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JUL 22 1992

CLERK, SUPREME COURT,

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

versus

WILLIAM A. BORJA,

Respondent.

CASE NO. 77,840

TFB NO. 90-11,351(06A)

CROSS-PETITIONER'S REPLY BRIEF

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AND REFERENCES

In this Brief, the Appellee/Cross-Appellant, William A. Borja, will be referred to as "**Respondent**". The Appellant/Cross-Appellee, The Florida Bar, will be referred to as "**The Florida Bar**" or "**The Bar**". "Tr. 1" will refer to the transcript of the Final Hearing held on January 8, 1992. "Tr. 2" will refer to the transcript of the Final Hearing held on January 10, 1992. "Tr. 3" will refer to the transcript of the Final Hearing held on January 31, 1992. "RR" will refer to the Report of Referee dated February 27, 1992. "R" will refer to the record in this cause. "Tr. 0" will refer to the transcript of the Final Hearing held on December 15, 1988 in case number 72,962.

REPLY ARGUMENT

ISSUE I

**THERE IS NO COMPETENT CREDIBLE
EVIDENCE TO SUPPORT THE FINDING
OF THE REFEREE THAT BILL BORJA
FAILED TO MAINTAIN MINIMUM TRUST ACCOUNTING RECORDS**

The Bar contends that Carol Stephanick took some, but not all, of Borja's trust records home with her. Stephanick did testify that **she** took all of Borja's trust records home **with** her. Tr. 2, pg. 35; Tr. 2, **pg.** 42. The problem with Carol Stephanick's testimony lies in her eagerness to please Bar counsel. Bar counsel's questions would often suggest the correct answer and Stephanick would follow these "**cues**". For example, Stephanick testified:

Q. [by Bar counsel] Subsequent to December of '88, did you continue to prepare trust account records?

A. [by Carol Stephanick] Yeah, the records being the little records that we kept.

Q. Well, you testified that you made records for a period of June '88 until approximately November or December of '88?

A. Uh, huh.

* * *

Q. And did you do that in Mr. Borja's office?

A. No, I did it at home.

Q. Did you take all of his records from the office home?

A. Yeah. In fact, when I did the first comparison for Pedro I took everything home.

(emphasis supplied)
Tr. 2, pg. 35.

Upon further examination by Bar counsel, Ms. Stephanick testified:

Q. Did you take any of Mr. Borja's trust account records home with you?

A. Yeah. I did. At one point I had the ledger cards and I had everything home.

Q. What do you mean by everything? Could you tell me what documents you had at home?

A. I had the check stubs, I had the ledger cards, I had a lot of correspondence that I had taken and I **just** thought was important.

Tr. 2, pg. 42.

It was only upon further direct examination that Carol Stephanick testified:

Q. And you took those [records] with you when you left?

A. Uh, huh.

Tr. 2, pg. 43.

Ms. Stephanick testified that she prepared the trust records at home because there was no time during the day to do this work. Tr. 2, pg. 36.

Throughout her examination, Ms. Stephanick testified that she worked on Borja's trust records at her home and it was only upon a direct question by Bar counsel as to whether she took the records with her when she left Borja's employ that Ms. Stephanick responded:

Uh, huh.

Tr. 2, pg. 43.

Of course, it was this same eagerness to please Bar counsel that resulted in the contradictory testimony regarding whether Mr. Borja ever acknowledged that he had received the boxes of records that Ms. Stephanick allegedly left outside his office building early one Saturday morning. Upon first being asked whether Borja acknowledged receiving the records, she responded negatively. Upon being asked again, Ms. Stephanick, taking the cue, responded positively. Tr. 2, pg. 47.

In implicit recognition of the weakness of Ms. Stephanick's testimony, the Bar states that this testimony is **"supported"** by the fact that Borja produced his 1987, 1988 and 1989 ledger cards, trust account check stubs for 1988 and 1989 bank statements for his April, 1990 audit. Bar Brief, pg. 10-11.

Of course, this does not prove anything, because the Bar's auditor, Pedro Pizarro, testified that he could not tell whether the documents produced by Mr. Borja were original documents or reconstructions prepared on Mr. Borja's behalf. Tr. 3, pg. 169.

Borja testified that he did maintain trust accounting records, but the records had been taken by Carol Stephanick and were now missing. Tr. 1, pg. 96; Tr. 1, pg. 80.

Borja testified that he had to order copies of his bank statements and checks from the bank. Tr. 1, pg. 75. In fact, that is why Borja waited until June of 1989 to hire Ralph Donaldson, a C.P.A., to reconstruct his records. Tr. 1, pg. 106; Tr. 1, pg. 179. There **was** nothing that he could do until he obtained the cancelled checks and bank statements. Tr. 1, pg. 106.

Donaldson testified that, other than a few ledger cards and the bank statements, all of the accounting records were missing. Tr. 1, pg. 139, 140.

Similarly, Frederick Doolittle, a C.P.A. hired by Borja in September of 1989 to reconcile his trust accounts, testified that he had the January, 1989 client ledger cards and photocopies of the 1987 ledger cards, but he never **saw** the 1988 ledger cards. Tr. 2, pg. 91. Doolittle found that many entries on the ledger cards were inaccurate. Tr. 2, pg. 98.

No one testified that the records examined by Pedro Pizarro were the original records. If the original records were available, then why would Mr. Borja hire two different accountants to try to reconstruct them?

The Bar has not presented sufficient credible evidence to establish that Borja failed to maintain minimum trust account records. The Bar's case **rests** upon the credibility of Carol Stephanick, a convicted embezzler. Her testimony was often

contradictory and betrayed an eagerness to please Bar counsel.

The ruling of the referee should be reversed.

ISSUE II

THERE IS NO COMPETENT CREDIBLE
EVIDENCE THAT BILL BORJA FAILED
TO FOLLOW REQUIRED TRUST ACCOUNTING PROCEDURES

The Bar makes much of the fact that C.P.A. Michael Lewis was not hired to audit, review or prepare Borja's trust account and, when Lewis was asked if he knew whether all required trust account records were prepared, he responded that he did not know. Bar Brief, pg. 12.

However, a more complete recapitulation of Mr. Lewis' testimony is more enlightening:

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Q. [by Bar counsel] Do you know whether or not [Borja] actually had all of his trust records that he is required to keep prior to that hearing?

A. [by Michael Lewis] I don't remember lack of those records being a problem. And I think I would.

Q. But do you know whether or not all of his trust account **records** were made, preserved and prepared?

A. I was under the impression --

Q. Do you know?

A. I do not know. I do not know of it becoming a problem, and I think if there were something missing, I would remember that there was a problem.

Q. But you weren't engaged to review all of the trust account records and to work on them, were you?

A. Not engaged specifically, but in the process of trying to tie in the revenue being transferred, You know, we would have dealt

with a good percentage of their records.

(emphasis supplied)

Tr. 2, pg. 135-136.

In addition to assisting Borja with his divorce litigation, Lewis also consulted with Borja's C.P.A. and bookkeeper to review the procedures that had been set up and whether they were reasonable. Tr. 1, pg. 125-126; Tr. 1, pg. 127.

In reply to Argument I infra, Borja has already noted that many of the records produced by Borja for the April, 1990 audit were copies of his bank statements and checks and reconstructions of his other records.

In response to the Bar's contention that Borja's trust account records were never prepared in the first place, it should be noted that Borja testified that they were. Tr. 1, pg. 96. Even Carol Stephanick admitted that, following the June, 1988 audit, she started making comparisons and started a trust journal, cash journal, and deposits journal. Tr. 2, pg. 22. Stephanick had prepared all of the trust records in November or December of 1988. Tr. 2, pg. 39. **She** prepared reconciliations with false figures to cover her thefts. Tr. 2, **pg.** 40. Stephanick admitted that it was her responsibility to prepare a ledger card for each new client and she did so. Tr. 2, pg. 72-73.

Stephanick had to "**phony**" up the records in order to cover her thefts. Tr. 2, pg. 80. She made phony entries on the ledger cards and reconciled the bank statements to conceal her thefts. Tr. 2,

pg. 79-80.

Certainly, Ms. Stephanick did testify that she failed to reconcile the amounts in the trust account with the amounts on the ledger cards. Tr. 2, pg. 84. But, to support this charge, the Bar has to largely rely upon the uncorroborated testimony of Ms. Stephanick -- testimony that can hardly be considered to be clear and convincing evidence to support this offense.

The ruling of the referee **should** be reversed.

ISSUE III

THERE IS NO COMPETENT CREDIBLE EVIDENCE THAT BILL BORJA USED CLIENT FUNDS FOR PURPOSES OTHER THAN FOR WHICH ENTRUSTED

As a starting point, the Bar auditor conceded that he found no instance where Borja, without authorization from his client, used funds that had been deposited by the client in the trust account and converted them to his personal use. That didn't occur during this audit, nor during the previous two audits conducted by Pedro Pizarro. Tr. 3, pg. 172.

Borja confirmed that he had never taken any money from a client that he was not authorized to take and, to the best of his knowledge, he had complied with the trust accounting requirements. Tr. 3, pg. 209.

Although the Bar concedes that the shortage in Borja's trust account **was** caused largely by Carol Stephanick's thefts, it argues under Rule 5-1.1 that, if a secretary steals clients funds, the attorney is responsible for violating this rule.

However, the cases cited by the Bar do not support this proposition. For example, in The Florida Bar v. Davis, 577 So.2d 1314 (Fla. 1991), Davis had no trust account at any bank, nor did he maintain an internal trust account ledger or records. The Florida Bar v. Davis, supra at pg. 1315. Davis argued that you should not be liable for an "unintentional clerical error". Id. at pg. 1316. This Court upheld the referee's finding of guilt, determining that the problems faced by Davis could have been avoided with appropriate trust accounting procedures. Id.

The trust account violations in The Florida Bar v. Neely, 488 So.2d 535,536 (Fla. 1986) were caused by gross neglect in the management of the trust account. Similarly, in The Florida Bar v. Armas, 518 So.2d 919 (Fla. 1989), the referee found that Armas' office manager had "mishandled" trust funds. However, there is nothing in this opinion to indicate that the "mishandling" was intentional theft. The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982) is inopposite. In Whitlock, there were twenty-seven overdrafts, payroll checks written on the attorney's trust account, and other obvious violations.

These **cases** are distinguishable. In each case, some fault or neglect on the part of the attorney caused the trust account violations.

However, in the present case, Ms. Stephanick was such a skilled embezzler and covered her tracks so well, that compliance with the trust accounting rules would not have deterred her.

C.P.A. Michael Lewis who discovered the thefts testified that it would have been difficult to pick up Ms. Stephanick's stealing from the accounts because "**she was** very good". Tr. 1, pg. 129. Reconciling the bank balances would not necessarily have caught Ms. Stephanick. Tr. 1, pg. 130. The bank number itself would tie in, even though the payee would be different. The bank account would reconcile. Tr. 1, pg. 130.

Lewis then testified:

. . . that's what I am trying to stress to all of my attorney clients. It could happen to

anyone, what happened to Bill.

Tr. 1, pg. 131.

In fact, one of Lewis' secretaries stole from him and he caught her, but she was an "easier catch" than Stephanick. Tr. 1, pg. 131.

Borja agrees that clients do not entrust their funds to attorneys so that secretaries can steal those funds.

However, if an attorney complies with the trust accounting standards, is he still at the mercy of a faithless employee? If an attorney is the victim of a skillful embezzler, does the fact that the embezzlement occurred constitute an automatic violation of Rule 5-1.1?

The Florida Bar has not presented case law to support this "absolutist" position.

There was no evidence presented that any neglect by Borja contributed to Stephanick's thefts.

The problem inheres in a small office. As Mr. Lewis noted, if you have a lack of separation of duties and one employee has total control of the checking account **and** recording the records, it is very difficult to catch a defalcation. Tr. 1, **pg.** 131.

Finally, the Bar complains that it took Borja several months to replace all of the stolen funds. Borja responded that there was a delay of approximately five months because he had to rebuild his records to find out what monies "might be **out**" and he had to "**get** the ability" to replace the monies. Tr. 1, **pg.** 84; Tr. 1, **pg.** 85.

The ruling that Mr. Borja used client funds for purposes other than that for which they were entrusted is not supported by credible evidence and should be reversed.

ISSUE IV

THERE IS NO COMPETENT CREDIBLE EVIDENCE
TO SUPPORT THE FINDING OF THE REFEREE THAT MR.
BORJA MADE A MATERIAL FALSE STATEMENT IN HIS
ANNUAL BAR DUES STATEMENT WHERE, AS HERE,
HE MADE A NOTATION TO REFLECT THE EXISTENCE OF
THE DIFFICULTY HE WAS ENCOUNTERING AT THE TIME

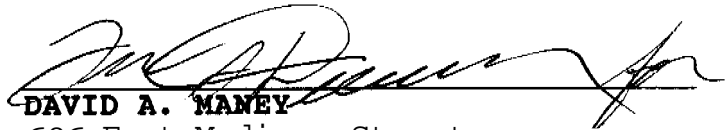
Mr. Borja was of the opinion that any notation as to an exception concerning compliance with the Florida Bar trust rules would involve a representation that all was not well. He had been to trust accounting lectures given to Bar members where he was told that any mark on the paper, whether there was no answer to any of the questions or listing an exception, the Bar was going to contact the attorney about the matter. Tr. 1, pg. 104. That is exactly why he put the exception on the dues statement. Tr. 1, pg. 104. There was no misrepresentation in this case because Mr. Borja did make an exception to the record.

CONCLUSION

The ruling by the referee is not supported by substantial, competent evidence and should be reversed with instructions that Mr. Borja be found not guilty of the charges brought by the Florida Bar.

Alternatively, if the Court affirms the rulings of the referee, the discipline recommended by the referee should be modified to eliminate the ninety day suspension.

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