IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL JOSEPH BARBONE,

Respondent.

_____/

Case No. 85,470

TFB Nos. 94-11,055 (13A)
94,11,290 (13A)

ANSWER BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the Florida Bar will be referred to as "The Florida Bar," or "the Bar." The Respondent, Michael J. Barbone, will be referred to as "Respondent."

"TR-1" will refer to the Transcript of testimony before the Referee at the final evidentiary hearing in the disciplinary case styled THE FLORIDA BAR v. MICHAEL J. BARBONE, TFB Nos. 94-11,055 (13A) and 94-11,290 (13A), dated September 11, 1995. "TR-2" will refer to the Transcript of testimony before the Referee at the penalty hearing in the same case dated September 26, 1995.

"RR" will refer to the Report of Referee in Supreme Court Case No. 85,470, dated October 18, 1995.

"Rule" or "Rules" will refer to the Rules Regulating the Florida Bar. "Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, MICHAEL JOSEPH BARBONE, has petitioned this Court to review the referee's findings and recommended sanction. The Complainant, THE FLORIDA BAR, herein answers Respondent's Initial Brief. This case involves Respondent's violation of the Rules Regulating The Florida Bar, as they relate to trust accounting requirements.

This case involved two counts; the Complainants were The Florida Bar and Anthony and Christine Zink. In Count I of its Complaint, the Bar had alleged that Respondent's trust account contained numerous unexplained shortages, and that Respondent had failed to comply with the minimum trust accounting procedures required by the Rules. The referee found by clear and convincing evidence that Respondent had violated ten (10) such rules. RR at 3. Count II was based on Respondent's representation of Mr. and Mrs. Zink, and the referee found the Respondent not guilty of any violations regarding the same. RR at 4.

A final evidentiary hearing was conducted September 11, 1995, followed by a penalty hearing on September 26, 1995. At the final hearing, the evidence presented as to Count I (i.e, whether Respondent had violated the trust accounting rules) consisted mainly of a "battle of the experts." As part of its investigation, and pursuant to subpoena, the Bar had conducted an

audit of Respondent's trust account records. TR-1 at 6-7. Mr. Pedro Pizarro, CPA ("Pizarro"), the Bar's staff auditor (now retired), testified for the Bar regarding the results of his audit. See TR-1 at 4-22. Mr. Leonard Anton, CPA ("Anton"), testified for the Respondent. See TR-1 at 31-36. The referee accepted both witnesses as "well-qualified CPA's." TR-1 at 31.

In conducting the Bar's audit, Pizarro used December 31, 1991 as his "starting point," because Respondent certified that the balances reported as of that date were accurate, said balances being the end result of a previous audit. TR-1 at 21. Respondent thus admitted that, as of December 31, 1991, he was entitled to $2,419.00 in fees, to be assessed against the then-current balance in his trust account of $4,063.64. Accordingly, Pizarro's audit proceeded from the fact (supplied by Respondent) that Respondent's trust account then had an overage of $1,644.64. TR at 21-22.

Pizarro testified on direct that Respondent did not comply fully with the subpoena. The accounting records sought by the Bar constituted the minimum records which should be attendant to maintaining the accounting procedures required under the rules. Pizarro nonetheless took what records were offered, conducted a "preliminary" audit, and continued to seek the rest of Respondent's records. See TR-1 at 8-9; TR-1 at 15-18. At one point, Respondent did provide Pizarro with additional, partial

information, following which Pizarro issued a final report. TR-1 at 16. The subpoena for the complete records was issued for February 14, 1994. TR-1 at 8. Respondent produced his additional information on April 15, 1994. TR-1 at 15-16. However, Pizarro testified that Respondent's ledger cards were never produced. TR-1 at 18. Neither did Respondent ever produce any monthly or annual reconciliations comparing the account balance with the available funds. Id.

Through his staff, Respondent communicated to Pizarro, on May 18, 1994, that he could not balance the account, and that Respondent "was planning to engage an accountant to go through his files and reconcile everything." TR-1 at 19-20. Pizarro's testimony on direct continued:

> Q. Other than the communications you've just described to the Court, did you receive any other communications from either Mr. Barbone or from someone in his office or someone on his behalf which explained why there were negative balances within the trust account according to your audit, or providing you with records or something that would reduce the negative balances, the shortage that you came up with in your audit?
>
> A. No. (TR at 20.)

Pizarro's audit report stated that the largest shortage of funds in Respondent's trust account occurred at the end of the audit period, January 31, 1994; that shortage Pizarro calculated to be $8,500.00. TR-1 at 27.

Pizarro testified that he did not necessarily need Respondent's ledger cards (which were never produced), as long as he had the deposits and disbursements "properly identified by client." TR-1 at 24. Interestingly, Pizarro noted that some of the missing information could accrue to Respondent's benefit; i.e., if Respondent could show that some of the disbursements were fees, that would reduce or perhaps even negate the shortages discovered. See TR-1 at 19. As stated, Respondent never produced such additional information. Lastly, Pizarro testified that, in his opinion, Respondent had not provided the minimum records required under the rules. TR-1 at 22.

Respondent's counsel attempted to use, to Respondent's own advantage, Respondent's failure to produce (or keep) the records which the Bar had requested:

> [MR. PIZARRO]: So when I finished and I prepared the accounting, I can say the records he gave me, the deposits and disbursements which I feed into my computer, the net result reflects a shortage. What I can't say is what the shortage or overage is in that case.
>
> Q: In other words, you can't tell with a great deal of accuracy what the status of his account was unless you had all that other information. Isn't that correct?
>
> A. Yes, I need identification of all the items and also a determination by his office of any fees that were in the trust account.
>
> Q: And you never got that?
>
> A: I never got that. (TR-1 at 25)(emphasis supplied)

In stark contrast to the data given to Pizarro, Respondent's expert, Mr. Anton, testified that he "was furnished individual ledger accounts for each client" dating back to 1992. Anton was also "furnished monthly reconciliations of the trust account balances compared to the amount of cash on hand starting from December 1991 up to and including July of 1995." TR-1 at 32. Thus, Respondent furnished to Anton what he had failed or refused to furnish to Pizarro. Nonetheless, Anton also testified as to shortages in the account. Anton's record testimony shows that Respondent's trust account had a shortage of $1,060.73 in July, 1992; a shortage of $132.08 in August, 1992; a shortage of $747.98 in September, 1992; a shortage of $1,364.89 in January, 1993, and a shortage of $89.06 in January, 1994. TR-1 at 33-34.

Anton testified that he received Respondent's documentation less than one month before the final evidentiary hearing (i.e., 16 months after the Bar subpoenaed the same). TR-1 at 36. He further testified that he had no idea when the documents had been prepared. Id. Lastly, Anton testified that, in his opinion, Respondent was in "substantial compliance" with the trust accounting rules. TR-1 at 35. As for the numerous shortages which Anton found, the Respondent admitted that they were accurate. TR-1 at 71.

Based on the foregoing evidence as to Count I, the referee found Respondent guilty of violating the following Rules

Regulating The Florida Bar: Rule 4-1.15(a)(funds in trust); Rule 4-1.15(d)(trust account rules); Rule 5-1.1(a)(funds in trust); Rule 5-1.1(d)(trust accounting procedures); Rule 5-1.2(b)(4)(documentary support); Rule 5-1.2(b)(5)(journal); Rule 5-1.2(b)(6)(ledger records); Rule 5-1.2(c)(1)(B)(monthly comparisons); Rule 5-1.2(c)(2)(annual balances); and Rule 5-1.2(c)(3)(retention of records). RR at 3.

As for discipline, the referee considered Respondent's prior disciplinary record, as well as appropriate aggravating and mitigating factors. See RR at 4-5; see generally TR-2. The referee recommended that Respondent be suspended for six months and thereafter until proof of rehabilitation. RR at 4. Such rehabilitation would include Respondent taking and passing the Multistate Professional Responsibility Examination. Id. The referee further recommended that Respondent's suspension be followed by a two-year probation. Id.

SUMMARY OF THE ARGUMENT

The Bar argues that the evidence presented was competent and substantial, that such evidence supports the referee's findings, and that said findings are not clearly erroneous. As to the allegations concerning Respondent's trust accounting violations, the referee fairly heard testimony from two accounting experts. The testimony of these two experts was consistent regarding the essential issue, i.e., that Respondent committed numerous technical violations relating to his client trust account.

The two experts diverged only with respect to their opinions regarding whether or not Respondent had complied with the trust accounting rules. The Bar argues that such conclusions, while competent, cannot be considered as more substantive than the totality of each expert's testimony. Respondent, however, in his Initial Brief, relies exclusively on the conclusional opinion reached by his own expert. Respondent's own expert did, however, identify several unexplained shortages in Respondent's trust account. The Bar submits that such findings, as reported by Mr. Anton, are more substantive than Mr. Anton's opinion. Therefore, the competent, substantial evidence adduced at the final hearing does support the referee's finding of guilt.

As for the recommended discipline, the Bar argues that the referee was likewise correct. The overriding factor in this regard is Respondent's prior violations of the trust accounting

rules, for which Respondent received a public reprimand followed by a one-year suspension. The Bar notes that Respondent's violations in this case occurred during his probation for substantially similar violations.

Respondent was also previously convicted of neglecting an important legal matter, for which he received a 30-day suspension. When Respondent's prior record is taken into account, plus the aggravating and mitigating factors appearing here, the recommendation made by the referee is entirely consistent with the objectives of Bar discipline, the Standards for Imposing Lawyer Discipline, and relevant case authority.

ARGUMENT

I. THE REFEREE'S FINDINGS AND RECOMMENDED SANCTION ARE CORRECT AND SHOULD BE APPROVED.

A. Respondent has Failed to Show that the Referee's Findings are Clearly Erroneous or Wholly Without Evidentiary Support.

Respondent's Initial Brief contains a single paragraph disputing the referee's findings. Said paragraph offers the conclusion that Respondent has not violated any of the ten (10) Rules which the referee found Respondent to have violated. The premise for this broad conclusion is that Respondent's expert witness testified that "Respondent adequately maintained all required records[.]" Thus, the premise is itself a conclusion.

In attorney discipline cases, a referee's findings of fact arrive at this Court clothed in a presumption of correctness, and it is the petitioner's burden to establish that the referee's findings of fact are wholly without support in the record. The Florida Bar v. Hirsch, 359 So. 2d 856 (Fla. 1978). The referee's findings will be upheld by the Court unless clearly erroneous or without evidentiary support. Id. In this case, Respondent has generally denied the referee's findings in their entirety, as they relate to Respondent's misconduct. In doing so, however, Respondent has failed to cite any portion of the record. He does not challenge any of the evidence upon which the referee relied in issuing said findings. Respondent sets forth no logical or legal arguments to support his proposition that this Court should

ignore the referee's findings and accept Respondent's version of the facts. Respondent cites no case authority whatever. His entire "argument" consists solely of a brief synopsis of expert testimony, which he has removed from its proper context. In doing so, he merely reprises evidence containing an opinion, and a version of facts, which the referee clearly declined to credit. Thus, Respondent has utterly failed to meet his burden of production, and his burden of persuasion, as they pertain to any challenge of the referee's findings. Because there is some evidentiary support for the referee's finding that Respondent is guilty of the ten rules violations, this Court must approve the referee's determination of same. See The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). Accordingly, the Court must ignore Respondent's "argument," and Respondent's challenge to the findings must fail as a matter of law.

B. The Recommended Sanction Comports with the Objectives of Bar Discipline, The Standards for Imposing Lawyer Discipline, and Relevant Case Authority.

Regarding the recommended sanction, the Bar first argues that the overriding factor in this case, pertaining to Respondent's sanction, is the fact of Respondent's recidivism during his probation; i.e., the fact that Respondent committed rules violations during a time when he was on probation for his previous, substantially similar violations. See TR-2 at 6-7.

The Bar next responds to Respondent's cited authorities, as contained in his Initial Brief. Respondent relies upon The Florida Bar v. Aaron, 490 So. 2d 941 (Fla 1986); The Florida Bar v. Neely, 488 So. 2d 535 (Fla. 1986); The Florida Bar v. Rogowski, 399 So. 2d 1390 (Fla. 1981); and The Florida Bar v. Miller, 548 So. 2d 219 (Fla. 1989).

Respondent cites Aaron, supra, for the proposition that a failure to keep adequate trust account records warrants a public reprimand and a one-year probation. The Bar notes, however, that, prior to the instant matter, Respondent has been found guilty of failing to keep adequate trust account records, and did in fact receive a public reprimand and a one-year probation. See Supreme Court of Florida cases 79,770 and 80,614; see also RR at 4. The Bar also notes that the Aaron opinion makes no mention of any prior disciplinary record in that case. Therefore, the Bar argues that Aaron cannot reasonably support Respondent's contention that the recommended sanction is excessive.

Similarly, Respondent's reliance on The Florida Bar v. Miller, 548 So. 2d 219 (Fla. 1989), is misplaced. The respondent in Miller received a 90-day suspension for trust account violations absent a dishonest motive. Id. at 221. However, the Bar notes that Miller had no prior disciplinary record. Id. at 219. Therefore, Miller cannot reasonably support Respondent's

argument for a lesser sanction. For identical reasons, Respondent's reliance on Rogowski, supra, is also misplaced.

Respondent cites The Florida Bar v. Neely, 488 So. 2d 535 (Fla. 1986), for the proposition that unintentional accounting errors made by a previously disciplined attorney warrants a 60-day suspension and two-year probation. See id. at 536. Mr. Neely's disciplinary record included two previous convictions, the first for "self-dealing and misrepresentation," for which he received a 90-day suspension, the second for "neglect of a legal matter," which earned him a public reprimand and a one-year probation. Id., n.2; see also The Florida Bar v. Neely, 372 So. 2d 89 (Fla. 1979); The Florida Bar v. Neely, 417 So. 2d 957 (Fla. 1982).

The Bar argues that Neely is distinguishable in two important areas. First, Neely did not commit back-to-back violations of the trust accounting rules, as has Respondent. Second, Mr. Neely's one-year probation for lack of diligence, imposed in 1982, was clearly over by the time he was found to have grossly neglected his trust accounting duties. Thus, Neely did not commit the same violation twice, and did not do so while on probation for a prior, similar violation. In contrast, that is precisely what occurred here. Thus, the Bar contends that Neely cannot reasonably apply to the instant matter.

The overriding factor in this case is the fact of Respondent's recidivism, during his probation, relative to the same rules he has previously violated. In The Florida Bar v. Whigham, 525 So. 2d 873 (Fla. 1988), this Court addressed the issue of a respondent's recidivism regarding technical violations of the trust accounting rules. Identical to the Respondent, Mr. Whigham's first violation of said rules resulted in a public reprimand with a one-year probation. Id. at 874. Thereafter, during his probation, Whigham failed to submit monthly reconciliations of his trust account, as the terms of his probation required. Id. A Bar audit revealed overdrafts and "an apparent shortage." Id. As in Respondent's case, no client complained to the Bar, and no client suffered actual injury. Id. Whigham admitted to several technical violations regarding his trust account. Id.

Due to his recidivism, the referee recommended that Whigham be suspended for three years. This Court agreed, and suspended him for three years. Id. at 875. Moreover, the Court barred Whigham from ever having a client trust account. Id. This, after the Court noted that "Whigham cooperated with The Florida Bar and entered a plea of guilty to the charges." Id. at 874.

The main point of distinction between Whigham and the instant matter is that, here, Respondent did not fully cooperate with the Bar, by and through his non-production of records, and

he did not plead guilty. Thus, keeping in mind the precedent established in Whigham, the Bar feels that the sanction recommended by the referee in this case is more than just and proper.

In reviewing a referee's recommended sanction, the scope of this Court's review is somewhat broader than that afforded to findings of fact. The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989). Nonetheless, the Bar notes that a separate penalty hearing was conducted in the instant case, wherein both parties did submit arguments as to the recommended sanction. Because of this, the Bar argues that the referee's recommendation should carry a higher presumption of correctness than may be usual.

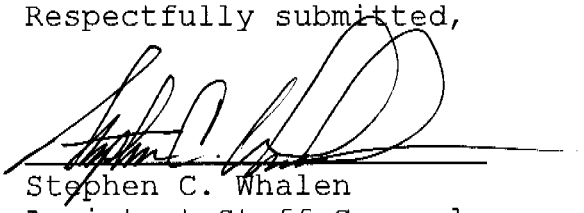
The Bar further notes that the recommended sanction is well within the Standards for Imposing Lawyer Discipline (Standards). Standard 4.12 states that suspension is appropriate when a lawyer knows or should know that the lawyer is dealing improperly with client property, and causes potential injury to a client. Respondent should be well aware of this Standard, since he has previously received a public reprimand for similar misconduct. The Bar argues that Respondent, by repeating the misconduct while on probation for same, and considering the fact that he has previously been suspended by this Court, has elevated the deterrent aspect of lawyer discipline above the rehabilitation component of same. Respondent has previously been afforded

adequate opportunity for rehabilitation. Accordingly, any sanction the Court imposes in this case must necessarily address Respondent's repeated failure or refusal to comply with the Rules Regulating The Florida Bar.

CONCLUSION

For all the foregoing reasons, the referee's findings of fact should be approved by the Court, and the referee's recommended sanction of suspension for six months and thereafter until proof of rehabilitation should also be approved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief has been furnished by regular U.S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy by regular U.S. Mail to Thomas E. Parnell, Esq., Counsel for Respondent, at 508 W. Fletcher Avenue, Suite 105, Tampa, Florida 33612-4313, and a copy by regular U.S. Mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 27th day of February, 1996.

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