IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

WILLIAM A. BORJA,

Respondent.

_____/

CASE NO. 77,840

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

REPLY BRIEF OF PETITIONER AND ANSWER BRIEF TO CROSS PETITIONER'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Reply Brief of Petitioner and Answer Brief to Cross Petitioner's Initial Brief, the Appellee/Cross-Appellant William A. Borja will be referred to as "the 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 an January 31, 1992. "RR" will refer to the Report of Referee dated February 27, 1992. "R" will refer to the record in this cause.

REPLY TO RESPONDENT CROSS-PETITIONER'S STATEMENT OF THE CASE AND FACTS

The Florida Bar will rely on its rendition of the facts as set forth in its Initial Brief which refutes or differs from some of the facts set forth in the Respondent's Answer Brief.

SUMMARY OF THE ARGUMENT

The Referee found that the Respondent did not knowingly provide false testimony in a disciplinary proceeding before Judge Alvarez in December, 1988 due to the fact that Respondent was unfamiliar with the Bar rules. The Referee's finding is contrary to the evidence and clearly erroneous.

The Bar did not in its Initial Brief, misquote the testimony of the Respondent during the hearing before Judge Alvarez, in December, 1988 which the Bar alleges was false. In addition, the quoted testimony of the Respondent was false and Respondent was aware of the same in that Respondent had not hired a CPA, as of December, 1988, to keep his "trust account" balances; there were serious problems with Respondent's trust account in December, 1988 because required trust records were not prepared and maintained, required trust account procedured were not followed and thefts from the trust account were occurring; and Respondent did not take his earned fees out of the trust account every thirty (30) days. The Referee apparently believed Respondent's testimony before Judge Alvarez was false but that Respondent was unaware of the same due to his unfamiliarity with the Bar Rules.

Respondent challenges the findings by the Referee that Respondent failed to maintain minimum trust accounting records; that he failed to follow required trust accounting procedures; that client trust funds were used for purposed other than the purpose entrusted to Respondent; and that

Respondent made a material false statement in his 1989 Statement of Annual Bar Dues. The Referee's findings challenged by Respondent are supported by clear and convincing evidence as outlined extensively in the Bar's Initial Brief in this cause and should be upheld.

The Bar challenges the Referee's recommended discipline of the Respondent. The Respondent contends that a suspension of less than ninety (90) days is appropriate. The case law set forth by Respondent in support of his position is clearly distinguishable from the instant case. The case law and standards set forth by the Bar in its Initial Brief, clearly establish that disbarment is appropriate for Respondent's misconduct.

REPLY ARGUMENT
ISSUE I

THE REFEREE'S FINDING OF FACT AND CONCLUSIONS OF LAW IN REGARD TO THE RESPONDENT'S AND/OR HIS WITNESSES TESTIMONY DURING THE DISCIPLINARY HEARING BEFORE JUDGE ALVAREZ IN SUPREME COURT CASE NO. 72,962, ARE CONTRARY TO THE EVIDENCE AND CLEARLY ERRONEOUS.

The Bar in its Initial Brief quoted testimony given by the Respondent during the Final Hearing before Judge Alvarez in Supreme Court Case No. 72,962. The Bar stated that the Respondent was asked the following questions and provided the following responses:

> Q. "At the present time is there any problem with your auditing of your account, sir, or the CPA's that are now keeping your balances, Sir?"
>
> A. "None whatsoever"...
>
> Q. "Are you willing to do anything that they say to keep this account in **proper** order?"
>
> A. "Well, certainly I want to do that...I do not have as good a knowledge as maybe certainly an accountant would have. I understand basically in theory all of this. The day-in and out workings of it, I do not have, if you will, the time and the knowledge to really do it properly. Relying on secretaries, the present secretary that I have, I think that basically she can do a pretty good job, but I think as a safety precaution because I never want to go through this again, Mr. Lewis has been hired, and if for whatever reason he would quit or want to do something else, then I have somebody else to do this on a monthly basis...
>
> Q. "You testified that you take your fees out of the account every thirty days?"
>
> A. "Yes".
>
> Q. "You still do it that way?

A. "Yes"
(Bar Exhibit 21).

The Respondent in his Answer Brief contends that the Bar misquoted the Respondent's testimony. A review of the Bar's Exhibit 21 clearly establishes that the Bar did not misquote the Respondent's testimony as set forth above.

The Respondent also contends that even if the Bar's quote of the Respondent's testimony before Judge Alvarez is correct, the Respondent's testimony was not false in that the Respondent had hired Mr. Lewis a CPA. The Bar does not dispute the fact that the Respondent had hired Mr. Lewis prior to December, 1988, however, Respondent had not hired Mr. Lewis to audit, handle, maintain, or review Respondent's trust account records and procedures on a monthly basis. Rather, Respondent had hired Mr. Lewis to assist him in his divorce litigation by updating Respondent's operation account records and by preparing a financial affidavit for Respondent. (TR.1, p.121, L.4-13). The hearing before Judge Alvarez did not relate to or involve the Respondent's operating account. The case before Judge Alvarez involved allegations that the Respondent violated The Florida Bar Rules Regulating Trust Accounts. Therefore, it is clear that the quoted material set forth above was in regard to Respondent's trust accounts since the Respondent's operating account was not an issue.

It is clear from the record in this case, that in December, 1988 there were serious problems with Respondent's trust account records and procedures which Respondent was

aware of; that no CPA had been hired by Respondent to keep his trust account balances; and that Mr. Lewis had not been hired to prepare Respondent's trust account records on a monthly basis.

It is also clear from the record in this case that the Respondent provided false testimony during the hearing before Judge Alvarez in December, 1988. Support for the Bar's position is contained in the Bar's Initial Brief and will not be reargued herein.

The Referee found that the Respondent was "so out of touch and unfamiliar with the Bar rules and procedures that he did not knowingly provide false testimony during the December, 1988 disciplinary proceeding before Judge Alvarez. (RR. Section 11).

It is clear from this finding that the Referee believed that the Respondent gave false testimony however the Referee further believed that Respondent did not know he gave false testimony because he was so unfamiliar with the Bar rules. Respondent did not need to be familiar with the Bar rules to know that as of December, 1988 he had not hired a CPA to keep his trust account balances. Further Respondent was familiar with the Bar rules regarding trust accounts due to two prior Bar audits. The Referee's finding is erroneous and should not be upheld.

ISSUE II

A SUSPENSION PLUS TWO YEARS PROBATION IS AN INSUFFICIENT DISCIPLINARY SANCTION FOR RESPONDENT'S MISCONDUCT.

The Respondent contends that a suspension plus two years probation is a sufficient discipline for Respondent's misconduct in this case. The Respondent cites The Florida Bar v. Aaron, 529 So. 2d 1685 (Fla.1988) in support of his position. Aaron received a public reprimand for minor trust account violations.

The Aaron case is distinguishable from the Respondent's case in the following respects: 1) Aaron had been found not to be in substantial compliance with the trust accounting rules on two (2) occasions whereas the Respondent has been found to be not in substantial compliance with the trust accounting rules on three (3) occasions; 2) contrary to Aaron, the Respondent was found to have falsely certified to The Florida Bar in his Statement of Annual Bar dues, that he was in substantial compliance with the Trust Accounting Rules and Procedures at a time when he knew the same was false; 3) Aaron only had one prior discipline whereas the Respondent has an extensive prior disciplinary record including one private reprimand and three (3) public reprimands between March, 1988 and January, 1991; 4) contrary to Aaron, client funds were stolen by two (2) of Respondent's secretaries over a one year period of time and the Respondent failed to replace the stolen client funds for eight (8) months; 5) and contrary to Aaron,

the Respondent knowingly provided false/misleading testimony during a disciplinary hearing before Judge Alvarez in December, 1988.

The Respondent cites The Florida Bar v. Carter, 502 So. 2d 904 (Fla. 1987) in support of his position that a suspension plus probation is appropriate in this case. Carter received a ninety (90) day suspension for failing to properly supervise his non-lawyer personnel in the record keeping of estates. The instant case is obviously distinguishable from Carter.

Contrary to the case sub judice, the Carter case did not involve trust account violations including theft of client funds. In this case, Respondent had trust account violations which were the same violations that he had previously been disciplined for. In addition, Carter did not intentionally provide false information to The Florida Bar in his statement of Annual Bar dues as did Respondent. Further, Carter did not intentionally provide false/misleading testimony to a Referee in a prior proceeding as did Respondent. Like the Respondent, Carter did have a prior disciplinary record, however, the Respondent's prior record is more extensive than Carters.

Respondent also relies on The Florida Bar v. Ollinger, 489 So. 2d 726 (Fla. 1986) in support of his position that a short term, non-rehabilitative suspension is appropriate for his misconduct. Ollinger received a sixty (60) day suspension for failing to supervise his non-lawyer personnel, failing to

promptly pay to a client, funds that the client was entitled to, and misapplication of client funds held for a specific purpose.

Ollinger is distinguishable from the instant case. The Respondent's misconduct in this case is much more serious than Ollinger's misconduct. Respondent's total lack of supervision over his non-lawyer personnel resulted in a large sum of money being stolen from his trust account by two (2) secretaries over a one year period of time. In addition, Ollinger had not previously been disciplined for trust account violations as was the Respondent. Further, Ollinger did not submit a false certification to The Florida Bar and he did not intentionally provide false testimony to a Referee in a prior disciplinary case as did Respondent. Ollinger did have a prior disciplinary record consisting of one (1) public reprimand whereas Respondent's prior record included one private reprimand and three (3) public reprimands.

The case law and standards set forth in the Bar's Initial Brief support the Bar's position that disbarment is appropriate for Respondent's misconduct in this case.

ANSWER TO CROSS-PETITIONER'S INITIAL BRIEF
ISSUE I

THERE IS COMPETENT CREDIBLE EVIDENCE TO SUPPORT THE FINDING OF THE REFEREE THAT RESPONDENT FAILED TO MAINTAIN MINIMUM TRUST ACCOUNTING RECORDS.

The Respondent contends that it is undisputed that Carol Stephanick took all of Respondent's trust account records home with her. Respondent also contends that the records were never returned to him. The Bar takes issues with the foregoing. What is undisputed is that Carol Stephanick took some of the Respondent's trust records home with her after she left the Respondent's employment in March, 1989. Ms. Stephanick admitted taking the trust account cancelled checks made out to Carol Busch" and she admitted that said checks were turned over to law enforcement after she was arrested for the thefts fromthe Respondent. Ms. Stephanick also testified that she initially took trust account ledger cards, trust account check stubs, some correspondence, trust account cancelled checks and trust account bank statements. Ms. Stephanick also testified that she eventually returned all of the records, with the exception of the trust account cancelled checks. In addition, Ms. Stephanick testified that after she returned the records to the Respondent, he verified their receipt by phone. (TR.2, p.42-44).

Ms. Stephanick's testimony with respect to returning the records she took (except for cancelled checks) is supported by the fact that the Respondent produced for the Bar's April,

1990 audit, his 1987, **1988** and 1989 ledger cards, trust account check stubs for **1988**, and 1989 bank statements. (R, Bar Exhibits 12, 13, 25 and 28).

Ms. Stephanick also testified that the trust account records she took home, did not include reconciliations or comparisons. (TR.2, p.42-43). The records which Ms. Stephanick initially took home with her could not have included comparisons because Ms. Stephanick had not prepared the same for the period covering from June, 1988 through March, 1989. Further, Ms. Stephanick could not have stolen Respondent's missing trust account records from the end of March, 1989 through September, **1989** since she did not work for Respondent after March, 1989. (TR.l, p.72-73).

There is clear and convincing evidence to support the Referee's ruling and the same should be upheld.

ISSUE II
THERE IS COMPETENT CREDIBLE EVIDENCE THAT RESPONDENT FAILED TO FOLLOW REQUIRED TRUST ACCOUNTING PROCEDURES.

The Respondent contends that Michael Lewis, CPA testified that he did not remember any problem with the maintenance of Respondent's trust account records prior to the December 15, 1988 hearing before Judge Alvarez. The Respondent fails to set forth the fact that Mr. Lewis was never hired to audit, review, or prepare Respondent's reconciliations and comparisons in regard to the trust account. The only work performed by Mr. Lewis in regard to Respondent's trust account was to verify that all funds transferred to Respondent as fees actually went into the Respondent's operating account. (TR.1, p.125). Further, when Mr. Lewis was asked by Bar Counsel, if he knew whether or not all required trust account records were prepared **and** preserved by Respondent, he replied that he did not know. (TR.l, p.135, L.19-23).

The Respondent also states in his Brief that Ralph Donaldson, **CPA**, confirmed that **all** of Respondent's trust accounting records were missing. Obviously, all of the records were not missing in that numerous trust accounting **records** were produced by Respondent for the April, 1990 audit, including records allegedly stolen and never returned by Carol Stephanick.

In addition, Mr. Donaldson was not hired by Respondent until May, 1989, thus he would not know whether trust records

were prepared and maintained prior to said date.

The Respondent's Brief also sets forth that Frederick Doolittle, CPA, testified that trust account records were missing. The Bar does not dispute Mr. Doolittle's testimony that trust account records were missing. The testimony and evidence as set forth in the Bar's Initial Brief establishes that the records were missing because they were never prepared. In addition, Mr. Doolittle did not know whether the trust records that were missing were ever prepared since he was not hired by Respondent until approximately September, 1989.

The Respondent contends that since Mr. Donaldson and Mr. Doolittle could not reconstruct Respondent's trust account records or draw any conclusions about the same due to the lack of **records,** that Pedro Pizarro's working papers and his conclusions and/or opinions that Respondent violated numerous trust accounting rules must be erroneous. The Respondent's position is without merit. Mr. Doolittle and Mr. Donaldson could not reconstruct Respondent's trust account records because the Respondent failed to provide them with the client balances that were established during the previous audit of Respondent's trust account conducted by The Florida Bar for the periad covering from July, 1987 to May, 1988. (R, TFB Exhibit 12, p.1).

Mr. Pizzaro on the other hand, utilized the client balances established from the prior audit and worked forward

in time. Mr. Pizzaro's opinion in this case were supported by his working papers.

The Bar's Initial Brief fully addresses the facts in the record which support by clear and convincing evidence, the Referee's findings that the Respondent failed to follow required trust accounting procedures thus the Bar will not reargue the same herein.

ISSUE III

THERE IS COMPETENT CREDIBLE EVIDENCE THAT CLIENT TRUST FUNDS WERE USED FOR PURPOSES OTHER THAN FOR WHICH ENTRUSTED TO HIM.

The Respondent argues that there is insufficient evidence to support the Referee's finding that client funds were used for purposes other than for which entrusted to Respondent. The Bar presented clear and convincing evidence to support the Referee's finding.

Pedro Pizarro's audit report reflects shortages in the Respondent's trust account each and every month from July, 1988 through January 30, 1990. The shortage in Respondent's trust account was caused primarily as a result of Carol Stephanick's thefts. However, the shortages were also caused by client's negative balances resulting from the Respondent's use of client trust funds to pay costs on behalf of clients who did not have funds in the trust account. (R. Bar Exhibit 12).

Based on the negative client balances and the shortages in Respondent's trust account, client moneys which were entrusted to the Respondent for a specific purpose were used for a purpose other than the purpose for which the funds were given to Respondent. The clients did not entrust their funds to the Respondent so that his secretaries could steal it and use it. In addition, the clients did not entrust their funds to Respondent so that he could utilize them to pay costs on behalf of clients who did not have funds in the trust account.

Rule **5-1.1** of the Rules Regulating Trust Accounts does not state that, if a secretary steals client funds, or if an attorney uses client trust funds to pay other clients' costs, the attorney is not responsible for violating this rule. The Respondent is personally responsible and accountable for all client trust funds. The Florida Bar v. Davis, 577 So. 2d, **1314** (Fla. **1991).**

In April, May, OF at the latest June, **1989,** when Respondent discovered Ms. Stephanick's thefts, he owed a duty to his clients to immediately replace the stolen funds. In this case, the Respondent did not do that. Instead, the Respondent, in essence, borrowed his clients' trust funds, without authority, until he earned the funds stolen. In February, **1990,** the Respondent **replaced** $699.45 to his trust account which represented the client negative balances caused by the Respondent's advancing of funds for clients who did not have funds in the trust account.

The evidence in this case, showed that the Respondent did not supervise his trust account and that he failed to protect client funds entrusted to him **as** an attorney.

Evidence of the Respondent's total lack of respect for his client's trust funds is established by the fact that when the Respondent discovered that Carol Stephanick had stolen from **his** operating account, he did not immediately fire her; he did not confiscate his trust records, including his trust account checkbooks; and he did even take steps necessary to

prevent future secretaries from stealing from him or his clients, as evidenced by Athena's thefts.

Further, the Respondent did not immediately replace funds stolen by his secretaries but, instead, he waited for the bank to replace or refuse to replace the funds. When the bank refused to replace the majority of the funds stolen, the Respondent, again, did not replace the funds. He waited until he earned all of the missing client funds which did not occur until approximately eight **(8)** months after he discovered the thefts.

This Court cannot allow the Respondent to blame others for his deficiencies and mistakes in regard to his trust accounts. He must be held personally accountable in this case.

In The Florida Bar v. Davis, **577** So. 2d **1314** (Fla. **1991)** this Court held that accountings by third parties in no way relieves an attorney from his or her obligations to properly handle and account for money or property entrusted to that attorney by a client. ***(See* also** The Florida Bar **v.** Armas, **518**, So. 2d **919** (Fla. 1989); The Florida Bar v. Whitlock, **426** So. 2d **955,** (Fla. **1982);** and The Florida Bar v. Neely, **488 So.** 2d **535,** (Fla. **1986)** which relate to an attorney's failure to properly supervise the making of his trust account records.)

By reason of the foregoing facts, the Referee's finding that client trust funds were used for a purpose other than for which entrust to the Respondent, which is a violation of Rule

5-1.1, Rules Regulating Trust Accounts, is supported by competent credible evidence.

ISSUE IV

THERE IS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE FINDING OF THE REFEREE THAT RESPONDENT MADE A MATERIAL FALSE STATEMENT IN HIS ANNUAL BAR DUES STATMENT.

The Respondent challenges the Referee's finding that he made a material false statement in his 1989 Statement of Annual Bar dues. Respondent claims that his certification was true due to the notation that he placed on the statement. The Respondent 's position is without merit since his notation refers to Mr. Pizarro's audit, which covered the period from June, **1987** through May, **1988** and not the period from July 1, **1988** through June, **1989** which is the period covered by the 1989 Statement of Annual Bar Dues.

The Respondent's 1989 Statement of Annual Bar Dues covers the period from July **1**, **1988** through June **30**, **1989**. During that period of time, Ms. Stephanick stole approximately $30,000.00 from Respondent's trust account. The Respondent discovered Ms. Stephanick's thefts from the trust account and was aware of the fact that she stole $30,000 probably in April or May, **1989**, but no later than June, 1989, when he notified his bank of the thefts (Bar Exhibit #1). The Respondent did not submit his **1989** Statement of Annual Bar Dues until August **21, 1989**. (R, **Bar** Exhibit **19).**

At the time the Respondent submitted his **1989** Statement of Annual Bar Dues, he knew that there was a large shortage in his trust account.

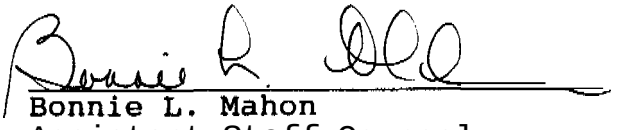
The Respondent's notation in no way notified The Florida Bar of the extensive shortage in Respondent's trust account, and the lack of required trust account records. It is obvious that the Respondent misrepresented the true status of his trust account records and procedures in an effort to avoid Bar intervention and an audit which would reveal trust account violation by the Respondent.

The finding challenged by Respondent should be upheld.

CONCLUSION

Based on the **foregoing,** The **Florida Bar** respectfully requests the Court to uphold the Referee's findings of **fact** challenged in the Cross-Petitioner's Initial Brief; reject the Referee's finding of fact challenged by the Bar in its Initial Brief; reject the Referee's recommendation that the Respondent be found not guilty of violating Rule 4-8.1(a) and (b) and find Respondent guilty of the same; and reject the Referee's recommended discipline of a ninety (90) day suspension and disbar the Respondent from the practice of law in this State.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing REPLY BRIEF OF PETITIONER AND ANSWER BRIEF TO CROSS PETITIONER'S INITIAL BRIEF has been furnished by U.S. Regular Mail to David A. Maney, Counsel for Respondent at Maney, Damsker & Arledge, P.A., 606 East Madison Street, Post Office Box **172009**, Tampa, **FL 33672-0009**; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, ***650*** Apalachee Parkway, Tallahassee, Florida 32399-2300, this 30th day of June, **1992.**

/BONNIE L. MAHON