

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case

No. SC00-256

Complainant,

vs.

ALAN IRA KARTEN,

Respondent.

THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent has submitted to this Court a highly argumentative twenty-six (26) page Statement of the Case and Facts frequently devoid of adequate references to the record. The Bar has moved to strike and this Court has reserved ruling on that motion. Therefore, the Bar will not attempt to deal with every argument set forth in the Statement of the Case and Facts. Rather, the Bar will present herein the vital facts and references to the record ignored by the respondent. The pertinent facts follow.

Respondent represented Nelson Loynaz pursuant to the Criminal Justice Act, 18 U.S.C. 3006A. Loynaz was imprisoned. However, the government and Loynaz entered into a Stipulation and Settlement Agreement (TFB Exh. 6), of which the salient portions follow:

1. On August 8, 1996, a Federal grand jury in this District returned a Second Superseding Indictment against Nelson Loynaz, Jr., (hereinafter “Defendant”) and others. Pursuant to 21 U.S.C. §853, the Indictment sought the forfeiture of the defendant’s assets; a Bill of Particulars, filed October 11, 1996, more particularly described some of the defendant’s assets, including the following vehicles:
 - a. One Mercedes Benz E320, VIN: WDBEA32E6SC217274; Florida Tag SJK-32Y;

- b. One 1966 Chevrolet Corvette, VIN: 194376S109024;
 - c. One 1967 Chevrolet Corvette, VIN: 194377S118864;
 - d. One 1968 Ford Mustang, VIN: 8T02J16541502030;
 - e. One 1966 Ford Mustang GT350, VIN: 6S2282;
 - f. One 1994 Dodge Viper, VIN: 1B2BR65SE2RV102388.
2. The United States and Nelson Loynaz, Jr. stipulates (sic.) that the vehicles described in a), b), c), d), and e) above shall be returned to the defendant without assessments for maintenance and storage; the vehicle in f) above and thirty thousand (\$30,000.00) dollars via cashier's check from Alan I. Karten, Esq., attorney for Nelson Loynaz, Jr., payable to "United States Marshals Service," shall be forfeited to the United States of America. (Emphasis added)

While his client remained imprisoned, the respondent delivered \$30,000.00 and took possession of the four (4) cars. (T. 56,57). In accordance with the agreement, the fifth car, a Mercedes, was returned to Loynaz' wife, Mary Loynaz, and the sixth car, a Dodge Viper, was forfeited to the government. All of the foregoing facts are undisputed.

Respondent claims that he sold all four (4) cars to his business partner Robert Woltin (T. 288). Furthermore, he insisted that he made no profit.

In a pleading entitled "Alan I. Karten's Response to the Defendant Nelson Loynaz Jr's. Motion for Return of Property" (TFB Composite Exh. 3) in Federal

Court respondent represented that:

“All four [vehicles] were sold for \$30,000.00.”

In a letter to the Bar dated June 18, 1998, (TFB Comp. Exh. 3) the respondent wrote:

“... the vehicles were titled to me by the State of Florida and those vehicles were delivered to the ultimate buyer at no profit to me.”

At trial he continued to assert that he sold the four (4) cars for \$30,000.00 (T. 288, 308) and, therefore, made no profit.

The sale was made to Robert Woltin, a business associate, according to respondent (T. 288). Woltin handled the sale of one of the vehicles, a Corvette, to Thomas Duncan who also testified (T. 166, ff.) However, the Purchasing Agreement (TFB Exh. 10) stated, in pertinent part, that:

This purchase is being made by and between the following parties: Robert Woltin who is representing the (seller or sellers) ... (Emphasis supplied)

The check for payment for the vehicles was made out to Alan Karten (T. 184). Karten offered the explanation that since the title was made out in his name, the check had to be issued to him. (T. 291).

Woltin arranged the sale of one of the cars and received a \$1,000.00 deposit and a \$24,000.00 check as the sales price. (T.159). The \$24,000.00 check was

made out to Karten, who endorsed it. (T. 159).

The Bar's auditor traced the check and testified that it was deposited in the account of 201 East Atlantic Investments, Inc. (T. 185). Karten was one of three shareholders in 201 East Atlantic. (Karmin, depo. pg. 5).

The other shareholders were Woltin, the supposed purchaser of the cars, who was the President of 201 East Atlantic, and Carl Karmin. (Karmin, depo. pg. 5). The books and records of the corporation established that respondent received a credit for a \$24,000.00 capital contribution to the corporation based upon the \$24,000.00 deposit. (Depo. Karmin pg. 17). That was in addition to the \$30,000.00 which respondent said that Woltin paid him for the cars.

Respondent claimed he didn't know anything about it at that time and only learned about it during April, 2000. (T. 296). However, Woltin testified as follows:

Q. Did Mr. Karten give you the check as part of his capital contribution toward Louis Louis Too?

A. Yes, he did. (T. 159).

Loynaz and his wife Mary (now ex-wife) testified that Mary was prepared to deliver the \$30,000.00 for the forfeiture with the assistance of a friend, Manny Mesa (T. 53, 119). Respondent confirmed that someone identified as Mesa came to his office with Mary Loynaz, but he, Karten threw him out of his office. (T. 307).

Loynaz sought to obtain the return of his vehicles through pro se pleadings.

The government responded (TFB Exh. 12) and declared, among other statements that:

The parties filed a stipulation which stated that defendant would forfeit a 1994 Dodge Viper and \$30,000. In return, the United States would return a 1966 Corvette, a 1967 Corvette, a 1968 Ford Mustang, a 1966 Ford Mustang and a 1995 Mercedes E320 (DE:648). As a result, the Court entered a final order of forfeiture which confirmed that defendant would forfeit the 1994 Dodge Viper and \$30,000.

The government also advised the Court in its response that:

A review of defendant's motion and defense counsel's response demonstrates that defense counsel sold the two Mustangs and the two Corvettes and kept the proceeds as his fees for services.

The question presented by the government was whether respondent had thereby violated the Criminal Justice Act by seeking an extra fee.

The matter was referred to Magistrate Turnoff who issued a "Report and Recommendation" (TFB Exh. 13). The report adopted by Judge Davis stated, in part:

It is undisputed that Mr. Karten, acting as Defendant's counsel, sold the two Mustangs and two Corvettes - vehicles which were part of criminal indictment - and kept

the proceeds.

Further, according to the Report, Karten had testified that the sale proceeds were merely a \$30,000.00 reimbursement for the amount paid to the government. There is no indication in the Report that respondent revealed the existence of a profit on the sale of one of the four (4) vehicles.

The referee found that respondent was in violation of Rule 4-8.4(c) (engaging in conduct involving dishonesty, fraud deceit or misrepresentation) of the Rules of Professional Responsibility and recommended disbarment.

Respondent filed a Petition for Review.

SUMMARY OF THE ARGUMENT

ISSUE I

The referee found that the respondent was guilty of violating Rule 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Conduct. Respondent has failed to overcome the presumption of correctness of that finding. There is competent substantial evidence that respondent took for his own benefit four (4) classic cars that were to be released by the government to his client, Nelson Loynaz, Jr.

A Stipulation and Settlement Agreement between Loynaz and the United States government stated, without ambiguity, that the four (4) vehicles were to be returned to Loynaz. The agreement provided for a forfeiture of a fifth car, and \$30,000.00. While his client was in prison, respondent delivered \$30,000.00 to the government and took the vehicles.

A business associate of respondent had an arrangement with respondent whereby he would reimburse respondent for the \$30,000.00 payment and receive a share of some of the profits from the sale of the vehicles. Respondent told a different story, namely that he agreed to share profits with Loynaz. Furthermore, he insisted to the Bar that he had made no profit on the transactions. He denied any benefit from a \$24,000.00 check made out to him and endorsed by him in

connection with the sale of one of the cars.

However, the Bar discovered records which the respondent had not revealed. They established that the respondent received a \$24,000.00 credit towards his capital contribution to a corporation, 201 East Atlantic Investments, Inc. There were only two other shareholders of that corporation. Robert Wolin, president of the corporation testified that respondent asked him to apply the \$24,000.00 toward his capital contribution. Carl Karmin, a member of The Florida Bar, testified as custodian of records that the \$24,000.00 credit had been entered on the books. The respondent claimed that he promised a share of any profits to Loynaz, but gave him nothing based upon the claimed lack of profit. Loynaz denied the existence of a profit sharing agreement.

Respondent claimed that he entered into the profit sharing agreement with Loynaz because he (respondent) was “gracious”. While he insisted that Loynaz did not own the cars, and therefore, respondent was free to buy them from the government, the government witnesses testified that the cars were to be returned to Loynaz, as the agreement stated, and there was no pending issue of ownership.

ISSUE II

Respondent has also failed to demonstrate an abuse of discretion in regard to the referee’s denial of a motion for rehearing. Respondent sought rehearing

and/or to reopen the case. The precise nature of the motion is a bit unclear.

However, there was no claim of newly discovered evidence. No explanation was offered as to why the alleged evidence was not offered during the trial.

Respondent sought to introduce evidence which would impeach Loynaz. However, it was clear from the trial, that the Bar had corroborated Loynaz' testimony with the testimony of the same government representatives who had been in charge of his prosecution. His position was also corroborated by the explicit terms of the Settlement Agreement. Furthermore, respondent's credibility, not that of Loynaz, had been throughly destroyed. He had falsely testified that he made no profit. He falsely testified that the issue of ownership permitted him to obtain the four (4) vehicles. The referee was in the best position to know that in regard to the material issues, the question of who was credible was settled.

ISSUE III

Disbarment is appropriate. Respondent engaged in dishonest conduct of a most serious nature. He took his client's property and made fraudulent representations to the Bar regarding not making a profit and repeated that false claim under oath. Under those circumstances, Florida's Standards for Imposing Lawyer Sanctions, and case law recommend disbarment.

Disbarment is recommended even without aggravating factors. However,

failure to acknowledge the wrongful nature of the conduct is a viable aggravating factor when a respondent denies his guilt in bad faith. Furthermore, Loynaz was clearly a client with a disability because he was imprisoned and had no opportunity to directly facilitate the return of his vehicles. Also, an admonishment given in 1998 in regard to a 1997 case was a proper aggravating factor.

Mitigation, based upon the testimony of character witnesses, need not be given great weight in view of respondent's offensive conduct.

ISSUES ON APPEAL

I.

WHETHER THE RESPONDENT ESTABLISHED ANY ERROR REGARDING THE FINDING OF GUILT

II.

WHETHER THE RESPONDENT FAILED TO ESTABLISH ANY ERROR IN REGARD TO RESPONDENT'S POST TRIAL MOTION

III.

WHETHER DISBARMENT IS THE APPROPRIATE DISCIPLINE

ARGUMENT

I.

THE RESPONDENT FAILED TO ESTABLISH ANY ERROR REGARDING THE FINDINGS OF GUILT

The referee found that respondent was guilty of violating Rule 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Responsibility. Respondent challenges that finding.

The essence of the violation was that respondent took possession of four (4) automobiles which the United States government was returning to his client, sold them and profited thereby and thereby deprived his client of the vehicles.

Respondent denied the existence of a profit. (TFB Exhs. 2, 3 and 4, T. 308).

When confronted with records that established the existence of the profit, respondent offered no reasonable explanation. Both of his business partners testified regarding the records which revealed a \$24,000.00 profit. Respondent also sought to recover additional fees under the Criminal Justice Act, 18 U.S.C.S. 3006A. He was court appointed counsel for his client, Nelson Loynaz, Jr., but was not entitled to additional fees under the act.

The applicable standards for review were set forth in The Florida Bar v.

Vining, 761 So. 2d 1044 (Fla. 2000).

A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. See Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992); Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986). If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. See MacMillan, 600 So.2d at 459. The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions.

(at 1047)

This court added:

[A] party does not satisfy his or her burden of showing that a referee's findings are clearly erroneous by simply pointing to the contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings. See Florida Bar v. Schultz, 712 So.2d 386, 388 (Fla. 1998); Florida Bar v. de la Puente, 658 So.2d 65, 68 (Fla. 1995)... Because the referee was in the best position to resolve this conflict and there is both record and logical support for her conclusion, this Court will not disturb those findings of fact as to guilt.

(at 1047)

Respondent has failed to meet his burden of overcoming the presumption of correctness of the referee's findings.

The document which enabled the respondent to engage in the improper

conduct was a Settlement Agreement between the United States government and Loynaz. The agreement follows:

STIPULATION AND SETTLEMENT AGREEMENT

Plaintiff, the United States of America and the Defendant, Nelson Loynaz, Jr., hereby agree and stipulates (sic.) as follows:

1. On August 8, 1996, a Federal grand jury in this District returned a Second Superseding Indictment against Nelson Loynaz, Jr., (hereinafter “Defendant”) and others. Pursuant to 21 U.S.C. §853, the Indictment sought the forfeiture of the defendant’s assets; a Bill of Particulars, filed October 11, 1996, more particularly described some of the defendant’s assets, including the following vehicles:
 - a. One Mercedes Benz E320, VIN: WDBEA32E6SC217274; Florida Tag SJK-32Y;
 - b. One 1966 Chevrolet Corvette, VIN: 194376S109024;
 - c. One 1967 Chevrolet Corvette, VIN: 194377S118864;
 - d. One 1968 Ford Mustang, VIN: 8T02J16541502030;
 - e. One 1966 Ford Mustang GT350, VIN: 6S2282;
 - f. One 1994 Dodge Viper, VIN: 1B2BR65SE2RV102388.
2. The United States and Nelson Loynaz, Jr. stipulates (sic.) that the vehicles described in a), b), c), d), and e) above shall be returned to the defendant without assessments for maintenance and storage; the vehicle in f) above and thirty thousand (\$30,000.00) dollars via cashier’s check from Alan I. Karten, Esq., attorney for Nelson Loynaz, Jr., payable to “United States

Marshals Service,” shall be forfeited to the United States of America. (Emphasis added)

3. The defendant, Nelson Loynaz, Jr., Mary Loynaz, their heirs, agents and assigns, agree to forever withdraw any and all claims regarding the seized assets, and agree to release, hold harmless and fully indemnify the United States of America and all officers, agents or employees of the Unites States from any and all claims concerning the seizure and disposition of the seized assets.
4. The U.S. Marshall shall dispose of the forfeited vehicle and the thirty thousand (\$30,000.00) according to law.

The Settlement Agreement did not require any additional proof of ownership prior to delivery of the vehicles to Loynaz. While respondent was to deliver \$30,000.00 to the government in behalf of Loynaz, who was incarcerated, the Agreement did not authorize respondent to obtain the vehicles for his own benefit. (T. 38).¹

Loynaz had arranged for his wife and a friend, Manny Mesa, to deliver the \$30,000.00 to the government. (T. 53, 119). Nevertheless, respondent sent Loynaz a retainer agreement (T. 42) and several documents designated as “Power of Attorney” (T. 45) for the cars. Loynaz declined to sign. (T. 42-44). These

¹ Respondent repeatedly denied that Loynaz owned the cars. That attempt to create an issue is simply a huge red herring. The government determined that the cars should be returned to Loynaz. No one else intervene or filed separate legal proceedings to assert ownership of the vehicles. No court ruled that someone other than Loynaz owned the cars.

acts clearly evidenced respondent's efforts to "cover his tracks." Respondent proceeded to deliver \$30,000.00 to the government and take possession of the cars. (T. 56, 57). When Loynaz' wife went to get the cars, she was told that they were gone. (T. 49).

Mary Loynaz confirmed her husband's testimony that Nelson had recruited a friend, Manny Mesa, to deliver the \$30,000.00 to the government. (T. 137).

She testified that she went to the respondent's office three times, but initially, was not able to speak to him. (T. 137). When he did speak to her, his response to her inquiries about the cars was evasive. (T. 138). Respondent did not reveal that he had obtained possession of the cars. (T. 138). Respondent asked Mesa to leave his office. (T. 307). Respondent refused to accept the \$30,000.00. (T. 139).

In addition to the fact that respondent denied that Loynaz was entitled to the vehicles, Respondent denied that there was any profit, claiming that he sold the cars for only \$30,000.00. (TFB Exhs. 2, 3, 4, T. 308). On the other hand, respondent also testified that he entered into the transactions related to the vehicles because he visualized the opportunity to make a profit. (T. 263, 264).

A former business associate, Robert Woltin, testified as to the transactions which he and respondent had discussed. Woltin's testimony contradicts respondent regarding an alleged agreement with Loynaz to sell the cars and share

the profits. (T. 253, 264, 265). He also denied that he owned the cars at any time. (T. 164). Respondent would obtain the vehicles (with \$30,000.00 borrowed from his wife). Woltin would reimburse him immediately and would sell the cars. (T. 157). Respondent would receive an additional \$30,000.00 realized from the sale of the vehicles and Woltin would get any additional profits.

Woltin testified that he reimbursed respondent for the \$30,000.00 and arranged the sale of one of the cars, a Corvette, to Thomas Duncan for \$25,000.00. The \$25,000.00 consisted of a \$1,000.00 deposit and a \$24,000.00 cashier's check made out to the respondent. (T. 158). Respondent endorsed it, and it was deposited in the account of 201 East Atlantic Investments, Inc. (T. 185) in which both Woltin and respondent had a financial interest. (T. 156). The \$24,000.00 was given to Woltin (President of the corporation) by respondent as part of his capital contribution to the corporation. (T. 159).

Duncan confirmed the sale. Woltin told him that he was selling the cars for a friend, a lawyer. (T. 167-168). Although respondent denied making a profit, Carlos Ruga, the Bar's Auditor traced the \$24,000.000 check given to respondent. It was Ruga who testified that the \$24,000.00 check was deposited in the account of 201 East Atlantic Investments, Inc. (T. 185) which operated a restaurant, Louie

Louie Too.²

Carl Karmin, the third shareholder in the 201 East Atlantic Corp., testified (via his deposition), that he and respondent were 25% shareholders and Woltin was the president, owning 50% of the corporation (Depo. pg. 5). Entries from the company's check book and general ledger identified the \$24,000 as part of respondent's capital contribution. (Depo. pg. 17).

John Roth who had been an Assistant United States Attorney working on Loynaz' case told Bar Investigator Jim Crowley that he recalled an agreement whereby the cars were to be returned to Loynaz. (T. 192). The Settlement Agreement, according to Roth, was between the government and Loynaz and was an accommodation based upon Loynaz' cooperation with the government. (T. 187, 194, 195). Roth stated that there was never any agreement for respondent to receive the cars. (T. 194-5).

Loynaz told Roth that even though the titles were in the name of another party, the automobiles belonged to him. (T. 193). Roth observed that convicted drug dealers do not have cars in their own names. (T. 194). FBI Special Agent Scott Wiegman was the lead agent on the Loynaz case (T. 364). His understanding

² The restaurant is identified in the transcript as both "Louie Louie Too" and "Louis Louis Too".

was that the vehicles would be returned to respondent “on behalf of Nelson Loynaz.” Ownership was not an issue as far as Wiegman was concerned, although he eventually concluded that Loynaz probably owned the automobiles. (T. 372, 377). (A representation by Loynaz that he owned no property was made after the government had taken everything, T. 28).

The government entered into the Settlement Agreement which stated that the vehicles would be returned to Loynaz. Respondent conceded that such was the case. (T. 265). The agreement was clear. Loynaz, separately, would forfeit \$30,000.00 and a fifth vehicle. Proof of ownership was not an issue, and there was not the slightest indication in the agreement that respondent or anyone else was free to purchase the vehicles. When respondent obtained control of the vehicles and delivered the \$30,000.00 check, respondent did not advise the government that he was purchasing the four (4) cars. (T.276).

Respondent’s explanation of what took place can only be described as bizarre. He admits that he took the four (4) cars and delivered \$30,000.00. He states that Woltin bought the four (4) cars from him for \$30,000.00. Woltin and an employee of Louis Louis Too (the restaurant owned by 201 East Atlantic Corp.) went with him to pick up the cars. (T. 275). (The sale, if it had taken place, could not be described as an arm’s length transaction.)

Respondent said that originally he planned to make a profit because he believed that the cars were worth far more than \$30,000.00. (T. 263-64). He alleges that he told Loynaz of his plan to “purchase” the cars and share the profit, even though Nelson Loynaz had no ownership interest in the cars, in respondent’s opinion. (T253, 264-65; The Florida Bar Exhs. 2, 3, 4).

He planned to share profits with Nelson Loynaz since his anticipated profit would be a “windfall”. (T. 264). When asked why he would share the profits with Loynaz, he responded:

I don’t know, I was gracious. I didn’t need all the money. (T. 265)

Note that respondent did not have the \$30,000.00 to give to the government as part of the Loynaz’ forfeiture but had to borrow the money from his wife. (T. 271).

Note also that respondent was asked to leave the restaurant where he had assisted with the daily operation because he wrote one or more checks to himself on the restaurant’s account. (Depo. Karmin, pg. 26). Respondent claimed that Karmin had authorized the checks as reimbursement (for a computer). Karmin stated that he did not authorize it. (Depo. pgs. 25-6).

The evidence is undisputed that in addition to the \$30,000.00 paid to respondent by Woltin, which was used to repay respondent’s wife, a \$24,000.00

check from Duncan was made out to respondent for the purchase of the Corvette.

Respondent testified that although he had sold the four (4) cars to Woltin, the check was only made out to him because:

The car, as Bob even testified today, was in the shop. Bob was doing work on the car and outlaying funds. If it was my car, he wouldn't be outlaying funds to fix the car. The title was in my name.

Duncan would not give over a check to Bob because the title was in my name, so they required me to be there. I got the cashier's check, and I signed it over to Bob. (T. 291).

Of course, the transfer would have been easier if Woltin put the title in his own name. Respondent asserted that Woltin didn't put the title in his name because he would have had to pay sales tax twice and Duncan would have had to pay sales tax. (T. 290).

The foregoing is respondent's explanation for claiming that he did not profit from the transaction, i.e., that the \$24,000.00 payment for the Corvette was not made for his benefit, i.e., a credit of \$24,000.00 to his capital contribution. (T. 294). He added that it was Woltin (T.293) who added the endorsement "Pay to the order of 201 East Atlantic Inc." (T. 292). He claims that he did not learn until sometime later that he was credited with a \$24,000.00 capital contribution. (T. 295). He offered no explanation as to who might have given him that credit of

\$24,000.00 if it was not based upon the sale of the Corvette. There is no document supporting an effort to reverse the purported unwanted capital contribution made on his behalf. (T. 353).

Woltin was 50% owner of the corporation in which respondent had a 25% and \$125,000.00 interest. (T. 155, 56; Depo., Carl S. Karmin, pg. 4-5).

Deposits into the corporate account were made only by respondent, Karmin and Woltin. (Depo, 7, 9).

Woltin also testified regarding the \$24,000.00 check from Duncan and respondent's capital contribution. The following question and answer addressed to Woltin are extremely significant.

Q. Did Mr. Karten give you the check as part of his capital contribution towards Louis Louis Too.

A. Yes, he did. (T. 159).

Woltin did not sign the endorsement to the 201 East Atlantic Corp. (T. 162), nor did he recall depositing it in the account of Louis Louis Too. (T. 162), the restaurant owned by East Atlantic. Karmin, the third partner, was custodian of records for 201 East Atlantic Inc. (Depo. pg. 5). He testified that the records which reflected the \$24,000.00 capital contribution credit to the respondent, were prepared by either respondent, Woltin or himself (Depo. pg. 9). He had no direct

knowledge of the \$24,000.00 entry or credit.

The respondent has failed to establish a lack of competent substantial evidence or an erroneous ruling regarding respondent's conversion of his client's property. There is competent substantial evidence that respondent exploited the Settlement Agreement to obtain possession of the four (4) classic cars. There is also competent substantial evidence to support the conclusion that respondent made a profit which he sought to conceal. In any case, even if he had not made a profit, respondent deprived his client of possession of the four (4) classic cars.

Respondent's conduct was also in violation of the federal statute which authorized his appointment as counsel for Loynaz. His appointment was under the Criminal Justice Act, 18 U.S.C. §3006(A). Subsection (f) provides that "except as so authorized or directed, no such person or organization (the appointee) may request or accept any payment or promise of payment for representing a defendant."

Respondent clearly sought to request an additional fee from his client by sending the retainer agreement and power of attorney (TFB's Exhs. 7 and 8) for the purpose of retrieving the automobiles. Also, he sought to obtain unwarranted fees under his appointment, in the government's view. (TFB Exh. 12).

II.

RESPONDENT HAS DEMONSTRATED NO ERROR IN REGARD TO DENIAL OF HIS POST-TRIAL MOTION

The final hearing in this case began on December 15, 2000 and after further hearing on December 18, 2000 the guilt phase concluded on January 5, 2001. Hearing on discipline took place on January 11, 2001; January 12, 2001 and January 19, 2001. The referee issued his report on January 29, 2001.

Respondent submitted a “Motion to Supplement the Record and for Rehearing” on February 8, 2001, ten (10) days after the final hearing concluded. Respondent did not submit a Motion to Reopen, the focus of this second argument on appeal. However, he did mention reopening in the concluding paragraphs of his Motion to Supplement and for Rehearing.

Respondent’s argument stresses one statement in the Referee’s Report regarding the credibility of Nelson Loynaz, Jr., the complainant. Respondent suggests that he could have contradicted some of Loynaz’ testimony through some documents, after the hearing was concluded. Therefore, he states, it was error for the referee to deny his motion, now presented by respondent as a Motion to Reopen.

Although the relief sought by respondent is somewhat ambiguous in view of

the title of his motion, the context remains the same. The Bar would submit that there are several elements of the context which demonstrate that the referee did not abuse his discretion. Granting or denying a Motion for Rehearing is within the trial judge's (referee's) discretion. Maryland Casualty Co. v. Murphy, 343 So.2d 1051 (Fla. 3d DCA 1977).

There is a presumption of correctness in favor of the trial court in regard to his exercise of discretion. Bailey v. Lloyd, 62 So.2d 56 (Fla. 1952); Clayton v. Clayton, 275 So.2d 588 (Fla. 1st DCA 1973). The burden is upon the appellant to show abuse. Hamlet v. Hamlet, 583 So.2d 564 (Fla. 1991). The moving party must establish that the trial court's judgment was arbitrary or unreasonable. Hamlet, *supra*.

At the conclusion of the final hearing, there was no significant question regarding complainant's credibility. The person whose credibility was substantially undermined was the respondent. Despite the efforts at trial and on appeal to create complexity where none exists, the material facts are few and establish that respondent's testimony was thoroughly discredited. Since the material facts have been set forth in detail above, a brief version follows.

A settlement agreement between Loynaz and the United States government provided that:

The United States and Nelson Loynaz, Jr., stipulates (sic.) that the vehicle described in a), b), c), d), and e) above shall be returned to the defendant without assessments for maintenance and storage; the vehicle in f) above and thirty thousand (\$30,000.00) dollars, via cashier's check from Alan I. Karten, Esq., attorney for Nelson Loynaz, Jr., payable to "United States Marshals Service," shall be forfeited to the United States of America.

(Emphasis added)

Despite some grammatical deficiencies, the agreement is clear. Five (5) vehicles were to be returned to the defendant. (One of the five (5) was returned to Mary Loynaz, Nelson's wife. Her entitlement to the fifth car was not an issue). A sixth car and \$30,000.00 were to be forfeited to the government.

No document and no government witness connected with the case supported the assertion by respondent that upon delivering the \$30,000.00 he was entitled to treat the four (4) remaining cars as his own. Respondent decided, on his own, to take possession. No order of any court provided him with an ownership interest. When the respondent originally responded to the Bar he insisted that he made no profit on the transaction. (TFB Exhs. 2, 3, 4, T. 208). He also insisted that the vehicles did not belong to Loynaz. (TFB Exhs. 2, 3, and 4).

However, the evidence presented at trial revealed that his denial of a profit was a false representation. A business partner, Robert Woltin, stated that he

reimbursed the \$30,000.00 to the respondent, and respondent received an additional \$24,000.00 check for which he was given a capital contribution credit.

(T. 159). The credit for a \$24,000.00 capital contribution was reflected in the records of a corporation of which respondent and Woltin were major shareholders.

In addition to the fact that respondent was not entitled to take the vehicles, the denial of a profit was pertinent because he claimed that he told Loynaz of the proposed sale and promised to share profits with Loynaz. When confronted with the \$24,000.00 credit, respondent maintained that he didn't know how that happened. (T. 296). He did not share the profit with Loynaz.

The Bar would submit that respondent's position was directly and unambiguously contradicted by the Settlement Agreement and the corporate records. The motion for rehearing must be considered in the context that respondent's credibility was damaged beyond repair, and not that of Loynaz, (who was handicapped from the outset by his criminal record).

Additional information, after the conclusion of the trial, was submitted to the referee, who was the trier of fact. The referee was obviously in the best position to determine that the materials proffered would not have had any meaningful impact upon his decision, and rightly so, in view of the context discussed herein.

No argument was or is offered to the effect that this was newly discovered

evidence. Therefore, that basis for rehearing should not be considered by this Court. No explanation was offered in the motion regarding why the evidence had not been submitted during the final hearing, a requirement set forth in Donaldson v. State, 772 So.2d 177 (Fla. 1998), cited as authority by the respondent. However, if this Court does consider the issue of newly discovered evidence, denial of the motion was not an abuse of discretion since there was no proof that the evidence could not have been obtained prior to the final hearing. Dalton v. Dalton, 412 So. 2d 928 (Fla. 1st DCA 1982). Respondent would have had to demonstrate his diligence regarding discovery of the evidence. Braznell v. Braznell, 191 So. 457 (Fla. 1939).

Viewed as a generic motion for rehearing, there was also no evidence of an abuse of discretion. The purpose of a motion for rehearing is to direct the attention of the trier of fact to matters not considered or which were overlooked. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). The respondent's Motion for Rehearing was totally lacking in that regard.

As the Court stated in Rayburn v. State, 188 So.2d 374, 376 (Fla.2d DCA 1996):

Ordinarily the question of allowing the reopening of cases

is one involving sound judicial discretion of the trial court, a discretion rarely interfered with on the appellate level.

Furthermore, the admission or rejection of impeachment testimony in regard to a motion to reopen is within the sound discretion of the trial court. Winn Dixie Stores v. Sheldon, 184 So.2d 667 (Fla. 4th DCA 1966). The summary nature of the denial is of no consequence since the trial court is not required to assign any reason for denial of rehearing. Stoner v. W.G. Inc., 300 So.2d 268 (Fla. 2d DCA, 1973).

The circumstances of this case establish that there was no abuse of discretion in regard to rejecting the Motion for Rehearing.

III.

DISBARMENT IS THE APPROPRIATE DISCIPLINE

This court has the ultimate responsibility for determining the proper discipline. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). The three (3) purposes of discipline should be considered.

First, the judgement 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.

Florida Bar v. Cibula, 725 So.2d 360, 363 (Fla. 1998) quoting Florida Bar v. Reed, 644 so. 2d 1357 [Fla. 1994]

Florida's Standards for Imposing Lawyer Sanctions are helpful in applying the general purposes of discipline to the specific facts of this case. Standard 4.1 deals with failure to preserve the client's property. Standard 4.11 provides that:

Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

Also, Florida Standard 5.11(f) provides that disbarment is appropriate when:
a lawyer engages in any other intentional conduct

involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

The referee has recommended disbarment. This court will not second guess a referee's recommendation for discipline if that discipline has a reasonable basis in existing law. The Florida Bar v. Vining, *supra*.

Several cases involving similar misconduct have resulted in disbarment. In The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989), the respondent had also converted his client's property for his own use. Fitzgerald and a client were partners in a real estate venture. He, like respondent Karten, sold the client's property (half interest in the real estate). He did so without the client's consent or knowledge. In other parallel conduct, respondent took for his own personal use funds that belonged to his client as a result of the sale.

In another case which is strikingly similar, The Florida Bar v. Kramer, 548 So.2d 233 (Fla. 1989), the respondent also converted a client's property for his own personal use, and concealed his actions. He pled guilty to knowingly disposing of property entrusted to him. He also provided a false affidavit, just as the respondent in this case, has submitted false claims in correspondence and testimony in which he denied the realization of a profit.

In The Florida Bar v. DeSerio, 529 So. 2d 1117 (Fla. 1987) respondent

withheld funds which rightfully belonged to his client. His client lost an additional sum of money due to neglect. Respondent was disbarred.

The foregoing cases suggest that respondent's disbarment is not dependent upon aggravating factors. Assuming arguendo that there is some authority to the contrary, the Bar would submit that the findings regarding aggravating factors should be sustained.

Respondent argues initially that the finding of a violation of Standard 9.22(g), of the Florida Standards for Imposing Lawyer Sanctions, "refusal to recognize wrongful nature of the conduct," is improper. Respondent relies upon The Florida Bar v. Mogil, 763 So.2d 303 (Fla. 2000).

In Mogil this court held that a consistent denial of guilt negates 9.22(g) as an aggravating factor. In other words, a respondent should not be penalized for a good faith defense.

The words "good faith" do not appear in Mogil. However, the Bar would submit that this court should limit Mogil to a good faith circumstance. A respondent should not be permitted to avoid 9.22(g) as an aggravating factor by advancing a bad faith or frivolous defense. Thus, in The Florida Bar v. Weisser, 721 So.2d 1142 (Fla. 1998), failure to acknowledge wrongful conduct was found to be an aggravating factor subsequent to a spurious defense. A bad faith defense is a

circumstance in which refusal to recognize the wrongful nature of the conduct should be an aggravating factor. A respondent should not be permitted to benefit from a bad faith defense.

Also, the referee's findings as to aggravating factors will be upheld if there is competent, substantial evidence in the record. The Florida Bar v. Bustamante, 662 So.2d 687 (Fla. 1995). This is a case in which failure to acknowledge wrongful conduct should be an aggravating factor, since the finding is supported by competent substantial evidence. Respondent testified falsely about not making a profit. The profit was concealed in the records of 201 East Atlantic Investment Inc. Respondent presented disingenuous arguments suggesting that his client did not own the cars and, therefore, he was entitled to purchase them. The agreement with the government and all of the government witnesses, however, was clear and definitive. There was no issue of ownership raised in the Settlement Agreement and four (4) of the vehicles were to be returned to Loynaz, and not the respondent.

The testimony of Scott Wiegmann, the F.B.I.'s lead agent on the case, emphasizes the frivolous nature of respondent's position:

- Q. Mr. Wiegmann, it was your understanding that Mr. Karten was to become the owner of those vehicles and they were to be turned over to him?
- A. No. The owner of the vehicles would be – I wasn't concerned

with ownership. The vehicles were going to be returned to Mr. Karten because Mr. Karten was not incarcerated and Nelson Loynaz was incarcerated. So those were the only two parties that we were negotiating with.

Obviously, they had to be returned to someone and they were going to be returned to Mr. Karten.

Q. On behalf of Mr. Loynaz.

A. Yes.

(T.372-3)

Wiegmann's testimony also illustrates that the referee ruled correctly regarding aggravating factor 9.22(h), "vulnerability of the victim." Respondent concedes that vulnerability of a victim can be an aggravating factor. He asserts that Loynaz has no right to claim vulnerability because he was, inter alia, "adept at filing pro se complaints." (Respondent's brief, pg. 48). He was nevertheless a vulnerable victim. Standard 9.22(h). In fact, this entire plot unfolded because Loynaz was imprisoned and respondent was not. That enabled respondent to take the cars and prevented Loynaz from being designated as the party to deliver the forfeiture check and retrieve the vehicles.

Respondent also argues that the referee improperly relied upon an admonishment received July 24, 1998 because the events occurred prior to the admonishment. Respondent relies upon The Florida Bar v. Carter, 429 So.2d 3

(Fla. 1983) and The Florida Bar v. Dunagan, 565 So.2d 1327 (Fla. 1990).

However, this court after Dunagan, pointed out that “cumulative misconduct can be found when the misconduct occurs near in time to the other offenses, regardless of when discipline is imposed.” The Florida Bar v. Golden, 566 So.2d 1286, 1287 (Fla. 1990).

Respondent was admonished in Case Number 1997-70,162. The case number refers to the year 1997 as the year in which the file was opened. The active case and the admonishment date July 24, 1998, were certainly near in time to respondent’s taking of the vehicles on November 14, 1997.

It is also clear that during the same year of the taking of the vehicles (1997) respondent was being investigated in the admonishment case. This was a time when respondent “should have been conducting himself in the most upstanding manner.” The Florida Bar v. Orta, 689 So.2d 270, 273 (Fla. 1997). Apparently, the existence of a bar investigation in one matter did not deter the respondent from committing the misconduct sub judice.

Respondent also stresses mitigation based upon favorable testimony by character witnesses and the weight it should be given. However, in appropriate circumstances, very little weight will be given to the mitigating effect of character testimony.

For example, in The Florida Bar v. Cruz, 490 So.2d 48, (Fla. 1985)

extremely compelling character testimony was offered. This Court summarized the testimony as follows:

Respondent then introduced three witnesses to testify in his behalf, two of whom participated in the federal trial proceedings. The first of these witnesses was the United States District Court judge who presided at respondent's trial and accepted respondent's guilty plea. He testified that respondent is religious, "not a criminal type," and "essentially a very good person." The judge also testified that with respect to the offense, respondent was more of an aider or abettor really rather than a conspirator, in the strict sense of the word. He never got anything for it, but there was enough there so that a jury could have nailed him, if it had elected to do so. I don't know whether the decision to plead guilty was the right decision or not ... I wish the sentence could have been less and maybe it should have been.

Respondent called as his witness the probation officer who conducted the investigation for respondent's PSI report. The investigator testified that respondent had an "exemplary background," that he did not feel respondent had used his position as an attorney to violate any laws, and that respondent's involvement in the events surrounding the crime was the result of poor judgment rather than an attempt to further a criminal conspiracy. Respondent also called as a witnesses Bishop Armando Leon, who testified favorably concerning respondent's character. (At 49. Emphasis supplied).

Despite the strong character evidence, provided by more objective witnesses than in the instant case, respondent was disbarred for bribery convictions. The

mitigation was only the basis for retroactivity of the disbarment.

This respondent took his client's property while the client was in jail. He attempted to hide the fact that he made a profit on the sale of the vehicles. He ignored the explicit Stipulation and Settlement Agreement drafted by the government for the benefit of his client. There is competent substantial evidence to support the finding of aggravation. Based upon the applicable Standards and Cases, the recommendation of disbarment should be approved.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's report should be approved.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's answer brief was forwarded via Airborne Express (Airbill 3370025724) to **Thomas D. Hall**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to respondent's attorney, **G. Richard Strafer**, Esquire, 2400 South Dixie Highway, Suite 200, Miami, Florida 33133, on this ____ day of July, 2001.

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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.

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