 2000-71,116(11F)

The Florida Bar's Initial Brief

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES .... ii - vi

SYMBOLS AND REFERENCES.. vii

STATEMENT OF THE CASE AND OF THE FACTS .... 1 - 10

SUMMARY OF ARGUMENT .... 11 - 12

POINTS ON APPEAL 13

ARGUMENT .... 14 - 40

I. THE REFEREE ERRED IN FINDING THERE WAS NO COMPETENT EVIDENCE OR FACTS TO SUPPORT THE ALLEGATIONS OF MISAPPROPRIATION/CONVERSION CONTAINED IN COUNT III AND COUNT IV OF THE FLORIDA BAR'S COMPLAINT .... 14 - 24

II. THE REFEREE ERRED BY FAILING TO MAKE THE PROPER RECOMMENDATIONS AS TO GUILT AND DISCIPLINARY MEASURES TO BE APPLIED .... 25 - 35

III. THE REFEREE ABUSED HIS DISCRETION IN FAILING TO TAX THE FLORIDA BAR'S COSTS TO THE RESPONDENT IN LIGHT OF HIS FINDING THAT COSTS WERE REASONABLE AND NECESSARY .... 36 - 40

CONCLUSION 41

SIGNATURE PAGE 42

CERTIFICATE OF SERVICE 43

CERTIFICATE OF TYPE, SIZE, &STYLE & ANTI-VIRUS SCAN.... 43

INDEX TO APPENDIX 44

TABLE OF AUTHORITIES

CASES **PAGE**

Kenet v. Bailey,
679 So.2d 348 (Fla. 3d DCA 1996) 32

The Florida Bar v. Bosse,
609 So.2d 1322 (Fla. 1992) 37, 38

The Florida Bar v. Breed,
378 So.2d 783 (Fla. 1979) 27

The Florida Bar v. Calhoon,
102 So.2d 604 (Fla. 1958) 25, 34

The Florida Bar v. Carter,
410 So.2d 920 (Fla. 1982) 24

The Florida Bar v. Cibula,
725 So.2d 360, 363 (Fla. 1998) 29

The Florida Bar v. Dancu,
490 So.2d 40 (Fla. 1986) 29

The Florida Bar v. Davis,
419 So.2d 325 (Fla. 1982) 36, 37

The Florida Bar v. Gold,
526 So.2d 51 (Fla. 1988) 40

The Florida Bar v. Golub,
550 So.2d 455 (Fla. 1989) 22

The Florida Bar v. Gussow,
519 So.2d 603 (Fla. 1988) 20

The Florida Bar v. Harris,
400 So.2d 1220 (Fla. 1981) 27

The Florida Bar v. Hayden,
583 So.2d 1016 (Fla. 1991) 14

The Florida Bar v. Knowles,
500 So.2d 140 (Fla. 1986) 27, 30

The Florida Bar v. Lehrman,
485 So.2d 1276 (Fla. 1986) 36

The Florida Bar v. McCain,
330 So.2d 712 (Fla. 1976) 34

The Florida Bar v. McClure,
575 So.2d 176 (Fla. 1991) 14, 20, 23, 26, 28

The Florida Bar v. McKenzie,
442 So.2d 934 (Fla. 1983) 14

The Florida Bar v. McShirley,
573 So.2d 807, 809 (Fla. 1991) 15, 38

The Florida Bar v. Miele,
605 So.2d 866 (Fla. 1992) 39

The Florida Bar v. Moses,
380 So.2d 412 (Fla. 1980) 25

The Florida Bar v. Reed,
664 So.2d 1357 (Fla. 1994) 29

The Florida Bar re Roberts,
721 So.2d 283 (Fla. 1998) 32

The Florida Bar v. Roman,
526 So.2d 60 (Fla. 1988) 28

The Florida Bar v. Shanzer,
572 So.2d 1382 (Fla. 1991) 30, 31

The Florida Bar v. Simring,
612 So.2d 561, 566 (Fla. 1993) 22, 32

The Florida Bar v. Spann,
682 So.2d 1070 (Fla. 1996) 14

The Florida Bar v. Tillman,
682 So.2d 542 (Fla. 1996) 30

The Florida Bar v. Vannier,
498 So.2d 896 (Fla. 1986) 14

The Florida Bar v. Vining,
761 So.2d 1044 (Fla. 2000) 25

The Florida Bar v. Wagner,
212 So.2d 770 (Fla. 1968) 25

The Florida Bar v. Weaver,
356 So.2d 797 (Fla. 1978) 22, 34

The Florida Bar v. Whigham,
525 So.2d 873 (Fla. 1988) 27

RULES REGULATING THE FLORIDA BAR

3-7.6(o)(1) 38

3-7.6(o)(2) 37

3-7.6(o)(3) 37

4-1.1 9

4-1.3 9

4-1.4 9

4-1.5(a) 9

4-1.15(a) 9, 26, 34, 36

4-1.15(b) 9, 26, 30, 34, 36

4-1.15(d) 9, 26, 30, 34, 36

4-8.4(a) 9, 33

4-8.4(b) 9, 33

4-8.4(c) 9, 30, 33

4-8.4(d) 9, 33

5-1.1 33

5-1.1(a) 9

5-1.1(d) 30

5-1.2 30

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

9.22(e) 30

9.32(a) 31

9.32(b) 31

9.32(f) 31

9.32(g) 31

9.32(l) 31

SYMBOLS AND REFERENCES

For the purpose of this Initial Brief on Appeal, The Florida Bar will be referred to as either TFB or the Bar. Respondent will be referred to as the Respondent or Torres. Witnesses will be referred to by their surnames only. The Estate of Verne Stoner will be referred to as the Estate or Mobile Home Park/Estate.

The transcript of the final hearing before the Referee consists of six volumes and will be referred to as Volume I, Volume II, Volume III, Volume IV, Volume V, and Volume VI. References to the transcripts of the final hearing will be set forth as TR and page number, followed by either I, II, III, IV, V, or VI denoting the volume.

References to The Florida Bar's exhibits at final hearing will be set forth as TFB Ex. and number. References to Respondent's exhibits at final hearing will be set forth as R Ex. and number. References to the Report of Referee dated January 27, 2004 will be set forth as ROR and page number.

STATEMENT OF THE CASE AND OF THE FACTS

Following a probable cause finding by Grievance Committee "F" of the Eleventh Judicial Circuit, The Florida Bar filed a four (4) count Amended Complaint against Respondent on November 13, 2002. The Honorable Judge Jorge Labarga was appointed as the Referee in this matter. On November 17, 2003, Respondent filed "Respondent's Second Amended Answer and Affirmative Defenses to First Amended Complaint" hereinafter "Second Amended Answer". (TR 46, I).

The matter ultimately proceeded to final hearing before the Referee on November 17, November 18, and November 19, 2003.

The Respondent in his "Second Amended Answer" admitted to the allegations contained in paragraphs 1, 3, 4, 5, 6, 7, 10, 11, 14, 21, 22, 26, 28, 33, 34, 36, 37, 45, 47, 48, 50, and 52 of The Florida Bar's Amended Complaint. In addition, Respondent admits in his "Second Amended Answer" to those allegations contained in paragraph 23 of The Florida Bar's Amended Complaint to the extent that Respondent violated "Florida Bar Rules relating to the establishment and maintaining a trust fund on behalf of his client". Respondent also admits in his

"Second Amended Answer" to those allegations contained in paragraph 35 of The Florida Bar's Amended Complaint to the extent that Respondent violated "the rules of The Florida Bar with regards to establishing and maintaining a trust fund and/or trust accounts". Respondent also testified to violating the Rules of The Florida Bar regarding trust accounts. (TR 639-640, IV).

As well as the foregoing admissions and/or statements, the referee found the following undisputed facts:

1) Irene C. Stoner and Verne L. Stoner were legally married until Irene Stoner's death sometime in 1979.

2) Daniel Stoner was the son of Verne and Irene Stoner; Irene Stoner also had a daughter, Virginia Taylor ("Taylor"), from a previous unrelated marriage.

3) During their marriage, Verne and Irene Stoner took title to the trailer park as joint tenancy [sic] with right of survivorship.

4) Following Irene Stoner's death, Verne married his step-daughter, Virginia Taylor.

5) Sometime in 1983, Verne Stoner died, leaving the trailer park in the control and possession of his step-daughter/wife, Taylor.

6) Neither Taylor nor Daniel Stoner, as potential heirs and/or

beneficiaries to Verne Stoner, probated the trailer park, which left the potential beneficiary rights of Taylor and Daniel Stoner unresolved.

7) After Verne Stoner's death, Taylor assumed control of the day-to-day operation of the trailer park, which included the collection of all monthly payments for trailer park leases/ rentals.

8) Taylor ultimately hired Georgina Hennessey ("Hennessey") to operate/manage the trailer park and to collect the rental proceeds derived therefrom.

9) Sometime in 1994, Taylor completely abandoned the trailer park and, for unknown reasons, literally disappeared. Consequently, all control and operation of the trailer park was left in the sole possession and control of Hennessey.

(ROR, 3-4).

Furthermore, Hennessey sometime in or about 1994 (subsequent to Taylor disappearing) testified that she hired Respondent in furtherance of representing the trailer park. (TR 258, II; TR 260-261, II; and TR 533, IV).

That in May, 1997, Daniel Stoner, who Respondent recognized had a

potential interest in the trailer park (TR 538, IV), also hired Respondent to represent his interest in the trailer park and to provide an accounting of the park. (TR 330, II; TR 640-641, IV).

That Hennessey managed the trailer park from 1993-1997 and that there were approximately 54 - 58 trailer park tenants during this time-frame who each paid approximately one hundred fifty dollars ($150.00) per month in rent to Hennessey. (TR 251-252, II; and TR 286, II). That during Respondent's representation of the Park, it was the custom and practice of the trailer park that all rental proceeds be paid in cash. (TR 129-130, I). That Respondent effected legal representation on behalf of the trailer park from 1994 through 1998 and that Respondent charged Hennessey twelve thousand dollars ($12,000.00) for his legal representation of the trailer park. (TR 544, IV; TFB Ex. 35 - May 12, 2003 Deposition of Respondent, pp 12-17).

That Hennessey left the Park in May, 1997 and hired a successor manager, Albert Siniscalco ("Siniscalco") to take over management of the park. (TR 271-273, II).

That Siniscalco assumed the management of the trailer park from May, 1997 through March, 1998 and remitted all rental proceeds and records for that period to Respondent. [See Deposition of Albert Siniscalco, dated June 11, 2003, filed

on June 25, 2003 and admitted into evidence on November 17, 2003.] (TR 21, I; TR 638-639, IV).

That during the period of May, 1997 to March, 1998 in which Siniscalco was the manager of the park, all rental proceeds from the park were remitted to the Respondent which Respondent kept in his personal residence. (TR 536, IV; TR 638 - 639, IV).

That during Respondent's representation of Stoner, Stoner did make written requests for an accounting from Respondent; that Respondent never provided Stoner with an accounting from the Mobile Home Park. (TR 641, IV; TFB Composite Ex. 16 - October 20, 1997 letter addressed to Respondent from Stoner).

That Stoner fired Respondent and hired Regina Bushkin, Esq., and Connie Hiaasen, Esq., on or about December, 1997 to probate the trailer park (hereinafter Mobile Home Park/Estate).

On March 24, 1998, a probate proceeding was initiated by Ms. Bushkin and Ms. Hiaasen in which the probate court ultimately determined that Daniel Stoner and Virginia Taylor were the beneficiaries of the Estate of Verne Stoner. The probate Judge ordered Respondent to provide within twenty-four (24) hours an

accounting of the Mobile Home Park/Estate and to turn over all Mobile Home Park/Estate funds and accounting records to Ms. Bushkin and Ms. Hiaasen. On or about March 25, 1998, Respondent provided said funds and accounting records to attorneys Bushkin and Hiassen. (TFB Composite Ex. 1 and TFB Ex. 2). That Respondent has stipulated to the fact that he could not account for $20,779.34 of the Mobile Home Park/Estate proceeds and as a consequence of this shortfall in funds due and owing to the Estate of Verne Stoner, Respondent borrowed $20,300.00 from Hennessey and in turn executed an IOU in the same amount.[1] (TR 548-551, IV; see ROR, 19-20, see also TFB Composite Ex. 14).

Sometime in or about June 1998, in their capacity as counsel for the Estate of Verne Stoner, Ms. Bushkin and Ms. Hiaasen contacted the Broward County State Attorney's Office to report Respondent's misappropriation/conversion of Mobile Home Park/Estate funds. (TR 149, I).

The State Attorney's Office ultimately determined that Respondent had misappropriated $42,000.00 from the Mobile Home Park/Estate and on February 9, 2000, effected a plea agreement wherein Respondent and the State Attorney's

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[1] Moreover, Respondent has repaid only $1,700.00 of the $20, 300.00 borrowed from Hennessey, as such, $18,600.00 has never been repaid to Hennessey.

Office agreed to the following:

A) The State Attorney's Office would only charge/indict Respondent with Misdemeanor/Petit Theft; and

B) Respondent would make payment of $42,000.00 in restitution to the Mobile Home Park/Estate; and

C) Respondent would be allowed to plea 'no contest' to a single misdemeanor theft count. (TR 425-436, III).

However, unbeknownst to the State Attorney's Office, the Respondent had initiated a civil lawsuit on January 12, 2000 for the exact monies (i.e. $42,000.00) that he ultimately agreed to pay in criminal restitution on February 9, 2000.[2] Respondent stated as the basis of his civil claim the "[he] was forced to pay 'restitution' in the amount of forty-two thousand dollars ($42,000.00) to the Estate of Verne Stoner".[3] Moreover, Respondent recognized at the time he initiated the

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[2] The February 9, 2000 Plea Agreement was ratified by the Criminal Court and was predicated upon the understanding that the Estate of Verne Stoner would receive the $42,000.00 in restitution from Respondent. (TR 439, III). The $42,000.00 included $18,600.00 loaned to Respondent by Hennessey, which the State Attorney's Office characterized as Estate Funds, as well as an additional $23,400.00 which the Respondent and the State Attorney's Office agreed was to be remitted to the Estate of Verne Stoner as part of said criminal plea agreement. (TR 763 - 768, V).

[3] The gravamen of Respondent's suit being that the "Mobile Home Park/Estate" and "Taylor" had jointly conspired to deprive him of his fees for legal services rendered; Respondent, as plaintiff, initiated claims of (1) intentional

civil lawsuit that the $18,600.00 borrowed from Hennessey had been deemed by the Broward County State Attorney's office (by virtue of Respondent's criminal plea agreement) to be funds belonging to the Estate of Verne Stoner. (TFB Composite Ex. 12; TR 551-554, IV; TR 420, III; and TR 763-768, V).

What is more, the Broward State Attorney's Office was not made aware of Respondent's civil lawsuit to recoup the $42,000.00 paid as restitution to the Estate of Verne Stoner until 2003; further, had the State Attorney's Office known of Respondent's attempts to recoup the $42,000.00, it would not have entered into the February 9, 2000 plea agreement with Respondent. (TR 439 - 440, III). Likewise, due to the State Attorney's Office having only recently been apprised of the fact that Respondent had in fact recouped monies he had agreed to pay in criminal restitution, the State Attorney's Office was effectively precluded from re-opening its criminal case against Respondent. (TR 457-458, III).

Respondent ultimately obtained a default judgment against Virginia Taylor in that civil case for $42,000.00, the monies previously paid by Respondent to the

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infliction of emotional distress, (2) conspiracy, and (3) quantum meruit in order to seek damages in the amount of $42,000.00 to offset the criminal restitution paid by him to the Mobile Home Park/Estate as a result of his plea arrangement in the *State of Florida v. Ronald Torres* criminal proceedings. (TFB Composite Ex. 7; specifically, Respondent's Complaint, filed January 12, 2000 and Respondent's Amended Complaint, filed April 17, 2000).

Estate of Verne Stoner for criminal restitution. In addition, Respondent also received $38,000.00 for his attorney fees and costs incurred. Altogether, Respondent ultimately received $80,000.00 from the Estate of Verne Stoner.[4]

The Referee found the Respondent guilty of violating Rules 4-1.15(a) (Clients' and third party funds to be held in trust), 4-1.15(b) (Notice of receipt of trust funds; delivery; accounting), and 4-1.15(d) (Compliance with trust accounting rules) of the Rules of Professional Conduct.

The Referee found Respondent not guilty as to Rules 4-1.1 (Competence), 4-1.3 (Diligence), 4-1.4 (Communication), 4-1.5(a) (Illegal, prohibited, or clearly excessive fees), 4-8.4(a) (A lawyer shall not violate or attempt to violate the rules of professional conduct), 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyers honesty), 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation), 4-8.4(d) (A lawyer shall not engage in conduct within the practice of law that is prejudicial to the administration of justice) and 5-1.1(a) (Trust Accounts: nature of money or

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[4] As a result of Respondent's lawsuit against Ms. Taylor, Respondent caused to have a Writ of Garnishment levied against the Estate of Verne Stoner. The Estate ultimately settled with Respondent for $80,000.00; said $80,000.00 represents the $42,000.00 Respondent had previously remitted to the Estate in criminal restitution, plus additional fees and costs Respondent is said to have incurred.

property entrusted to attorney) of the Rules Regulating The Florida Bar.

The Referee recommended that Respondent be suspended for one (1) year commencing as of the date of his report, followed by three (3) years of probation with the following special conditions: (1) he shall submit to random audits of his office accounts, trust accounts, and escrow accounts to be conducted by The Florida Bar and/or its designated agent(s); (2) he shall attend a debt management course; and (3) he must complete a minimum of thirty (30) hours (10 per each year of probation) of Continuing Legal Education courses with an emphasis on ethics.

In addition, the Referee also ordered Respondent to make payment of the sum of $80,000.00 in restitution to Virginia Taylor's share of the Estate of Verne L. Stoner; said payment to be made within the three (3) year probationary period.

On January 26, 2004, The Florida Bar filed its Amended Affidavit of Costs requesting that $18,903.64 in costs be taxed to Respondent. The costs incurred by the Bar included court reporter fees, investigative costs, and an administrative fee authorized by the Rules of Discipline.

The Referee found that the costs submitted by The Florida Bar were reasonable and necessary in order to properly present this matter to the Referee and ultimately to the Florida Supreme Court, but declined to tax those costs against Respondent.

The Florida Bar filed its Petition for Review on March 23, 2004.

SUMMARY OF ARGUMENT

A referee's findings of fact and recommendations carry a presumption of correctness and will be upheld unless shown to be clearly erroneous or lacking in evidentiary support. However, where a party can demonstrate that the record clearly contradicts the conclusions made or that there is no evidence in the record to support particular findings, a referee's findings may be reversed.

Examination of the record in the instant case indicates that the Referee was clearly erroneous in finding no competent evidence was presented to support the allegations contained in Counts III and IV of The Florida Bar's Complaint. The testimony of the witnesses, as well as the documentary evidence presented, clearly indicates that the Bar proved by clear and convincing evidence that Respondent is guilty of misappropriation/conversion of funds of the Mobile Home Park/Estate

Moreover, Respondent's civil lawsuit is, in effect, a direct, contumacious, and intentional disregard and violation of his February 9, 2000 plea agreement in that Respondent has ultimately and intentionally avoided his court imposed obligation of remitting $42,000.00 to the Estate of Verne Stoner. As a direct

consequence of Respondent's actions, Respondent has not only misappropriated/ converted Estate funds, but has intentionally disregarded his obligation with the Criminal Court and/or the State Attorney's office.

Respondent's civil lawsuit was, by its very design, meant to undermine the plea agreement he had entered into with the Broward County Criminal Court. As such, Respondent's conduct violates the most basic tenets and principles relating to honesty and integrity in the legal system. As such, Respondent has deliberately engaged in conduct which is prejudicial to the administration of justice.

This Court has frequently endorsed the principle that such ethical violations and their negative effect upon public confidence in the legal system will not be tolerated. The Respondent's conduct impacted the legal system as viewed by the public. Respondent's intentional conduct resulted in the abrogation of a Court sanctioned plea agreement and order. Disbarment is the rational response to the violations evidenced in this case.

Additionally, the Rules of Discipline provide that the Bar may recover its costs when it prevails in a disciplinary action unless there is a showing of unnecessary, excessive, or improper authentication of those costs. In the instant matter, the Referee specifically found that the Bar's costs were reasonable and necessary. Therefore, the Referee abused his discretion by failing to tax the Bar's

costs to the Respondent in this proceeding. The Referee's failure to tax costs to the Respondent after having found same to have been reasonably incurred by the Bar was an abuse of the Referee's discretion.

POINTS ON APPEAL

I

WHETHER THE REFEREE ERRED IN FINDING THERE WAS NO COMPETENT EVIDENCE OR FACTS TO SUPPORT THE ALLEGATIONS OF MISAPPROPRIATION/CONVERSION CONTAINED IN COUNT III AND COUNT IV OF THE FLORIDA BAR'S COMPLAINT.

II

WHETHER THE REFEREE ERRED BY FAILING TO MAKE THE PROPER RECOMMENDATIONS AS TO GUILT AND DISCIPLINARY MEASURES TO BE APPLIED.

III

WHETHER THE REFEREE ABUSED HIS DISCRETION IN FAILING TO TAX THE FLORIDA BAR'S COSTS TO THE RESPONDENT IN LIGHT OF HIS FINDING THAT COSTS WERE REASONABLE AND NECESSARY

ARGUMENT
I

THE REFEREE ERRED IN FINDING THERE WAS NO COMPETENT EVIDENCE OR FACTS TO SUPPORT THE ALLEGATIONS OF MISAPPROPRIATION/CONVERSION CONTAINED IN COUNT III AND COUNT IV OF THE FLORIDA BAR'S COMPLAINT

The Florida Bar recognizes that a Referee's findings of fact and recommendations carry a presumption of correctness. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). The party seeking review of such findings and/or recommendations carries the burden of showing that they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991). The party which contends that the Referee's findings of fact and conclusions as to guilt (or innocence) are erroneous, must demonstrate that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions made. The Florida Bar v. Spann, 682 So.2d 1070 (Fla. 1996). In the absence of such a showing, the Referee's findings will be upheld. The Florida Bar v. Hayden, 583 So.2d 1016 (Fla. 1991); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983).

The Florida Bar submits that the Referee's conclusions in the instant case clearly contradict the trial record, to wit:

On pages 27 and 28 of the Report of Referee, the Referee concluded the following,

> "[t]he clear and convincing evidence presented does not suggest that the Respondent intentionally or knowingly converted or misappropriated client property."

Specifically, the referee found that The Florida Bar failed to prove "that the Respondent converted or misappropriated any funds belonging to the Estate of Verne Stoner." (ROR 23). As a result of that finding the Referee determined that The Florida Bar's request for disbarment was not appropriate. (ROR 28). The Florida Bar will show that the Referee's findings and recommendation in this regard are erroneous and contradicted by the record evidence.

In the instant case, The Florida Bar is seeking to overturn the Referee's findings that Respondent did not convert or misappropriate any funds belonging to the Estate of Verne Stoner. In order for The Florida Bar to prevail on this point, it must be shown that Respondent acted with intent to permanently deprive or convert his client's funds. The Florida Bar v. McShirley, 573 So.2d 807, 809 (Fla. 1991).

As previously set forth in the Statement of the Case, Respondent stipulated to being short $20,779.34 in monies due and owing to the Mobile Home Park/Estate. This Stipulation was effected by the parties on or about November

14, 2003, just immediately prior to the final hearing in this matter. [However, it should be noted that previously, on May 12, 2003, Respondent, at his own deposition, had maintained that he in fact was not short $20,300.00 and that he had in fact overpaid the Estate. (See TFB Ex. 35, May 12, 2003 Deposition of Respondent, pp 58-59).] Moreover, and most importantly, Respondent has to date failed to provide an adequate or proper explanation as to why he was short $20,779.34 (TR 567, IV), why he borrowed $20,300.00 from Georgina Hennessey to cover the shortage[5], or why he initiated a civil lawsuit to recoup $42,000.00 in criminal restitution which he had agreed to pay and did pay pursuant to a criminal plea agreement with the Broward State Attorney's Office.

As stated, the Respondent resolved the shortage with the Broward State Attorney's Office and initially the Estate by entering into a criminal plea agreement and paying $42,000.00 in restitution to the Mobile Home Park/Estate on or about December, 1999. (TR 427-429, III). Yet the Respondent, quite inexplicably and unbeknownst to the State Attorney's Office initiated a civil lawsuit on or about January 12, 2000 in order to obtain the exact monies he had paid to the Mobile

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[5] Respondent repaid $1,700.00 of the $20,300.00 to Georgina Hennessey; $18,600.00 was never repaid to Georgina Hennessey, was ultimately deemed to be Estate funds and, as such, was included within the $42,000.00 restitution amount to the Estate of Verne Stoner.

Home Park/Estate in criminal restitution.

Review of the November 19, 2003 transcript discloses the following exchange between Bar Counsel and Respondent:

BY MR. BROMBACHER:

Q. If you would, could you read Paragraph 36 of what is Exhibit 28, it's [your] amended complaint, into the record please.

A. As a direct and proximate result of the Defendant's deliberate acts, including, but not limited to, their refusal to intervene on Torres' behalf or otherwise exonerate him for services performed with the knowledge and implied consent of Stoner and Taylor, individually and as Stoner's attorney in fact, Torres was ultimately forced to pay, quote, unquote, restitution in the amount of $42,000 to the Estate of Verne L. Stoner.

Q. So you in fact sought the $18,600.00 as part of this $42,000?

A. I sought $42,000.00, as that's was what I had paid, yes, sir.

Q. ... The Default Final Judgment makes reference to you having received $52,000, which represents the $42,000 in criminal restitution and the attorney's fees that you were speaking of.

A. It represents the $42,000 that I paid as part of the settlement and the additional fees for the defense of the proceedings, yes.

(TR 765, 766,

V).

The Respondent paid $42,000 in restitution to the Mobile Home Park/Estate on or about December 23, 1999 and understood that said monies were in furtherance of the criminal plea that was to be effected on February 9, 2000. The Respondent understood that said monies were part of the terms and conditions of the plea agreement, as evidenced by the testimony of John Hanlon (TR 427-429, 434, III) and the following exchange between Bar Counsel and Respondent.

> Q. It was your testimony that when you borrowed the $20,000 from Ms. Hennessey, it was your understanding that the monies were her own and not the estate?
>
> A. That's correct.
>
> Q. And subsequent to your borrowing the monies, you came to understand that these monies were deemed by the estate and the State Attorney's Office and Ms. Hennessey to be monies of the estate?
>
> A. That's what I was told.
>
> Q. And in fact when you entered into the plea agreement for $42,000, there were two separate checks, and that you separated them allocating for monies that you thought were those ... from Ms. Hennessey that you were now remitting to the estate?
>
> A. Yes.
>
> Q. The $18,600 was the amount that you owed Ms.

Hennessey on the IOU?

A. Yes.

Q. Now, ultimately, you filed suit seeking all of the $42,000 back?

A. Yes.

Q. But $18,600, you admitted you owed to either the estate or Ms. Stoner?

A. Yes.

(TR 763, 764, V).

Based on the above exchange, it is irrefutable that Respondent knew ***at the time he initiated the civil lawsuit*** to recoup the $42,000.00 he had previously paid in criminal restitution, that a portion of the $42,000.00 ($18,600.00) was deemed to be funds due and owing to the Estate of Verne Stoner.

Before the plea agreement had even been ratified by the Honorable Judge Robert Diaz (TFB Ex. 23), Respondent was on January 12, 2000 seeking to recover the exact monies he had paid in restitution as part of a criminal plea agreement. (TFB Ex. 7). Such conduct is not only deliberate, it constitutes a complete and utter abrogation of Respondent's plea agreement and, in every conceivable way, is intentionally improper and, by Respondent's own design, was meant to undermine the criminal judicial system. Parenthetically, it should be noted

that the Broward State Attorney (Mr. John Hanlon, Esq.) was unaware of Respondent's attempt to recoup the $42,000 in restitution and had he known of Respondent's efforts in this regard, he would have not entered into the criminal plea arrangement with Respondent. (TR 439-440, III). Respondent has intentionally acquired $18,600.00 that he knew belonged to the Estate and, in effect, converted/ misappropriated these funds by causing the said $42,000.00 to be disbursed to him as part of a civil settlement with the Estate of Verne Stoner (TFB Ex. 9, Global Settlement Agreement). Such conduct clearly involves an overt act of dishonesty and misrepresentation, and is prejudicial to the administration of justice. See The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991).

By Respondent securing a judgment against the Estate and ultimately settling with the Estate for $80,000.00 (TFB Ex. 9), Respondent has knowingly misappropriated $18,6000.00 of the Estate funds for his own personal use. Respondent had agreed to make restitution to the Estate for the $42,000.00 and has, through his own deliberate actions of initiating a civil litigation against the Estate of Verne Stoner, refused to honor his agreement to pay said monies to the Estate. Such conduct warrants disbarment as Respondent has completely abrogated and disregarded the ruling of the criminal court. See The Florida Bar v. Gussow, 519 So.2d 603 (Fla. 1988).

Furthermore, Respondent has engaged in a continuing pattern of misconduct in that Respondent has throughout his representation of the Mobile Home Park/Estate failed to open and maintain a trust account or depository for the Estate funds. In conjunction with not having opened a Trust Account, Respondent had absolutely no explanation (or timely remorse) concerning the shortage of $20,779.34. Although Respondent has stated that the stipulated shortage was unintentional, three facts when taken together clearly show Respondent's intent:

First, the Referee found that Respondent "knew, or at the very least, should have known, that he was dealing improperly with funds belonging to the Mobile Home Park/Estate by failing to deposit said funds in trust and by keeping accurate records." (ROR, p 23). Second, Respondent, on or about March 25, 1998, recognizing that he was short approximately $20,300.00, borrowed $20,300.00 from Georgina Hennessey, which Respondent himself characterized as having been "technically embezzled from the Stoners." (See TFB Composite Ex. 12, TR 545-554, IV). Furthermore, and perhaps most egregiously, Respondent sued to reclaim said monies which he had earlier agreed to and did pay in criminal restitution as part of a criminal plea agreement with the Broward State Attorney's Office.

This confluence of events, in conjunction with Respondent's own actions,

characterizations, and admissions, show clear knowledge/intent to convert and/or misappropriate Estate funds. See The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989); The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978).

Although the Referee recognized the impropriety of Respondent's civil lawsuit and ordered restitution of $80,000.00, the Referee failed to find deliberate knowledge and intent in Respondent's conduct. Based on the existing trial record, however, it is irrefutable that Respondent knew that the $18,6000.00 which he paid in criminal restitution to the Estate of Verne Stoner had been deemed to be Estate monies.

Respondent's actions can only be discerned as his attempt to deprive and/or misappropriate/convert Estate assets to his own. Respondent had absolutely no lien, color of title, or legal right to the $18,600.00 paid in criminal restitution. The funds were borrowed by Respondent and ultimately acknowledged to be funds belonging to the Estate of Verne Stoner. Yet, Respondent sued to recoup this $18,600.00 at issue. As the facts are uncontroverted, Respondent is liable to the Estate (and to this Court) for his acts as a matter of law.

As stated by this Court in The Florida Bar v. Simring[6], "[t]he respondent's

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[6] 612 So.2d 561, 566 (Fla. 1993)

'sloppy and *intentionally* improper trust accounting procedures' cannot be used as a shield to hide his intent to misappropriate trust account funds." It is clear and undisputed that Respondent completely and unilaterally mismanaged and misused client funds which ultimately was to the detriment of the beneficiaries of the Estate of Verne Stoner - Virginia Taylor and Respondent's own client, Daniel Stoner.

Such mismanagement and misuse of funds to the detriment of Estate beneficiaries constitutes conduct prejudicial to the administration of justice. See The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991) (Attorneys' mismanagement of funds to the detriment of estate beneficiaries constitutes conduct prejudicial to the administration of justice regardless of whether funds are withheld from estates intentionally or through negligence).

Furthermore, no substitute or competent evidence exists in the record to support the notion that Respondent's lawsuit and subsequent litigation to recoup monies paid in furtherance of his criminal restitution was the result of inadvertence, mistake, or neglect. Respondent deliberately and intentionally sued to obtain $18,6000 which he knew the State, the Estate, and Hennessey deemed to be assets of the Estate of Verne Stoner. The evidence at trial shows Respondent misappropriated/converted Estate funds when he sought to recoup $42,000.00 in criminal restitution. In fact, Respondent engaged in litigation which resulted in the

Mobile Home Park/Estate returning those funds which Respondent paid in criminal restitution after having spent in excess of $280.000.00 to defend the Estate in litigation initiated by Respondent ($80,000.00 to settle the lawsuit with Respondent and $200,000.00 in legal fees). (ROR 25).

The evidence is overwhelming and unrefuted that Respondent deliberately converted/misappropriated Estate funds by initiating litigation for monies which Respondent knew he had no ownership or possessory interest.

As evidenced by the foregoing, it is the position of The Florida Bar that the Referee's findings with regard to Counts III and IV of the Bar's Complaint are clearly erroneous and inconsistent with the evidence presented. Where findings of fact are clearly erroneous or lacking in evidentiary support, they should be overturned. The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982). The Florida Bar has proven by clear and convincing evidence the allegations set forth in Count III and Count IV of its complaint and the Referee's findings and recommendation regarding the facts and conclusions for Count III and Count IV should be reversed.

ARGUMENT
II

THE REFEREE ERRED BY FAILING TO MAKE THE PROPER RECOMMENDATIONS AS TO GUILT AND DISCIPLINARY MEASURES TO BE APPLIED.

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

Some basic principles which apply to this case should be considered. When deciding upon the proper discipline, the single most important concern is the protection of the public from incompetent, unethical, or irresponsible representation. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner which will cause laymen, and the public generally, to have the highest respect for and confidence in the members of the legal profession. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). Any conduct of an attorney which brings the administration of justice into scorn and disrepute demands condemnation and the application of appropriate penalties. The Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958).

The referee found that Respondent was in violation of three (3) rules,

specifically Rules 4-1.15(a) (Clients' and third party funds to be held in trust), 4-1.15(b) (Notice of receipt of trust funds; delivery; accounting), and 4-1.15(d) (Compliance with trust accounting rules). In addition to a suspension and other probation conditions, the referee also ordered Respondent to make payment in the sum of $80,000.00 in restitution to the Estate of Verne Stoner with said payment to be made within the three (3) year probationary period.

The evidence in regard to the above violations must be given great weight. As stated by the referee:

> "the evidence does support, by a clear and convincing evidence standard, based upon the Respondent's admissions and his answer to The Florida Bar's First Amended Complaint that he knew or ***at the very least, should have known*** that he was dealing improperly with funds belonging to the trailer park by failing to deposit said funds in trust and by keeping accurate records ." (Emphasis added.) (ROR 23).

In The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991), this Court held that an attorney's "mismanagement of funds to [the] detriment of estate beneficiaries constitutes conduct prejudicial to the administration of justice, regardless of whether funds are withheld from estates intentionally or through negligence."

Assuming *arguendo*, Respondent's actions are the result of mere negligence and are not intentional, such negligence alone would support a three year

suspension. The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988).

Respondent failed to safeguard the rental proceeds from the Mobile Home Park/Estate. It is The Florida Bar's position that Respondent's failure was more than simple negligence or inadvertence as Respondent engaged in a deliberate and intentional plan or scheme to withhold and misappropriate/convert Estate funds.

Respondent willfully agreed to receive Estate funds. By doing so he was obligated to deal properly with those funds and to keep accurate records regarding those funds. By failing to do so, he has betrayed the trust placed in him. Respondent's continuing and irresponsible misuse/mismanagement of client funds (i.e. his failure to account for client funds, his failure to maintain a trust account, and his failure to maintain any kind of trust account records) in and of itself warrants more severe discipline than a one (1) year suspension. [The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981); The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979); The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986)]. Respondent by his own admissions has failed to preserve the property of a client and only delivered said monies as part of a criminal plea agreement.

Moreover, Respondent, at his May 12, 2003 deposition, had still failed to acknowledge or comprehend any misconduct (intentional or otherwise) on his part and, to the contrary, asserted that he overpaid the Estate. What Respondent failed

to recognize is that he entered into a criminal plea agreement on or about December, 1999 wherein he accepted the terms of the criminal plea agreement - that Respondent would make payment of $42,000.00 in restitution to the Mobile Home Park/Estate. Yet, Respondent as of May, 2003, was still adamant that he overpaid and that his civil lawsuit to recoup the monies paid in criminal restitution was somehow appropriate.

But by far the most egregious conduct of the Respondent is his civil lawsuit; Respondent's suit to recover criminal restitution funds involves not only a fraud on the criminal court, but a deliberate civil misappropriation which strikes at the very heart and core of a lawyer's ethical responsibility. Either offense (fraud or misappropriation) is so offensive and contrary to the principles of the legal profession as to justify disbarment. See The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988).

Respondent's civil lawsuit resulted in his improper misappropriation/ conversion or, at the very least, improper withholding of Estate funds. Such conduct has been held to warrant disbarment. See The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991); The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988) (Theft of client funds, effectuated through fraud on the court, warrants disbarment regardless of mitigating factors).

On innumerable occasions this Court has stated that there are three purposes of discipline. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Cibula, 725 So.2d 360, 363 (Fla. 1998) [quoting The Florida Bar v. Reed, 664 So.2d 1357 (Fla. 1994)].

As the Court has state previously:

> The single most important concern of this Court in defining and regulating the practice of law is the protection of the public from incompetent, unethical, and irresponsible representation. The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980). The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence. (Emphasis supplied).
>
> The Florida Bar v. Dancu, 490 So.2d 40 (Fla. 1986).

The misuse of client funds is among those acts which do the greatest damage

to the public trust. That principle has been explicitly set forth by this Court in The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991):

> This Court has repeatedly asserted that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment.

The respondent in The Florida Bar v. Tillman, 682 So.2d 542 (Fla. 1996) was disbarred for violating Rules 4-1.15(b) (prompt delivery of client funds), 4-1.15(d) (compliance with trust account rules), 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), 5-1.1(d) (money entrusted must be used for specified purpose), and 5-1.2 (compliance with trust acccount procedures and record keeping requirements) of the Rules Regulating The Florida Bar. The similarity to this case is readily apparent. In Tillman, this Court stated again that the misuse of client funds is one of the most serious offenses an attorney can commit.

In The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986) decided under the former rules, the respondent was also disbarred. The misuse of client funds was appropriately condemned by imposition of the most serious form of discipline.

In this case, the referee found that there was one aggravating factor: a pattern of misconduct [Standard 9.22(e)]. The Bar would submit that this serious and substantial aggravating factor outweighs the mitigating factors.

The mitigating factors were:

1. 9.32(a) - absence of a prior disciplinary record;
2. 9.32(b) - absence of dishonest or selfish motive;
3. 9.32(f) - inexperience in the practice of law;
4. 9.32(g) - character of reputation;
5. 9.32(l) - remorse.

Even if the referee's mitigating factors were given greater weight than the aggravating factors, they are not sufficient to overcome the presumption in favor of disbarment. The holdings in the most recent cases support that conclusion. As stated in Shanzer, supra:

> In some cases we have found that presumption rebutted by mitigating evidence, and we imposed the slightly lesser discipline of suspension. See, e.g., *The Fla. Bar v. Schiller*, 537 So.2d 992 (Fla. 1989). In the overwhelming number of recent cases, we have disbarred attorneys for misappropriation of funds notwithstanding the mitigating evidence presented. See *The Fla. Bar v. Shuminer*, 567 So.2d 430 (Fla. 1990); *The Fla. Bar v. Golub*, 550 So.2d 455 (Fla. 1989); *The Fla. Bar v. Fitzgerald*, 541 So.2d 602 (Fla. 1989); *The Fla. Bar v. Gillis*, 527 So.2d 818 (Fla. 1988); *The Fla. Bar v. Newhouse*, 520 So.2d 25 (Fla. 1988); *The Fla. Bar v. Bookman*, 502 So.2d 893 (Fla. 1987); *The Fla. Bar v. Knowles*, 500 So.2d 140 (Fla. 1986); *The Fla. Bar v. Rodriguez*, 489 So.2d 726 (Fla. 1986); *The Fla. Bar v. Ross*, 417 So.2d 985 (Fla. 1982).

When funds are placed in an attorney's trust account, a fiduciary relationship

is established. Kenet v. Bailey, 679 So.2d 348 (Fla. 3d DCA 1996). The Third District quoted Justice Cardozo regarding the extraordinary duty of a fiduciary.

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."
>
> (Footnote 4, p. 350).

Respondent did not remotely fulfill his obligation as a fiduciary. Furthermore, this Court has declared that fiscal irresponsibility will not be tolerated. The Florida Bar re Roberts, 721 So.2d 283 (Fla. 1998).

The conduct of Respondent and existing case law clearly and unequivocally support the allegations as put forward in Counts III and IV of The Florida Bar's Complaint, as well as the Bar's recommended disciplinary sanction of disbarment.

As this Court stated in The Florida Bar v. Simring, "[t]he respondent's sloppy and intentionally improper trust accounting procedures cannot be used as a shield to hide his intent." As the referee rightly concluded, the Respondent knew or should have known that he was dealing improperly with Estate funds and that

he failed to keep accurate records. One must conclude that based upon the uncontested facts, Respondent deliberately engaged in conduct which involved the

misuse, mismanagement, and ultimately the misappropriation/conversion of client funds. As such, Respondent has violated or attempted to violate the rules of professional conduct, committed criminal acts that reflect adversely on a lawyer's honesty, engaged in conduct which is dishonest, fraudulent and deceitful, and engaged in acts prejudicial to the administration of justice, as well as having failed to hold Estate monies in a trust account. Said conduct is clearly violative of Rules 4-8.4(a), 4-8.4(b), 4-8.4(c), 4-8.4(d), and 5-1.1 of the Rules Regulating The Florida Bar.

As stated above, Respondent knew or "should have known" that he was mismanaging funds belonging to the Mobile Home Park/Estate. Respondent's conduct, at the very least, displayed a serious and intentional indifference to the role of an attorney as a fiduciary. A long term pattern of trust fund misconduct was admitted. The misconduct included his failure to safeguard Estate funds. The referee's determination that Respondent's conduct was unintentional is not supported by Respondent's actions.

The foregoing conclusion is supported by the dual nature of Respondent's violation. The Respondent mismanaged Estate funds, was caught, pled to a criminal charge, and then sued to recoup the exact same monies that he paid in restitution. The referee himself concluded that this was inappropriate and improper

and he ordered Respondent to pay $80,000.00 in restitution to the Estate of Verne Stoner.

As this Court is not bound by the referee's recommendation as to discipline, The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978), the ultimate responsibility for discipline is at issue on petition for review. The Florida Bar v. McCain, 330 So.2d 712 (Fla. 1976). There is no basis for the referee's recommendation of a one year suspension, or that Respondent only violated Rules 4-1.15(a), 4-1.15(b) and 4-1.15(d), given Respondent's documented intentional misconduct.

Respondent has engaged in a scheme to undermine his criminal plea and exact civil redress in monies he knew were Estate funds. Said conduct clearly and without question constitutes conduct which is both corruptive and prejudicial to the administration of justice. The referee's comments regarding the lack of proof of intent and of Respondent's mitigation have been amply negated. Respondent's deliberate conduct inherently undermines the legal system, and constitutes intolerable conduct on the part of an attorney. The Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958).

Corruption of the system of justice must be viewed as the most serious offense that a lawyer can commit. The applicable standards and cases require

disbarment instead of suspension. Therefore, Respondent should be disbarred.

ARGUMENT
III

THE REFEREE ABUSED HIS DISCRETION IN FAILING TO TAX THE FLORIDA BAR'S COSTS TO THE RESPONDENT IN LIGHT OF HIS FINDING THAT COSTS WERE REASONABLE AND NECESSARY.

This Court has previously stated the general rule that "An attorney found guilty of charges brought by the Bar will have the costs assessed against him." The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986). The Referee's guilty finding as to the charges lodged against Respondent by the Bar in the instant matter are not in dispute. The Referee found the Respondent guilty of violating Rules 4-1.15(a) (Client's and third party funds to be held in trust), 4-1.15(b) (notice of receipt of trust funds, delivery, accounting) and 4-1.15(d) (Compliance with trust accounting rules). In addition, the Referee also ordered Respondent to make payment of the sum of $80,000.00 in restitution to Virginia Taylor's share of the Estate of Verne L. Stoner. In light of the fact that over two (2) dozen allegations of The Florida Bar were either proven and/or stipulated to, The Florida Bar is entitled to recover all costs of the disciplinary proceedings brought against the Respondent. As this Court previously stated in The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982), "[g]enerally where there is a finding that an attorney has been found guilty of violating a provision of the Code of Professional Responsibility, the Bar should be

awarded costs". Davis at 328. Accordingly, the Referee erred in denying the Bar's request to assess its costs against the Respondent.

Rule 3-7.6(o)(3) of the Rules of Discipline provides as follows:

> When the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated.

In the instant case, the Bar requested recovery of its costs incurred in investigator time and court reporter fees, as well as the administrative fee provided for in the rules. Not only was there no finding by the Referee that the costs were in any way unnecessary, excessive, or improperly authenticated, but such a position was never even raised by the Respondent or the court. In fact, the Referee specifically found that all of the Bar's costs were reasonable and necessary. (ROR 33).

Rule 3-7.6(o)(2) of the Rules of Discipline provides that:

> **Discretion of Referee**. The Referee shall have discretion to award costs and absent an abuse of discretion the Referee's award shall not be reversed.

Although the Referee does have discretion in making a recommendation regarding the award of costs, the final decision rests with this Court. The Florida Bar v. Bosse, 609 So.2d 1322 (Fla. 1992). In the instant case, the Referee's

decision not to require Respondent to pay the costs of these proceedings is contrary to the general rule that the Bar should be awarded the costs of the proceedings where they prevail, especially in light of the fact that the Referee found that such costs were reasonably and necessarily incurred. Under the relevant case law and the applicable rules, the Referee abused his discretion by failing to assess the Bar's costs in this matter against the Respondent when a large number of allegations of the Complaint were proven.

The Courts have noted that one of the primary purposes of lawyer discipline is to demonstrate to all members of the profession the seriousness of their ethical violations as well as to deter others who might be tempted to become involved in like violations. The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991). The imposition of costs upon attorneys found guilty of ethical violations serves to hold errant members of the Bar financially accountable for the costs associated with disciplining them as opposed to having the Bar membership as a whole bear the associated costs. The costs incurred in connection with disciplining lawyers who violate their ethical obligations should properly be imposed upon the guilty party.

Rule 3-7.6(o)(1) of the Rules of Discipline provides a list of all taxable costs associated with the disciplinary process. Included among the costs that may be recovered by the Bar are court reporter costs, investigative costs, and

administrative fees. All of the costs incurred in the instant case fall within the parameters of the rule.

This Court has consistently held that it is more appropriate that the costs of a disciplinary proceeding be taxed to the guilty part than be borne by the balance of the membership. The Florida Bar v. Miele, 605 So.2d 866 (Fla. 1992). The Court in Miele reasoned that in the absence of misconduct on the part of Respondent, the Bar's actions would not be necessary. As the Referee found, the Bar's costs in this case were reasonable and necessary in the prosecution of this matter. But for the conduct of the Respondent, the costs would not have been incurred. The Respondent should be required to pay these costs as a part of the discipline imposed in this case. As stated earlier, Respondent's actions in abrogating his criminal plea agreement and therefore disregarding the court sanctioned criminal plea agreement constitute deliberate and intentional conduct, which by its very design undermines the public's confidence in our judicial system and legal profession. The imposition of costs is an important part of the sanction to be imposed against Respondent for his abhorrent behavior.

The costs of these disciplinary proceedings should be taxed to the Respondent. They should not be borne by the members of the Bar who honor the ethical requirements of their profession. As this Court held in The Florida Bar v.

Gold, 526 So.2d 51 (Fla. 1988), when the choice is between imposing the costs of discipline on those who misbehave or on those who have not misbehaved, the costs is properly borne by the Respondent. Gold at 52. Accordingly, the Referee erred in failing to tax costs to the Respondent and, as such, the Respondent should be required to pay the full costs of these disciplinary proceedings.

CONCLUSION

The fact that the Referee did conclude that Respondent violated The Rules Regulating The Florida Bar, and ordered restitution in the amount of $80,000.00 clearly evidences misappropriated and /or converted funds that were deemed to be due and owing the Estate of Verne L. Stoner. Moreover, Respondent's intentional overt and obvious disregard of his legal obligations clearly pronounced in the said criminal plea agreement must be viewed as a most serious offense. The applicable standards and cases require disbarment instead of a suspension. Therefore, the Referee's findings of fact, and recommendation as to discipline should be reversed.

Lastly, The Florida Bar respectfully requests that this Honorable Court reject the Referee's recommendation as to costs and instead impose all costs incurred by The Florida Bar in these disciplinary proceedings on the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief was forwarded via Airborne Express, airbill no. 3370015025, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Glenn S. Cameron, Attorney for Respondent, at Cameron, Davis & Gonzalez, P.A., 250 Australian Avenue South, One Clearlake Centre, Suite 1601, West Palm Beach, Florida 33401, and to Ronald Robert Torres, Respondent, at 15327 N.W. 60th Avenue, Suite 215, Miami Lakes, Florida 33014, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this ____ day of April, 2004.

____

ARLENE KALISH SANKEL
Bar Counsel

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

I HEREBY CERTIFY that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

____

ARLENE KALISH SANKEL

Bar Counsel

INDEX TO APPENDIX

A. Report of Referee in the matter of The Florida Bar v. Ronald Robert Torres, Supreme Court Case No. SC02-1801, The Florida Bar File No. 2000-71,116(11F), dated January 27, 2004.