

IN THE SUPREME COURT OF FLORIDA

**THE FLORIDA BAR,**

Complainant,

v

CASE NO. SC01-724

TFB NO. 2000-11,891(13F)

**DOMENIC L. MASSARI, III,**

Respondent.

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RESPONDENT'S REPLY BRIEF

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## ARGUMENT

### POINT I

THE REFEREE’S FINDINGS WERE NOT SUPPORTED BY CLEAR AND

CONVINCING EVIDENCE BECAUSE THE ONLY DIRECT EVIDENCE SUPPORTING THE BAR'S ALLEGATIONS CAME FROM RESPONDENT'S CLIENT, RONALD MARTINEZ, WHOSE TESTIMONY IS UNWORTHY OF BELIEF

Respondent recognizes that there is a line of cases in disciplinary matters, some of which are cited by The Florida Bar in its brief, which seem to stand for the proposition that a referee's findings of fact are unassailable by an appellant. *Florida Bar v. Vining*, 721 So. 2d 1164 (Fla. 1998) is such a case. For this court, however, to set down a concrete rule to the effect that a referee's findings will not be overturned unless there is "no evidence" in the record to support the finding is to cloak a referee with an aura of infallibility. Such a rule completely emasculates the fundamental principal in disciplinary proceedings that The Florida Bar must prove misconduct by "clear and convincing evidence." See, e.g., *Florida Bar v. Rayman*, 238 So. 2d 594 (Fla. 1970). Just because a referee makes findings of fact favorable to The Florida Bar should not automatically mean that the Bar has met its burden of proof. This court still has the

continuing duty to require charges such as these to be supported by clear and convincing evidence where the charges have been denied by reputable members of the Bar. *Id.* p. 598.

This court specifically declared on page 596 of *Rayman* that:

the quantum of proof suggested by a mere "preponderance of the evidence" as is the case in ordinary civil proceedings

does not seem to wholly satisfy the requirements of a proceedings such as this . . . . “there must a clear preponderance against [the accused attorney]”.

The court then when onto emphasize on page 597 that the

evasive and inconclusive evidence which was given by the complaining witness was insufficient to sustain the disbarment judgment recommended by the referee.

The evidence presented to the referee by Mr. Martinez was not worthy of belief. As set forth in the initial brief, Mr. Martinez’s testimony should be discounted by this court because, simply stated, he does not tell the truth. For example:

1. Mr. Martinez admitted fraudulently submitting a back dated fixed price contract to a bank (when the parties according to him had a cost plus contract) for his own financial gain. TR96;

2. Mr. Martinez signed the June 26, 2000 letter under oath before a notary but, when he handed it to Sergeant Waters on July 10, 2000 he said it was mostly untrue. Either he lied when he signed it under oath or he lied to Sergeant Waters;

3. When he gave a sworn statement to the Bar on December 12, 2000 he swore that he had not given the June 26, 2000 letter to Sergeant Waters and that it should not have been given to him;

4. Mr. Martinez never saw fit to tell either the Bar or Sergeant Waters that he received \$1,000.00 from Mr. Massari on the day he signed the June 26, 2000

letter; and

5. He told the personnel at First American Title that he would tell anybody who asked about the release that the signature on it was his. TR119.

The Florida Bar has a huge advantage over respondents in disciplinary proceedings. The technical rules of evidence do not apply (a rule that was exploited by Bar counsel by his repeated attempts to insert matters from other grievance committee investigations into the record where the grievance committee had not even conducted a probable cause hearing on those allegations); the Bar had unlimited financial resources, supported by 70,000 dues-paying members of the Bar, and which far outweigh those of respondents. Great latitude is given to the Bar in procedures before the referee in general. The Bar gets its costs assessed against a respondent even if it only proves a portion of its charges while the respondent can recoup his costs in a successful defense only if the referee finds that there was “no justiciable issue . . . .” raised by the Bar. Rule 3-7.6 (o)(4). The Bar, of course, would like the “clear and convincing rule” diluted to the point where any evidence is sufficient to prove up their case. It is incumbent upon this court to resist any such thought. It has, therefore, the “continuing duty” to make sure that a referee adheres to the clear and convincing standard and that they do not in good faith lapse back into a “mere preponderance” evidentiary standard. This court acknowledged

its duty in *Rayman* when it stated

While we cannot say that there was no evidence to support the referee's findings, we are constrained to the view that much of the supportive testimony itself is evasive and inconclusive so that when it is considered together with the above recited inconsistencies, the evidence does not establish the charges with that degree of certainty that should be present in order to justify a finding of guilt on charges as serious as those made against these Respondents. p.598.

See also *Florida Bar v. Thomson*, 271 So. 2d 758 (Fla. 1972).

In the statement of facts at the outset of the Bar's Answer Brief, it asserts as fact numerous contested statements. In light of Mr. Martinez's "admitted penchant" for outright misrepresentations (e.g., his fraudulent contract with the bank) and his frequent lapses in memory (e.g., his "forgetting" to tell the Bar during his sworn statement on December 12, 2000 that he had given Sergeant Waters a copy of the June 26, 2000 letter or that he received \$1,000.00 from Mr. Massari on June 26, 2000) and his willingness to sign under oath a document that he later said was untrue and then filing it with the police department for its use during a criminal investigation, nothing that Mr. Martinez said to the referee should be considered a fact. Some of the items in the Bar's statement of fact that Respondent contests include:

1. On page two of its brief the Bar states as fact that Mr. Martinez

did not come into Respondent's office. This testimony was disputed by Respondent, by Ms. Hebert (Respondent's secretary), by Brad Muller and by Brenda Rona Terry. TR 360-364, 258-260, 302, and 237-239.

2. On page four of its brief the Bar would have this court believe that everything that Mr. Martinez told his lawyer friend Larry Rardon was fact. All of Mr. Rardon's testimony, however, was hearsay and was predicated exclusively on what Mr. Martinez told Mr. Rardon.

3. Pages five and six of the Bar's answer brief summarize the events at First American Title Company's offices. The testimony of Ms. Durbin and Ms. Harlow, however, is a mere repetition of what Mr. Martinez told them. Once again, this was hearsay and neither Ms. Durbin nor Ms. Harlow took any independent steps to verify whether Mr. Martinez was telling them truth.

4. The Bar is not quite accurate on its characterization of the conversation that Mr. Massari had with Ms. Durbin when she called him from her office (while hiding from him the fact that Mr. Martinez was standing in the office at the time of the call). In fact, Ms. Durbin testified that:

He informed us that he was still waiting for a court approval or pending court approval to release the funds to Mr. Martinez. TR142.

Respondent testified that he told Ms. Durbin that Mr. Martinez wanted a court order and that he was “insisting” on such an order before the funds were released. TR372. Because Mr. Massari had received no waiver of confidentiality from Mr. Martinez, Mr. Massari did not reveal the confidential business transaction between himself and Mr. Martinez to Ms. Durbin. TR373. Mr. Massari did not say that an order was needed to release the funds.

5. The Bar accurately states that Mr. Martinez repeatedly told the police he did not want to file a complaint against Respondent. Perhaps, however, Mr. Martinez did not want to file a complaint against Mr. Massari because he did not want police investigating the details of his transaction with Respondent. If in fact, he had engaged in bank fraud, had lied to First American Title, was trying to keep from paying all of his subcontractors, and had substituted a bogus page into his file at Mr. Massari’s office, it could be that he did not want the police investigating his own actions.

6. While Mr. Martinez testified that he was presented with a letter to Sergeant Waters when he first picked up his funds, this was disputed by Respondent and his secretary, Ms. Hebert. TR 377, 269.

7. On page eight of its brief, the Bar states as fact Mr. Martinez’s testimony that he signed the June 26, 2000 letter to Sergeant Waters without reading it. Both Respondent and Ms. Hebert testified otherwise. Mr. Martinez did

acknowledge that he swore to the accuracy of the letter when he signed it before the notary. TR 79. Regardless of whether he read it at that time or not, it is clear that Mr. Martinez read the letter and later delivered it to Sergeant Waters, some 14 days later, rather than tearing it up. On page nine of its brief, the Bar makes much of Mr. Martinez's disavowal of the accuracy of the letter when he presented it to Sergeant Waters. The Bar asserts that Mr. Martinez told Sergeant Waters that various portions of the letter were untrue when he delivered the letter. Sergeant Waters did not testify to corroborate that aspect of Mr. Martinez's testimony. Why not? Either way, Mr. Martinez either signed under oath a document that he knew was untrue or he lied when he allegedly made his disavowal statements to Sergeant Waters.

8. On page eleven of its brief, the Bar points out that on December 12, 2000, Mr. Martinez gave a sworn statement to The Florida Bar. The Bar, does not mention, however, that Mr. Martinez testified under oath that date that he had not given the June 26, 2000 letter to Sergeant Waters. Ten days later Mr. Martinez gave the Bar a letter (Rx. 2, TR 126, dated December 12, 2000 in which he stated he suddenly remembered giving the letter to Sergeant Waters.)

The Bar argues on page 15 that Mr. Martinez's testimony was corroborated by witnesses Durbin, Harlow, Rardon and Green. Other than Ray Green, however,

all of the witnesses' testimony was pure hearsay predicated entirely on what Mr. Martinez told them (the exception being Ms. Durbin's brief conversation with Respondent).

Mr. Green's testimony was only that Mr. Martinez's signature was mechanically reproduced on the escrow instructions and that it was not Mr. Martinez's signature on the release. He could not testify who made the reproductions. In fact, Mr. Green's testimony is suspect regarding the release because he only viewed very limited number of examples of Mr. Martinez's handwriting. When shown Respondent's exhibit 4, examples of Mr. Martinez's signatures on various invoices, he dismissed them as irrelevant. Glancing through that exhibit proves that Mr. Martinez's handwriting varies greatly. Ms. Hebert's testimony that he signed the release while sitting down with no support underneath it explains more than adequately the discrepancy in his signature. Mr. Green acknowledged that the circumstances under which a document is signed, e.g., the position of the signer and the surface on which the document is placed, could vary a person's signature.

On page 15 of its brief the Bar emphasizes that the referee found Ronald Martinez did not sign the March 8, 2000 satisfaction and release. However, in so doing, the referee relied on Mr. Martinez's testimony and ignored that of Ms.

Hebert. As pointed out above, Mr. Green's opinion on this matter should be disregarded.

Respondent submits that there was not a "clear and convincing" evidentiary basis for the referee to find that Mr. Martinez did not sign on February 14, 2000 a document captioned "Martinez Escrow Instructions". The evidence is overwhelming that Mr. Martinez lied when he said that he never went into Respondent's office on the night of February 14, 2000. The night was significant; it was not only Valentine's Day but it was Respondent's birthday. Ms. Hebert, Ms. Terry and Mr. Muller all testified that they were in Respondent's office to celebrate his birthday. All three specifically and unequivocally remembered Mr. Martinez being in the office. None of those witnesses has been shown to be a liar; Mr. Martinez admitted that he would lie for personal financial gain. TR 96.

Respondent respectfully submits that the referee could not possibly have found that Mr. Martinez did not go into Respondent's office on February 14, 2000 if the referee adhered to the clear and convincing evidence standard. If Mr. Martinez lied about being in Respondent's office that night, it is logical that he lied about signing the escrow agreement. It is but a short step thereafter to find that it was Mr. Martinez, not Respondent, who substituted the reproduced signature escrow instructions into the file during the two occasions that he took the file home

with him (see Ms. Hebert's testimony at TR 261). Mr. Martinez had a motive for substituting the escrow instructions. He wanted his money back sooner than what the agreement called for. There is also the intriguing testimony by Mr. Muller to the effect that Mr. Martinez, separated from his wife for years, was attracted to Ms. Massari and wanted to date her. TR 310,311. This is corroborated by the fact the Mr. Martinez first went to Ms. Massari to represent him and only hired Mr. Massari after she declined the representation.

The Bar argues on page 22 of its brief that Brad Muller "had a strong motive help Respondent." Mere financial dealing do not create a desire so intense to help an individual that a witness will perjure himself in Bar disciplinary proceedings. The Bar has no evidence to point out that Mr. Muller would lie for Respondent's behalf. None of the financial transactions by Mr. Muller, his mother or his brothers were shown by the Bar to be in any way improper. When his unblemished word is compared to that of Mr. Martinez's, there is no basis for accepting Mr. Martinez's word over Mr. Muller's.

Similarly, Brenda Terry had no motive to lie for Respondent. Unlike what the Bar argues on page 23 of its brief, her story was not inconsistent with that of Respondent's and Mr. Muller's. Neither of the latter two said that Mr. Martinez was never in the lobby.

Ms. Terry's receipt of Mr. Martinez's business card is very logical. Mr. Martinez indicated that his hand writing was on the back of the card but he said he gave it to Respondent. Ms. Terry testified, however, that Mr. Martinez gave her the card on February 14, 2000 because she and her husband were contemplating building a home. TR 239,239. R. Ex. 5.

The Bar would have this court believe that Ms. Hebert, Mr. Muller and Ms. Terry would all commit perjury in a Bar disciplinary proceeding. They have no basis for their argument other than speculation. Respondent urges this court to find that the testimony of Mr. Martinez, with its inconsistencies, misrepresentations, lies under oath and with his admitted willingness to commit fraud for personal gain, cannot be considered "clear and convincing evidence" of misconduct when rebutted by three witnesses and by Respondent, a lawyer who has never been found to have engaged in misrepresentation.

The Bar improperly relies on *Florida Bar v. Stalaker*, 485 So. 2d 815, 816 (Fla. 1986). While in *Stalaker* the case boiled down to a "credibility contest" between the accused lawyer and his law partner, in the case at bar Mr. Martinez is a person with no credibility and whose testimony is rebutted in large part by four witnesses. This is not a respondent against the accuser credibility contest. This is the accuser against four other witnesses. As a matter of law, this court should

find that misconduct was not proven by clear and convincing evidence.

## POINT II

### UNDER THE CIRCUMSTANCES OF THIS CASE DISBARMENT IS NOT THE APPROPRIATE DISCIPLINE TO IMPOSE

This court's decision on January 31, 2002 in *Florida Bar v. Baker*, 27 Fla. L. Weekly S.111 (Case No. SC-96,980) shows just how "clearly off the mark" the referee's recommended discipline in the instant case is. See *Florida Bar v. Vining*, 707 So. 2d 670, 673 (Fla. 1998). In *Baker*, this court reduced a referee's recommendation from disbarment down to a 91-day suspension. The allegations of misconduct against Mr. Baker were akin to those of Respondent's; numerous instances of forgery and false notarizations. Notwithstanding that fact, this court said that while

his conduct was dishonest and unlawful, we find the ultimate sanction of disbarment is not warranted. p.S112.

The court noted that as a mitigating factor in *Baker* that he did not commit any fraud on the court. The court also noted that Mr. Baker's conduct was not connected with the practice of law. Respondent's conduct, while more accurately characterized as a business dealing with his client, is somewhat connected with the practice of law. Therefore, he is asking this court for a two year suspension rather than the 91-day suspension imposed in *Baker*.

Respondent asks this court to review the cases cited in pages 45 through 49 of his brief as support for his position that the “ultimate discipline” of disbarment is not warranted in this case. Where, as here, the evidence against the accused lawyer is “discredited” the ultimate sanction is not appropriate. See *State ex rel: The Florida Bar v. Oxford*, 127 So. 2d 107,111 (Fla. 1960).

The misconduct involved in *Florida Bar v. Korones*, 752 So. 2d 586 (Fla. 2000) was far more egregious than the conduct here. Although the court in that case did not consider as aggravation Mr. Korones’ prior two disciplinary sanctions, it did not grant him mitigation for an unblemished record; a factor that appears here. More significantly, however, is the far greater scope of Mr. Korones’ misconduct. It lasted over three years and involved a fraudulent submission to the court; a severely aggravating factor. More significant is the fact that Mr. Korones did not make restitution to the victims of his misconduct until after his final hearing. In the case at bar, restitution with interest was made prior to Respondent even knowing of Bar or the police involvement. Unlike *Korones*, the Respondent has not pled guilty to grand theft either.

*Florida Bar v. Roman*, 526 So. 2d 60 (Fla. 1988) also involved a fraud on the court. Mr. Roman created a fictitious heir so that he would receive the proceeds of an estate rather than it escheating to the state. In *Florida Bar v. Graham*, 605

So. 2d 53 (Fla. 1992) the lawyer misappropriated funds from at least two personal injury clients. He had a \$30,000.00 shortage in his trust account. He disregarded court orders and blatantly lied to the Bar It is “clearly off the mark” to impose the same discipline in the case at bar as that meted out to Mr. Graham.

Respondent has had an unblemished record for 28 years and there is nothing in the record to show that he is not a person of good moral character. If he engaged in the misconduct that the referee found him guilty of committing, it is clearly an isolated incident. The ultimate sanction of disbarment should not be imposed. The cases cited by Respondent as support for the two year suspension that he asked this court to impose are the appropriate cases to follow in this proceeding.

### CONCLUSION

This court should not accept the referee’s findings of fact. They are not based on clear and convincing evidence, free of inconsistencies and doubts. The referee’s findings should be rejected and the Respondent should be acquitted.

Should this court find that the referee’s factual findings are supported by the evidence, he should be suspended for no more than two years.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and seven copies of Respondent's Reply Brief were delivered by hand to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927 and that copies were sent to Thomas Edward DeBerg, Bar Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607 and to John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 11<sup>th</sup> day of February, 2002.

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John A. Weiss

**CERTIFICATE OF TYPE SIZE AND STYLE**

I hereby certify that Respondent's Corrected Initial Brief is submitted in 14 point proportionately spaced Times Roman Font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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John A. Weiss