IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Complainant,

vs.

HARVEY L. WEISS,

Respondent.
_____/

Case No. 76,407

TFB File No. 90-01219-02

# ANSWER BRIEF

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## INTRODUCTION

Appellant, HARVEY L. WEISS, will be referred to as Respondent throughout this Brief. Appellee, THE FLORIDA BAR, will be referred to as The Bar.

References to the Report of Referee will be by the symbol RR followed by the appropriate page number.

References to the transcript of the October 26, 1990 hearing before the Referee will be by the symbol TR followed by the appropriate page number. The two exhibits attached to the Bar's complaint, the Decision and Recommendation of the Disciplinary Review Board and the order of the New Jersey Supreme Court filed May 8, 1990 shall be referred to as CEX A and CEX B respectively.

The Exhibit submitted into evidence at final hearing, the affidavit of Robert J. Prihoda, will be referred to FHEX A.

## STATEMENT OF CASE

On July 30, 1990, The Florida Bar filed a formal complaint against Respondent, Harvey L. Weiss. A Request for Admissions was filed simultaneously with the formal complaint.

On August 23, 1990, Leon County Circuit Judge John E. Crusoe was appointed Referee in this matter by order of the Supreme Court of Florida.

Respondent filed his Answer to Request for Admissions in this matter on or about September 6, 1990.

Upon proper notice, a formal hearing was held in this matter before the Referee on October 26, 1990. As a result of this hearing the Referee submitted a report wherein he found Respondent guilty of ethical misconduct and recommended Respondent be disbarred.

On or about December 4, 1990, Respondent filed a Petition for Rehearing before the Referee. The Florida Bar filed its response to the aforesaid Petition for Rehearing on December 10, 1990. The Referee entered his order denying Petitioner's request for rehearing on December 13, 1990.

On December 31, 1991, Respondent filed a Petition for Review seeking a reduction in the recommended discipline of disbarment to a period of suspension for six months with proof of rehabilitation and payment of costs.

## STATEMENT OF FACTS

On June 18, 1990, The Florida Bar received notice that Respondent had been suspended effective May 22, 1990 from the practice of law in New Jersey for a period of six (6) months. Based upon copies of the order of suspension by the New Jersey Supreme Court (CEX A) dated May 1, 1990 and the Decision and Recommendation of the Disciplinary Review Board of New Jersey (CEX B), The Florida Bar filed a formal complaint pursuant to Rule 3-3.2(a), Rules of Discipline.

In 1984, the New Jersey Office of Attorney Ethics performed a random audit of Respondent's law practice. (CEX A, p. 1) This audit covered the period from September, 1983 to June, 1984. As a result of the audit, Respondent was charged with six counts of ethical violations, including failure to maintain trust account records, advancement of legal fees, failure to safeguard client funds, and misappropriation of client funds. (CEX A, p. 2)

The New Jersey audit and subsequent investigation revealed that Respondent had been using a CPA to balance the partnership books and reconcile its bank statements. At no time did Respondent supervise the CPA's accounting or inform him of the requisite rules of the New Jersey Bar Association concerning trust accounts. Respondent also failed to have regular discussions with his

accountant regarding reconciliations of his trust account balances. (CEX A, p. 2)

The New Jersey Office of Attorney Ethics made two audit visits to Respondent's law office. The results of the audits showed that for the first six months of 1984, the following shortages were found for Respondent's clients: Mae Keller - $39,000; Donvi Corporation - $8,000; Estate of Mohr - $45,000. Between September 1983 and June 1984, Respondent's trust account showed negative balances on nineteen separate occasions. These negative balances ranged from a low of minus $2,765.79 to a high of minus $24,052.98. (CEX A, p. 3)

It was found that Respondent did not receive notices from the bank of these negative shortages in his trust account due to an overdraft protection coverage by his bank. Although on these occasions the overdraft coverage was available it was not automatic since each instant was provided only with approval of a bank official. The overdraft coverage only went into effect when there was a negative balance in Respondent's trust account. (CEX A, p. 3)

Before the New Jersey hearing, Respondent testified that he considered such negative balances in his trust account to be loans from the bank and not invasions of client trust funds. An example of this thought process is evidenced by the fact that Respondent and his law partner placed $40,000 of their personal funds into their

trust account after the initial audit to cover shortages was discovered. Respondent considered this to repay overdrafts and not a replacement of client funds. (CEX A, p. 4)

Respondent and his accountant testified that the shortage revealed in the initial audit was the result of the taking of $48,810.20 for legal fees owed by a client named Quartier. However, no funds were on deposit at such time for this particular client to cover such fees and Respondent was unable to produce documentation to support such a claim. (CEX A, p. 4)

Respondent and his law partner were well versed in business matters in that they were co-owners of a first and second mortgage company.

The New Jersey Board of Attorney Ethics recommended that Respondent be suspended for six months on a finding of gross negligence in violation of DR 9-102 and the New Jersey Supreme Court entered a final order adopting the recommendation and suspending Respondent for six months on May 1, 1990. (CEX B)

## SUMMARY OF ARGUMENT

Respondent was found guilty of misconduct by the Referee in this matter based upon conclusive proof of misconduct as shown by the disciplinary order of suspension from New Jersey and other competent evidence.

The Referee correctly applied the standards of the Supreme Court of Florida in finding Respondent guilty of misappropriation and conversion of trust account funds.

Respondent is limited in his argument only to the appropriateness of the recommended discipline since his failure to appear at the final hearing waived any objections as to the evidence presented to the Referee or alleged bias on behalf of the New Jersey Bar auditor.

Not being restricted to the findings of the New Jersey Supreme Court, the findings of fact by the Referee are permissible and correct. In view of the lack of responsibility showed by Respondent in dealing with his trust accounts and continued denial that there was any misuse or invasion of his trust account the recommendation of disbarment is the appropriate decision.

## ARGUMENT

### THE RECOMMENDED DISCIPLINE OF DISBARMENT IS APPROPRIATE IN LIGHT OF THE FINDINGS MADE BY THE REFEREE

Respondent has asked that the discipline of disbarment recommended by the Referee in this matter be rejected and that a lesser discipline be ordered. Respondent suggests that the appropriate discipline should be a six month suspension, the same discipline that was rendered against Respondent in his resident state of New Jersey.

The only question to be addressed upon Respondent's request for review is the appropriateness of the recommended discipline made by the Referee in the instant case. It is abundantly clear that this is the central question put forth by the Respondent in his brief. Respondent makes this single argument on the first page of his argument when he states that "Respondent is only seeking review of the Referee's discipline." Initial Brief of Respondent, p. 10.

Although Respondent correctly states the limited grounds for review in this matter, he proceeds to attempt to argue the factual merits of his position and the findings of fact made by the Referee.

Respondent argues that the Referee's findings of violations of any misconduct other that the violation of

gross negligence made by the New Jersey Supreme Court is improper. Respondent argues that the New Jersey order is only conclusive proof of "gross negligence" and can only be the basis for a similar finding by this court.

Rule 3-4.6, Rules of Discipline, provides that a final adjudication in a disciplinary proceeding by a court of another jurisdiction that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct.

While Respondent would argue that under this rule, the only finding the Referee in the instant case could make is the same as that of the New Jersey Supreme Court, this is an erroneous position taken by the Respondent for several reasons.

The key point against Respondent's argument is that the provisions of Rule 3-4.6 provide that a final adjudication is conclusive proof of the misconduct not the specific violation. Any other interpretation of this rule would allow only a finding that a Respondent in such situation had been found guilty of only a specific violation and not the facts or conduct that supported the violation. This would place the entire burden or proving such misconduct upon The Florida Bar by establishing the factual basis of the foreign discipline. Our rules provide such is the case only when a Respondent can show

that the foreign jurisdictions proceedings were unfair. Such an argument is not made in this matter.

Citing the case of The Florida Bar v Abrams, 402 So. 2d 1150 (Fla. 1981), Respondent argues that this court is not bound by the discipline imposed by the foreign jurisdiction. More importantly, a closer reading of Abrams contradicts the main thrust of Respondent's argument against the Referee's report.

While Respondent argues that the Referee is limited by the factual findings made by the New Jersey Supreme Court and cannot make findings of guilt beyond those in the New Jersey order, this is not the case. In Abrams, this court has held that if there is sufficient evidence to justify other findings of violations, this court is not limited by the findings of a foreign jurisdiction and may certainly go beyond them in Florida proceedings. This court also held that there is no prohibition of finding that the same act of misconduct violates the provisions of more than one disciplinary rule. Abrams, p. 1153.

Finally, in Abrams, this court held that it is not bound by the discipline of the foreign court and Respondent's improprieties must be analyzed and dealt with according to the standards of this state and not the foreign jurisdiction.

Since there is no argument as to the facts found by the Referee herein, the appropriate discipline to be

entered in this matter must be according to Florida standards. Any attempt by Respondent to argue appropriate discipline in Florida based upon the reasoning and standards of the New Jersey Supreme Court is misplaced and contrary to the holdings of this court.

Respondent has also argued that The Florida Bar is limited to only the finding of misconduct from New Jersey and is prohibited from enhancing this misconduct without presenting competent evidence beyond the order of discipline.

At the final hearing, The Bar introduced the Decision and Recommendation of the Disciplinary Review Board of New Jersey (CEX A) and the New Jersey Supreme Court Order of Discipline (CEX B) along with an affidavit from the New Jersey Bar auditor who conducted the random audit of Respondent's trust account.

Respondent has set forth several arguments against the use of the auditor's report in an effort to argue his case before this Court rather than before the Referee. As earlier noted and admitted in his brief, Respondent chose not to attend the final hearing.

Any objection made by the Respondent regarding the use of the auditor's report and his argument against the Referee's having considered this report should be stricken and not be considered in the ultimate decision of this matter.

Respondent failed to attend the final hearing in this matter where the opportunity to make these objections was available. Any objection to the introduction to such evidence was waived by his non-appearance. His failure to appear and timely raise any objection at trial precludes Respondent from now arguing his objections as a basis of overturning the Referee's recommendation of disbarment.

It may be regarded as a general rule of appellate review that questions not timely raised and ruled upon in the trial court will not be considered on appeal. 3 Fla.Jur. 2d. Appellate Review §392. (1978) The rule operates to prevent a party from complaining on appeal of errors that the trial court was given no opportunity to correct or obviate. Paul v Kanter, 155 So. 2d 402 (3rd DCA, 1963).

Respondent's argument of surprise regarding the introduction of the auditor's affidavit is clearly an untimely attempt to help correct his decision not to attend the final hearing. Respondent had ample opportunity to request by appropriate discovery procedures what matters were to be presented to the Referee. Any intimation that The Florida Bar was under any duty or obligation to reveal its trial strategy absent formal discovery is misguided.

Any claim by Respondent at this juncture that the auditor was a biased witness must be discounted because

Respondent must be seen as having waived such opportunity by his failure to attend the final hearing. The mere fact that the auditor was employed by the New Jersey State Bar without some direct evidence of bias cannot support such a claim as made by Respondent.

Although the auditor did not appear at the final hearing this matter in itself will not operate to disallow such evidence as his report. This court has held that in Bar disciplinary cases, hearsay evidence is admissible and there is no right to confront witnesses face to face. The Florida Bar v Vannier, 498 So. 2d 896 (Fla. 1986).

A review of the auditor's affidavit shows that it merely gives a more detailed discussion of the reasons for the negative balances in Respondent's trust account. These are the same negative balances to which the Respondent admitted to in his answers to The Florida Bar's Request for Admissions.

Since it is the rule in Florida that the factual basis of Respondent's misconduct must be analyzed and dealt with according to the standards of Florida, whatever reasoning and standards used by the New Jersey authorities are not applicable and should not be considered.

As stated by both parties in this matter, the only question that is to be addressed by this court is the appropriateness of the Referee's recommended discipline.

This court should only consider whether or not the facts of Respondent's misconduct should support his being disbarred under our current standards.

The Referee made the following finding in his report:

> The audit report shows a conversion and misappropriation of trust funds belonging to the Respondent's clients. All the overdrafts and all the negative balances represent misappropriation for the personal use of Respondent and his law firm. (Page 3, Referee's Report).

Based on his findings of misappropriation of trust funds, the Referee found Respondent guilty of violating the provisions of Rule 3-4.3 (the commission by a lawyer of any act which is unlawful or contrary to honesty and justice), of the Rules of Discipline of The Florida Bar, and Rules 4-1.15(a) (a lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the client specifically instructs, in writing, that such be done. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and

other property shall be kept by the lawyer and shall be preserved for a period of six (6) years after termination of the representation), 4-1.15(b) (upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property), 4-1.15(c) (when in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept separate by the lawyer until the dispute is resolved), and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), of the Rules of Professional Conduct of The Florida Bar.

This Court's position on the misappropriation of trust funds by an attorney is well documented. In The

Florida Bar v Breed, 378 So. 2d 783 (Fla. 1979) this court wrote in its opinion that misuse of clients' funds is one of the most serious offenses a lawyer can commit. While echoing Breed's characterization of the misuse of clients' funds this court in The Florida Bar v Newman, 513 So. 2d 656, 658 (Fla. 1987) stated that the Court has not hesitated to find disbarment appropriate where attorneys have demonstrated a pattern of misuse of client funds, e.g., The Florida Bar v Knowles, 500 So. 2d 140 (Fla. 1986); The Florida Bar v Harris, 400 So. 2d 1220 (Fla. 1981).

On numerous occasions this court has held that the misappropriation and misuse of trust funds warrants disbarment. In the case of The Florida Bar v Stillman, 401 So. 2d 1306 (Fla. 1981) this court held that the appropriation of a client's money to an attorney's own use warrants disbarment. In The Florida Bar v Baker, 419 So. 2d 1054 (Fla. 1982) the attorney was disbarred from the practice of law for misconduct amounting to theft where he failed to properly identify and preserve his client's funds. In The Florida Bar v Tarrant, 464 So. 2d 1199 (Fla. 1985) this court held that an attorney would be disbarred where on two occasions he had removed funds from a client's trust account and converted these funds to his own use. Where an attorney had made improper transfers from a client's trust account resulting in shortages, such misconduct was

found to warrant disbarment. The Florida Bar v Mattingly, 342 So. 2d 508 (Fla. 1977).

While each side to a Bar discipline matter can generally find case authority to support what it feels should be the appropriate discipline, each case must stand on its own merits.

The facts as found by the Referee in this case support a finding of misappropriation. This court has held that personal use of funds entrusted to an attorney, beneficial ownership of which lies in another, is misappropriation, even when committed with the intent to repay. The Florida Bar v Greenfield, 517 So. 2d 16, 17 (Fla. 1987). Based on this fact, Respondent was found guilty of the charged violations.

Respondent has argued that several mitigating factors in his case obviates the necessity of disbarment. Respondent continues to claim no responsibility for his wrongful invasion into his trust account other than blame his bookkeeper. His claim of such mitigation is misplaced. Not only did Respondent fail to instruct his bookkeeper as to the requirements of a lawyer's trust account, he failed to personally supervise and examine his periodic reconciliations. Such a review would have immediately shown Respondent the existence of continued shortages.

At the final hearing in New Jersey, Respondent demonstrated his complete lack of understanding of his

responsibility as an attorney when he continued to insist that the shortages did not represent a misuse of trust funds, but merely loans to the bank that was covering these shortages with an overdraft protection agreement. Even the deposit of $40,000 of personal funds from Respondent and his law partner to cover the shortages of client Quartier's account was characterized as a loan repayment. Even in Respondent's brief, this misuse of trust funds is labeled merely "reprehensible bookkeeping." This continued attitude toward such misconduct presents a grave question as to Respondent's fitness to practice law and remain in a position of trust.

The recommendation of disbarment by the Referee is the appropriate discipline and clearly meets the purposes of disciplinary judgments as set forth in The Florida Bar v Pahules, 233 So. 2d 130, 132 (Fla. 1970). Disbarment in this instance would protect society from Respondent's conduct and not deprive it of a qualified attorney. Respondent's lack of understanding of his duties begs his qualifications. The recommended discipline is also fair in view of the violations and while Respondent may view such as harsh, it does allow for reformation and readmittance. Finally, disbarment for such conduct will be a deterrence to other members of The Bar not to be tempted to misuse their trust funds.

## CONCLUSION

Based upon the finding of misappropriation of trust funds by Respondent, this court should affirm the Referee's recommended discipline of disbarment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. 76,407; TFB File No. 90-01219-02 has been forwarded by certified mail #P 981-962-345, return receipt requested, to JOHN A. WEISS, Counsel for Respondent, at his record bar address of Post Office Box 1167, Tallahassee, Florida 32302, on this 25th of February 1991.

JAMES N. WATSON, JR.
Bar Counsel