IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Cross-Respondent

vs.

Case No. 78,969
TFB No. 91-11,571 (13A)

CHARLES B. CORCES,

Respondent/Cross-Petitioner

BRIEF OF RESPONDENT/CROSS-PETITIONER

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SYMBOLS AND REFERENCES

Appellee will use the following symbols and references in his brief.

AC: Amended Complaint

RA: Request for Admissions

Tr1: Transcript of referee hearing of March 3, 1993.

Tr2: Transcript of referee hearing of April 22, 1993.

Tr3: Transcript of referee hearing of June 24, 1993.

RR: Report of referee dated September 24, 1993.

C's Exh: Complainant's Exhibit

R's Exh: Respondent's Exhibit

CS: Complainant's written summation

RS: Respondent's written summation

PRELIMINARY STATEMENT

Issue I and its supporting argument is presented in support of Respondent's cross-petition for review. Issue II and its supporting argument is presented in support of Respondent's Response to Complainant's petition for review.

Complainant/cross-respondent will be referred throughout as Complainant. Respondent/cross-petitioner will be referred throughout as Respondent.

STATEMENT OF THE CASE

Complainant, filed an Amended Complaint alleging trust accounting procedure violations. While the Complaint alleged various acts which constituted violations of the Rules of Professional Conduct, it did not allege that the acts were intentional, (AC).

Pending hearing before the referee, Complainant filed a Request For Admissions. The Respondent did not file answers to the Request For Admissions. He explained that he well knew the consequences of not filing answers to a Request For Admissions which was that he had admitted the allegations asserted in the Request, except for the fact that the misappropriation was intentional. (Tr3-78-79 & Tr1-4). The Request For Admissions did not ask the Respondent to admit that the misappropriation was intentional. (RA).

Complainant did not call any witnesses in its case in chief. After introducing certain exhibits in evidence, without objection, (Tr1-4-12), Complainant rested its case. (Tr1-12). Respondent then called Ann Akonom, his office manager, to testify. (Tr1-15-50). At a subsequent hearing she was again called to clarify her testimony. (Tr2-97-102)

After that hearing the parties submitted written summations. (CS & RS). In Respondent's summation, he conceded that all of the violations alleged in the Complaint had occurred. His summation was, essentially, limited to the argument that the trust accounting violations were not intentional. (RS).

The Referee filed a written report wherein he found that the testimony of Ann Akonom was "incredulous" and based on that finding concluded that the misappropriation was intentional. This finding was made prior to the mitigation hearing conducted on June 24, 1993. (Tr3-5, 31-33). After the mitigation hearing, the Referee recommended that Respondent be suspended for a period of one year. (RR paragraph Numbered IV.). The Referee based this recommendation on the following factors:

> (1) There had been no client complaint concerning any loss.
> (2) There was no loss to the client.
> (3) All funds had been fully restored prior to the bar audit.
> (4) This was an isolated incident.
> (5) The incident was brought to light long after the client had been made whole.
>
> (RR Paragraph IV)

Orally, at the mitigation hearing, the Referee elaborated on his findings. (Tr3-125-136). First he disagreed with the undersigned counsel's misstatement that this was a "minuscule mathematical error[1]." (Tr3-126). Second, the Referee disagreed with Complainant's counsel that there was no remorse or lack of cooperation on the part of Respondent. (Tr3-126). In fact the

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[1] Of course the Referee was correct. What the undersigned counsel meant to say was what he said in his written Summation of Counsel for Respondent to the effect that Respondent's office manager's testimony that in the five (5) years she had worked for Respondent he had never asked her to divert monies for his personal use or benefit was supported by the fact that ". . . aside from minuscule mathematical errors, there are no other diversions reflected" in the audit. (RO-5-6). At oral summation after the mitigation hearing, the undersigned counsel, inappropriately, use the word "minuscule" as if referring to the the amount of money diverted in the instant case, (tr3-108), when he meant as above explained.

Referee made a specific finding that ". . . there is remorse shown," (Tr3-127), and that Respondent recognized that what he did was ". . . a major error." (Tr3-127). The Referee specifically found, contrary to Complainant's assertion, that there was not ". . . any lack of cooperation." (Tr3-127), but that ". . . the decisions you've made - - first of all, I think they were by advice of counsel" and that: " I tend to believe your testimony. I think it was sound advice on the part of Mr. Gonzalez." (Tr3-127).

The Complainant Petitioned this Honorable Court for a Review of the Referee's Report and Respondent cross-petitioned.

STATEMENT OF THE FACTS

Ann Akonom testified that she was employed by Respondent as a paralegal and office manager and did his bookkeeping. (Tr-18). She worked for Respondent between May of 1987 to January of 1992. (Tr-16).

Respondent relied heavily upon her in keeping up with his bookkeeping entries. (Tr-19). During this period of time, certain collection files were opened, (Tr-19-20), and Ann Akonom had the responsibility of keeping track of the different attorney fee percentages involved in the various collection accounts. (Tr-21). She was in charge of distributing the client's monies and earned attorney's fees. (Tr-22).

One of the collection accounts was the Sun Pharmacy Account. (Tr-23). The amount that was to be collected was in the area of $75,000 or $80,000. (Tr-29). The Sun Pharmacy ledger reflected

that throughout the period between March 25, 1988, through September 19, 1988, at periodic intervals, sums, primarily in the amount of $5,000 would be collected from which 33% or $1666.66 was charged as earned fees. The balance would remain in the trust account in trust for the client. On many occasions when Ms. Akonom would call the Sun Pharmacy clients to inform them that some monies had been collected, they, unlike other accounts, would inform her to hold the money until a couple more payments would come in. (Tr-24-25).

On April 29, 1988 Respondent called Ms. Akonom and asked her:

> "Do we have this amount of money[2] available as fees earned in this account?"
>
> (Tr-23)

When she inquired as to which account, Respondent clarified that he was speaking of the Sun Pharmacy account. (Tr-23).

Ms. Akonom pulled the Sun Pharmacy ledger and, after checking, responded: "yes we do." Respondent then informed her that a bank debit memo would arrive in the mail from the bank and, that when it came through, to credit the amount of withdrawal as fees. (Tr-23-24).

At the March 3, 1993 hearing, Ms. Akonom testified that she apparently came to this conclusion based on a review of the ledger (Tr1-41). The ledger shows, however, that on that date

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[2] At the March 3, 1993 hearing Ms. Akonom could not remember the amount inquired about, but calculated it was the $6,000 figure that was discussed at the hearing. (tr-41).

the amount posted on the ledger was in fact $6,576.68 not $11,516.68. The $11,516.68 figure was not posted until May 3, 1988.

At a subsequent hearing, Ann Akonom testified that on reflection, and after review of a check dated April 21, 1988, in the amount of $5,000 payable to Sun Bank, that she must have considered this check, which she had in hand, in arriving at the $11,516.68 figure. She explained that this check was probably received on April 25, 1988. (Tr2-97-98, 100-101), which was four days prior to Respondent's inquiry.

Respondent did not testify at the violation hearing. He did, however, testify under oath at the mitigation hearing. (Tr3-69). He testified that he had never been audited nor accused of illegal activity. (Tr3-72). On January 15, 1991, however, he had been arrested on an unrelated matter and as a result of that arrest he received notice of an audit by the Florida Bar. (Tr3-72). This audit disclosed the misappropriation in question, but by the time of the audit the money had been replaced.

Respondent explained that, initially, as a result of his January 15, 1991 arrest, he was charged in state court via information filed in March of 1991 and spent the next year litigating the case. (Tr-73-74). Then, prior to the third and final trial date scheduled for February 10, 1992, he was indicted by the Federal government and he was discharged of his state charges. (Tr3-73). His federal trial began in November of 1992 and on December 18, 1992 a mistrial was declared due to a hung

jury. (Tr3-76).

Respondent further explained that because of the pending criminal charges his counsel, the undersigned, advised him not to discuss the matter with ". . . the auditor or anyone investigating that or any other matter." (Tr3-78). He did, however, cooperate indirectly with the Florida Bar by directing Ms. Akonom to answer whatever inquiries they had with regard to the matter. (Tr3-77).

He also testified that it had always been his intention to plead to the Bar violations and one of the reasons he did not respond to the Request for Admissions was because he was aware that failure to respond would constitute an admission. (Tr3-78-79).

During the investigation it was learned that the trust accounts were erroneously labeled escrow accounts rather than trust accounts and Respondent testified that he had now remedied that situation. (Tr3-80).

He also testified that he remedied the IOTA account situation and that his financial institution was remitting to the IOTA account. (Tr3-80).

Respondent also admitted commingling. He explained that the commingling consisted of his depositing personal funds in the trust account, which, at the time he mistakenly did not understand to be commingling and admitted having done this on several occasions. (Tr3-80-81). On some occasions he would leave earned fees in the trust account and not move them over to the

attorney-at-law account. (Tr3-81).

As to the Sun Pharmacy account, he testified that what happened was basically as Ms. Akonom had testified, (Tr3-81), except that she was mistaken when she had testified that they discovered the error about a month later. The error was discovered within a matter of days. (Tr3-82).

He recognized that not reporting it immediately was a ". . . terrible mistake. . ." on his part. (Tr3-82). Moreover, that he should have told the auditor and Complainant's counsel as soon as the audit started and would have except for the pending criminal charges and the mental confusion it causes. (Tr3-82).

He explained that, if he had wanted to intentionally use his client's funds, he would have taken the $5,000 check and, instead of depositing it, would have cashed it because ". . . I know what debit memos are. I know they show up in a bank transaction." (Tr3-83). He further explained that he had a good reputation and relationship with both the Key Bank of Florida and Manufacturers Bank of Florida and if had any cash flow problems he could have called them and advised he was going to be 10 or 60 days late, whatever. (Tr3-86). While ". . . I made serious errors after that mistake was made. . . I did not intentionally divert the use of those funds." (Tr3-83). He explained that he knew the Bar was going to discover the diversion because ". . .those debit memos were in my bank records . . . when they were turned over to the Bar auditor. (Tr3-83).

Respondent also stated that he recognized that although the

money was replaced before he had been arrested on the unrelated charge and before there was any audit and without any client complaining, ". . . if a client's funds were diverted, whether negligently or intentionally, the client suffered some harm." (Tr3-85).

Respondent further explained that the federal investigation was so thorough and pervasive that if there had been any other improprieties it would have been discovered as they have looked at his son and daughter's savings account, his inlaws bank accounts and his wife's bank account. (Tr3-88).

Additionally, Respondent called numerous character witnesses all who testified to his good reputation for truth and veracity, viz: Shirley Williams, (Tr3-11), Manuel Junco, (Tr3-16), Mark Garrison, (Tr3-22), Nancy Sharon Herring, (Tr3-31) and James R. Vickers. (Tr3-57-58).

Shirley Williams also testified that she had worked at the Key Bank and that whenever Respondent was going to be late with a payment he would call and say that he was going to be late. (Tr3-11).

At this mitigation hearing, Respondent attempted to call numerous character witnesses, viz: Nancy Sharon Herring, (Tr3-34), Joseph Valenti, Jr. (Tr3-41), Kenneth Stumpy, (Tr3-52) and Jodi Minkler. (Tr3-54) to testify to the truth and veracity of Ann Akonom, but the referee refused to consider their testimony upon Complaint's relevancy objection, which argued that the Referee had already determined that her testimony was

incredulous. (Tr3-31-33). The Referee did, however, allow Respondent to proffer the testimony of these witnesses.

SUMMARY OF ARGUMENT

Issue I. The Referee's ultimate conclusion that Respondent had intentionally misappropriated the funds was clearly erroneous. Moreover, it was an ultimate conclusion which merits a broader review than a finding of fact. The Complainant never alleged the misappropriation was intentional nor did it ever present any evidence to show an intentional conversion. The Referee prematurely determined the conversion was intentional based, not on any evidence presented by Complainant, but on his disbelief in the testimony of one of Respondent's witnesses, and without having considered all of the evidence including that of Respondent and the character witnesses that supported both his and his witnesses for truth and veracity.

Issue II. Even accepting the Referee's finding that the misappropriation was intentional disbarment is not merited. The referee recommended a one year suspension because he (1) it was an isolated incident, (2) the monies had been replaced before any audit was conducted, (3) the complaint was generated from the audit itself, not from any independent complaint, (4) the Respondent had cooperated and (5) was remorseful. Under these circumstances a sanction no greater than that recommended by the Referee is merited.

While Complainant now takes the position that Respondent should be disbarred because he knowingly presented the witness

whose testimony the Referee found to be "incredulous." But, Complainant's counsel had previously recommended suspension even after having heard the witness testify. All except possibly one of the cases relied upon by Complainant are cases where the attorney was specifically charged with either testifying falsely or having suborned perjury. Respondent has neither been charged with perjury, accused or suborning perjury nor specifically found by the Referee to have testified falsely.

ARGUMENT

ISSUE I.

THE REFEREE'S CONCLUSION THAT RESPONDENT INTENTIONALLY MISAPPROPRIATED THE FUNDS IS CLEARLY ERRONEOUS AND HIS RECOMMENDATION THAT RESPONDENT BE SUSPENDED FROM THE PRACTICE OF LAW IS UNJUSTIFIED.
(This issue is presented in support of Respondent's cross-petition)

Respondent is fully cognizant of the fact that a Referee's findings are accorded the presumption of correctness and that he bears the heavy burden of establishing that the Referee's findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992).

Respondent's submits, however, that the Referee's finding that Respondent intentionally misappropriated the funds is not only clearly erroneous, but a legal conclusion which is subject to a broader review by the Court.

(a) The Referee's Conclusion Is Clearly Erroneous.

We understand it to be Complainant's burden to prove by clear and convincing evidence that the Respondent is guilty of

the specific rule violation. The Florida Bar v. Weiss, 586 So. 2d 1051, 1053 (Fla. 1991); The Florida Bar v. Burke, 578 So.2d 1099, 1102 (Fla.1991). In The Florida Bar v. Neu, 597 So.2d 266, 268 (Fla. 1992) this Court said:

> In order to find that an attorney has acted with dishonest, fraud, deceit, or misrepresentation, The Florida Bar must show the necessary element of intent [citations omitted]. . . [and]. . . 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. . . The Florida Bar must establish that Neu intended to convert his client's funds, and consequently that he acted with dishonesty, misrepresentation, deceit or fraud.

With this in mind, we point out that the Complainant, neither alleged in its Complaint, nor presented any evidence, that the misappropriation was intentional, but in fact rested its case without presenting any evidence of intent.

Having admitted the act of misappropriation Respondent sought to show that the actual conversion was not an intentional act on his part. To this end he presented the testimony of Ann Akonom, his office manager, who testified as set out above in the statement of facts.

Even though the officer manager's testimony was under oath, the Referee chose not to believe her, finding her testimony "incredulous." Then, predicated on this "incredulous" finding the Referee concluded that the misappropriation must have been intentional.

Consequently, the Referee found an essential element, i.e.

intent, to exist, not on any affirmative evidence supplied by Complainant, but through his disbelief in Respondent's witness.

In other words, as we read the Referee's report, had Respondent not called Ann Akonom as his witness there would be no "incredulous" finding, yet it is this "incredulous" finding that led the Referee to conclude that the misappropriation was intentional. It is inescapable that the Referee visited upon Respondent the perceived sins of his office manager in order to reach the conclusion that he did.

It is this leap in reasoning which, we respectfully submit, renders the Referee's finding clearly erroneous. It simply does not necessarily follow that because Respondent's office manager may have testified falsely - a fact which we most respectfully dispute - Respondent intentionally misappropriated the funds. Ms. Akonom may well not have checked any records at all, yet told Respondent that there were sufficient funds. In such a case, Respondent could not be considered to have intentionally converted them. While he may have been guilty of not reporting the conversion as soon as he discovered it - a fact he well admitted - he would not be guilty of knowingly converting them at the time they were converted.

Additionally it should be observed that the Referee's disbelief in Ms. Akonom's testimony is predicated in a large measure on what occurred after the conversion. He points out that no debit memo was ever recorded on the client's ledger card, that no deficit was ever noted on the ledger card or the trust

account and that no office memo, letter or ledger entry acknowledging the shortage appears acknowledging the shortage. While these facts bespeak of a "serious error in judgment" in not immediately reporting the matter, as Respondent acknowledged, they do not establish that at the time the money was misappropriated it was intentional.

(b) The Referee's Conclusion Is A Legal Conclusion Subject To A Broader Review Than the Clearly Erroneous Rule.

Moreover, we respectfully submit that, while the Referee's findings that the office manager's testimony was "incredulous" may be a finding of fact which is subject to the clearly erroneous rule, the Referee's conclusion that Respondent intentionally misappropriated the funds is an ultimate legal conclusion ". . . which is subject to broader review. . ." The Florida Bar v. Aaron, 529 So.2d 685, 686 (Fla.1988); The Florida Bar v. Inglis, 471 So.2d 38 (Fla. 1985).

A broader review of the evidence calls for consideration of all of the evidence, not simply the "incredulous" conclusion. In Weiss, supra, the Court recognized that there is ". . . a clear distinction between cases where the lawyer's conduct is deliberate and intentional and cases where the lawyer acts in a negligent or grossly negligent manner." Id at 1053. The question is not whether the office manager's testimony was incredulous, but whether she did in fact inform Respondent there were sufficient funds available. If so, the misappropriation may have been negligent, even grossly negligent, but not intentional.

In considering this question, a broader review of the evidence requires consideration of all of the evidence including Respondent's testimony under oath which the Referee did not consider because he had arrived at his conclusion before Respondent had testified. It required consideration of Respondent's character witnesses, concerning his truth and veracity, which, here again, the Referee did not consider because he reached his conclusion before they testified. And, it requires consideration of the character witnesses concerning his office manager with respect to truth and veracity, which the Referee refused to consider because he had already reached his conclusion.

But, in the instant case, the Referee reached his ultimate conclusion without having considered all of the evidence since it is undisputed that prior to the hearing of June 24, 1993 (Tr3) the Referee had already made his finding that Ann Akonom's testimony was "incredulous" and that based on that "incredulous" finding that Respondent had intentionally misappropriated the funds. (Tr3-5, 31-33).

One may say that the Referee would not have been swayed by this evidence - and it well may be true, but it is small comfort to be told this after the fact.

This is not meant as a criticism of the Referee. His failure to consider all of the evidence may have occurred as a result of a misunderstanding. It was agreed at the April 22, 1993 hearing that there would be a "mitigation" hearing ". . .if

a violation is found to be recommended by the Referee." (Tr2-90-91). But since Complaint never alleged that the conversion of funds was intentional the Referee could well have found the act to have occurred without concluding it was intentional. Nevertheless, prior to the "mitigation" hearing of June 24, 1993 (Tr3) where, for the first time Respondent testified and presented witnesses concerning his truth and veracity, the Referee had already concluded that Respondent had intentionally misappropriated the funds.

Moreover, it should noted that:

(1) Ms. Akonom testified under oath and that fact should not lightly be considered.

(2) When Ms Akonom testified, she was no longer under Respondent's employment; consequently, any allegiance one might conceivably perceive that would be strong enough to cause her to lie under oath for Respondent, it was certainly not because she was employed by him.

(3) The Referee placed considerable emphasis on the fact that when Ms. Akonom first testified she stated that her clerical error was caused by her misreading of the client's balance, but that her testimony was "impeached" by the fact that on the day in question the ledger card did not reflect a sufficient sum in the client's balance and that at a later hearing she testified that she must have considered an undeposited check that she had in hand. The Referee concluded this testimony was incredulous. But, the incident occurred in April of 1988. Ms. Akonom

testified to this event in 1993, almost five years later. It is not unreasonable for a witness to remember an event to the extent of remembering she made a mistake without remember the details of the mistake. Moreover, the very fact that she was unsure of her testimony speaks more to establish that she appeared without the benefit of rehearsing her testimony than it does that she was lying under oath. While it was his prerogative, the Referee ignored her testimony that this was not the only account which the office manager had to concern herself. As she testified:

> "I was doing a 10,000 things. I was office manager, I was handling 50 collections at the time."
> (Tr-41).

It is entirely logical that while events may not have been exactly as she recalled five years later they were such that the the misappropriation was the result of negligence, but not intentional. It is often difficult for one to re-trace his or her thought processes, especially when that process results in error. Consequently, exactly how Ms. Akonom arrived at the conclusion that there were sufficient earned fees available may never be clearly determined. The point is, however, that she testified under oath that she went through a thought process that led her to so conclude and that sworn testimony should not discarded lightly.

It is true that the Referee did consider this latter evidence before judging the office manager. But, he did not consider it in light of Respondent's testimony or the testimony of the character witnesses.

Therefore, it is most respectfully submitted, while the Referee was justified in finding that there had been a misappropriation he was not justified in concluding that it was intentional rather than the result of simple or gross negligence without considering all of the evidence.

ISSUE II.

COMPLAINANT HAS FAILED TO CARRY ITS BURDEN OF DEMONSTRATING THAT THE REFEREE'S RECOMMENDATION THAT RESPONDENT SHOULD BE DISBARRED INSTEAD OF, AS RECOMMENDED BY THE REFEREE, SUSPENDED FOR ONE YEAR.
(This issue is presented in Response To Complainant's Petition for Review)

Alternatively, Respondent submits that even should this Court find the Referee's conclusions are correct, the circumstances do not merit, as the Complainant now asserts, disbarment.

Respondent recognizes that the misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment. The Florida Bar v. Shanzer, 572 So.2d 1382, 1383 (Fla. 1991). But, this presumption can be rebutted by various acts of mitigation. The Florida Bar v. Farbstein, 570 So. 2d 933 (Fla 1990). Moreover, as this Court has often said, the correct sanction is one that is (1) fair to society, (2) fair to Respondent and (3) a deterrence to others. The Florida Bar v. Neu, 597 So. 2d 266 (Fla.1992).

The Referee, even after determining that the violation was intentional, called for a one year suspension as being the

sanction that best met the above criteria. He found the following factors in mitigation:

> (1) There had been no client complaint concerning any loss.
> (2) There was no loss to the client.
> (3) All funds had been fully restored prior to the bar audit.
> (4) This was an isolated incident.
> (5) The incident was brought to light long after the client had been made whole. (RR Paragraph IV)

Additionally the Referee made an oral finding that Respondent was remorseful, that he had cooperated. (Tr3-125-127), that the complaint in this case was generated from the audit itself, not from any independent complaint, (Tr3-128) and that Respondent had no history of violations such as were involved in the instant case[3].

The Referee's recommendation was not whimsically reached. He summarized and compared numerous disciplinary proceedings recently decided. (Tr3-130-133). He compared three cases appearing in the Florida Bar News, all of which are unreported decisions, viz: William Thomas Edwards wherein Edwards ". . had converted funds from his trust account for his personal use on 13 occasions amounting to $20,000" and Edwards received a two year suspension. (Tr3-131). Lee Peter Speronis, where fees to his firm were repeatedly not delivered to the firm, but used by Mr. Speronis for his personal benefit and he received a two-year

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[3] Although the Referee did find that Respondent had previously received one private reprimand and one public reprimand for violation of Rule 4-1.4(a), Rules of Professional Conduct (Communication: a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information).

suspension. (Tr-131). Ann Hernandez Yanks who ". . . misappropriated client funds for her personal use . . . " and received a one year suspension even though there ". . .was not even full reimbursal as there was here." (Tr3-132-133).

The Referee also commented on the three year suspension of Alan K. Marcus which is reported as The Florida Bar v. Marcus, 616 So.2d 975 (Fla.1993) where Mr. Marcus is reported to have ". . . systematically and repeatedly misappropriated client funds . . . " and this Court rejected the Bar's argument that he be disbarred.

Additionally, we would call the Court's attention to the following cases: The Florida Bar v. MacMillan, 600 So.2d 457 (Fla.1992) where the Referee found the attorney to have engaged in ". . . conduct involving dishonesty, fraud, deceit, or misrepresentation" id at 459 and in aggravation that the attorney had ". . . a dishonest or selfish motive in the misappropriation of the $4,000." Id at 459, but recommended a two year suspension which was upheld by this Court. The Florida Bar v. McShirley, 573 So.2d 807 (Fla.1991), where there the Referee had found ". . . deliberate and intentional misappropriation. . ." id at 808, the conversions were substantial, and consisted of ". . . a repeated 'dipping into' the trust account," Id at 808 and this Court approved a three year suspension rather than disbarment. The Florida Bar v. Pincket, 398 So.2d 802 (Fla.1981) where the attorney converted $35,500 held in trust by him for his clients in a real estate transaction and an additional $21,000 entrusted

to him as attorney for the personal representative of an estate. The Court imposed a two year suspension even though the $21,000 had not been repaid.

In The Florida Bar v. Stark, 616 So. 2d 41 (Fla.1993) the attorney had knowingly used his clients funds amounting to some $8,466.28 which was not repaid until after the referee's report. There was also a shortage of $17,066.29 in the trust account. Additionally, the attorney had violated the Court's temporary suspension order. This Court imposed a three (3) year suspension. In its decision this Court considered restitution as a mitigating factor even though it was not made until after the referee's report had been filed.

Every one of the above cases contained more aggravating circumstances than the instant case, but in none did the Court impose disbarment. In all the conversion was intentional. In some there were repeated conversions. In others the funds were not returned until after the audit or not at all.

Complainant relies primarily on The Florida Bar v. MacMillan, supra, but recognizes, as it must, that in MacMillan "[t]his Court supported the Referee's recommendation of a two (2) year suspension. (Complainant's br. p. 12). Complainant seeks to distinguish MacMillan, however, by suggesting that Respondent presented false evidence through his office manager with the intention of creating a false impression that the misappropriation was unintentional and further arguing that Respondent did not cooperate with the audit. But, the Referee

found that Respondent did cooperate with the audit. This contention that Respondent presented false evidence has already been covered in Issue I above and need not be re-argued ad nauseam. Suffice to repeat that Complainant's position is not only an attack on Respondent, but on the undersigned counsel who is the one who presented the evidence. Moreover, as already discussed above, the Referee found that Respondent did in fact cooperate.

Additionally, we would point out that the sanction that Referee recommends is the one that was initially called for by Complainant and one that was recommended by the Complainant's counsel after he had heard the testimony of Respondent's office manager - which "false" testimony, Complainant now claims was knowingly presented by Respondent.

After the hearing of March 3, 1993, and having heard the testimony of Ann Akonom, Respondent's office manager, Complainant's counsel, on May 7, 1993 filed his COMPLAINANT'S CLOSING ARGUMENT, AND ARGUMENT ON DISCIPLINE recommending a suspension from the practice of law ". . . for a minimum of one year." (CS-12). It is true that after the disciplinary hearing of June 24, 1993, Complainant's counsel reversed his position and recommended disbarment[4]. (Tr3-102). But, most of the reasons that Complainant now gives for requesting disbarment were known

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[4] In arguing before the Referee, Mr. Deberg stated that "[i]n my previous written argument, I suggested that the least appropriate discipline would be a two-year suspension," but as can be seen from his written summation, (CS-12), what he recommended was a minimum one year suspension.

to Complainant at the time that Complainant recommended a minimum suspension of one year.

What troubles Complainant is that at the June 24,1993 hearing, where, for the first time Respondent testified, he stated that "w]hat happened is basically the way Ms. Akonom has testified to about." (Tr3-81). Respondent continued, stating that "[w]hat I think is different or what I think she was incorrect about some of it," (Tr3-81), was

> ". . .when she said and testified that it was some -- at the end of the month or a month later that we found out about it. I think we found out about it within a matter of days. I think it was the end of the following week when the debit memo came through from the bank that she brought it to my attention."
>
> At that time, I saw and knew that I had a problem. And I think every decision I made with respect to that account from that day on was a very big mistake. If I'd have handled it properly, I think I would have sought independent counsel and contacted the Bar. That would have been the way to handle it. I didn't do that. And it was a terrible mistake.

Complainant contends that because Respondent did not repudiate his office manager's testimony, but in fact attempted to bolster it by proffering evidence of her truth and veracity and testifying that the facts occurred substantially as she testified, Respondent essentially testified falsely and this is an aggravating factor meriting disbarment. (See Complainant's br. p. 14).

Since only outright repudiation would satisfy Complainant, Respondent is placed in an untenable position. He is accused of

promoting false testimony on the part of his office manager. Yet, if Respondent verily believed the facts to be as his office manager testified, he would in fact have testified falsely if he had repudiated her.

In support of its argument that Respondent should be disbarred because, as Complainant argues, the Respondent falsely represented evidence at the hearing before the Referee, the Complainant relies on The Florida Bar v. O'Malley, 534 So.2d 1159 (Fla.1988); The Florida Bar v. Smiley, 622 So.2d 465 (Fla.1993); The Florida Bar v. Agar, 394 So.2d 405 (Fla.1981) and The Florida Bar v. Graham, 605 So.2d 53 (Fla.1993)

First, we would observe that in O'Malley this Court did not order disbarment. It ordered a three (3) years suspension because the Referee, having found that the attorney had testified falsely under oath, did not ". . . place due emphasis on the fact that O'Malley deliberately and unequivocally lied under oath." Id at 1162. The referee had recommended a 90 days suspension as part of a condition of two years probation. Second, in O'Malley the attorney appears to have been specifically charged with having committed perjury in another proceeding. Thus O'Malley received due process notice of the accusations concerning perjury. This Respondent has not been charged within committing perjury or lying under oath, the Referee has not found him guilty of committing perjury and to the extent that Complainant says he knowingly presented false testimony Respondent has not "had his day in court."

Smiley was a case where the Referee had recommended disbarment after specifically finding that Smiley ". . . failed to cooperate with the Bar's investigation. . ." Id at 466-467 - contrary to the finding in the instant case - and where the Referee found that Smiley had falsely stated under oath the amount of fees he had received. Again, there is no finding in the instant case that Respondent testified falsely under oath. Respectfully, we submit that a finding that the testimony of a witness called by Respondent is "incredulous" is a far cry from saying the Respondent himself testified falsely.

In Agar the attorney was specifically charged with having presented false testimony in a divorce proceeding. He was specifically found guilty of having falsely called the wife as a the husband's residency witness, representing her to be a person other than who she was. In Graham, the attorney, inter alia, was also specifically charged with having made misrepresentations to the Bar under oath in a previous proceeding.

Thus, as we read them, in all of the above cases, except possibly Smiley, the attorney was specifically charged with either having falsely testified under oath or suborning perjury in a previous proceeding. In Smiley there was, if not specific charges of having previously testified under oath, at least a specific finding by the Referee - not so here.

In one other case cited by Complainant, The Florida Bar v. Shanzer, 527 So.2d 1382 (Fla.1991) there was no claim of false testimony, but the Referee had recommended disbarment after

finding there had been misappropriation of funds and after specifically finding not only that there was a dishonest or selfish motive, but a patter of misconduct. In the instant case, the Referee recognized that this was an isolate instance.

CONCLUSION

The circumstances do no merit disbarment as Complainant now requests. Inasmuch as the misappropriation was not intentional a period of suspension of no more than 90 days is merited. But, even should the Court accept the Referee's finding it should also accept the Referee's recommendation of one year's suspension.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Respondents/Cross-Petitioner's Brief has been furnished to the Honorable Thomas E. DeBerg, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriot Hotel, Tampa, Florida 33607 by United States Mail, this 24th day of February, 1994.

Anthony F. Gonzalez