IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. SC00-2455

vs.

TFB File No. 99-01,221(02)

ARTHUR EUGENE LEWIS,

and

TFB File No. 99-01,222(02)

MARLOW VINCENT WHITE,

Respondents.

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AMENDED ANSWER BRIEF OF RESPONDENTS

RICHARD A. GREENBERG
Florida Bar No. 0382371
325 West Park Avenue
Tallahassee FL 32301
Telephone: (850) 681-9848
ATTORNEY FOR RESPONDENTS

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STATEMENT OF THE FACTS[1]

In August 1995, Charles W. Holt (hereinafter Holt) hired the law firm of Lewis and White (Lewis & White, L. C., a Florida limited liability company) to represent him, two corporations in which he had a controlling interest, and TON Realty Partnership ("TON"), a Mississippi general partnership.[2] The primary assets of HRCC were an FCC-licensed radio station in Montgomery, Alabama and HRTV stock. The NBC-affiliated television station in Tallahassee was the primary asset of HRTV which operated its broadcast facility on land owned by TON and leased to HRTV.

HRCC/HRTV's assets were placed into a Receivership in the United States District Court, District of Arizona in Phoenix, on July 29, 1992, on the motion of its prime secured lender, Finova. Prior to the establishment of the Receivership, Finova

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[1] Respondents accept Complainant's Statement of the Case with one exception. The trial before the referee was held on December 10, 2001, not December 3, 2001.

[2] Holt-Robinson Communications Corporation ("HRCC"), an Alabama corporation, in which Holt owned 80% of the issued and outstanding stock, owned all of the outstanding stock of Holt-Robinson Television, Inc. ("HRTV"), a Florida corporation. Holt was one of five general partners owning twenty percent each of TON. Volume 4, Bar Trial Exhibits, Tab 1; Holt deposition at page 9. Hereafter references will be, e. g., "BTE4: Tab 1; Holt deposition at 9."

obtained an Arizona state court judgment against Holt personally for $5.9 million which was accruing interest at approximately 10% per annum.[3] On July 31, 1992, HRCC and HRTV filed a petition under the Bankruptcy Code in the Northern District of Florida, but the Receiver obtained a lifting of the automatic stay and continued the receivership action.

On August 17, 1993, the Bankruptcy Court dismissed the Chapter 11 proceedings and the Receiver resumed full-control over the assets.[4] During the bankruptcy proceedings, an Examiner appointed by the court found that Holt had defrauded the bankruptcy estate out of more than $385,000 and the Receiver asserted a claim against Holt for that sum plus interest.[5]

In August 1994, Holt was referred to a financial consultant, Charles Lee, in connection with Holt's attempt to obtain financing to regain another of his radio stations out of a Mississippi bankruptcy.[6] Lee agreed to work for Holt and Holt

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[3] Volume II, Bar Trial Exhibits, Civil Trial Transcript: Holt testimony at Page 979, Lines 16-24. Hereafter, e.g., "CTT: Holt at 979/16-24."

[4] Volume 1, Bar Trial Exhibits; Tab 11, page 2. Hereafter, e. g., "BTE1; Tab 11, Page 2."

[5] CTT: Holt at 1053/11 to 1054/6. CTT: White at 1388/8-17; 1391/13-17.

[6] Bar Trial Transcript, Lee testimony at Page 11, Lines 17 to 20. Hereafter, e. g., "BTT: Lee at 11/17-20."

agreed to pay Lee a fee of 6% of the proceeds if a loan was obtained. Holt, however, failed to inform Lee about the receivership, the $5.9 million judgment or the 1992 Tallahassee bankruptcies. Lee was unable to obtain financing under the circumstances.[7]

As to the HRCC/HRTV assets, Holt believed they were at the mercy of the receivership and gone[8] since on July 29, 1994, the U. S. District Court authorized the Receiver to sell the HRCC/HRTV broadcast assets to Soundview Media Investments, Inc. [BTE1: Tab 11, Page 2-3] In addition, the Receiver had ceased paying rent to TON[9] and the Soundview contract contemplated the purchase of the broadcast assets only and not the real estate. This was a critical situation because the City of Tallahassee had re-zoned the TON realty so that, if the station was relocated, the alternative and "grandfathered" use for the property (a 182,000 s.f. retail center) would cease and its highest and best alternative use would be a 5,000 s.f. retail center[10]; and,

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[7] CTT: Holt at1021/5 to 1023/13 and 1031/2 to 1032/9.

[8] CTT: Lee at 1099/3-22 and 1187/7-21.

[9] When the Receiver was paying rent to TON, the IRS was garnishing Holt's share. BTE1: Tab 10; and, BTT: Lee at 15/9-10.

[10] CTT: Charles Francis at 280/23 to 28/15.

in the circumstances, the property could literally have become valueless due to tower leases in place.[11]

Holt was desperate and without any idea of what to do.[12] His sole goal was to obtain financing to take his Petal, Mississippi, radio station out of bankruptcy. When Lee attempted to arrange financing for Holt, he learned from a third-party about the Finova judgment and the Receivership; that Holt had already engaged several attorneys to get him clear of the judgment without success; that the Receiver was not paying rent to TON and had not renewed, and would not renew, the lease and could not be persuaded to pay arrearages.[13]

Lee tried to engage an attorney in Florida to salvage something out of the TON real estate and the Receivership. He put together an informational package which he transmitted to at least three Tallahassee attorneys. None would take the case on a contingent fee basis.[14] Lee asked Holt if he knew any Hattiesburg, Mississippi attorneys and maybe they would know a Tallahassee attorney who he could get to take the case. Holt did know Paul "Bud" Holmes in Hattiesburg and met with Holmes who

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[11] CTT: Lewis at 157/1to 159/8; White at 1365/3-20.

[12] CTT: Holt at 986/21 to 987/4.

[13] CTT: Francis at 278/11 to 281/23.

[14] CTT: Lee at Pages 1106-1107. BTT: Lee at 12/4 to 15/21.

called Respondent Lewis and, after a brief discussion, including Holt's representation that he would pay Respondents a 35% contingent fee and Holmes an additional 15% to pay the costs of litigation, Lewis agreed to meet Holt in Tallahassee. A day or so later, Lee and Holt drove to Tallahassee and met Lewis. Respondent White was not present at the meeting.[15]

At the meeting in Tallahassee, Lee told Lewis that Holt needed financing to get back in the radio business and that Holt needed to clear his personal debt, particularly the Finova judgment. [BTT: Lee at 20/6-16] Holt told Lewis that he was the Chairman and controlling shareholder of HRCC/HRTV and was a general partner of TON. [CTT: Lewis at 157/6-15] Holt told Lewis that he wanted Finova sued for racketeering and for selling the receivership assets for less than what they were worth.[16]

Lee told Holt that Lewis & White would take the case on a contingent basis for a fee of 35% of the value of the gross recoveries of property, funds, assets or claims recovered by the firm for Holt, HRCC, HRTV and TON and an hourly fee against which the contingent fee would be applied. Lewis wanted an hourly fee base because, at that point, he believed the representation would basically revolve around the TON

[15] CTT: Holt at 1023 to 1024; Lee at 1108-1109. BTT: Lee at 16/7 to 19/15; Lewis at 75/5 to 76/6. CTT: White at 17-24. Holmes later declined to advance the costs when presented with a budget. BTT: Lewis at 76/7-21.

[16] CTT: Holt at 978/17-23 and 993/6-19.

real estate situation and that the prime gambit would be an eviction action against the Receiver.[17]

Lewis had determined that the only way to effectively stop the impending sale of the Montgomery, Ala. radio station and bring all of the interested parties to one table so that he could understand the situation was to put HRCC/HRTV into bankruptcy in Tallahassee. He advised Holt and Lee that the two corporations, having been dormant during the receivership, would have to be revived with directors and officers elected and resolutions passed authorizing the filing of the bankruptcy petitions. [BTT: Lewis at 80/2-17]

Holt did not want to be an officer[18] and Lewis suggested Scott Newbern, a law student who was clerking for him on a case who had earlier served as a senior commercial loan officer with a Tampa financial institution and who had contacts in the broadcast industry. [BTT: Lee at 66/17 to 67/1; Lewis: 81/5-21] Holt wanted Lee to be Secretary/Treasurer and represented Lee to be his trusted financial advisor with his full confidence whom Respondents were to look to if any decision had to be made

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[17] BTT: Lewis at 78/18 to 79/8.

[18] BTT: Lee at 25/3-24. Holt also did not advise Lee or Lewis of the previous HRCC/HRTV bankruptcies in Tallahassee [BTT: Lee at Page 37, Lines 5-17; Lewis at 84/21 to 85/7].

since Holt wanted to keep an arms length between himself and the corporations.[19] [See BTE1: Tabs 4 and 5]. Lee and Holt represented that Holmes had agreed to advance the costs necessary for the litigation for 15% of the gross recovery on the racketeering claim.[20] Lewis also determined that, in order to put pressure on the Receiver to pay rent to TON, an eviction action should be filed.

Pursuant to the discussions in Tallahassee, Lewis prepared a contingent fee letter agreement[21] dated August 17, 1995, together with HRCC/HRTV shareholder resolutions to elect directors, director resolutions to elect officers, and resolutions authorizing the bankruptcy filings. Lewis sent the package of documents to Holt. After going through the documents in detail with Holt sitting next to Lee at the "pull-out" they used in Lee's desk. Holt executed them, including the fee letter [BTE1: Tab 3, as

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[19] BTT: Lee at 26/3-23 (and Lee kept Holt advised of all the activities going on); Lewis at 81/23 to 82/4. In fact, Holt was secretive towards Respondents. [BTT: Lewis at 132/13-19] White never spoke to Holt but once, in person, during the entire year of representation and only when Respondents had demanded a meeting. At the December 1995 meeting, Holt reiterated Lee had his full confidence and authority and for Respondents to deal through him. [CTT: White at 1383/11-1385/2] After the December 1995 meeting, Lewis only spoke to Holt again once. [CTT:514/21 to 515/2] An issue at trial was the disbursements to Lee's DEC corporation, but as far as Respondents knew Holt was a part of DEC. [BTT: Lewis at 142/23 to 143-3].

[20] CTT: Lee at 1110/13-15. BTT: Lewis at 118/13 to 120/1.

[21] It was the first contingent fee agreement he had ever drafted. Respondent White was on vacation at this time. [BTT: Lewis at 73/22 to 74/9; 79/16-17].

discussed below, is a copy] in Lee's presence.[22] They then put the documents in a Greyhound express package to return them to Lewis. Holt told Lee that he would drop them off at the Greyhound station for delivery to Lewis.[23]

Lewis called Lee inquiring about the execution of the documents and Lee told Lewis that Holt had executed the fee agreement and other documents and had taken them to the Greyhound station for shipping. Lewis then placed an "ss" next to Holt's name on a copy of the agreement. [BTE1: Tab 3; CTT: Lewis at 423/17 to 424/19; Lee at 1124/1-21; BTT: Lee at 120/15 to 123/2]

When the package arrived in Tallahassee, Lewis instructed Sterling Cain, a law student Lewis had hired to assist in the case, to fetch it, pull the bankruptcy resolution, and file the other documents. [CTT: Lewis at 425/15 to 427/23; Respondents Trial Exhibit 1]. Lewis then initiated the bankruptcy, removed the Receivership case to Tallahassee, and Respondents entered the litigation in Phoenix. [CTT: Lewis at 132/1 to 133/25]

[22] CTT: Lee at 1119/23 to 1123/25. BTT: Lee at 22/11 to 23/17; and, 44/ 7 to 47/10.

[23] CTT: Lee at Page 1123, Lines3-25. BTT: Lee at Page 23, Lines 15-24.

Early in the representation, when Lewis believed he had secured a buyer for the TV station, Holt informed Lewis through Lee[24] that he wanted Robinson's 20% stock interest in HRCC because he wanted to be able to use all of the $5 million in net loss carry forwards available because of the settlement [BTT: Lee at 28/19 to 29/1 and Lewis at 89/19 to 92/2; CTT: Lee at 1142/8-22]. Holt planned to establish a "super-station network" along I-10. [CTT: Lee at 1152/23-1155/3]. Respondents prepared a Memorandum of Agreement that Robinson and Holt executed October 3, 1995, wherein Robinson would receive, in redemption of his stock, 20% of the cash recovery to HRCC/HRTV reduced only by the "[d]ocumented out-of-pocket costs incurred... solely in relation to the pursuit of the collection of funds from the Receivership estate on behalf of HRCC..." and the Lewis & White fees.

In the Agreement, Holt acknowledged the existence of "that certain fee agreement by and between Charles W. Holt and Lewis & White, L. C., dated August 17, 1995..." [BTE: Tab 8; page 3, footnote 1(a); footnote 1(b)] It confirmed to Lee that Holt intended Respondents to receive 35% of the gross recovery. [BTT: Lee at 33/12-18]

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[24] During the ensuing year, Lewis dealt almost solely with Lee and spoke to Holt only once or twice and met him once or twice. [BTT: Lewis at 82/5-11]

Respondents[25], not only thwarted Soundview[26] from obtaining a transfer of the television license from the FCC with concomitant forfeiture of their $1.2 million deposit to the Receiver, but also located a new purchaser (after extensive and complex dealings with four other potential purchasers), Gannett Communications, that would not relocate the station, and litigated Finova and the Receiver into accepting a global settlement which, among other things, provided $4.6 million to the Receiver for the purchase of the TV station, $465,000 to Soundview, released Holt from the Receiver's $385,000 claim (plus interest) against Holt for fraud in the 1992 bankruptcy [BTT: Lewis at 95/5-19], released Finova's lien on the HRCC/HRTV stock with its $5 million in net operating loss tax carry-forwards worth approximately $1.5 million, released Holt from a deficiency claim by Finova in an amount of approximately $2 million [BTT: Lewis at 94/2-23], brought $625,000 cash to HRCC/HRTV and paid TON

[25] Lewis described the case as the most complex in his career. [BTT: Lewis at 84/12-14] The only expert witness in the civil trial, Tallahassee attorney Ben Wilkinson, testified that he'd never seen such a mess. [CTT at 273/3 to 274/18].

[26] CTT: White at 1364/24 to 1365/20. Had Soundview's contract remained viable, it was going to relocate the station and the TON realty would have had, potentially, a negative value. [CTT: White at 1365/8 to 1369/21.]

$85,000 in back rent on a claim for which the claims-bar date had passed [CTT: White at 1373/4-8] and paid $925,000 for the land.[27]

The Agreement for Purchase and Sale was signed by Gannett and all of the TON partners (including Holt), by Newbern as president of HRCC and HRTV and, individually, by Holt and Robert N. Robinson, Jr., the 20% shareholder in HRCC/HRTV. [BTE1: Tab 20; last pages] Incorporated by reference in the purchase agreement was an Escrow Agreement among all the parties that appointed Respondents as “Seller’s Agents” which Lewis executed as Agent and Attorney-in-Fact for TON. [BTE1: Tab 20; pages 3 *et seq*.] The Gannett transaction closed in Portland, Maine, in late July 1996, and White attended to ensure, in particular, that Holt was released from the Finova judgment[28] and the Receiver’s claim, which were the final unresolved issues. [BTT: Lewis at 481/23 to 482/16; 100/7-9].

After the global settlement, Lewis provided Lee with a summary of the HRCC/HRTV obligations and proposed distribution of the recovered funds and Lee

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[27] “It was beyond believing...they were able to stop the sale of the TV station, able to acquire...enough funds...to clear Mr. Holt’s judgment...pay a lot of debts of the corporation, other reliefs that I was amazed to hear that was given to benefit Mr. Holt.” [BTT: Lee at 28/6-14]. The Stipulation that settled the case describes some of the benefits to Holt. [BTE1: Tabs 11 and 13].

[28] Working out the settlement became more and more complex. “Finova just hated Mr. Holt.” [BTT: Lewis at 166/17-23] Respondents did not trust Finova to release Holt. [CTT: White at 1387/15 to 1388/7]

instructed[29] Respondents to begin distributions based on the schedules. [BTT: Lee at 64/3 to 65/3]. Upon receipt of the $1,549,054.97 in proceeds to a special trust account, Respondents allocated $628,852 to HRCC/HRTV and $920,203 to TON. The TON partners made it clear to Lewis they believed the 35% contingency arrangement should only apply to Holt, so a separate fee arrangement was made regarding their interests. [BTT: Lewis at 129/21 to 130/4]. Respondents then disbursed based upon the global settlement [BTT: Bar counsel confirming to Referee at 56/24 to 57/3] and Lee's approval as treasurer after his consultation with the other directors. [BTT: Lewis at 154/4-8].

Not counting the $4.6 million paid directly by Gannett to the Receiver for the TV station, the gross recoveries Respondents obtained for Holt included the $625,000 cash to HRCC/HRTV, the $73,000 utilized to redeem Robinson's 20% interest in the companies[30], the Receiver's release of the claim against Holt for $385,000 plus

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[29] Throughout the representation, Lee instructed Respondents what to do; not the other way around. [BTT: Lee at 34/11 to 35/5] Various accountings and summaries of proposed disbursements were prepared. [BTT: Lewis at 158-164]

[30] Despite their claim for 35% of the value of all recoveries, because Robinson had not personally guaranteed the Finova note (and no fraud claims against him, his stock was redeemed at a value applying the 35% only against the $625,000 less the portion of the fees applied against the cash and costs. [CTT: Lewis at 436/9-25] Respondents did not assert their claim for fees in a manner that would deprive the corporations of cash necessary to redeem Robinson's stock.

interest, the deficiency forgiveness by Finova in an amount no less than $700,000, payment of $500,000 to HRCC/HRTV's unsecured creditors [CTT: Lewis at 719/23 to 721/6], and Finova's lien release on the HRCC/HRTV stock Holt pledged for the loan, effecting the forfeiture of Soundview's $1.2 million deposit to the Receiver, and the $850,000 cash value[31] of the corporations net operating loss carry forwards. HRCC/HRTV recoveries alone totaled $4,333,000.

It was obvious to Respondents, however, that the funds to pay 35% of the total recovery were not available and so they calculated the 35% fee only against the actual $1,549,054.97 million in gross cash received, i.e. $542,169.25, plus $49,869.03 in costs advanced[32] for a total of fees and costs due of $592,038.28.

Contemporaneous with the closing of the sale to Gannett on July 31, 1996, Bill Neely, one of the TON general partners, instructed Respondents to separate any involvement of Holt from the remaining TON partners interests. This concern arose because Neely, as the managing general partner, was under a Mississippi garnishment order imposed by Finova to pay-over all funds attributable to Holt from TON and

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[31] Respondent Lewis, a former CPA and a masters in tax law, valued the carry forwards at $1.7 million if Holt utilized them in his "superstation" venture or at a cash value of $850,000 if he sold them. Lewis cited *Lisbon Shops v. Koehler*, 77 S.Ct. 990 (1957), as authority. [CTT: Lewis at 340/10 to 346/7; 596/5 to 605/13; 706/9 to 719/9; BTT: Lewis at 69/25 to 70/7]

[32] See Recap Schedule 1A; BTE: Tab38, page 6.

Neely was aware the IRS had a lien against Holt individually in the amount of approximately $125,000. [BTE1: Tab 10; CTT: Lewis at 476/10-18; 483/17 to 484/20; BTT: Lewis at 158-161] Neely was concerned that either Finova or the IRS would levy the entire TON proceeds to satisfy Holt's individual indebtedness and, at best, would require effort and expense to separate the non-Holt partners' interests from Holt's problems. [CTT: Lewis at 402/13-19 504/6-10; BTE1: Tab 37; page 2]

Respondents, who had been instructed by Holt to deal exclusively with Lee in all matters on his behalf, conferred with Lee and transferred Holt's net share of the TON proceeds to the HRCC/HRTV account. Thereafter, the HRCC/HRTV funds, restored with the share of the TON funds allocable to Holt, were administered through the HRCC/HRTV officers and directors, principally Lee who acted for Holt individually as well as in his capacity as HRCC/HRTV Secretary-Treasurer. Lee then instructed Respondents to begin distributions based on the schedules. [BTT: Lee at 64/3 to 65/3].

Holt received funds out of the initial distribution and did not object to their commencement. [BTT: Lee at 38/3 to 39/13; CTT: Lewis at 486/4-17] The TON partners (except Holt) had approved the distributions [BTE1: Tab 20; page 2], but Respondents did not apply the contingency to that portion of the TON settlement attributable to the other four partners. [BTT: Lewis at 101/16 to 103/15; 146/16 to

148/15]. Respondents believed they had authority based not only on the approvals of the HRCC/HRTV officers and directors and the October 3, 1995, Memorandum of Agreement (where Holt ratified the fee agreement that Lee saw him sign), but also on the authority of the Purchase and Sale Agreement and escrow agreement making Lewis "Seller's Agent" that was signed by all parties. [CTT: Lewis at 471/7-20; BTT: Lewis at 121/22-23]

After the distributions, Lee signed-off on a document approving them in his corporate capacity.[33] [BTT: Lee at 58/7-21; see BTE: Tab 20] The Referee summed it up and addressed Lewis who affirmed the Referee's following distillation of the case:

> Wait, wait just a minute. *** Considering I'm the trier of fact here, what you're saying is that the TON business disbursements from Chicago Title...your fee that you took from the TON settlement referred as far as the contingency only to Mr. Holt's one fifth share of the TON disbursement *** and then Mr. Tatum and Mr. Neely and...Mr. O'Laughlin and whoever? I guess there may be one more. *** Your fee agreement with them had nothing to do with the 35%. But, now, that was based on what you testified to...was an agreement with Mr. Neely as the managing partner and the other partners and what you believed was also Mr. Holt's agreement by him having no disagreement expressed to you?

[BTT: 147/14 to 148/14].

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[33] As the Referee found [Report; Finding 25, page 8], Holt executed a proxy in Lewis' favor that was never utilized adversely to Holt. Lewis relied on the corporate officers for direction. [BTT: Lewis at 135/23 to 136/7]

On August 26, 1996, after Holt apparently realized he would receive no cash recovery under the fee agreement[34], he had Lee prepare and transmit claims totaling $552,628.62 in "expenses" to Respondents to be reimbursed out of the recoveries, including the TON recoveries, of the $625,000 cash that redounded to HRCC/HRTV. [BTE:42]. In other words, and without reference to the redemption of Robinson's stock or payment for Lee's services, Holt proposed that Respondents accept $25,000 for their services. Holt's expense claim violated the October 3, 1995, Memorandum of Agreement with Robinson, however, wherein Holt not only acknowledged the August 17, 1995, fee agreement, but also agreed that the only costs chargeable against the 20% of the HRCC net proceeds that Robinson would receive in redemption of his stock would be "documented out-of-pocket costs incurred solely in relation to the pursuit of the collection of funds from the Receivership estate on behalf of HRCC...." [See BTE1: Tab 8; page 3, footnote 1(a) and (b)]

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[34] As Wilkinson testified, "[T]he value of the legal services here...exceeds in my opinion not only what they charged or would want to charge but it is greater than that." CTT at 273/17-22.

Respondents rejected all but $4,384 of Holt's cost reimbursement[35] claim since the balance violated the October 3, 1995 Agreement. [CTT: Lewis at 411/19 to 421/1] Respondents conferred with Lee[36] who concurred that the claim for costs violated the October 3, 1995 agreement and the August 17, 1995 fee agreement.[37] This is when Holt told Lee that he had no written fee agreement with Respondents.

Upon receipt of this news from Lee, Respondents checked their files and discovered the fee agreement was not among the documents received at the Greyhound station in August 1995. Respondents conducted a year's worth of legal services, however, in the belief they had a signed fee agreement from Holt and would not have done so without believing such to be true. [BTT: Lewis at 84/2-8; CTT: White at 1361/6-13]

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[35] Complainant admits that Respondents only disbursed $527,667 to themselves not $592,038. [IB at 10] The difference in the numbers of $64,371.28 is roughly the $4,384 in costs reimbursed to Holt and $60,000 Respondents gave him.

[36] The "HRCC/HRTV/Holt" account was administered as a corporate account. Respondents looked to Lee for approvals since, under the October 3, 1995 agreement, only certain expenses and costs applicable to HRCC/HRTV alone were chargeable against the gross proceeds received by HRCC/HRTV (including the 35% fee to Respondents and excluding the "Holt/TON" funds) in computing the redemption of Robinson's 20% interest. [BTT: Lewis at 156-157]

[37] Robinson, a long time associate of Holt's, was afraid Holt would try to reduce the redemption price by exaggerating his costs. [BTT: 156/25 to 157/13]

Respondents knew that Holt had acknowledged "that certain" August 17, 1995, fee agreement in the October 3, 1995, agreement. [CTT: White at 1361/15-25] Respondents did not doubt their entitlement to 35% of all the benefits obtained for Holt [BTT: Lewis at 103/11 to 104/12], but wanted an executed contract for their files and, in August 1996, sent a duplicate fee agreement to Lee and asked him to have Holt re-execute it.[38] Holt refused to sign it and walked out and never contacted Lee again. [CTT: Holt at 62/2-4; BTT: Lee at 58/24 to 59/5; Lewis at 663/6-18]

In fact, of the $164,000 in TON proceeds, Holt had only asked for $17,000. [CTT: White at 1352/15 to 1353/1] Indeed, nothing more was heard from Holt until early November 1996 when Jack Pittman, a Hattiesburg attorney, contacted Lewis on Holt's behalf. [CTT: Lewis at 431/17-20] Lewis provided Pittman and accountant Herb Slay with the October 31, 1996 accountings. Slay made several suggested corrections which Respondents made to the accountings. [BTT: Lewis at 160-163]

Pittman then informed Lewis that HRCC/HRTV purported to have had a meeting of the board of directors on December 6, 1996, at his Hattiesburg office, but

[38] This is what Complainant refers to as the original of the fee agreement, unsigned by Holt, found in the records of Charles Lee. [IB at 4]. The other "second contract" that Lewis "signed per verbal authorization from Charles Lee" was Lewis' notation on a copy of the fee agreement, with an "ss" written next to Holt's name, indicating that Holt had signed the original contract upon being told so by Lee.

there was no quorum and it was not properly noticed.[39] Another meeting of the directors was then properly noticed and held on December 24, 1996, in the offices of Respondents. Lee attended in his capacity as Secretary-Treasurer[40] and director and Newbern attended in his capacity as President and director. [CTT: Lee at 1113/15 to 1116/8; BTE7: page 10]. Holt and the fourth director, Ted Tibbett, attended by telephone.

Holt knew that, functionally, the funds had been disbursed to Respondents and he wanted them back. [BTE7: Transcript of December 24, 1996 meeting; page 17/8-16] At the meeting, it was agreed that the directors were only dealing with HRCC funds. [BTE7: page 42] At the ensuing civil trial, Holt's trial counsel even stipulated that it was an HRCC/HRTV meeting and had nothing to do with Holt [CTT: Claude Walker at 624] even though the HRCC/HRTV account also held what were sometimes described as the "Holt portion", but all such funds were controlled and disbursed by HRCC/HRTV. Use of such nomenclature (Holt funds vs. HRCC/HRTV funds) was necessary to clearly describe, and fairly compute, the amounts due Robinson under

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[39] BTT: Lewis at 136/12 to 138/5; 589/5 to 592/1. BTE7: page 5.

[40] At no time, except after Lee's purported but admittedly ineffective removal as an officer on December 6, 1996, were Respondents notified that Lee did not act with corporate authority or with Holt's individual authority. [CTT: Lewis at 519/1 to 524/24; 697/11 to 701/16] Respondents continued to rely on Lee's approvals through early 1997 when litigation ensued.

the October 3, 1995 agreement. [CTT: Lewis at 625/2 to 630/9; see footnote 32, *supra*]

During the meeting, the directors voted that no further disbursements of company funds be made and"funds be preserved for later to be reclaimed at a later date on behalf of <u>HRCC</u> if it's determined that they were not in the right amounts." [BTE7:page 52] Respondent White agreed pending the results of an accounting. [BTT: Lewis at 107/1-13; CTT: Lewis at 324/3 to 333/1; White at 1416/17-21; BTE7: page 73]. Lewis was not present. [BTT: Lewis at 619/18-22]

Respondents transferred HRCC monies to which Holt claimed entitlement into the trust account of attorney William E. Whitlock. [BTT: Lewis at 626/18-624/12-21].These funds included $17,000 from $85,000 paid in December 1996 [BTT: Lewis at 145/11-15] by the Receiver for back rent that Respondents recovered for TON although the bar date for the claim had passed. Whitlock, per the agreement at the December 24, 1996 meeting, engaged the Tallahassee accounting firm of Law, Redd, Crona and Munroe. [BTT: Lewis at 138/25 to 139/4]. Holt did not object. Lewis received a verbal report on the accounting results in March 1997 that Respondents were still owed $200,000. [CTT: Lewis at 322/21 to 324/16].

On March 31, 1997, Respondents initiated litigation against Holt in Leon County Circuit Court, as contemplated by Rule 14-1.1(b) of the Rules Regulating The Florida

Bar [BTE6: Tab 2, page 2 *et seq*.], asserting counts for breach of contract, quantum meruit, establishment of a lost document, a declaratory action and fraud. The declaratory action count sought a determination, among other things, that Respondents' firm had an equitable <u>interest</u> as opposed to an equitable lien[41] on the subject funds. When the audit report, provided to Holt's counsel, found that Respondents were entitled to $200,000 over and above the funds transferred to Whitlock's trust account, Respondents instructed Whitlock to refund the monies and provide notice of such to the court. Whitlock then filed his July 17, 1997, Notice of Refund with the trial court with service of a copy to Holt's attorney [CTT: Lewis at 409/17 to 411/9] and dismissed the declaratory action count.[42] **Two years later**, Holt's trial counsel filed an "emergency" motion for refund that was denied.[43] [BTT:

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[41] "In a trust relationship the trust beneficiary possesses an equitable ownership interest...while the trustee possesses legal title to the property. See *Axtell v. Coons*, 82 Fla. 158, 89 So. 419, 420 (1921). A constructive trust beneficiary...possesses an equitable ownership interest...which is substantively different than an equitable lien against the property." *In re General Coffee Corporation*, 828 F.2d 699, 706 (11th Cir. 1987).

[42] See, also, CTT: Lewis at 406-411 and **Civil Trial Composite Exhibit 4**.

[43] The failure of Holt to timely object to the refund, if not constituting judicial estoppel that the funds would not be an item of dispute at trial, did give Respondents reason to believe Holt acquiesced to the agreement between Respondents and HRCC/HRTV directors Lee, Newbern, Holt and Tibbets at the December 24, 1996, meeting, i.e. that Respondents would not expend the balance of the fees pending the audit which confirmed that Respondents had undercharged

Lewis at 139/10-20]

Prior to trial, in its June 14, 1999, order on pending motions, the trial court granted Holt's motion for partial summary judgment and ruled that Respondents' "contingent fee agreement dated August 17, 1995...failed to comply with...Rule 4-1.5(f)(1) and (2), Rules Regulating The Florida Bar" with respect to (1) the method by which the fee was to be determined, including the percentages that shall accrue to the lawyer, (2) whether litigation expenses were to be deducted before or after the contingent fee is calculated, and (3) because the fee agreement was not executed by attorneys Dennis LaRosa and Paul Holmes both of whom were to participate in the fee. *Chandris, S. A. v. Yanakakis*, 668 So.2d 180 (Fla. 1995), was cited for authority.[44] [BTE3: Tab 1]

A non-jury trial of the remaining issues was held from September 9 to 15, 1999, before Circuit Court Judge L. Ralph Smith, Jr. During the trial, Holt testified that his

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for their services.

[44] But *see*: "Finally, I have substantial concerns about the broad sweep of the blanket rule adopted by the majority in making the Rules of Professional Conduct rules of law. This is contrary not only to the court decisions cited in the majority opinion but also to the rules themselves. [Citation omitted] * * * To use rule 4-5.6 as the basis for invalidating a private contractual provision is manifestly beyond the stated scope of the Rules and their intended legal effect. * * * We are venturing into uncharted territory today based on a factual situation that simply does not appear to justify such a drastic pronouncement." *Chandris, supra,* at 188-189(Anstead dissenting with Kogan concurring).

oral agreement with Lewis was that Respondents took the case on the basis of 35% of the net cash distributed directly to HRCC/HRTV from the sale of HRTV's broadcast assets to Guy Gannett Communications (i.e. $628,000).

At the conclusion of the trial, Judge Smith entered his October 1, 1999, final judgment in favor of Holt and against Respondents in the amount of $295,867.00 plus interest and against Respondents' respective family trusts for sums transferred by Respondents' firm in the amount of $65,000 each. The judgment against the family trusts, which was inclusive of the judgment against Respondents and any amount collected against the trusts, would reduce the amount of the judgment against Respondents.[45] The judgment found that Respondents had over stated their costs advanced and that only $11,000 was allowed.[46]

Respondents appealed the judgment and, among other things, argued error in ruling the August 17, 1995, agreement failed to comply with the Bar rules because (1) the method of determining the percentages accruing to the lawyer was plainly to be

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[45] BTE3: Tab 2, page 9.

[46] Lewis was not present during Accountant Dodd's testimony and was unable to refute it, having had to leave the county to attend what became an emergency matter for a client because the trial date was reset so many times. [CTT: Court at 449/2-10] Prior to his departure, Lewis and Holt's counsel had agreed to a stipulation regarding $25,000 of the disputed costs leaving $18,000 at issue, but a hurricane was headed to Florida and Lewis could not wait to finalize the stipulation. [CTT: Holt's counsel and White:1339/6 to 1342/20. BTT: Lewis at 98/9-20]

applied against the gross recoveries of all entities and Holt, (2) the litigation expenses were to be paid after the contingent fee was calculated as clarified by the October 3, 1995, Memorandum of Agreement and (3) because the signature of attorney Paul Holmes was not required since (a) the 15% that Holmes was to share in was above the 35% fee to Respondents and he declined to advance the litigation costs and (b) attorney LaRosa was paid a flat fee that TON's managing partner assumed as a TON expense. The judgment was, nevertheless, affirmed in a *per curiam* decision entered September 21, 2001, by the First District Court of Appeals. [BTE3: Tab 3]

One day before the district court's decision, i.e. on September 20, 2001, Defendant Holt's deposition was taken by counsel for Respondents in connection with The Florida Bar disciplinary proceedings. In the September 20, 2001, deposition, Mr. Holt admitted, contrary to his testimony during the circuit court trial, that Respondents had been entitled to "35% of whatever was salvaged [BTE4: Tab 1; 14/15 to 15/10]; that he had no objection to the fee [15/22 to 16/1]; that there was no distinction between Respondents' representation of the corporate entities involved in the litigation handled by Respondents and Mr. Holt himself [16/7-24]; that the October 3, 1995, agreement acknowledging the existence of the fee agreement that had been ruled void by the circuit court was applicable to the "gross proceeds" [31/18-25 and 51/13 to 52/1]; that the satisfaction of a $5.9 million judgment against him [15/4-5] "was part of the equation" [42/3-6]; and, that "whatever cash they [Respondents] got from the sale of the assets that we had" and from a land partnership "was all that I know was salvaged." [41/22 to 42/10]

Respondents timely filed motions for rehearing, rehearing *en banc* and for certification, with the First District Court of Appeal based upon Holt's September 20, 2001, deposition in the Bar proceedings, and Holt responded with an errata sheet that recanted his recantation of his trial testimony. Respondents motions were denied. [BTE3: Tab 3] Mandate issued and the trial court entered an order requiring the funding of the $466,000 in supersedeas bonds posted against the judgment. [BTT: Lewis at 111/7-16; 175/25 to 176/2]

SUMMARY OF ARGUMENT

ISSUE I

A referee's findings of fact enjoy a presumption of correctness which will be upheld on review unless the facts are unsupported by the evidence in the record or are clearly erroneous. This Court will not re-weigh the evidence and submit its judgment for that of the referee if there is competent and substantial evidence to support the referee's findings.

The record in this case contains more than enough evidence to support the Referee's findings of fact and the conclusions that flow there from. In particular, the evidence supports the Referee's conclusion that Respondents were acting in conformity with the practice of using Charles Lee as an intermediary for Charles Holt when Respondents distributed funds.

ISSUE II

The Referee's conclusion that Respondent Lewis' testimony "can just as easily be viewed as indicating he had no controlling or management authority" in regard to the Lewis Family Trust is fully supported by the record. The Referee had the opportunity to hear Lewis' explanation of what he meant when he testified in a deposition that he "had nothing to do" with the Lewis Family Trust.

ISSUE III

A Referee's recommended discipline will not be "second guessed" as long as that discipline has a reasonable basis in existing case law and the standards for imposing lawyer sanctions. The Referee in a Bar proceeding is uniquely situated to assess the key considerations involved in recommending attorney discipline.

The cases relied upon by The Florida Bar in its initial brief are all distinguishable from the present case. In fact, nearly every case cited by The Bar involved a situation wherein the referee's finding of guilt was upheld by this Court. By and large, this Court also upheld the discipline recommended by the Referee in those cases.

This Court should give great deference to the recommendation of the Referee in this matter. The three months the Referee spent reviewing the entire record and preparing his lengthy report of referee should not be discounted.

ARGUMENT

Issue I (Restated)

The Referee's conclusion that Respondents neither violated Rule 4-8.4(c) by conduct involving dishonesty, fraud, deceit or misrepresentation or Rule 5-1.1 relating to trust accounts by taking trust funds belonging to Holt and the Board of Directors' express instructions is supported by the Record.

In Part IV of his Amended Report, the Referee made his "Recommendations as to disciplinary measures to be applied" in which, at page 14, he states:

> Although the civil trial court was able to observe the complaining witness face to face during his testimony, the reading of this testimony including depositions indicate that it could have easily determined that the complaining witness' credibility at the most, or his memory at the least, could come into question.

Despite the Referee's finding regarding Mr. Holt's testimony and his statement that he would review the entire record[47], the Statement of the Facts in the Initial Brief contains misstatement of fact, ignores facts that support findings made by the Referee, and does not supply facts in the record to support the arguments made in the brief. Complainant is free to challenge the Referee's findings of fact in the argument section of the brief, however, "factual statements contained in briefs are of crucial importance" and "should be stated clearly, concisely and <u>objectively</u>." *Overfelt v. State*, 424 So.2d

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[47] "But I can tell you right now, I'm going to look at everything you've got in front of me...." [BTT: Referee statement at Page 187, Lines 13-15.]

945, 949 (4th DCA 1983). This is not the case with the Initial Brief.

Although the Referee found that "[p]rior to any disbursements being made, no closing statement was prepared by the respondents which contained the signature of the client and all lawyers involved",[48] the Referee also found that "[a]ll disbursements were approved by the Board of Directors of HRCC, Inc.[49]; and, "[a]ll fees were approved by Lee as Secretary/Treasurer and other officers of HRCC, Inc."[50]

Holt had instructed Lewis and White to conduct all business dealings with Lee.[51] As the Referee found [Report; page 14], Holt rarely contacted Respondents, either in person or by any other counsel, until the legal work resulted in the settlement; that Holt had notice in August 1996 that Respondents were making distributions[52], he did not object until November 1996[53] and the distributions were made in conformity

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[48] Report, Finding 15 at page 6; BTT: Lee at 38-39.

[49] Report, Finding 14 at page 6; BTT: Lee at 38-39.

[50] Report, Finding 19 at page 7; BTT: Lee at 38; Lewis at 167/4-18. CTT: Lewis at 471, 486, 555 See, also, BTE, Tab 20, page 2 and signature pages at the end of the Agreement for Purchase and Sale following the United States District Court's "Consolidated Order Reconfirming Sale of Assets of WTWC-TV."

[51] Report, Finding 5 at page 4; BTT: Lee at 26; BTT: Lewis at 365.

[52] BTT: Referee recap of Lewis testimony at 147-148.

[53] Report, Finding 5 at page 4; also, e. g. Volume II, Pittman testimony at page 867; BTT: Lee testimony at 39 and 63-63.

with the practice of using Lee as an intermediary and with the approval of the Board of Directors that Holt had approved. The Referee noted also that Holt delayed over 2 years before complaining to the Bar about Respondents' conduct.[54]

Although the Referee did find that no closing statement was prepared prior to distributions, he found that disbursements were approved by the Board of Directors, the Secretary/Treasurer and other officers; that Holt had notice in August 1996 that distributions were ongoing; and, that Holt did not object to the disbursements until November 1996.

Complainant's litany concerning the distributions and Mr. Pittman's understandings, etc., does not address the basis for the Referee's findings that Complainant established no evidence that Respondents established a relationship with Lee in direct conflict with and adverse to Holt's interests; that Respondents' contact with Lee was exclusively as an HRCC officer and Holt's intermediary; and, that Respondents never directed Lee to act in any fashion. [Report at 7; Finding 20] Although Respondents disbursed funds to Lee, Respondents did not know that Holt and Lee had no agreement between them. [Report at 6; Finding 18].

Complainant acknowledges that in disciplinary proceedings a referee's findings

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[54] Report, Finding 26 at page 8.

of fact enjoy a presumption of correctness that will be upheld unless the facts are unsupported by the evidence in the record or are clearly erroneous (and the court will not re-weigh the evidence and substitute its judgment for that of the referee if there is competent and substantial evidence to support the referee's findings). The record contains an ample basis for the Referee's findings of facts concerning the engagement of Respondents and their attempt to obtain Mr. Holt's ratification of the original signed fee agreement, the existence of which he acknowledged in writing in the October 3, 1995, Memorandum of Agreement between Mr. Holt and Mr. Robinson, the other HRCC shareholder.

Respondents provided the audit report to Holt's counsel and, in complete consistency with the agreement made at the December 24, 1996, HRCC/HRTV Board meeting, Respondents instructed Whitlock to refund the monies and provide notice of such to the court. The declaratory action count in the ensuing litigation, which sought a determination of whether Respondents had an equitable interest or an equitable lien on the subject funds, was then moot and it was dismissed. [CTT: Lewis at 406-411] Two years after the July 17, 1997, filing of the Notice of Refund, Holt's trial counsel filed an "emergency" motion for refund that was denied. [CTT: Lewis at 409/17 to 411/9; BTT: Lewis at 139/10-20].

In any event, Respondents had every right to believe that the HRCC/HRTV officers had the authority to honor its contract with them and; that the approval of the board of directors was not necessary. *Edward J. Gerrits, Inc. v. McKinney*, 410 So.2d 542 (Fla. 1st DCA 1992), *petition denied* 419 So.2d 1196. The record abounds with confirmation by Lee and Newbern that they approved the payment of Respondents' fees. Complainant's contention that Newbern was elected by Lewis pursuant to Holt's proxy is not an accurate statement: Lewis merely nominated Newbern, Holt elected him. [BTE1: Tabs 4 and 5] .

As to the concern expressed by Ted Tibbet, who Complainant describes as having "no financial stake in the matter", about the monies paid to Lee, Lee answered Tibbett's remark that it was a strange board: "Well, Mr. Holt set it up." [BTE7: Page 45] Regardless, if Tibbetts had no financial stake, why did Holt instruct Lee to keep him in the dark about a possible distribution? [BTT: Lee at 29/15 to 31/13]

Respondents rendered extraordinary legal services[55] and obtained results that Mr. Holt had never dreamed possible; voluntarily reduced the fee to which they had every reason to believe they were entitled; then, discounted the reduced fee so that HRCC could redeem Robinson's stock for Holt's benefit and have sufficient funds

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[55] Even Circuit Judge L. Ralph Smith, in his Final Judgment for Holt and against Respondents, found that "the legal services which were actually rendered were competently performed, in accordance with significant time restraints, resulting in substantial benefits to the client." [BTE3: Tab 2; page 8]

to pay Lee.

Complainant also dwells on the fact that the October 3, 1995, Memorandum of Agreement (MOA) did not discuss TON funds. This misses the point. By virtue of the MOA, Holt gave Respondents good reason to believe that they did not need to go searching for the fee agreement. Even if Respondents had knowledge it did not exist, they had reason to believe Holt had ratified it. It should also be noted *Chandris, S. A. v. Yanakakis*, supra, was not decided until December 1995.

The record contains an ample basis for the Referee's finding that the fees to Respondents were approved. Complainant's contention that Respondents had a relationship in conflict with Holt is based upon innuendo.

Issue II (Restated)

The Referee correctly concluded that Respondent Lewis did not violate Rule 4-3.3 relating to candor to the tribunal by denying he had anything to do with the Lewis Family Trust and that someone other than his wife controlled the trust's bank accounts.

The Referee correctly concluded that no evidence was presented that Respondent Lewis is guilty of violating Rule 4-3.3 (Candor Toward the Tribunal). Complainant focuses on Lewis' April 1999 deposition testimony where he stated he did not know where the co-Trustee (Jeffrey Wallace) of the Lewis Family Trust lived because he did not have anything to do with the trust. Lewis was then asked: "Who does?" As quoted in the Initial Brief, in pertinent part, Lewis answered:

> Wallace, I guess. * * * I settled that trust in 1980...and I'm not on any checking accounts, I don't do anything with it. I've been through the IRS with this thing and I don't...all I do is if we have a distribution, we cut a check and send it. That's all we do." [IB at 22.]

Lewis was then asked: "So, you distributed, you made the decision with Marlow to distribute $65,000 into a trust that you have nothing to do with? Is that what your statement is?" He answered (having already acknowledged settling the trust in 1980):

> No. I'm saying – that the trust, my family is a beneficiary of it. I set it up in 1980 for my family, yes. So, yes, I caused that to be distributed to a trust for my family. Yes, I did.

[BTE3: Tab 4; Lewis deposition at 133/10-13].

In response to a question about where the $65,000 check went, Lewis answered that he did not know where the check went saying "I don't control the bank account." Asked who else was a trustee, Lewis answered: "My wife, Mary Lou Lewis." Asked if she was the one that controlled the bank account, Lewis answered:

> No. Wallace controls the bank account. She's the co-trustee as protector for the children. <u>And she's in communication with her brother, I assume. I don't know. She doesn't share all that with me and I don't care about it</u>.

[BTE3: Tab 4; Lewis deposition at 134/10-21]

Complainant bases its contention that Lewis lacked candor in answering the deposition question because Lewis' wife acknowledged writing checks on the trust account to Lewis and for household expenses; because Lewis prepared tax returns for the family trust and his wife did not know where he got the information to complete the tax returns[56]; because his wife said her brother, the co-trustee, was difficult to contact; and, because the trust held a 45% interest in Respondent's firm.[57]

Complainant argues that "[f]or the Referee to conclude that Lewis answered honestly, he had to conclude that Lewis would place his profits from the Holt deal[58] into an account were [*sic*] he would have no control over or any benefit from those funds." [IB at 23]. Respondents suggest that it does not take a great leap of faith to believe that a husband would place the great bulk of his earnings at the disposal of his wife for her benefit and for their children's benefit, i.e. the same as if no trust was involved.

Although, as Complainant notes, the circuit court judge held the transfers by

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[56] Joanie Hanney, Respondents' bookkeeper at the time, prepared tax returns for the trust. [BTT: 110/22-25; BTE3; Tab 4, Lewis deposition testimony at 151/8-15, 197/18-19]

[57] Complainant also contends, contrary to the record, that Respondents placed the majority of the profits in their family trusts to avoid IRS debts. *See* White's trial testimony cited in the Initial Brief at 6. The "trust" account referred to in the trial testimony was the escrow account opened per instructions from Chicago Title in July 1996. Respondents organized their firm in 1992. [BTT: Lewis at 70/15-19]

[58] As it turned out, it was the HRCC/HRTV/TON deal, not the Holt deal; Holt had no RICO action against Finova.

Respondents to their respective family trusts was a fraudulent transfer to avoid a creditor (the IRS[59]) [IB at 23], the Referee understood that the firm was founded with the family trusts as a non-voting class of members in 1992 (even if he found the entity structure not authorized) [Report: Page 8] and that the firm did distribute fees [45% of the firm's profits to each trust[60]]. The transfers were not "with the actual intent to hinder, delay or defraud any creditor."

The Referee read White's testimony that at the time there were no liens, levies or judgments, but he feared an IRS dispute. [CTT at 1418-1419]. The Referee understood that White was answering the question of why the firm elected to <u>leave</u> their fees in the account after it had served its purpose as a clearing account for the HRCC/HRTV funds and not addressing the issue of the profit distributions to the family trusts.

As to the contention that Lewis lacked candor because Lewis' wife acknowledged writing checks on the trust account to Lewis and for household expenses, the Referee read Lewis' testimony that his wife was "in communication with her brother, I assume. I don't know. She doesn't share all that with me and I don't care about it." The Referee heard Lewis testify, in response to examination by Bar

[59] The record contains no reference to any IRS action against Respondents.

[60] BTE3: Tab 4; Lewis at 160/19-23.

counsel about having nothing to do with the trust: "What I was referring to was I didn't have anything to do with the policies of the trust or who named the trustees or the checking accounts of the trust, the business of the trust. That's what I was referring to." On further examination, Lewis testified: "...I didn't tell my wife what to do with the trust. I didn't tell Jeff Wallace what to do with the trust." [BTT: Lewis at 108/7 to 110/21]

As to the fact that Lewis prepared tax returns for the family trust, Lewis testified that he signed the returns, but that a bookkeeper prepared them. He signed the returns because the bookkeeper was not qualified to sign them as preparer and, if there was an audit, he could assist without obtaining a power of attorney. [BTT: Lewis at 110/22 to 111/2].

Mrs. Lewis' testimony was not that she did not know where Respondent Lewis got the information to complete the tax returns. She testified, "I guess he got the checkbook and whatever and figured them out." [BTE3: Tab 12, Page 22]

Complainant contends that Lewis' testimony was false because not only has he executed the trust's tax returns as the preparer, he also controls when funds are deposited into the account and his wife writes checks at his direction. [IB at 25]. A review of Mrs. Lewis' referenced testimony, however, shows that she writes checks "for whatever I deem necessary they be used for" that "it was my decision what...I should pay out of the trust, what I could use the monies that were in the trust....”; that she makes deposits into the trust and “sometimes I give a deposit slip to Gene and he’ll make a deposit from the firm. He does not record the deposits in the checkbook.” [BTE3: Tab 12, pages 7-12 and 18] Her testimony was clear, however, that she decided what and who she would pay out of the trust account.

Complainant also contends that Lewis falsely testified that Respondents’ firm structure had been approved by the Bar and that no such approval exists. [IB at 25]. What Lewis said was that he corresponded with the Bar, but he had no formal or informal opinion on the issue. [BTT: Lewis at 113/6-13; 114/13 to 115/1]. Lewis also testified there was a Bar complaint against Respondent White that raised the entity issue, but the complaint was closed out without consequence relative to the entity issue. [BTT: Lewis at 113/22 to 114/12].

The Referee’s finding that “[n]o evidence was presented that Lewis has any controlling interest or authority to manage the trust nor that he did any act to manage the Lewis Family Trust except provide legal services including tax preparation” [Report at Page 8, Finding 23] is supported by competent evidence. Likewise, the Referee’s conclusion [Report at Page 8, Finding 24] that Lewis’ deposition testimony “can just as easily be viewed as indicating he had no controlling or management authority” is fully supported by the record.

Complainant concludes its argument on this issue by rearguing Issue I and comparing the facts in the instant action to that in *The Florida Bar v. Bailey*, 803 So.2d 683 (Fla. 2001). Bailey not only had no basis to support his contention that he was free to use the Biochem stock funds as his own, but all of the evidence was to the contrary. In the instant action, Respondents had ample basis to believe that the funds in question were earned fees in consonance with a written agreement with disbursement approved.

The contention that Respondents attacked their client just as Bailey did is not even remotely viable. Respondents obtained Holt's release from a devastating judgment when Holt, and all of his previous counsel, had given up obtaining a release from the Finova judgment, much less any other recovery. In addition to all of the other valuable benefits, Respondents obtained Holt's release from the Receiver's $500,000 fraud claim. Bailey, in an *ex parte* communication, disparaged his client before the judge who would sentence him under a plea agreement.

Respondents' contention that Holt is dishonest (admitted by Complainant[61] in its attack on Lewis) was justifiably asserted in defense after completion of the representation. Holt's inability to tell the truth is amply demonstrated in Holt's

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[61] "That Holt may have a similar penchant for untruthfulness as Lewis is irrelevant." Initial Brief at page 25; second sentence in the first full paragraph.

testimony in the Bar proceedings deposition and his recantation in the errata sheet.

Issue III (Restated)

The recommended discipline is adequate and supported by case law as well as the Florida Standards for Imposing Lawyer Sanctions.

The Bar recognizes "that a recommended discipline will not be "second-guessed" so long as that discipline has a reasonable basis in existing case law and the standard for imposing lawyer sanctions." [IB at 14]. This Court has gone even further and noted that, as to discipline, the referee in a Bar proceeding occupies a favored vantage point for assessing key considerations - such as a respondent's degree of culpability and his cooperation, forthrightness, remorse, and rehabilitation (or potential for rehabilitation). *The Florida Bar v. Lecznar*, 697 So. 2d 1284, 1288 (Fla. 1997).

The Florida Bar asserts a public reprimand is inadequate in this case because a "public reprimand should be reserved for isolated incidences of neglect, lapses of judgment or technical violations of the trust accounting rules." (IB at 29) citing *The Florida Bar v. Schultz*, 712 So. 2d 386, 388 (Fla 1998). What the Bar overlooked in this regard, however, is that the referee found what occurred in this case to be exactly an isolated incidence of neglect, lapses of judgment, and technical violations of the trust accounting rules.

The Bar asserts that “Lewis and White knew at the time they made distributions that they did not possess a signed contingency fee or fee contract.” (IB at 30). While it is true the Respondents did not “possess” a signed contingency fee contract, they believed in good faith that Holt had signed one in 1995. Also, Holt had ratified the existence of, and his acquiescence in the terms of, a contingent fee agreement in the October 3, 1996 memorandum of understanding.

Respondents submit the standards for imposing lawyer sanctions support the recommended discipline in this case. Standard 4.13 provides that a public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. The referee found that “The Florida Bar has not shown by clear and convincing evidence that the Respondents acted with the intent to defraud Holt, dishonestly or deceitfully toward Holt or any misrepresentation. It would seem that intent to violate the trust rules is lacking.” Amended Report of Referee at 15.

The Bar asserts Standard 6.12 applies to Respondent Lewis’ allegedly false testimony in a deposition. As pointed out in Section II of this Answer Brief, Lewis did not make a false statement or improperly withhold material information. Standard 6.12 is inapplicable to this case.

The Bar further asserts that Standard 7.2 should apply in this case.

Respondents submit that if any provision of Standard 7.0 (violations of other duties owed as a professional) applies in this case, it is Standard 7.3. This standard provides that a public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

At one point in the initial brief, The Bar asks several questions which appear to be rhetorical in nature. [IB at 34]. The answer to the final question is clear. The case presented to the Referee is not the exact same case presented to Judge Smith. The Referee had the benefit of additional testimony from Respondent Lewis and from Charles Lee. More importantly perhaps, the Referee had the benefit of the evasive, contradictory, and later amended testimony of Charles Holt

The Florida Bar recognizes "that some might argue that there is support in the case law for the recommended discipline. Such cases are distinguishable". [IB at 37]. Likewise, the cases cited by The Florida are all distinguishable from the present case. In almost every single case cited by The Bar, the Respondent was found ***guilty*** by the referee of the rule violations alleged by The Florida Bar and those findings were upheld by this Court. This Court also upheld the discipline recommended by the referee in almost every case.

In *The Florida Bar v. Greenfield*, 517 So. 2d 16 (Fla 1987), the referee found the respondent guilty of some violations and _not_ guilty of others. 517 So. 2d at 17 (emphasis in original). This Court affirmed the referee's findings and recommended discipline.

In *The Florida Bar v. McAtee*, 601 So. 2d, 1199 (Fla 1992), this Court upheld the referee's findings of fact. Also, this Court noted that the facts regarding "improper use and maintenance" of respondent's trust account were "not in dispute." *Id.* at 1200. Clearly, the facts in this case are in dispute.

In *The Florida Bar v. Tunsil*, 503 So. 2d 1230 (Fla. 1986), the only issue before this Court was the discipline to be imposed. The respondent and The Florida Bar stipulated to the facts, including respondent's admission he misappropriated funds. *Id.* at 1230. Respondents have never admitted to misappropriating any funds.

In *The Florida Bar v. Neu*, 597 So. 2d 266 (Fla. 1992), this Court was again faced with a situation where the facts were stipulated. *Id.* at 266. In addition, this Court should take heed to its prior ruling in *Neu:*

> In order to find that an attorney has acted with dishonesty, fraud, deceit, or misrepresentation, The Florida Bar must show the necessary element of intent. *The Fla. Bar v. Burke*, 578 So. 2d 1099, 1102 (Fla 1991). Further, in *The Florida Bar v. Dougherty*, 541 So. 2d 610 (Fla 1989), and *The Florida Bar v. Lumley*, 517 So. 2d 13 (Fla. 1987), we have found that an attorney's lack of intent to deprive, defraud or misappropriate a client's funds supported a finding that the attorney's

> conduct did not constitute dishonesty, misrepresentation, deceit or fraud. Thus, The Florida Bar has the burden of showing that the Referee's findings are clearly erroneous or not supported by the record. The Florida Bar must establish that [Respondents] intended to convert [their] clients' funds, and consequently that [they] acted with dishonesty, misrepresentation, deceit or fraud. *The Florida Bar v. Neu*, 597 So. 2d 266, 268 (Fla. 1992).

In *The Florida Bar v. Wingham*, 525 So. 2d 873 (Fla 1988), this Court affirmed the referee's recommended discipline in a case where the respondent admitted all the allegations against him. In *Wingham*, the respondent basically violated probation previously imposed for mismanagement of his trust account. *Id.* at 873-874.

In *The Florida Bar v. Burke*, 578 So. 2d 1099 (Fla. 1991), this Court reduced the recommended discipline from 18 months to 91-days (rejecting The Bar's request for disbarment), but noted "this incident was brought about by the same negligence and prejudicial conduct for which *Burke* was previously disciplined." *Id.* at 1102. There is no evidence Respondents have previously been disciplined.

In *The Florida Bar v. Hartman*, 519 So. 2d 606 (Fla. 1988), neither party contested the referee's findings. The sole issue before this Court was the discipline to be imposed. *Id.* at 606.

In *The Florida Bar v. Behrman*, 658 So. 2d 95 (Fla. 1995), this Court upheld the referee's recommended discipline. There was no challenge in *Behrman* to the referee's findings.

In *The Florida Bar v. Rue*, 643 So. 2d 1080 (Fla. 1994), this Court noted that "The Bar is essentially asking this Court to re-weigh the evidence and reach different findings of fact, which [this Court] will not do." *Id.* at 1082 (citing *The Florida Bar v. MacMillan*, 600 So. 2d 457 (Fla 1992)). In fact, the Bar's entire argument for suspending Respondents is premised on this Court re-weighing the evidence and reaching different findings than the Referee. The Referee's three months of reviewing the record in this case (December 10, 2001 trial to March 15, 2002 initial report of referee) should not be discarded so cavalierly.

In *The Florida Bar v. Cibula*, 725 So. 2d 360 (Fla. 1998), this Court upheld the referee's findings (*Id.* at 362) and increased the discipline based upon those findings. In other words, this Court performed its traditional role of granting deference to a referee's findings and broader latitude to its review of the recommended discipline.

In *The Florida Bar v. Poplack*, 599 So. 2d 116 (Fla. 1992), this Court upheld the referee's recommended discipline.

The Bar's initial brief states this court imposed a 91-day suspension in *The Florida Bar v. Schultz*, 712 So. 2d 386 (Fla. 1998) (IB at 37). In fact, this Court imposed a 90 day suspension in *Schultz*. *Id.* at 389.

In *The Florida Bar v. Rubin*, 709 So. 2d 1361 (Fla. 1998), no issue was raised regarding the referee's findings. *Id*. at 1362.

In *The Florida Bar v. Hollander*, 594 So. 2d 307 (Fla. 1992), this Court approved the referee's findings and recommended penalty. *Id*. at 307.

The Bar also relies on *The Florida Bar v. Rood*, 633 So. 2d 7 (Fla. 1994) and it's "strikingly similar" facts. [IB at 32]. The only similar facts in *Rood* are that the clients testified they did not sign a fee agreement and no signed fee agreement could be produced. Unlike *Rood*, however, Respondents had a third party witness (Charles Lee) who testified he saw Mr. Holt sign the fee agreement. In addition, Mr. Holt acknowledged the existence of the fee agreement in the October 3, 1996 Memorandum of Agreement. Significantly, this Court accepted the referee's findings of fact and recommendations of guilt in *Rood*. *Id*. at 9.

The Bar also cites *The Florida Bar v. Krasnove*, 697 So. 2d 1208 (Fla. 1997), in support of its argument that Respondents should be suspended. Again, as with nearly every other case cited by The Florida Bar, this Court upheld the referee's findings in *Krasnove*. *Id*. at 1210. The undersigned counsel is also quite aware that this Court in fact reduced the referee's recommended discipline in *Krasnove.*

Respondents submit the discipline recommended by the Referee in this matter is appropriate. If this court should decide, however, the Referee erred in finding both Respondents not guilty of violating Rule 4-8.4(c), Rules Regulating the Florida Bar, and Rule 5-1.1(a), Rules Regulating Trust Accounts, and Respondent Lewis guilty of violating Rule 4-3.3, Rules Regulating the Florida Bar, the Court should remand this matter to the Referee for a hearing on the appropriate discipline to be imposed.

The Florida Bar is asking this Court to suspend both Respondents from the practice of law. [IB at 27]. A review of the record will show the Referee did not hold a separate hearing on the discipline to be imposed in this matter. The parties should be afforded the opportunity to establish a record of mitigating and aggravating factors under the standards for imposing lawyer sanctions prior to imposition of any suspension.

CONCLUSION

This Court should affirm the Referee's findings and recommended discipline.

Respectfully submitted,

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RICHARD A. GREENBERG
Florida Bar No. 0382371
325 West Park Avenue
Tallahassee FL 32301
Telephone: (850) 681-9848
ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U. S. Mail/Hand Delivery to Edward Iturralde, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee FL 32399-2300, this ____ day of November, 2002.

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RICHARD A. GREENBERG

xc: John A. Boggs

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

Undersigned counsel does hereby certify that the Initial Brief of The Florida Bar v. Arthur Eugene Lewis and Marlow Vincent White 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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RICHARD A. GREENBERG