IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARVIN S. DAVIS,

Respondent.
_____/

Case No. 74,219
[TFB Case No. 88-31,041 (18A)]

ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

The complainant, The Florida Bar, shall be referred to as "the Bar". Transcript of the evidentiary hearing, dated November 22, 1989, shall be referred to as "T I". Transcript of the evidentiary hearing on January 19, 1990, shall be referred to as "T II". Transcript of the disciplinary hearing held on February 16, 1990, shall be referred to as "T III". The Report of Referee dated May 18, 1990, shall be referred to as "RR". Bar exhibits shall be referre to as "B-Ex".

STATEMENT OF THE CASE

The Eighteenth Judicial Circuit Grievance Committee "A" voted to find probable cause on March 2, 1989. The Bar filed its complaint on May 26, 1989. The final hearing was originally scheduled for November 22, 1989. The respondent filed a motion for continuance on November 10, 1989, which the Bar did not oppose and the referee granted it in part at the hearing where evidence was also taken. (T I, pg. 23-24) A further evidentiary hearing was held on January 19, 1990. The disciplinary hearing was held on February 16, 1990. The referee filed his report dated May 18, 1990, on May 21, 1990. He recommended the respondent be found guilty of violating the following Rules of Professional Conduct: Rule 4-1.15(a) for failing to maintain the minimum required trust account records for handling client funds that were entrusted to him for a specific purpose; Rule 4-1.15(b) for failing to promptly render a full accounting regarding at least $1,323 entrusted to him or to promptly turn over to his client funds to which the client was entitled; Rule 4-1.15(d) for failing to comply with the Rules Regulating Trust Accounts; and Rule 5-1.1 of the Rules Regulating Trust Accounts for failing to maintain the minimum required trust account records relating to a transaction where he was clearly handling funds that were entrusted to him by a client for a specific purpose other than fees. The referee recommended the respondent be suspended from the practice of law for ninety days and be

placed on a two year period of probation with the condition that he make restitution to Mr. Lopez in the amount of $1,323, pay costs of these proceedings and not violate any of the Rules of Discipline or Rules of Professional Conduct.

The Board of Governors considered this case at its meeting which ended on July 20, 1990, and voted not to appeal. The respondent petitioned for review on July 30, 1990, and filed his Initial Brief on September 12, 1990, after having been granted an extension of time by this Court.

STATEMENT OF THE FACTS

Except as otherwise noted, the following facts are taken from the report of referee dated May 18, 1990.

In or around early January, 1988, the respondent was recommended as an attorney to Roberto Lopez, an inmate at the Seminole County Jail, by a fellow inmate whom the respondent represented. Mr. Lopez was charged with trafficking in cocaine and also faced a similar charge in Orange County. On or around January 4, 1988, the respondent met with Mr. Lopez and was directed to pick up a check from the Veteran's Administration from Mr. Lopez's roommate. Mr. Lopez then took it upon himself to arrange for all of his future government checks from the Veteran's Administration and Social Security to go directly to the respondent's office address. The respondent did agree, however, to cash his client's government checks and deposit them to his inmate account or make any other distribution Mr. Lopez might direct.

During the time in question, Mr. Lopez received monthly Veteran's Administration checks in the amount of $1,333.00 except one for $1,394 in March, 1989, and a Social Security check in the amount of $440.00.

On January 6, 1988, the respondent again visited Mr. Lopez. At that time, Mr. Lopez provided the respondent with a letter

from the Veteran's Administration stating that he suffered from schizophrenia and another document indicating his prescribed medication from the Veteran's Administration. The respondent became concerned that Mr. Lopez apparently was not receiving the appropriate medication while he was incarcerated. Although the respondent was concerned about Mr. Lopez's competency, he apparently was not concerned about handling Mr. Lopez's funds and sought no guidance from the court concerning this aspect. (T II, pp. 60-62)

The respondent received Mr. Lopez's Veteran's Administration checks dated December 1, 1987, in the amount of $1,333.00; December 31, 1987, in the amount of $1,333.00; February 1, 1988, in the amount of $1,333.00; and March 1, 1988, in the amount of $1,394.00. Each check was endorsed by Mr. Lopez and either the respondent or his wife. The respondent maintained no bank trust account or internal trust ledger or other records other than receipts for Mr. Lopez. The respondent did not consider his client's checks to be trust funds and did not believe a trust account was needed. The referee specifically found that Mr. Lopez's funds were trust funds.

On February 7, 1988, the respondent prepared receipt #103 for the deposit of $1,773.00 into Mr. Lopez's inmate account in Orange County. He also provided his client with receipt #102 for $2,866.00 received by the respondent in legal fees. In total the

respondent should have had in his possession $4,573.00 belonging to his client. Records from the Orange County Jail failed to indicate a deposit for $1,773.00 made on either February 7, 1988, or any other date for Roberto Lopez by the respondent. Receipts from the Orange County Jail indicated two deposits, $440.00 by check and $10.00 in cash were made on February 7, 1988, by the respondent. The $440.00 apparently represented Mr. Lopez's Social Security check but the source of the $10.00 deposit could not be determined. The respondent was unable to account for the $1,323.00 difference except to state that he may have made an error in the amount when he wrote receipt #103. The respondent's lack of adequate recordkeeping made it impossible to determine the ultimate disposition of Mr. Lopez's monthly Veteran's Administration check. It appears from calculations that receipt #103 originally reflected the February Veteran's Administration check plus the Social Security check although it did not identify its components. Receipt #102 listed the February Veteran's Administration check number along with the check number for the December 31, 1989, Veteran's Administration check and a third unidentified check which probably referred to the Social Security check for Mr. Lopez.

SUMMARY OF THE ARGUMENT

In his Initial Brief, the respondent argued that the referee's findings of fact were without support in the record. The Bar submits that the respondent's argument is without merit. It is uncontroverted that Mr. Lopez's February, 1989, check from the Veteran's Administration in the amount of $1,333.00 was received and deposited by the respondent's office (B-Ex 8). Jail records clearly showed that these funds were never deposited to Mr. Lopez's prison account (B-Ex 1 and 2). The respondent admitted he maintained no trust account and no trust accounting records. While it is unusual for an attorney not to maintain a trust account, even one who primarily practices criminal defense law, the respondent needed to open one when it became clear he would be receiving his client's government checks on a regular basis. Although the respondent initially received the checks without his knowledge, he acquiesced and continued to act as a depository for his client's main source of income which he was to apply as his client directed. He had a fiduciary duty to safeguard his client's funds and account for them. These monies were clearly intended to be held in trust for Mr. Lopez's benefit, and he directed the respondent in making disbursements. Because of the lack of any substantial records other than receipts, at least one of which the respondent admits contains a clerical error, it is now impossible to determine what became of $1,323.00 of Mr. Lopez's money. The Bar submits it most likely

went toward payment of the respondent's legal fees without Mr. Lopez's prior permission.

The 90 day suspension recommended by the referee is quite appropriate for an attorney who cannot or will not recognize trust funds and the need for a proper bank trust account and internal trust records to properly handle and accurately account for the funds. As the referee wrote in paragraph 15 of his report the "[r]espondent handled trust funds for his client without a trust account or internal trust records and now finds himself unable to adequately account for a substantial portion of the funds through inadequate recordkeeping." (RR, p. 3) Failure to do so makes the result in this case almost inevitable.

ARGUMENT

POINT ONE

THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION OF GUILT ARE CLEARLY AND CONVINCINGLY SUPPORTED BY THE EVIDENCE.

It is well settled that a referee's findings of fact are presumed to be correct and will be upheld unless they are without support in the record. The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990). A referee's findings shall have the same presumption of correctness as judgment of a trier of fact in civil proceedings. Rule of Discipline 3-7.6(k)(1) of the Rules Regulating The Florida Bar, as amended in Re: Amendments to the Rules Regulating The Florida Bar, 558 So.2d 1008 (Fla. 1990); The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990). As this Court most recently stated in The Florida Bar v. Scott, 15 FLW 448 (Fla. Sept. 6, 1990):

> The burden is upon the party seeking review to demonstrate that the referee's report is 'erroneous, unlawful or unjustified.' Rule Regulating The Florida Bar 3-7.6(c)(5). This Court cannot reweigh the evidence or substitute its judgment for that of the trier of fact. At p. 3.

The Bar submits the respondent has failed to meet this burden and that the evidence clearly and convincingly supports the referee's findings that $1,323.00 of Mr. Lopez's money remains unaccounted for and the respondent lacks the required trust accounting records or bank trust accounts necessary to determine what became of the funds.

In his brief, the respondent argues that Mr. Lopez suffered no financial loss. This presumes that Mr. Lopez either had no interest in the missing $1,323 or had agreed to apply that sum towards the respondent's fee. There is no evidence to this effect.

The respondent argues that he made a clerical error when he prepared receipt #103 (B-Ex. 4). The receipt, dated February 7, 1988, indicated that the respondent received $1,773.00 from Mr. Lopez and it was to be deposited to Mr. Lopez's Orange County Jail account. Although the respondent did not indicate the source or sources of money, it most likely was comprised of Mr. Lopez's $1,333.00 Veteran's Administration check and the $440.00 Social Security check. These amounts add up to exactly $1,773.00 and are the only types of checks or income it appears the respondent received on behalf of Mr. Lopez. The records from Mr. Lopez's inmate account indicated the only deposit made on behalf of Mr. Lopez at this time was a $440.00 government check and $10.00 in cash (B-Ex. 1 and 2). The source of the cash deposit cannot be determined. There is no doubt the respondent's receipt #103 was erroneous as to the amount. The real issue is what happened to Mr. Lopez's Veteran's Administration check for the month of February, 1988. The respondent does not know because he did not maintain either a trust account or trust account records nor did he consider Mr. Lopez's money to be trust funds to begin with. The check was not fictitious. It was received and

deposited by the respondent's office (T II p. 11). Receipt #102 (B-Ex. 4) indicated the respondent received $2,866.00 from Mr. Lopez on February 7, 1986. It appears the 1986 date is in error and should read 1988. The check numbers listed correspond with those of Mr. Lopez's December 31, 1987, and February 1, 1988, Veteran's Administration checks. These two amounts of $1,333.00 each, plus the undated $200.00 money order (B-Ex. 1) add up to exactly $2,866.00. Therefore, it would appear that Mr. Lopez's February 1, 1988, Veteran's Administration check perhaps less the $10.00 in cash deposited to his inmate account, may have been taken by the respondent as payment for his legal fees after he wrote receipt #103. It must be cautioned, however, that this is only one possible explanation because the respondent's recordkeeping was so grossly inadequate that the true disposition of the money can never be determined. Had the respondent handled the money as trust funds and maintained the appropriate records the disposition would have been evident. At any rate, it is clear from the Orange County Jail inmate account records that Mr. Lopez never received the full amount of his February 1, 1988, Veteran's Administration check (B-Ex. 1 and 2; T I, pp. 33-34; T II, pp. 5-7). Therefore, the Bar submits the evidence clearly supports the referee's findings that the respondent cannot account for the missing $1,323.00.

The problems faced by the respondent in this matter might have been avoided had he maintained a trust account and the

minimum required trust accounting records. This presumes that Mr. Lopez's checks would be deposited in the account and accounted for. Had he done so, perhaps the respondent would have noticed his "clerical error" on receipt #103. Because the respondent did not want to go to the trouble of opening such an account and maintaining the appropriate records, he elected to cast the burden onto the Orange County Jail. The Rules Regulating Trust Accounts do not state that when a third party makes an accounting for an attorney's client's funds given it by the attorney that the attorney is relieved of his duty to properly handle and account for his client's money and/or property entrusted to him.

Rule 5-1.1 of the Rules Regulating Trust Accounts states that money or other property entrusted to an attorney for a specific purpose is to be held in trust and must be applied only to that purpose. Rule 4-1.15(a) of the Rules of Professional Conduct requires trust funds to be placed in a separate bank trust account absent special circumstances not present here. The Bar submits the record clearly shows that Mr. Lopez entrusted his monthly government checks to the respondent and the respondent accepted responsibility for them. It is true that Mr. Lopez took it upon himself to arrange for all of this government checks to go directly to the respondent's office address without the respondent's prior knowledge or initial consent. (RR, p. 2; T II, p. 46) The respondent, however, acquiesced receiving the

subsequent checks and thus owed to his client the duties outlined in Rule 5-1.1 of the Rules Regulating Trust Accounts.

Apparently the respondent believes a trust account is not required where another agency maintains records of his client's funds it receives. There is a difference between acting as an "errand boy" and being a repository for a client's money. The Bar argues that the respondent's logic in this respect is fatally flawed. An attorney is accountable for the funds of a client or third person in his possession. See Rules 4-1.15(a), 4-1.15(b) and 5-1.1. There are simply no provisions in the rules allowing an attorney to place this responsibility on the shoulders of other individuals or organizations. It is the attorney to whom the client or third party is primarily entrusting the funds and/or property and not some unrelated agency or other person. Therefore, the duty to safeguard and properly handle trust funds according to the Rules Regulating The Florida Bar rests upon the shoulders of the members of The Florida Bar. The respondent was the last person to whom Mr. Lopez's February, 1988, Veteran's Administration check was entrusted. The jail can only account for the money it received. If the respondent cannot explain what happened to it, then who can?

ARGUMENT

POINT TWO

THE REFEREE'S RECOMMENDATION OF A NINETY DAY SUSPENSION AND TWO YEAR PERIOD OF CONDITIONAL PROBATION IS THE APPROPRIATE LEVEL OF DISCIPLINE IN THIS CASE.

In determining the appropriate level of discipline, three consideration must be made as laid out in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). First, the judgment must be fair to both society and respondent, protecting the former from an unethical attorney without unduly denying them the services of a qualified lawyer. Second, the discipline must be fair to the respondent with it being sufficient to punish the breach and at the same time encourage reform and rehabilitation. Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misconduct. The Bar submits that the referee's recommendation of a ninety day suspension and two year period of probation with a condition that the respondent make restitution to Mr. Lopez for the amount of $1,323.00, pay the costs of these proceedings and not violate any of the Rules of Discipline or Rules of Professional Conduct both conforms with the provisions of Lord, supra, and is supported by caselaw.

In The Florida Bar v. Miller, 548 So.2d 219 (Fla. 1989), an attorney was suspended for ninety days for using trust funds for unauthorized purposes without dishonest intent or knowledge of

the problems in his trust account. An audit of the trust account indicated that it contained shortages and three checks were dishonored due to insufficient funds. In mitigation, there was no prior disciplinary history, and no client lost any money. Additionally, the attorney cooperated with the Bar in its investigation and ultimately corrected the problems with his account. As a condition of reinstatement, he was required to have a certified public accountant prepare and submit to the Bar monthly accountings of the trust account for a period of one year.

In The Florida Bar v. Burke, 517 So.2d 684 (Fla. 1988), an attorney was suspended for ninety days with reinstatement made contingent upon his paying his clients interest at the rate of twelve percent a year for the ten month period during which he improperly deprived them of the use of their funds. The attorney failed to maintain complete records of client funds and failed to promptly deliver the money to his clients. The attorney received, on behalf of his clients, a disbursement in the amount of $8,380.60. He cashed the check but none of the funds were placed in his trust account. The attorney's trust accounting records were inadequate to determine what actually became of the funds. The attorney delayed remitting the funds to his clients for several months and then when they received his check drawn on the trust account it was not honored when presented for payment due to insufficient funds. The clients did not receive their

disbursement until the date of the grievance committee meeting, some ten months later. In mitigation it was noted that the attorney had made many contributions to both his community and to the state. The problems arose from the fact that the attorney tried to maintain his law practice by himself while attending to legislative duties and followed poor accounting procedures in his office.

A sixty day suspension and a two year period of probation was ordered in The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986) for his failure to properly supervise his trust account. The attorney had represented a client in an automobile accident case. After discharging the attorney, the client became aware that the attorney had received a check for personal injury protection benefits in the amount of $2,948.51 from the insurance carrier. The attorney had signed the client's name to the check and deposited to the trust account. Later, when the attorney wrote a check to the client's new attorney, the trust account contained insufficient funds to cover the check. The attorney failed to properly supervise the management of his trust account but there was no evidence of any dishonesty. Furthermore, no client suffered any harm. The more severe discipline was ordered in this case because the attorney had a prior disciplinary history. As a condition of his probation he was ordered to submit his account to unannounced audits by The Florida Bar and pay for the associated expenses.

In The Florida Bar v. Bartlett, 462 So.2d 1087 (Fla. 1985), an attorney was suspended for thirty days for trust account recordkeeping violations. He maintained two trust accounts, neither of which were properly labeled. There was evidence of commingling, lack of recordkeeping and use of client funds for purposes other than those for which they were entrusted to him. Additionally, one account had an overdraft and the other a negative balance. The attorney was ordered to attend a seminar on trust accounting and obtain a certificate of compliance. A failure to do so would result in the judgment being reopened.

An attorney was suspended for sixty days and placed on a three year period of probation in The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985). The attorney commingled in his trust account funds associated with his private business that was not directly connected with his law practice. He occasionally advanced substantial funds from his trust account to other accounts both for the business and his law practice before receiving deposits for those expenditures. In mitigation, none of the attorney's clients suffered any loss or delay. The court stated, however, "[W]e take a grim view of attorneys who fail to keep sacrosanct and inviolate their trust funds as required under this rule." (referring to Integration Rule 11.02(4)) In imposing discipline, the court considered the effect of the attorney's misconduct on others as well as his character in the likelihood of further disciplinary violations. As a condition of his

probation, the attorney was ordered to keep his trust books and records open and accessible to the Bar for examination without notice.

In The Florida Bar v. Davis, 446 So.2d 1072 (Fla. 1984), an attorney was suspended for three months for neglect and improper trust accounting procedures. The referee found that the improper trust accounting had been a matter of neglect rather than dishonesty and no client's funds had been misappropriated. In aggravation, the attorney had received a private reprimand for engaging in similar behavior which was contemporaneous with these charges.

In The Florida Bar v. Welch, 427 So.2d 720 (Fla. 1983), an attorney was suspended for three months after pleading guilty to commingling and failing to maintain the minimum required trust accounting records and follow the minimum trust accounting procedures. The attorney had a prior disciplinary history consisting of one private reprimand and one public reprimand.

A three year suspension was ordered in The Florida Bar v. Byron, 424 So.2d 748 (Fla. 1982). The attorney failed to keep accurate trust accounting records in connection with the administration of a client's estate. The attorney argued that he was merely guilty of sloppy bookkeeping which he attributed to his alcoholism. In aggravation, the attorney had previously been suspended for thirty days and sixty days.

In The Florida Bar v. Ragano, 403 So.2d 401 (Fla. 1981), an attorney was suspended for three months and placed on a two year period of probation for depositing client funds in an account not clearly labeled and designated as a trust account. The attorney received $30,000 from his client which, upon his advice, was to be held in escrow pending the final outcome of the client's dissolution of marriage action. The final judgment of dissolution had provided for the sale of the marital home and $30,000 represented the proceeds of that sale. The attorney had advised his client to place the funds in escrow in order to avoid any implied acceptance or acquiescence in the financial terms of the judgment pending its appeal. Later, a fee dispute ensued concerning the $30,000. The attorney had a prior disciplinary history and in fact a petition for reinstatement was considered at the same time as the instant disciplinary case.

The Florida Standards for Imposing Lawyer Sanctions which were adopted by the Board of Governors in 1986, also support the referee's recommended discipline of a ninety day suspension. Standard 4.12 concerning an attorney's failure to preserve his client's property calls for a suspension when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. The Bar submits the respondent should have known that Mr. Lopez's funds constituted trust funds and should have maintained the minimum required records in order to account for their disposition. As

the record clearly indicates, Mr. Lopez never received $1,323.00 nor has the respondent clearly accounted for it and if it was applied to attorney's fees it was done without Mr. Lopez's prior knowledge or consent. Given the lack of recordkeeping, it will never be known what actually happened to these funds.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will approve the referee's findings of fact, recommendation as to guilt, and recommendation as to discipline, and order the respondent suspended for a period of ninety days and be placed on a two year period of probation with the condition that he make restitution to Mr. Lopez in the amount of $1,323.00 and pay the costs of these proceedings now totalling $2,580.91.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief has been furnished by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to Respondent, Marvin S. Davis, at Post Office Box 2015, Sanford, Florida, 32772-2015; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 2nd day of October, 1990.

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