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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CYRUS ALAN COX,

Respondent.
_____/

Case No. 83,582
[TFB Case No. 93-31,770 (09A)]

ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The Report of Referee dated August 26, 1994, will be referred to as "RR."

The transcript of the final hearing shall be referred to as "T."

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "A" voted to find probable cause in this matter on February 23, 1994. The bar filed its complaint with this court on April 22, 1994. The referee was appointed on May 2, 1994. The respondent served his answer on May 12, 1994, wherein he admitted all of the bar's allegations. The final hearing was held on August 25, 1994, and the report of referee was issued on August 26, 1994.

Respondent served his petition for review on September 23, 1994, and moved for an extension of time to file his initial brief on October 18, 1994. The motion was granted on October 19, 1994, giving the respondent until November 7, 1994, to file the brief. He served his initial brief on November 11, 1994. He also requested oral argument.

The Board of Governors of The Florida Bar considered this case at its meeting which ended September 23, 1994. The board voted not to seek an appeal of the referee's recommended discipline.

STATEMENT OF THE FACTS

Unless otherwise noted, the following facts are derived from the report of referee.

The respondent was employed by the law firm of Sears and Manuel, P.A., from approximately October 1, 1990, through August 17, 1992, when he was discharged. The firm had in effect an informal policy that employee attorneys were not to engage in outside employment of a legal nature. This informal policy was incorporated into an office manual that was adopted in June, 1992. The restrictions on outside employment had previously been discussed with the respondent during a performance review in October, 1991. The respondent signed for a copy of the manual on June 1, 1992, but did not review it at that time. Almost from the very beginning of his employment, the respondent violated the firm's policy. This continued even after he was warned during his employment review in October, 1991, not to engage in outside legal work. On numerous occasions, he accepted representation of clients without proper office documentation. He used the firm's letterhead stationery for correspondence in some of these cases. He did not create client files for the office and, in some cases, received fees but did not remit the money to the law firm. In several cases, the respondent requested that the clients make the checks payable to him rather than the law firm. He billed some clients using the firm's letterhead stationery. He corresponded

with third parties on behalf of these clients using the firm's letterhead stationery, (T. p. 14). The law firm had no knowledge of the existence of these clients nor did it consent to the respondent's representation of them. After the firm learned of the respondent's activities and confronted him, he initially denied having engaged in any prohibited conduct or having received any fees for such services. He eventually admitted having collected the fees only after having been faced with documented evidence in each case.

The referee recommended the respondent be found guilty of violating Rules Regulating The Florida Bar 4-1.7(b) for representing clients without the knowledge and consent of the law firm for which he was working. Such representation could have resulted in the law firm having a conflict of interest by accepting a case against an unknown client of the respondent; 4-4.1(a) for representing clients without the knowledge or consent of the law firm for which he was working, concealing the representations from that firm and, in some cases, denying such representations; and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation pertaining to his performance of work for clients without the consent or authorization of the law firm, lying to his employer by denying such representation, and attempting to conceal the representation from his employer. Respondent admitted that he told some of his clients to make their checks payable directly to him.

SUMMARY OF THE ARGUMENT

In making his recommendation as to the appropriate level of discipline, the referee based his recommendations upon the mitigating and aggravating factors presented at the final hearing (T. pp.10-15). He took into account the mitigating factors presented by the respondent in his initial brief (T. pp. 10-13). He also took into account those aggravating factors omitted by the respondent in his brief, namely the fact that the respondent initially lied to his employer about having done legal work on the side for which he received compensation and admitted to his misconduct only after having been confronted by his employer with evidence. From at least October, 1991, the respondent was aware that he was not allowed to represent clients who did not retain the law firm yet he made a conscious decision to violate this employment policy. It is fortuitous that no client was harmed by the respondent's conduct, although the firm has no way to gauge its future potential malpractice liability that could arise from the respondent's representation of the secret clients. Because the law firm was not aware of the existence of these clients, it had no way to protect its own clients from being unwittingly embroiled in a conflict of interest situation that could have resulted in the firm's disqualification. Furthermore, the respondent pocketed legal fees and because there was little written contact with many of these clients, the firm has been left with no way to arrive at a figure for its losses. The

respondent cheated his law firm, left his and the firm's clients open to harm, would have continued on his course of conduct had it not been detected by the law firm and, once caught, initially misrepresented to his employer what he had been doing. The respondent does not appear to be willing to follow either the rules set forth by his employer or the rules regulating this profession. He does not appear to appreciate the gravity of his offense and what it says about his character or lack thereof.

> Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner which will cause laymen, and the public generally, to have the highest respect for and confidence in the members of the legal profession. When a lawyer commits any act or conducts himself in such fashion as to cause criticism of the Bar, he thereby impairs the confidence and respect which the Bar generally should enjoy in the eyes of the public. Striving for such an honorable and respected public image is not for the personal aggrandizement of the individual members of the profession; it is to enable them properly and effectively to perform the services and discharge the responsibilities which are entrusted to us. Without the respect and confidence of the public, it is impossible for the profession to discharge its duties effectively and efficiently, which duties are graver now than ever before in history. The Florida Bar v. Wagner, 212 So. 2d 770, 772-773 (Fla. 1968).

The bar submits the respondent's misconduct reflects adversely not only on himself but on the profession as a whole. The respondent knew it was wrong to "moonlight" but did it anyway at the risk of being fired and, upon being caught, tried to lie. He admitted to the truth only after being confronted with evidence.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF A THIRTY (30) DAY SUSPENSION IS APPROPRIATE GIVEN THE FACTS OF THIS CASE.

Although a referee's recommendation as to the appropriate level of discipline is subject to a broader scope of review than that afforded the findings of fact, the discipline recommendation is persuasive, The Florida Bar v. Reed, 19 Fla. L. Weekly S506 (Fla. October 6, 1994). The recommendation is afforded a presumption of correctness unless it is clearly erroneous or not supported by the evidence, The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992). In deciding what level of discipline is appropriate given the facts, this court considers the purposes of discipline.

> Protection of the public, punishment, rehabilitation of an attorney who commits ethical violations are three important purposes of disciplinary measures. Equally important purposes, however, are a deterrence to other members of the Bar and the creation and protection of a favorable image of the profession. The latter will not occur unless the profession imposes visible and effective disciplinary measures when serious violations occur. The Florida Bar v. Larkin, 447 So. 2d 1340, 1341 (Fla. 1984).

The bar submits the referee took into account the mitigating and aggravating factors (T. pp. 10-15). An attorney is not merely practicing law for personal gain and advancement, he is an officer of the court and as such has a higher duty, Application

of Harper 84 So. 2d 700, 703 (Fla. 1956), In re Keenan, 287 Mass. 577, 192 N.E. 65, 58. The license to practice law is a privilege, not a right, Petition of Wolf, 257 So. 2d 547 (Fla. 1972).

In short, the respondent, for his own personal gain, knowingly and willfully violated his employment conditions, took legal fees that should have been paid to his firm, denied his misconduct when initially confronted by his employer and admitted it only after being shown documented evidence, placed his clients and those of the firm in positions where conflicting interests could have developed and disqualifications been ordered, and left his former employer open to potential future malpractice claims in which the employer's defense could be hampered by the respondent's failure to maintain client files and document his representation. Although it appears that no client was harmed, the potential for injury and inconvenience existed. The respondent created a situation where he could be representing a client whose interests conflicted with a client of the firm. This could have resulted in both clients finding themselves in need of new counsel if a court had ordered the attorneys disqualified due to the conflicting interests. Both the firm's reputation and the clients could have been damaged. The respondent's conduct in this matter draws into serious question his judgment and character. He does not appear to respect the rules by which he is expected to abide. He knew his firm

prohibited outside employment yet he ignored the policy and pocketed his profits. In a recent seminar entitled "Ethics and Public Perception," speaker Michael Josephson defined the concepts of ethics and honesty. According to Mr. Josephson, ethics is not about rhetoric, what a person says, what a person intends, a written code or framed credo. It is about actions. Ethics is about doing what is right. Honesty is more than technical truthfulness. It is nondeception. The bar submits the respondent neither did the right thing by accepting outside employment for which he was compensated nor was he honest with his employer when initially confronted. He sought to avoid the consequences of his actions, i.e. being fired. The respondent's character has been called into question by his conduct. As Justice Terrell eloquently stated in The Florida Bar v. Murrell, 74 So. 2d 221, 225-226 (Fla. 1954);

> The lawyer should not require a guide to distinguish good and bad, neither can he separate the law from morality... By traditional American standards we judge people by the integrity of their character. Character is not a pliable substance like putty that may be made to give any place or any time that pressure is applied. Character is spiritual and rigid, it guides one's conduct by set moral values and no external immoral or amoral influence can veer his course from approved ethical standards. Integrity of character is the first prerequisite to dependability, to constancy of purpose, no single racial or economic group has a corner on it, it is found among the lowly as often as it is among the well-born. When a client has a real job to do it looks for the lawyer with character. No client worth having wants a lawyer without it, he is unstable, he is short on know-how, he will not stay put and he sometimes fails to distinguish the difference between his and his client's money.

The bar submits that not only do the case law and standards support a thirty (30) days suspension, such a suspension would best serve the purposes of discipline as outlined in Larkin, supra.

In The Florida Bar v. Herzog, 521 So. 2d 1118 (Fla. 1988), an attorney was suspended for ten (10) days because he engaged in deceptive billing practices. The attorney routinely adjusted his bills to lower the amount of costs presented to two clients. He did this because he feared that if the clients were presented with a large amount of costs, they would not authorize or approve the expenditures. Therefore, he adjusted their bills to lower the face amount of the costs and increase the number of hours he spent working on their legal matters. As a result, the total charge to the clients was generally reasonable, but the breakdown or subtotals for attorney's fees and costs was incorrect and misleading. Once the clients paid the bill, the attorney readjusted it so the advanced costs would be covered. His law firm never approved this method and had no knowledge of the attorney's actions. It could not be determined if these billing adjustments deprived the firm of legal fees.

In The Florida Bar v. Childers, 582 So. 2d 617 (Fla. 1991), an attorney was suspended for ninety-one (91) days after she improperly diverted funds belonging to her law firm. The attorney deposited to her personal savings account a $950 check

that had been made out in her name but that actually belonged to her law firm. In mitigation, the attorney acknowledged her error and cooperated fully with the bar's proceedings. She had no prior disciplinary offenses, expressed remorse for her misconduct and presented testimony from several people who stated that her action was totally out of character and a one time unexplainable aberration. Neither her firm nor any of its clients suffered harm from her misconduct.

In the respondent's case, he not only diverted funds that should have been paid to the law firm by directing clients to make their checks payable to him in several instances, he also wrote to third persons on behalf of the clients he was representing without his firm's knowledge or consent. This correspondence was made using the firm's letterhead stationery (T. p. 14). Therefore, these third persons had no way to know that the law firm was not representing the client.

An attorney was suspended for ninety (90) days in The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986), after he diverted fees from his law firm based upon the mistaken belief that it was done with the permission of the president of the professional association. The attorney was associated with a partnership in which he did not have an ownership interest. The referee considered in mitigation the fact that the attorney did considerably more work than either of the partners and brought in

about twice as much in fees as they. All three, however, earned identical salaries. When the attorney discussed his intentions to leave the firm with one of the partners, they discussed allowing the accused attorney to retain a portion of the fees he earned so long as he forwarded to the professional association an amount comparable to fees he had earned in the past. The referee found there was no oral agreement between the attorney and the partner which would rise to the level of an oral modification of the written employment remuneration agreement between the partnership and the accused attorney. However, the accused attorney did have reason to believe that he had received permission to retain some of the fees he earned. The partner with whom he had his discussion was president of the professional association and customarily handled the firm's financial arrangements with its employees. The court found that the accused attorney exercised extremely poor judgment by handling his financial affairs as he did but did not deliberately attempt to steal from his employer.

In The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986), an attorney was suspended for six months after he engaged in what this court termed as being a misguided and irrational act of self-help involving a dispute with his law partners over the division of fees. The attorney represented a client in a divorce action. The fee was deposited to the firm's account and was to be distributed according to a fee distribution formula. As part

of the client's property settlement, the attorney was to receive $75,000 in two equal installments which he was to forward to the client. After the divorce was final, the attorney told the client she owed him $25,000 in fees and upon receipt of her first marital settlement payment, he would retain $20,000 and she could provide him with a check for the balance made payable to an automobile dealer. The client acquiesced to the attorney's terms and her check was used as a down payment on an automobile being purchased by the attorney. At the disciplinary hearing, the attorney argued that he intended to take title to the car in the firm's name as a way of resolving a dispute he had with the firm regarding the fee distribution formula. This court found, however, from the evidence that it was clear the attorney did indeed to intend to steal the money from the firm by depriving them of the fee. Unlike Stalmaker, supra, the accused attorney was well aware he was diverting firm funds from behind the backs of his partners. In mitigation, no party suffered any real damage as a result of the attorney's actions, he had no prior disciplinary history, and he had been active in church, civic and local bar activities.

The Florida Standards For Imposing Lawyer Sanctions also support the referee's recommended discipline of a thirty (30) day suspension. Standard 7.2 calls for a suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a

client, the public or the legal system. The respondent's conduct not only could have harmed the clients involved, it brings into disrepute the integrity of the legal profession. If a lawyer is willing to cheat his law firm, why not the client?

Not only would a thirty (30) day suspension serve to deter others who may be tempted to engage in similar misconduct, it would serve to protect the favorable image of the profession. After all, if the discipline "does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it." The Florida Bar v. Wilson, 425 So. 2d 2, 4 (Fla. 1983).

CONCLUSION

Wherefore, The Florida Bar prays this Honorable Court will enter an appropriate order upholding the referee's recommendation as to discipline, impose a thirty (30) day suspension and tax against the respondent costs now totalling $682.15.

Respectfully submitted,

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By: _____
JOHN B. ROOT, JR.
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing answer brief and appendix have been furnished by regular U. S. mail to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U. S. mail to Charles A. Stampelos, counsel respondent, at Post Office Box 2174, Tallahassee, Florida 32316-2174; and a copy of the foregoing has been furnished by regular U. S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 18th day of November, 1994.

JOHN B. ROOT, JR.
Bar Counsel

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Report of Referee	A1

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CYRUS ALAN COX,

Respondent.
_____/

Case No. 83,582
[TFB Case No. 93-31,770 (09A)]

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on August 5, 1994. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - John B. Root, Jr.

For The Respondent - In pro se

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent Is Charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

1. The respondent did not contest the allegations contained in the bar's complaint.

2. Mr. Cox was employed by the law firm of Sears and Manuel, P.A., from approximately October 1, 1990, through August 17, 1992, when he was discharged.

3. Initially, Mr. Cox was paid on a billable hour basis and was expected to bill a minimum of thirty (30) hours per week for forty-eight (48) weeks. On October 5, 1991, the terms of the association were changed and Mr. Cox went on a salary basis of $40,000 per year plus a discretionary bonus.

4. The firm had in effect an informal policy that employee attorneys were not to engage in outside employment of a legal nature. This informal policy was incorporated into an office manual that was adopted in June, 1992. The restrictions on outside employment had previously been discussed with the respondent during a review in October, 1991. The respondent signed for a copy of the manuel on June 1, 1992, but did not review it.

5. Almost from the very beginning of his employment, the respondent violated the firm's policy. This continued even after he was warned during his employment review in October, 1991, not to engage in outside legal work.

6. On numerous occasions, the respondent accepted representation of clients without proper office documentation. Some of his correspondence in these cases was performed on business stationery. Files were not prepared for the office and, in some cases, fees which were paid were never received by the law firm but instead were received by the respondent. In several cases the respondent requested of the client that checks be made out in his, the respondent's, name.

7. While working for the law firm, the respondent accepted cases without the knowledge or consent of his firm, corresponded on such matters on firm stationery in some cases, billed clients on same, and, in some cases, asked them in writing to make payments of checks to him personally rather than to the firm. The respondent collected some fees which he kept. Initially, he denied having done so and admitted to having collected fees only after having been faced with documented evidence in each case.

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

I recommend the respondent be found guilty and specifically that he be found guilty of the following violations of the Rules Regulating The Florida Bar:

4-1.7(b) for representing clients without the knowledge and consent of the law firm for which he was working which could have limited his exercise of independent professional judgment in the representation of those clients or which could have resulted in the law firm having a conflict of interest by accepting a case against an unknown client of the respondent.

4-4.1(a) for representing clients without the knowledge or consent of the law firm for which he was working and concealing the fact from that firm and in some cases denying such representation; and

4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation pertaining to his performance of work for clients without the consent or authorization of the law firm and attempting to conceal the representation of those clients.

IV. Rule Violations Found: 4-1.7(b); 4-4.1(a) and 4-8.4(c) of the Rules of Professional Conduct.

V. Recommendation as to Disciplinary Measures to Be Applied:

I recommend the respondent be suspended from the practice of law for a period of thirty (30) days with automatic reinstatement at the end of the period of suspension as provided in Rule Regulating The Florida Bar 3-5.1(e). I specifically decline to recommend that the respondent make any restitution to the law firm because no audit was performed by the firm in order to ascertain the amount of the alleged deficiency, if any. Such would be a matter more appropriately addressed by the civil courts.

VI. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 39
Date admitted to bar: October 16, 1990
Prior disciplinary convictions and disciplinary measures imposed therein: None

VII. Statement of costs and manner in which costs should be taxed: I find the following costs were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
	1. Transcript Costs	$ -0-
	2. Bar Counsel Travel Costs	$ -0-
B.	Referee Level Costs	
	1. Transcript Costs	$102.65
	2. Bar Counsel Travel Costs	$ -0-
C.	Administrative Costs	$500.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	$ -0-
	2. Copy Costs (318 copies $.25)	$ 79.50
	TOTAL ITEMIZED COSTS:	$682.15

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 16 day of August, 1994.

s/ ROBERT E. PYLE

Referee

Original to Supreme Court of Florida with Referee's original file.

Copies to:

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