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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CYRUS ALAN COX,

Respondent.
/

Case No. 87,536
[TFB Case Nos. 95-31,066 (09A) & 95-31,390 (09A) 1

Case No. 88,~~831~~ 381
[TFB Case No. 96-30,729 (09A) 1

THE ~~FLORIDA BAR'S~~ ANSWER BRIEF AND INITIAL BRIEF ON CROSS-PETITION FOR REVIEW

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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 transcript of the final hearing held on August 19-21, 1996, shall be referred to as "T1", followed by the cited page number(s). The transcript of the final hearing held on September 19, 1996, shall be referred to as "T2", followed by the cited page number(s). The transcript of the disposition hearing held on November 12, 1996, shall be referred to as "T3", followed by the cited page number(s).

The Report of Referee dated December 31, 1996, in Case No. 87,536 will be referred to as "RR1", followed by the referenced page number(s). The Report of Referee dated December 31, 1996, in Case No. 88,381 will be referred to as "RR2", followed by the referenced page number(s).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Resp. Ex. _____, followed by the exhibit number.

STATEMENT OF THE CASE

On November 29, 1995, the Ninth Judicial Circuit Grievance Committee "A" found probable cause against the respondent in Case Nos. 95-31,066 (09A) and 95-31,390 (09A). The bar filed an eight count complaint on March 8, 1996 which was assigned Supreme Court Case No. 87,536. The Honorable William T. Swigert was appointed as referee on March 21, 1996.

On March 27, 1996, the Ninth Judicial Circuit Grievance Committee "A" found probable cause against the respondent in Case No. 96-30,729 (09A). The bar filed its complaint on July 2, 1996 which was assigned Supreme Court Case No. 88,381. The Honorable William T. Swigert was appointed as referee in Case No. 88,381 on or about July 11, 1996.

Pursuant to the referee's Order on Complainant's Motion to Shorten Discovery Time And Set Final Hearing dated August 13, 1996, Case No. 88,381 was consolidated for the final hearing with Case No. 87,536. The final evidentiary hearing was held August 19 - August 21, 1996, and September 19, 1996 and the disposition hearing, in which the parties presented arguments as to the appropriate level of discipline, was held on November 12, 1996. On December 31, 1996, the referee issued his reports in Case No. 87,536 and in Case No. 88,381,

With respect to Case No. 87,536, the referee found the respondent not guilty in Counts I, III, IV and V. In Count II, the referee found the respondent guilty of violating only R.

Regulating Fla. Bar 4-1.15(d) for setting up an account and calling it "escrow account" instead of "trust account."

With respect to Count VI in Case No. 87,536, the referee found the respondent not guilty of violating R. Regulating Fla. Bar 3-4.3, but found the respondent guilty of violating Rules 4-1.7(b), 4-1.8(a), 4-1.15(a), 4-1.15(d), 4-4.1(a), 4-8.4(c), 5-1.1(a), 5-1.1(c), 5-1.1(d), 5-1.1(g), 5-1.2(b), and 5-1.2(c).

In Count VII of Case No. 87,536, the referee found the respondent not guilty of violating Rules 4-1.4(a), 4-1.7 (b), and 4-1.8(a). In Count VIII, the referee found the respondent guilty of violating Rules 4-1.3, 4-1.4(a), and 4-1.4(b). The referee found the respondent not guilty on the other rules charged in Count VIII.

In Case No. 87,536 the referee recommended the respondent receive a thirty (30) month suspension, followed by a three (3) year period of probation; that the respondent attend and complete the Florida Bar Trust Account Procedures course; and that during the probation period, the respondent be subject to random trust account audits. The referee further recommended the respondent pay the bar's costs in prosecuting this case totaling $12,032.26.

In Case No. 88,381, the referee found the respondent guilty of an improper notarization on a client's will which violated Rules Regulating The Florida Bar 3-4.3, 4-8.4(c), and 4-8.4 (d). The referee recommended the respondent receive a one (1) year suspension to run concurrent with the thirty (30) month

suspension recommended in Case No. 87,536, and that the respondent pay the bar's costs of $903.00.

The Board of Governors of The Florida Bar considered these cases at its March 1997 meeting. The board voted to appeal the referee's discipline recommendations in Case No. 87,536 and, instead, seek disbarment and payment of the bar's costs. On or about April 4, 1997, the respondent filed a Petition for Review seeking review of the referee's findings of fact, findings of rule violations and the recommended discipline in both cases, 87,536 and 88,381. On April 7, 1997, the bar filed a cross-petition for review in Case No. 87,536. It is the bar's position that the referee reached erroneous conclusions not supported by the evidence in Count VII thereby rendering an inadequate recommendation as to the respondent's guilt. Further, the referee's recommended discipline of a thirty (30) month suspension and three (3) year period of probation is insufficient considering the facts of the case and because the referee recommended a concurrent one (1) year suspension in Case No. 88,381. Due to that cumulative discipline, disbarment is warranted rather than a period of suspension.

The respondent's initial brief was due to be filed by May 5, 1997. On April 30, 1997, the respondent served a Motion For Extension of Time requesting that he be permitted additional time, up to and including May 19, 1997, within which to file his initial brief. This Court granted the respondent's motion and

allowed him up to and including May 19, 1997 in which to file his initial brief. On May 19, 1997, the respondent served his initial brief.

STATEMENT OF THE FACTS

Only those specific findings of fact from the referee's reports which are the subject of this appeal are addressed below. Unless otherwise noted, the following facts are taken from the referee's reports in Case Nos. 87,536 and 88,381.

Case No. 87,536
TFB Case Nos. 95-31,066 (09A) & 95-31,390 (09A)

As to Count VI: In 1993, the respondent met James Ballweg and they worked together on business related activities as owner/investors. Michael Partain was the principal and operator of Action Loss Prevention Specialists, Inc. Mr. Ballweg was the senior associate and consultant and the respondent was general counsel. Mr. Ballweg obtained investment capital from a Swiss national and a Swiss attorney, Norbert Jann, for whom Mr. Ballweg was a U.S. agent. The money was used to start a new corporation, ALPS Marketing, Inc. which was incorporated in 1994.

The respondent became an associate with the law firm of Greenspoon, Marder, Hirschfeld and Rafkin (hereinafter referred to as "GMHR") on February 1, 1994 pursuant to an employment agreement executed by Gerald Greenspoon of the firm and the respondent. The respondent was to be paid an annual salary and agreed to bring his clients from his practice into the firm. The firm did not assume the respondent's account receivables and the

respondent was allowed to collect them. The firm maintained a trust account for its clients and the respondent was expected to utilize the firm's trust account for all client matters after joining the firm. The respondent did not have signatory authority on the firm's trust account.

When ALPS Marketing, Inc. was created, the respondent was the sole owner and director as well its attorney. On June 15, 1994, the respondent entered into an employment agreement with ALPS Marketing, Inc. that provided that he would be paid $4,166.66 per month. GMHR was entitled to any legal fees paid to the respondent by ALPS Marketing, Inc. as he was prohibited from other employment.

The respondent wrote to Norbert Jann on GMHR letterhead on July 14, 1994 to formalize the terms of a $150,000 line of credit being provided to Action Loss Prevention Specialists, Inc. In that letter, the respondent advised Mr. Jann he would represent him in the matter and be available for consultation to be charged at an hourly rate. The respondent advised Mr. Jann would be responsible for paying all the legal fees and the respondent would send him a monthly itemized billing statement. The respondent neither revealed his involvement with the company or its attorney nor his interest in it and its proposed subsidiaries. The terms of the agreement were that the respondent would use the $150,000 as a revolving line of credit to pay startup costs, four months of operating expenses, and attorney's

fees and costs. Action Loss Prevention Specialists, Inc. would be able to access the money only at a maximum rate of $25,000 per month from the second month forward and only after submitting a funding request. No one other than the respondent and Mr. Jann would have access to the funds. The funds would not be for Mr. Ballweg's personal use. In exchange for the line of credit, Mr. Jann would receive a certain percentage of the stock until the line of credit was repaid.

On July 25, 1994, Mr. Jann wired $150,000 to a trust account the respondent was maintaining at Barnett Bank, account number 002833049081. In his check register, the respondent noted receipt of the deposit on an unspecified date that was prior to July 25, 1994 and he began issuing checks against the funds as early as July 19, 1994. GMHR was not aware of this transaction or the respondent's involvement with ALPS Marketing, Inc. because of the separate trust account he was maintaining. The respondent noted the deposit of the $150,000 on the stub for check number 1058 but did not indicate if he issued that check and he did not date the entry. He then issued check number 1059 on an unknown date to himself in the amount of $15,000 to repay money the respondent advanced to Mr. Ballweg for start up costs. The check stub failed to reflect the purpose of the disbursement or the client matter. The respondent issued a number of checks made payable to Mr. Ballweg in the total amount of $30,038.00 for draws, advances and expense reimbursements. In addition, on July 27, 1994, the

respondent issued check number 1063 to Action Loss Prevention Services as a credit line advance in the amount of $56,182.71 and he also issued check number 1067 in the amount of $2,400 against Mr. Jann's funds but failed to indicate on the check stub the date or the identity of the payee. The respondent also paid $2,000 to the Seminole County Democratic Executive Committee as a donation by undated check number 1065. That check was also drawn against Mr. Jann's funds.

The respondent paid himself a total of $47,150 from Mr. Jann's funds. In addition to the $15,000 check he issued to reimburse himself for money he advanced to Mr. Ballweg, the respondent issued check number 1066 on July 29, 1994 in the amount of $11,000 as payment for accrued fees earned prior to January 31, 1994, although ALPS Marketing, Inc. was not incorporated until September 1994. On September 15, 1994, the respondent issued check number 1078 in the amount of $21,000 with the notation it was for a "Mercedes" automobile that the respondent bought for his own use. On October 24, 1994, the respondent issued check number 1083 in the amount of $150.00 for an unspecified reason.

The respondent issued additional checks to others from funds deposited by Mr. Jann. On August 19, 1994, the respondent issued check number 1073 from his trust account to Municipal Credit Union in the amount of $724.65, and there was no client matter or purpose identified. By check number 1074 dated August 29, 1994,

the respondent made a payment from Mr. Jann's funds for a client matter. And, by check number 1080 dated September 28, 1994, the respondent paid out $3,000 'to cover ALPS check."

The respondent also used Mr. Jann's funds to open a separate checking account for ALPS Marketing, Inc. The respondent issued check number 1068 in the amount of $10,000 from his trust account and used it to open account number 234046599 at Barnett Bank for the company (hereinafter referred to as "the ALPS account"). The check stub failed to reflect the payee or the issuance date. The respondent issued check number 1002 from the ALPS account on September 22, 1994 to himself in the amount of $3,000 for "Auto Purchase." It was intended to be used to buy an automobile for the corporation and was drawn against Mr. Jann's funds deposited to the ALPS account. The respondent sold the corporation his Audi automobile and then used Mr. Jann's funds on deposit in the trust account to purchase a Mercedes automobile for himself. From the ALPS account, the respondent issued approximately eight checks to Mr. Ballweg, two of which, check numbers 1025 and 1026, were marked as payment for his salary. In addition, the respondent issued check number 1018 on November 21, 1994 in the amount of $12,762.75 payable to GMHR as payment for the legal fees of an Ed Maddy regarding a dissolution of marriage action. Mr. Jann was not aware of that disbursement nor was it in any way related to developing business for ALPS Marketing, Inc. Mr. Ballweg paid Mr. Maddy's fees because Mr. Maddy was a friend of one of the

corporate principals.

On November 18, 1994, Mr. Jann wired approximately $200,000 to the respondent's operating account maintained at NationsBank, account number 036034103032, an account on which the respondent's legal assistant also had signatory authority. There was no record of those funds ever being transferred to the respondent's trust account as required since the funds constituted a second loan from Mr. Jann to Mr. Ballweg. Despite the $200,000 deposit, the account's ending balance on November 30, 1994 was a negative $9,673.71 and two checks were returned due to insufficient funds.

GMHR learned of the $200,000 wire transfer after an employee of the bank called to inquire as to why one of the firm's attorneys was having such a large sum of money transferred to his personal business account. After being confronted, the respondent, in a memorandum dated November 28, 1994 to Michael Marder, advised the money was legal fees he earned two years before while a sole practitioner. The respondent failed to declare any of the money he received as income on his tax returns for 1994. On January 5, 1995, the respondent advised GMHR these same funds were a loan from Mr. Jann.

The respondent never provided Mr. Jann with a detailed accounting of the disbursement of his investment funds and made disbursements that violated the terms of their agreement. The only accounting was a letter by the respondent dated November 6, 1994, written on GMHR letterhead, where he failed to advise Mr.

Jann he had repaid himself for a loan he made to Mr. Ballweg for start up costs and failed to advise Mr. Jann of his total legal fees other than to state they had been minimal. The respondent told Mr. Jann in the letter that his role in the corporations was to regulate the distribution of money and to coordinate the legal aspects of any contracts entered into. He further stated that in his opinion, Mr. Jann's funds had been used in accordance with the terms of the agreement. In fact, this was not true. However, Mr. Ballweg and Mr. Jann testified that Mr. Ballweg had executed promissory notes for each wire transfer to respondent and Mr. Ballweg was permitted to spend the funds at his discretion. Mr. Ballweg testified he was shown each and every disbursement made by the respondent concerning those funds from the operating, trust, and ALPS Marketing, Inc. accounts where funds were ultimately transferred. Mr. Ballweg testified that he specifically authorized each and every disbursement made by the respondent. In response to a question by the referee, Mr. Jann stated that he had no complaint concerning the way his affairs were handled by the respondent.

The respondent's trust account failed to comply with the Rules Regulating The Florida Bar. The check stubs for the period of September 1992 through December 1994 frequently failed to reflect the client identity, payee, date of disbursement, balance, and/or amount of disbursement and did not always reflect deposits. The records on check stubs concerning deposits also

failed to reflect the client matter and date. There was evidence of commingling and client funds were at times deposited to one of the respondent's two operating accounts at Barnett Bank, account number 2833049073, and NationsBank, account number 03603413932. The respondent's two operating accounts had checks returned due to insufficient funds. From the time the operating account at NationsBank was opened on June 3, 1994, the respondent had negative balances on four occasions.

In September, 1994, Michael Marder of GMHR had changed the respondent's employment agreement and he was made an independent contractor. The respondent continued as an independent contractor with GMHR until approximately December 28, 1994, when it was decided that the respondent would cease being an employee of GMHR effective January 3, 1995 and, instead, would rent office space from the firm. On January 5, 1995, Mr. Marder discovered the existence of a bank account established by the respondent which he considered to be unauthorized. The respondent was ejected from his office by GMHR, the locks were changed, and the firm kept the respondent's personal belongings, including his chair, desk, computer, bank records, and all of the respondent's client files. On January 6, 1995, Mr. Marder, David Lenox and GMHR's legal administrator, Scott Ross, met with the respondent by speaker phone and asked if he had diverted fees from the firm that it was owed by ALPS Marketing, Inc. They stated that the respondent admitted to having diverted less than $20,000. However, the

respondent testified that he did not take or divert any of GMHR's funds. The respondent admitted that he **said** he did so in the conversation with Mr. Marder, Mr. Lenox and Mr. Ross because he was upset and was trying to calm and resolve the intense and acrimonious situation.

Based upon the foregoing findings of fact, the referee found the respondent guilty of violating the following Rules Regulating The Florida Bar: 4-1.7(b), 4-1.8(a), 4-1.15(d), 4-4.1(a), 4-8.4(~), 5-1.1(a), 5-1.1(c), 5-1.1(d), 5-1.1(g), 5-1.2(b) and 5-1.2(c).

As to Count VII: John Meek was a long-time, close personal friend of the respondent in Denver, Colorado [RR1, p. 25]. During the time the respondent was employed by GMHR, he represented Mr. Meek in a tax equalization dispute with Mr. Meek's employer, Honeywell [T1, p. 600; RR1, p. 25]. Honeywell had a policy regarding the equalization of foreign-earned income and U.S. citizens that were working abroad [T2, pp. 901, 935]. Mr. Meek had been excluded from that policy which caused a significant increase in the amount of taxes he had to pay [T2, pg. 901]. Had Mr. Meek been included in the tax provision, Honeywell would have paid $8,000 in taxes Mr. Meek was now obligated to pay [T2, pp. 935-936]. In or around December 1994 the respondent made an interest free loan to Mr. Meek in the amount of $8,900 to pay the taxes that he owed [T2, pp. 901-902]. Thereafter, Mr. Meek

paid the respondent $100.00 toward the loan indebtedness.

The bar alleged that the respondent's loan to his client, Mr. Meek, was a conflict of interest because the respondent would be obtaining an interest in the outcome of the litigation. In addition, the terms of the loan transaction were not reduced to writing, nor was there any written disclosure regarding the potential conflict of interest. However, the referee found that the evidence did not show the respondent violated Rules 4-1.7(b) and 4-1.8(a). The referee also found the respondent not guilty of violating Rule 4-1.4(a) and the bar does not seek review of that finding,

Case No. 88,3-81
TFB Case No. 96-30,729 (09A)

The respondent was hired **by** Martha Skinner to prepare a will for her father, Charles Goethe. The respondent prepared the will for Mr. Goethe. Ms. Skinner and the respondent agree that Mr. Goethe executed the will outside the presence of a notary. The absence of a notary at the time of the signing of the will was confirmed by an affidavit of Susan B. Melton. However, Ms. Skinner and the respondent disagreed as to whether or not the respondent was present to witness Mr. Goethe's signing of the will. While Ms. Skinner claimed the respondent was not present to witness the will signing, the respondent testified that he was

present.

The referee found that there was sufficient evidence to conclude that the respondent was not present for the signing of the will. Therefore, the referee found the respondent guilty of obtaining an improper notarization in violation of Rules 3-4.3, 4-8.4(c).

SUMMARY OF THE ARGUMENT

This Court has long held in bar disciplinary proceedings that a referee's findings of fact are presumed correct and the burden of proving those findings to be erroneous or unsubstantiated rests on the party seeking a review of those facts. In the instant matters, the respondent contends that the referee's findings in Case No. 88,381 and in Count VI of Case No. 87,536 are not supported by clear and convincing evidence. The bar will show, however, that it has met its burden of proof as there is substantial evidence in support of the referee's findings, including the respondent's own testimony.

Although it is the bar's position that the referee's findings of fact are clearly supported by the evidence, the bar submits that in one instance the referee reached erroneous conclusions from those findings. In Count VII of Case No. 87,536, the referee found there was no conflict of interest in the respondent loaning money to a client, who was also a long-time friend, to pay outstanding taxes after the client suffered several financial setbacks. However, the evidence, including the respondent's own testimony, shows that a conflict did exist as the respondent's loan concerned the same matter for which he was providing legal services to the client. Further, the evidence established that there was no written disclosure of the potential conflict as required by the Rules Regulating The Florida Bar.

Accordingly, the referee's conclusion that the respondent's conduct in this matter did not violate the rules regarding conflict of interest is erroneous.

The referee has recommended the respondent be suspended for thirty (30) months in Case No. 87,536 and that he receive a concurrent one (1) year suspension in Case No. 88,381. The respondent argues those discipline recommendations are too harsh and that the range of discipline from a public reprimand to a ninety (90) day suspension would be more appropriate. The bar submits that, at the very least, the referee's recommended suspensions are sufficient. However, the bar contends that given the serious misconduct found by the referee, the relevant case law and standards, and the cumulative nature of the respondent's misconduct, disbarment in these matters is warranted.

The respondent objects to the referee's taxation of costs against him in the amount of $12,032.26 for Case No. 87,536 on the basis that the referee found him not guilty on some of the original charges. The respondent had the opportunity to object to those costs prior to the referee issuing his report. The referee chose to impose the full amount of costs charged by the bar against the respondent. As the imposition of costs is left to the discretion of the referee, consistent with the Rules Regulating The Florida Bar, the taxation of $12,032.26 in costs against the respondent in Case No. 87,536 is appropriate.

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF GUILT IN COUNT VI OF CASE NO. 87,536 AS TO R. REGULATING FLA. BAR 4-1.7(b), 4-1.8(a), 4-4.1(a), 4-8.4(c) AND 5-1.1(g) ARE CLEARLY SUPPORTED BY THE EVIDENCE.

"The party contesting the referee's findings and conclusions carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." The Florida Bar v. Spann, 682 so. 2d 1070 (Fla. 1996). The respondent contends that the referee's findings of guilt in Count VI of Case No. 87,536, with respect to five specific rule violations found, are not supported by the evidence. Two of those rules concern a conflict of interest, R. Regulating Fla. Bar 4-1.7(b) and 4-1.8(a). The respondent states at page 11 of his brief that the referee's report as to Count VI does not explain what conflict existed between his clients or between the respondent and his clients.

It is clear from the referee's findings and the testimony that in 1993, prior to his employment at GMHR, the respondent began representing James Ballweg and Action Loss Prevention Specialists, Inc. (hereinafter referred to as "ALPS, Inc.") [RR1, p. 15; T1, p. 560]. In June 1994, the respondent became an employee of ALPS, Inc.'s subsidiary, ALPS Marketing, Inc. [RR1, p. 171. By letter dated July 14, 1994, to Norbert Jann of

Switzerland the respondent set forth the terms of Mr. Jann's $150,000 line of credit he was providing to ALPS, Inc. [RR1, pp. 15-16; Bar Ex. 39]. In his letter, the respondent advised he would represent Mr. Jann in the matter and set forth his hourly fee rate and detailed how the $150,000 was to be utilized [RR1, p. 16]. The respondent claims that the referee's finding that the respondent's letter did not reveal to Mr. Jann the respondent's involvement with the company as its attorney nor his interest in it was erroneous. It is the respondent's position that his July 14, 1994 letter and the employment agreement dated June 15, 1994 signed by Mr. Ballweg and the respondent [Resp. Ex. 9] set forth his involvement in the company. However, there was no evidence presented that Mr. Jann was provided with a copy of the June 15, 1994 employment agreement. It is clear from the respondent's July 14, 1994 letter, [Bar Ex. 39], that he did not advise Mr. Jann that he also represented Mr. Ballweg and ALPS, Inc. nor did he reveal he was an employee of ALPS Marketing. Therefore, the referee's finding in that regard is correct.

The respondent's conflict of interest is further apparent with Mr. Jann's loans of $150,000 and $200,000 to Mr. Ballweg in July and November, 1994. At those times, the respondent was representing Mr. Jann and Mr. Ballweg simultaneously, he represented ALPS, Inc., and was an employee of ALPS Marketing, Inc. In addition, the respondent allegedly prepared promissory notes signed by Mr. Ballweg regarding the loans by Mr. Jann [T1,

p. 588]. It should be noted that the respondent did not possess copies of the promissory notes and testified at the final hearing that Mr. Jann had the original promissory notes in Switzerland [T1, pp. 584-585]. The respondent did not request Mr. Jann bring the promissory notes with him when he traveled from Switzerland to testify in the bar case on his behalf, and neither Mr. Jann nor Mr. Ballweg saw fit to bring even copies of the notes when they came to testify on behalf of the respondent [T1, pp. 585, 674-675 and 706].

The respondent testified at the final hearing that although his multiple representation and potential conflict of interest were discussed with Mr. Jann and Mr. Ballweg, he did not believe there was a written document reflecting that they both waived any conflict [T1, pp. 588-589]. Mr. Jann testified that as a businessman and an attorney, he did not see the need for independent advice where the respondent was representing him and Mr. Ballweg [T1, p. 664]. Mr. Ballweg testified he thought he saw a written memo where the respondent advised of the potential conflict in the dual representation and advised he had the opportunity to seek independent counsel, but that as an experienced businessman he did not think it was necessary and he discarded the memo [T1, pp. 714, 716]. Further, none of the three "experienced businessmen" found it necessary to have a written conflict disclosure when the respondent received an ownership interest in ALPS Marketing, Inc. in January, 1995 [T1, pp. 716-

717]. The respondent suggests in his brief that because Mr. Jann and Mr. Ballweg are sophisticated, experienced businessmen and friends the written conflict disclosure, as required by R. Regulating Fla. Bar 4-1.8(a), was not necessary. However, it strains all credibility that if the respondent did disclose the conflict, that two sophisticated businessmen did not find it to be of some concern. Furthermore, why would such experienced businessmen not reduce their conflict waivers to writing in case the transactions were questioned in the future? Although the respondent is also an experienced business man and an attorney, he apparently did not think he needed to protect himself by having his clients execute written conflict waivers. Nowhere in Rule 4-1.8 or its commentary does it say that a lawyer only has to comply with the written conflict disclosure requirement when the clients are uneducated or inexperienced in business and financial matters. Clearly, the evidence and testimony established that the respondent engaged in a conflict of interest when he neglected to inform Mr. Jann in writing of his representation of Mr. Ballweg and ALPS, Inc. and his involvement in the company, and when he failed to obtain the written consent of his clients regarding the dual representation and potential conflict. Thus, the referee's finding of guilt as to Rules 4-1.7(b) and 4-1.8(a) is supported by clear and convincing evidence.

The respondent argues that there was no evidence to support the referee's finding of guilt as to Rules 4-4.1(a) for making a false statement of material fact or law to a third person, and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. It appears the respondent misunderstands the referee's findings in this regard.

The respondent mischaracterizes the referee's findings regarding a memo dated November 28, 1994 from the respondent to Michael Marder of GMHR concerning the $200,000 wire transfer from Mr. Jann [Bar Ex. 2]. It has been the respondent's position during these disciplinary proceedings that upon being confronted by Mr. Marder regarding the $200,000 wire transfer, he advised that the money was Mr. Jann's personal funds for investment purposes and that the funds were also a loan to Mr. Ballweg and then he put such representations in the November 28, 1994 memo to Mr. Marder [T1, pp. 589-590; T2, pp. 895-896]. The respondent's memo states, in pertinent part, that "the funds received on November 18, 1994 by wire transfer from Switzerland ***are personal funds."*** (Emphasis added). The memo says nothing about the funds belonging to Mr. Jann or that they were investment funds. Mr. Marder testified during the final hearing that the respondent told him that the $200,000 were fees he had earned prior to joining GMHR, and that the money was overseas and he was bringing the funds back into The United States [T1, pp. 86, 93, 110-111,

245-247]. Mr Marder further testified that he asked the respondent for a memo stating the $200,000 was not client funds but, rather, was his personal funds; and that he questioned the respondent as to the tax implications on that sum of money and the respondent replied that he had reported the money on his tax returns [T1, PP. 93-97, 110-114, 245-247]. The referee specifically found that the respondent had failed to declare that money on any of his tax returns [RR1, p. 21]. In addition, David Lenox of GMHR testified at the final hearing that Mr. Marder had discussed with him that the respondent had represented the $200,000 was a fee he had earned in a transaction two years before; and that during a subsequent telephone conversation with the respondent, at which Mr. Lenox was present, the respondent advised that the funds were a loan from Mr. Jann [T1, pp. 282-2831. It appears the referee found the testimony of Mr. Marder and Mr. Lenox to be credible and thus found that when the respondent stated in his November 28, 1994 memo that the funds were his personal funds, he was representing that it was his legal fees he had earned two years before. The referee was in the best position to decide who was more credible.

> The referee, as finder of fact in Bar disciplinary proceedings, is in a unique position to assess the credibility of the witnesses and appraise the circumstances surrounding the alleged violations. Oftentimes, the referee has an opportunity to evaluate

first-hand the forthrightness and character of the respondent. The Florida Bar v. Lecznar, 22 Fla. L. Weekly s168 (March 27, 1997).

It is easy to interpret the respondent's use of the term "personal funds" to mean his earned legal fees, particularly when there was noting in the memo to suggest the money was anything but the respondent's own personal funds. It is certainly apparent that the respondent's representations that he initially advised Mr. Marder that the money was Mr. Jann's personal investment funds, and that his memo so reflects, was not truthful. Therefore, Rules 4-4.1(a) and 4-8.4(c) are implicated and, because there is support in the record, the referee's finding of guilt on those rules is not erroneous.

The respondent also takes issue with the referee's finding of guilt as to R. Regulating Fla. Bar 5-1.1(g) for using, endangering or encumbering a client's trust funds for the purpose of carrying on the business of another client without the permission of the owner of the funds after full disclosure. The trust account allegations against the respondent were, for the most part, dealt with under Count VI of Case No. 87,536. The respondent admitted to several violations regarding his trust account [T1, p. 634]. However, if the respondent needs an example of his violation of Rule 5-1.1(g), his issuance of check number 1084 from his trust account applies. Through testimony at the

final hearing it was established that the respondent's client, Lordes Zaczac, issued a check payable to the respondent in the amount of $775.19 on November 17, 1994 [Bar Ex. 21]. Two days earlier, on November 15, 1994, the respondent issued trust account check no. 1084 regarding the Zaczac matter. The respondent admitted during the final hearing that in his issuance of check no. 1084 he drew on trust account funds that were not yet deposited to the trust account [T1, p. 636]. Therefore, the respondent violated Rule 5-1.1(g) and the referee's finding of guilt on that rule violation is correct.

POINT II

THE REFEREE'S FINDINGS IN CASE NO. 88,138 ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

In Case No. 88,138, the referee found that the respondent prepared a will for Charles Goethe, that Mr. Goethe executed the will outside the presence of a notary, and that the respondent was not present to witness Mr. Goethe's execution of the will, although the respondent signed the will as a witness. As a result, the referee found the respondent guilty of violating R. Regulating Fla. Bar 3-4.3 for engaging in conduct that is unlawful or contrary to honesty and justice; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and 4-8.4(d) for engaging in conduct in connection with the practice of law that is contrary to honesty and justice.

It is uncontroverted that the respondent had Mr. Goethe sign his will outside the presence of a notary, and that the will was notarized at a location other than the nursing home where Mr. Goethe signed his will. The respondent contends at page 18 of his brief that the referee's finding that he was not present when Mr. Goethe signed his will is not supported by clear and convincing evidence. The respondent suggests that the only basis for the referee's finding is uncorroborated hearsay testimony in the form of an affidavit by Martha Skinner, Mr. Goethe's daughter. Ms.

skinner's affidavit [Bar Ex. 23] states the respondent was not present when her father signed his will. Even if Ms. Skinner's affidavit was the only evidence in support of the referee's finding, the fact that it is hearsay evidence is irrelevant. As was repeatedly discussed during the final hearing in this case, hearsay evidence is admissible in bar disciplinary proceedings. The Florida Bar v. Maynard, 672 So. 2d 530 (Fla. 1996); The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986).

However, there is additional evidence in this case which corroborates Ms. Skinner's affidavit, including the respondent's own testimony. In his answer to the bar's complaint, the respondent denied the allegation that he signed Mr. Goethe's will as a witness although he was not present when Mr. Goethe executed the will. During his deposition, taken on August 12, 1996, the respondent stated that he was present when Mr. Goethe signed his will [T2, pp. 929-930]. During the final hearing, the respondent testified that he recalled going over the will with Mr. Goethe but had no way of refuting the claims of other witnesses that he was not present when Mr. Goethe signed the will [T2, p. 927].

It would appear that the respondent's testimony and responses might call into question the credibility of Ms. Skinner's affidavit. However, the respondent has apparently forgotten about the second affidavit of nursing home employee, Susan B. Melton [Bar Ex. 46]. Ms. Melton's original affidavit was entered during the final hearing as Bar Exhibit 22. The bar

indicated to the referee that after the respondent testified about the will, another affidavit by Ms. Melton would be submitted. Bar Exhibit 46 was admitted into evidence during the final hearing on August 21, 1996 [T1, pp. 785-786]. The affidavit of Susan B. Melton, Bar Ex. 46, states that the respondent was not present in the room when Mr. Goethe signed the will. Even the respondent testified during the final hearing that he had no reason to believe Ms. Melton had any interest other than telling the truth [T2, p. 930]. Further, the respondent testified Ms. Melton's affidavit caused him to question his memory [T2, p. 930]. It appears the referee agrees and finds the affidavits of Ms. Skinner and Ms. Melton to be more credible than the respondent's questionable memory. Again, it is left to the discretion of the referee to determine the credibility of the witness testimony, Lecznar, supra. If the referee's findings are supported by competent substantial evidence in the record, the Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992). Simply because the referee in this case found other witnesses testimony more credible than the respondent's testimony, does not render his findings as erroneous. As there is clear and convincing evidence present in support of the referee's findings, the respondent's arguments on this issue are without merit.

POINT III

THE REFEREE'S RECOMMENDATION THAT THE RESPONDENT BE TAXED THE FLORIDA BAR'S COSTS OF $12,032.26 IN CASE NO. 87,536 IS APPROPRIATE UNDER THE RULES REGULATING THE FLORIDA BAR AND OTHER AUTHORITY.

The referee has the discretion to award costs and absent an abuse of discretion, the referee's award shall not be reversed, R. Regulating Fla. Bar 3-7.6(o)(2). The respondent argues in his brief that it was an abuse of the referee's discretion when he recommended that $12,032.26 in the bar's costs in Case No. 87,536 be taxed against him where there were multiple not guilty findings in addition to the guilty findings. The respondent suggests the costs should be prorated between the guilty and not guilty findings. The bar submits that all of the costs recommended by the referee are provided for in R. Regulating Fla. Bar 3-7.6(o) and the respondent has not shown an abuse of discretion in the referee recommending they be taxed against the respondent.

The respondent does not state in his brief that any of the bar's costs are outside the scope of Rule 3-7.6(o) nor does he specify any of the costs he deems to be excessive or unauthenticated. At the conclusion of the disposition hearing on November 12, 1996, the respondent presented his argument to the referee that the amount of costs taxed against the respondent should be prorated as to the not guilty findings. On November 12,

1996, the bar served its Third Preliminary Affidavit of Costs in Case No. 87,536 totaling $11,616.10. On November 21, 1996, the bar served its final Affidavit of Costs totaling $11,945.39. The respondent served his Objection to Imposition of Costs on December 6, 1996, which contained the same arguments as his brief on the issue of costs. The referee issued his report in Case No. 87,536 on December 31, 1996. The referee used the bar's Third Preliminary Affidavit of Costs of November 12, 1996 in assessing costs against the respondent and added $416.16 for the referee's travel costs and expenses for a total of $12,032.26. All of the bar's costs as listed in the affidavits of costs and the referee's costs are provided for in Rule 3-7.6(o). It is clear the respondent had the opportunity to present his objections to the imposition of costs to the referee prior to the issuance of his report. The referee, in his discretion, chose to tax the bar's costs against the respondent.

There is also no basis for a proration of costs based on the not guilty findings. This Court held in The Florida Bar v. de la Puente, 658 So. 2d 65 (Fla. 1995), that it was not an abuse of discretion when the referee imposed all of the bar's costs against the attorney where the attorney did not specify which costs he deemed unnecessary or excessive, nor when the attorney alleged he should not have been assessed the costs when they involved counts in which the referee absolved him of guilt. In The Florida Bar v. Miele, 605 So. 2d 866 (Fla. 1992), the Court

held the referee's assessment of costs against the attorney was not an abuse of discretion even though the bar did not prove all of its allegations, because had it not been for the attorney's misconduct there would have been no complaint and, thus, no costs.

Because the bar's costs as assessed by the referee are appropriate under the Rules Regulating The Florida Bar and relevant authority, and there has been no abuse of the referee's discretion, the respondent's arguments as to the imposition of costs against him are without merit.

POINT IV

THE REFEREE REACHED ERRONEOUS CONCLUSIONS IN FINDING THE RESPONDENT NOT GUILTY OF VIOLATING R. REGULATING FLA. BAR 4-1.7(b) AND 4-1.8(a) IN COUNT VII OF CASE NO. 87,536.

While not objecting to the referee's findings of fact in Count VII, the bar submits that the record evidence clearly contradicts the referee's conclusions from those findings. The evidence and the referee's findings of fact establish that a finding of guilt as to R. Regulating Fla. Bar 4-1.7(b) and 4-1.8(a) is warranted [the bar does not take issue with the referee's finding of not guilty as to the other rule charged in Count VII, 4-1.4(a)].

The referee found there was no violation in the respondent loaning money to his client, John Meek. It appears the referee's findings propose that the loan between the respondent and Mr. Meek was only a loan between close personal friends to help Mr. Meek with a tax indebtedness he was financially unable to pay. While it appears that the respondent and Mr. Meek were close, personal friends and that Mr. Meek experienced some financial hardships, it is also true that the respondent was providing legal representation to Mr. Meek in a tax dispute with his employer, Honeywell [T1, p. 600; T2, pp. 901-902]. Apparently, Honeywell had a policy regarding the equalization of foreign-earned income and U.S. citizens that were working abroad, and

Honeywell had excluded Mr. Meek from that policy causing a significant increase in the amount of taxes Mr. Meek had to pay [T2, pp. 901, 935]. According to the respondent, if Mr. Meek had been included in the tax provision, Honeywell would have paid $8,000 in taxes Mr. Meek was obligated to pay [T2, pp. 935-936].

In or around December, 1994, the respondent loaned Mr. Meek $8,900 to, as the respondent testified, pay some of the taxes that Mr. Meek owed [T2, pp. 901-902, 959]. It is clear from the respondent's own testimony that he loaned his client money for the same matter in which he was providing legal representation to the client. The respondent testified at the final hearing that Mr. Meek was going to make monthly payments on the loan and then pay it off in a lump sum at the end of the year out of a bonus he was expecting from his job [T2, p. 902]. However, Mr. Meek only paid $100.00 toward the loan indebtedness [T2, p. 902]. Therefore, Rule 4-1.7(b) would be implicated, which states that a lawyer may not represent a client where the lawyer's exercise of independent professional judgment in the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests.

In addition, the respondent testified that he discussed with Mr. Meek his rights regarding the loan and its implications, but could not locate a written disclosure to Mr. Meek of any potential conflicts, nor could the respondent recall if he even

provided written disclosure to Mr. Meek [T1, pp. 598-5991. It does not appear there is any document in existence referencing the respondent's loan to Mr. Meek and the terms of its repayment. Thus, Rule 4-1.8(a) is implicated which states that when a lawyer enters into a business transaction with a client or knowingly acquires an ownership, possessory, security or other pecuniary interest adverse to a client, that the transaction and terms be fully disclosed and transmitted to the client in writing; that the client be given a reasonable opportunity to seek the advice of independent counsel; and that the client consents in writing thereto.

There are similar bar disciplinary cases in which attorneys who loaned money to clients were found guilty and received discipline. In The Florida Bar v. Kramer, 593 so. 2d 1040 (Fla. 1992), the attorney loaned money to a client to pay the fees and costs to finalize the transfer of title in a foreclosure sale. In return, the attorney obtained a deed to the client's property. The transaction was not fully disclosed to the client who believed he was getting a mortgage and not giving a deed. The Court made specific findings regarding business transactions between lawyers and clients:

> Business dealings between lawyers and clients are fraught with conflict-of-interest problems, as this case clearly illustrates. Human nature makes such conflicts virtually inevitable notwithstanding a lawyer's good intentions. When a lawyer deals with a client in a business transaction, the lawyer must be

> scrupulous in disclosing the exact nature of the transaction and in obtaining the client's consent in writing. Failure to comply with these safeguards normally warrants a greater punishment than a reprimand . . . (at p. 1041).

The attorney in Kramer received a public reprimand. In another case, The Florida Bar v. Wooten, 452 So. 2d 547 (Fla. 1984), the attorney received a public reprimand for advancing over $20,000 to a client for maintenance and support of the client and his family to be repaid from the proceeds of the client's litigation. The court had consistently held that a lawyer may not advance money to a client except for the reasonable expenses of litigation.

It is clear from the facts and evidence that the respondent loaned money to a client for the same matter in which he was providing legal representation, and did not produce any written documentation or disclosure regarding the transaction. The Rules Regulating The Florida Bar regarding conflict of interests were designed to provide safeguards in transactions between lawyers and clients. The rules do not provide the exception that where a lawyer is a close friend of the client, those safeguards can be ignored. In this case, the facts, evidence, and applicable case law establish that a finding of guilt as to Rules 4-1.7(b) and 4-1.8(a) is warranted. The referee's conclusion that the respondent's conduct does not violate those rules is clearly erroneous.

POINT V

DISBARMENT RATHER THAN THE SUSPENSIONS RECOMMENDED IN CASE NOS. 87,536 AND 88,381 IS WARRANTED.

"This court's review of a referee's recommendations as to disciplinary measures is broader than that afforded the factual findings because the ultimate responsibility to order an appropriate sanction rests with this court. The Florida Bar v. Rue, 643 So. 2d 1080 (Fla. 1994). In the present cases, the referee has recommended the respondent receive a 30 month suspension, followed by a three (3) year period of probation, in Case No. 87,536 and a one (1) year concurrent suspension in Case No. 88,381. The referee has found the respondent guilty of numerous violations involving trust account violations, conflict of interest, improper notarization of a will and misrepresentations and, accordingly, the referee's discipline recommendations are not sufficient. The bar submits that the appropriate level of discipline is disbarment given the serious nature of the misconduct findings; the respondent's prior discipline; and the respondent's cumulative misconduct. Furthermore, the caselaw and Florida Standards for Imposing Lawyer Sanctions support disbarment. It is clear from the respondent's arguments before the referee and his initial brief that he does not understand that he has violated the rules. Perhaps it is because the respondent appears to be more concerned

with being a successful businessman than a lawyer that he has forgotten the high standards to which all lawyers must adhere. Disbarring the respondent will relieve him of the burden of complying with the ethical rules governing members of the bar.

The respondent suggests in his initial brief that the violations found against him are not serious or "technical" in nature so the range of discipline should only be from a public reprimand to a 90 day suspension. However, any discipline less than the referee's recommended discipline would be wholly insufficient. In Maynard, supra, a case with similar multiple violations, the Court found the referee's recommended 90 and 91 day concurrent suspensions to be "grossly inadequate." The Court found disbarment was appropriate for numerous violations, including conflicting interests, trust account violations, misuse of client funds, false statements to a tribunal and engaging in fraud, dishonesty, deceit or misrepresentation. Due to the seriousness and number of violations, and the lengthy period of time over which the violations occurred, disbarment was warranted. In the instant matter, the respondent engaged in misconduct similar to Maynard, the infractions are serious, and they occurred over an approximate two year period.

In The Florida Bar v. Crabtree, 595 So. 2d 935 (Fla. 1992), the attorney was disbarred for representing two different people in the same transaction without informing one of his representation of the other, taking fees and an interest in the

transactions without fully explaining his involvement and share in the transactions, and creating false letters designed to mislead anyone looking into the transactions. In Case No. 87,536 it certainly can be argued that the respondent's misrepresentations to Michael Marder were intended to mislead or obfuscate his involvement with the ALPS companies and Mr. Jann. In The Florida Bar v. Grev, 453 So. 2d 779 (Fla. 1984), the attorney's misconduct, which occurred over a three year period, involved neglect, inappropriate financial dealings with clients and failing to refund unearned fees. The referee found the attorney guilty of 45 rule violations. Given the cumulative nature of the attorney's misconduct, the court ordered that he be disbarred.

In one of the more serious cases involving trust account violations, an attorney was disbarred for persistent shortages of client funds despite deposits of personal funds, payment of personal obligations from the trust account and failure to maintain proper trust account records, The Florida Bar v. Simring, 612 So. 2d 561 (Fla. 1993). The Court specifically found that sloppy and intentionally improper trust accounting procedures warranted a finding of intentional misappropriation of client funds. On the other hand, in The Florida Bar v. Neu, 597 so. 2d 266 (Fla. 1992), the Court only ordered a six month suspension where commingling of the attorney's personal and trust funds resulted from negligence. The respondent claims in his

brief that his trust account problems were due to negligence and that he has corrected all deficiencies. Again, the respondent fails to understand what he has done wrong. The respondent was found guilty of commingling, improperly disbursing funds before receipt, numerous record keeping offenses and negative balances which indicated clients' money was at risk. The respondent's trust account records were so incomplete and in such disarray that it was extremely difficult to determine what transpired in his accounts. The respondent's misuse of his trust accounts was extremely egregious and to suggest that the violations were technical indicates his failure to grasp the most basic purpose of the trust accounting rules.

When considering an appropriate discipline in bar proceedings, the Court considers prior misconduct and cumulative misconduct as relevant factors. The Florida Bar v. Adler, 589 SO. 2d 899 (Fla. 1991). The respondent has a prior disciplinary record and his present misconduct is cumulative in nature. The respondent has a prior discipline of a 30 day suspension for engaging in legal employment not authorized by his law firm, willfully deceiving the law firm about his unauthorized employment, keeping some of the fees collected and initially denying representing outside clients and collecting legal fees from those clients. The Florida Bar v. Cox, 655 So. 2d 1122 (Fla. 1995). In the respondent's prior discipline case, the Court specifically found that the suspension was appropriate given his

dishonesty and misrepresentation toward his employer and his clients and his misconduct in diverting fees to his personal account. The respondent's misconduct is cumulative. An attorney's cumulative misconduct of a similar nature should warrant even more serious discipline than might dissimilar conduct. The Florida Bar v. Rolle, 661 So. 2d 296 (Fla. 1995). It is apparent from the respondent's prior suspension and his present cumulative misconduct, he has not learned anything. Furthermore, his past and present misconduct show the respondent lacks the ability to tell the truth [See Cox, supra; RR1, pp. 21, 23; RR2, p.2].

The Florida Standards for Imposing Lawyer Sanctions also support disbarment. Standard 4.31, concerning the failure to avoid conflicts of interest, calls for disbarment when a lawyer, without the informed consent of the clients, (a) engaging in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client. Standard 5.11(f), concerning the failure to maintain personal integrity, calls for disbarment when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely on the lawyer's fitness to practice. Standard 6.11(a), concerning

false statements, fraud, and misrepresentation, calls for disbarment when a lawyer, with the intent to deceive the court, knowingly makes a false statement or submits a false document. Standard 7.11, concerning violations of other duties owed as a professional, calls for disbarment when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

The bar submits that the mitigating factors that the respondent claims at page 23 of his brief are present in these cases are simply not applicable. In fact, there are no mitigating factors under Standard 9.3 present. There are, however, numerous aggravating factors under Standard 9.2, including 9.22(a) a prior disciplinary offense; 9.22(b) a dishonest or selfish motive; 9.22 (c) a pattern of misconduct; 9.22(d) multiple offenses; 9.22(g) refusal to acknowledge the wrongful nature of his conduct; 9.22(h) vulnerability of the victim (in Case No. 88,138 the victim was an elderly gentleman in a nursing home); and 9.22(i) substantial experience in the practice of law.

Perhaps if a single incident present in these cases is considered, such as the improper notarization of a will or failing to obtain a written conflict disclosure, then the respondent's misconduct might not amount to serious discipline.

However, if all of the respondent's numerous violations and his pattern of deception are viewed as a whole, the respondent's misconduct becomes quite serious. The respondent's actions in these matters show he has little regard for his responsibilities as an officer of the court and member of the bar. As it appears the respondent is much more concerned with his business and financial dealings than with the ethical practice of law, he should no longer be afforded the privilege of practicing law. Where an attorney's conduct evidences a total lack of understanding of his responsibilities as an attorney and to members of the bar, disbarment is warranted. The Florida Bar v. McGovern, 365 So. 2d 131 (Fla. 1978).

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, legal conclusions and recommendation of a 30 month suspension and a three year period of probation in Case No. 87,536 and a one year concurrent suspension in Case No. 88,381 and, instead, find the respondent guilty as to Count VII in Case No. 87,536 and impose disbarment in both cases and payment of the bar's costs now totaling $12,935.26.

Respectfully submitted,

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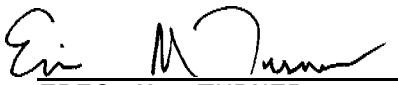
By: 

ERIC M. TURNER
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Initial Brief on Cross-Petition for Review and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent's counsel, Scott K. Tozian, 109 North Brush Street, Suite 150, Tampa, Florida, 33602; 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 10th day of June, 1997.

Respectfully submitted,

Eric M. Turner
Bar Counsel

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CYRUS ALAN COX,

Respondent.

CASE NO. 87,536

TFB NOS: 95-31,066(09A)
95-31,390(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, hearings were held on August **19,** 20, 21, and September 19, 1996. 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	Rose Ann DiGangi-Schneider and Eric M. Turner
For The Respondent	Scott K. Tozian

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

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commented on below, I find:

BACKGROUND SUMMARY

The Respondent became an associate for Greenspoon, Marder, Hirschfeld, Rafkin (GMHR) on February 1, 1994 pursuant to an employment agreement executed by Gerald Greenspoon and Respondent dated January 26, 1994. The agreement called for Respondent to be paid a salary of $75,000.00 annually [TFB Comp. Ex. 12].

The Respondent agreed to bring his clients from his practice into the firm. The firm did not assume the Respondent's accounts receivables and the Respondent was allowed to collect them.

The firm required files to be opened for clients which necessitated an internal conflict check and approval by the partners. The firm maintained a trust account for its clients, for which the Respondent did not have signatory authority. The Respondent was expected to utilize the firm's trust account for all client matters after joining the firm.

In September 1994, Mr. Marder changed Respondent's agreement with the firm and Respondent was made an independent contractor. [R. 213; Complaint, paragraph 3; Answer, paragraph 3]. Respondent continued as an independent contractor with GMHR until approximately December 28, 1994, when it was decided that Respondent would cease being an employee of GMHR effective January 3, 1995, and instead would

rent office space from the firm. [TFB Comp. Ex. 2, January 12, 1996 letter from Michael Marder to The Florida Bar - page 2].

On January 5, 1995 when Mr. Marder discovered the existence of a bank account he considered to be unauthorized, Respondent was ejected from his office by GMHR, the locks were changed, and the firm kept Respondent's personal belongings, including his chair, desk, computer, bank records of Respondent's accounts, and all Respondent's client files. [R. 69, 213, 565, 695, 700].

COUNT I.

Respondent represented Isabelle Wimberly in a domestic relations proceeding prior to joining GMHR. At the time Respondent joined the firm, Ms. Wimberly owed outstanding fees and costs to Respondent. Respondent continued to perform work for Ms. Wimberly after joining GMHR and Respondent billed her for the firm's services.

The employment agreement between GMHR and Respondent authorized Respondent to keep all fees earned prior to joining the firm. [TFB Comp. Ex. 12, paragraph 10; R. 75, 76]. However, the agreement did not address the method of allocating fees received, if both Respondent and the firm were owed fees by a particular client. [R. 218]. Nevertheless,

Mr. Marder admitted that the firm policy was to apply fees received to the oldest invoice if the fees did not constitute payment in full of all indebtedness. [R. 217].

The evidence established that Respondent reduced both his private practitioner bills and GMHR bills sent to Ms. Wimberly. It was also established that Respondent had the firm's authority to reduce GMHR bills. [R. 77, 148].

It is clear that Respondent was owed money for services performed as a solo practitioner at the time Ms. Wimberly's check of $212.50 was received by him at GMHR. It is also clear that GMHR was also owed for services rendered, however, Respondent's invoice was the older of the two.

Accordingly, the Referee finds that Respondent did not violate Rules 3-4.3 and 4-8.4(c) as Respondent had a legitimate claim to the referenced funds and as a result this count was disposed of by a directed verdict.

COUNT II

In or about November 1994, Respondent advised Michael Marder that he intended to have lunch with Patrick Smythe. [R. 65, 866]. At that time, Mr. Marder instructed Respondent to have no dealings with Mr. Smythe. [R. 65]. Thereupon, Respondent advised Mr. Marder that if Mr. Smythe needed counsel,

Respondent would advise him to make other arrangements. [R. 5 , 6].

Mr. Marder subsequently discovered in January 1995, after opening a piece of Respondent's mail that Respondent had opened an account at Barnett Bank entitled "Cyrus Cox, Escrow Agent for Patrick Smythe". [R. 65 - 67, 872; TFB Comp. Ex. 3]. Moreover, Respondent testified that he did not represent Patrick Smythe and an affidavit was received into evidence from Mr. Smythe indicating that Respondent did not represent him in the matter involving the escrow account. [R. 867, Resp. Ex. No. 14]. Moreover, the testimony of both Mr. Marder and Respondent confirmed that there was no file opened for Mr. Smythe. [R. 70, 225]. Additionally, Mr. Marder conceded that the existence of the escrow account did not establish an attorney/client relationship between Respondent and Patrick Smythe. [R. 226].

Respondent testified that the account was opened to hold the funds of his client, Jim Ballweg, in a transaction involving the purchase of some art owned by Mr. Smythe. [R. 867]. Mr. Ballweg confirmed under oath at the final hearing that Respondent represented him and not Patrick Smythe in the referenced transaction. [R. 721]. Moreover, GMHR billing records confirmed that Respondent billed for time expended on Mr. Ballweg's behalf in this transaction. [Resp. Ex. No. 153.

Accordingly, the Referee finds that The Florida Bar has failed to prove by reason of clear and convincing evidence that a conflict was created by Respondent representing Mr. Ballweg in a transaction with Mr. Smythe. Therefore, the Referee finds that Respondent did not violate the rules concerning conflict of interest set forth in The Florida Bar's Complaint, to wit: Rules 4-1.7(a) (b) and (c), 4-1.8(b), 4-1.10.

The Florida Bar further alleged that Respondent violated Rule 3-4.3 for engaging in conduct that is unlawful or contrary to honesty and justice; Rule 4-8.4(c), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and Rule 4-4.1(a), making a false statement of material fact or law to a third person in the course of representing a client. Those three charges appear to stem from the allegations of paragraphs 17 and 21 contained in Count II.

Paragraph 17 alleges that Mr. Smythe used the evidence of the escrow deposit to attempt to obtain a loan. However, the Referee notes that there was absolutely no proof adduced at trial relative to Mr. Smythe's conduct in this regard.

Additionally, paragraph 21 of The Florida Bar's Complaint alleged that Respondent denied having established "a professional relationship with Mr. Smythe" in a January 1995 conversation with members of GMHR. Insofar as the evidence

established that Respondent represented Jim Ballweg and not Patrick Smythe in this transaction, the Referee cannot conclude that there is clear and convincing evidence that Respondent established a "professional relationship" with Mr. Smythe, whatever that term might mean.

As a result, the Referee finds that The Florida Bar has failed to prove by clear and convincing evidence a violation of Rules 3-4.3, 4-4.1(a) and 4-8.4(c).

However, the Referee does find that Respondent violated Rule 4-1.15(d) for failing to comply with the Rules Regulating Trust Accounts in that the account set up by Respondent was entitled "escrow account" instead of "trust account".

COUNT III

Respondent represented Lourdes Zaczac while a sole practitioner prior to joining GMHR. The representation of Mrs. Zaczac continued after Respondent joined GMHR in February 1994. The evidence established that Respondent received a check in the amount of $1,000.00 from Mrs. Zaczac on October 27, 1994. However, the evidence retrieved from files in the possession of GMHR also showed that Respondent was owed outstanding receivables for services performed prior to joining the firm. Additionally, there is evidence that the firm received payment from Mr. and Mrs. Zaczac for fees owed

to GMHR around the same time that Respondent received the $1,000.00 check for services rendered as a sole practitioner. [R. 153, 887, 888; Resp. Comp. Ex. 17]. An affidavit executed by Lourdes Zaczac confirmed that the $1,000.00 payment was for work Respondent had performed in 1993 while he was a sole practitioner. [Resp. Ex. No. 133. Thus, there is an absence of clear and convincing evidence that the $1,000.00 check paid to Respondent was money to which GMHR was entitled.

Moreover, the evidence established that money paid by Mrs. Zaczac on November 17, 1994 in the amount of $775.29 with the notation "closing costs" was in fact paid by Respondent to Mindy S. Watkins at Alday Donaldson for closing costs in a transaction handled on behalf Mrs. Zaczac by Respondent. [Resp. Ex. No. 1 and 2].

Accordingly, the evidence established that the two checks referenced in Count III of The Florida Bar's Complaint were properly applied to their respective intended purposes and that GMHR was not entitled to receive any of the funds referenced in Count III of the Complaint. As a result, the Referee directed a verdict for Respondent as to this count.

Therefore, the Referee finds that Respondent did not violate Rule 3-4.3 or Rule 4-8.4(c) as charged by The Florida Bar in Count III of its Complaint.

COUNT IV

Respondent represented Southern Title and Abstract, Inc., and its owner, Millie Crenshaw, prior to joining GMHR and thereafter. [R. 873, 874]. During the time Respondent was a sole practitioner, Southern Title provided title services to Bishop Williams, a client of Respondent. Thereafter, Southern Title billed Respondent for the services provided to Mr. Williams. However, Respondent testified that he never advised Millie Crenshaw that he would pay for title services provided to Bishop Williams. [R. 874].

Thereafter, Millie Crenshaw deducted the indebtedness of Mr. Williams from her outstanding bill to GMHR as evidenced by her letter of transmittal dated August 19, 1994 to Respondent. [Resp. Ex. No. 16]. This evidence indicates that Ms. Crenshaw advised Respondent that she was making this deduction, however, the letter also reflects that it was a unilateral act and not done at the direction of Respondent. [Resp. Ex. No. 16).

Ms. Crenshaw did not appear at the final hearing herein, however, the Referee was provided with an affidavit purportedly signed by Ms. Crenshaw which indicated that she was directed to make the deduction from the GMHR bill by Respondent. [TFB Comp. Ex. No. 26]. However, there was no testimony to that effect and Respondent denied under oath to

having directed Ms. Crenshaw to make such a deduction. [R. 874, 875].

The Referee notes that while hearsay evidence is not strictly excluded in disciplinary proceedings, the Supreme Court of Florida has favored hearsay evidence whose reliability has been established. The Florida Bar v. Vanier, 498 So. 2nd 896 (Fla. 1986). The Referee further notes that The Florida Bar has the burden of proving allegations of misconduct by clear and convincing evidence. The Florida Bar v. Mm-able, 645 So.2d 438 (Fla. 1994).

In light of the fact that Respondent denied that he instructed Ms. Crenshaw to deduct the debt of Mr. Williams from the GMHR bill, and in light of the fact that Ms. Crenshaw's letter of August 19, 1994 to Respondent does not state that Respondent instructed her to make the deduction, the reliability of the affidavit executed just three days prior to the commencement of the final hearing is questionable. Accordingly, I find that The Florida Bar has failed to meet its burden of clear and convincing evidence in proving Respondent violated Rules 3-4.3 and 4-8.4(c).

COUNT V

The record established that Respondent's brother was a partner in an out-of-state law firm, Cox, Buchanan, Padmore

(hereinafter referred to as CBP) which wanted to establish a presence in Florida. [Answer, paragraph 353. The documentary evidence and testimony at trial established that Respondent and CBP considered entering into a special partnership arrangement. [R.338; Resp. Ex. No. 3, 4, 5, and 8]. In fact, certain documentary evidence suggested that a special partnership agreement had been reached. [Resp. Ex. No. 4]. However, the unrebutted testimony of Jonathan Cox, Gerald Padmore and Respondent established that the contemplated relationship never occurred or materialized. [R. 342, 346, 347, 447, 878].

Nevertheless, the evidence did establish that Respondent referred at least three (3) clients of GMHR to his brother's firm, to wit: Springbok, Trenary and Zaczac. [R. 355, 358, 359, 448, 881, 885, 888, 889]. However, Respondent's employment agreement did not prohibit him from referring matters to other firms. [R. 176, 177]. Additionally, Mr. Marder of GMHR admitted that the referral of matters to other counsel was in a client's best interest if the firm was unable to handle the client's needs. [R. 196].

In Zaczac, the assistance of CBP was sought because Respondent and/or members of his firm could not handle a single limited matter due to unfamiliarity with the area of law (immigration). [R. 885]. All other matters involving Zaczac

were handled by GMHR and substantial fees were paid to the firm by Zaczac. [R. 885 - 888].

In Trenary, the matter was referred to Respondent by GMHR in December 1993, prior to his joining the firm due to the lack of foreign expertise at GMHR. [R. 882]. After joining the firm, Respondent found the Trenary matter overwhelming and sought Gerald Padmore's assistance. [R. 448, 882]. Trenary consulted with CBP in a meeting in Houston attended by the client, CBP representatives and Respondent. [R. 344, 345, 449, 883]. While GMHR representatives insisted they were unaware of this referral, [R. 110, 188], it is also clear from the evidence that Respondent advised the firm of his trip to Houston and billed the client for his time. [R. 884]. Trenary did not ultimately hire CBP, but paid CBP a reduced amount for their time expended. [R. 350, 351, 450, 451]. However, Respondent was not paid any portion of the fee received by CBP. [R. 351, 452, 881].

The Springbok case was referred to CBP after GMHR partner, Michael Ross, instructed Respondent to get out of the case due to non-payment by the client. [R. 179, 890]. The evidence was uncontroverted that the client, in fact, did not pay his bills. [R. 181]. It was also clear that in order to withdraw, a substitution of counsel was required in the federal court litigation. [R. 180, 890]. The evidence further showed that

CBP ultimately agreed to a contingency fee arrangement with Springbok. [R. 362].

Most significantly, the evidence established that Respondent was not paid any money in referral fees from CBP in Trenary, Zaczac, Springbok, or any other case. [R. 351, 357, 362, 363, 452, 881].

The record further reflected that the Shrumm/CZX matter was actually referred from CBP to GMHR. [R. 177, 163]. While Mr. Lennox of GMHR testified there was a problem with GMHR getting paid [R.253], there was no evidence that such problem was attributable to Respondent.

Finally, the evidence established that Respondent had a non-legal position with ALPS Marketing, Inc. for which he was paid a monthly salary while contemporaneously under an employment agreement with GMHR. [Resp. Ex. No. 9]. It is clear that Respondent also billed ALPS Marketing, Inc. for legal work which was paid to GMHR during that same time. [Resp. Ex. No. 11]. Moreover, the amount of time Respondent devoted to legal matters on behalf of GMHR was not an issue. [R. 197]. The Referee finds that the issue of whether or not Respondent's non-legal position with ALPS Marketing, Inc. constituted a violation of Respondent's employment agreement is a civil matter and not a question of ethics. see e.g., The Florida

Bar v. Cook, 567 So.2d 1379 (Fla. 1990).

Accordingly, the Referee finds that The Florida Bar has failed to prove by clear and convincing evidence that Respondent violated Rules 3-4.3, 4-4.1(a) and 4-8.4(c) as charged in Count V of The Florida Bar's Complaint. Furthermore, the Referee notes that The Florida Bar previously voluntarily withdrew its allegation of a violation of Rule 4-1.5(g) in its Response to Respondent's Motion to Dismiss and to Strike. Finally, the Referee finds that there was no evidence or even any allegation of Respondent's handling of trust funds in Count V as paragraphs 46 and 52 relate to Respondent's operating account. Under these circumstances, there can be no finding of a violation of Rules 4-1.15(d) and 5-1.2(c) concerning trust accounts and trust accounting procedures.

COUNT VI

The evidence established that Respondent did establish both a legal and non-legal relationship with Norbert Jann, Jim Ballweg and ALPS Marketing, Inc. [R. 663, 664, 687]. In fact, Respondent received an ownership interest in ALPS Marketing, Inc. in February 1995. [R. 664, 687, 7043. Respondent received from Norbert Jann the sum of $150,000 in July 1994 which was wired into his trust account. [R. 665, 688]. In November 1994, Norbert Jann wired $200,000 into Respondent's operating account. [R. 665]. The funds were

placed in the respective accounts at Mr. Jann's direction. [R.665].

The funds referenced above were sent to Respondent for start-Up costs and operational funds for ALPS Marketing, Inc. [R. 689].

For further background information, the Referee finds: Prior to becoming employed by GMHR, the Respondent met James Ballweg in or around 1993. They also worked together on business related activities as owner/investors. They became joint owners in a corporation known as ALPS Marketing, Inc., which was incorporated in 1994.

Michael Partain was the principal and operator of Action Loss Prevention Specialists, Inc. Mr. Ballweg was the senior associate and consultant. The Respondent was general counsel.

Mr. Ballweg obtained investment capital from a Swiss national, and a Swiss attorney, Norbert Jann, for whom Mr. Ballweg was a U.S. agent. The money was used to start the new corporations, ALPS Marketing, Inc., owned and operated by Mr. Ballweg, Norbert Jann, and the respondent.

The Respondent wrote to Mr. Jann, on GMHR letterhead, on July 14, 1994, to formalize the terms of the line of credit being

provided to Action Loss Prevention Specialists, Inc.

In his letter of July 14, 1994, the Respondent advised Mr. Jann he would represent him in this matter and be available for consultation to be charged at an hourly rate. The Respondent neither revealed his involvement with the company as its attorney nor his interest in it and its proposed subsidiaries.

The terms of the agreement were that the Respondent would have free access to the funds to pay startup costs projected to be $13,578.00, four months of operating expenses, attorney's fees and costs. The Respondent advised Mr. Jann would be responsible for paying all the legal fees and the respondent would send him a monthly itemized billing statement. No one other than the respondent and Mr. Jann would have access to the funds and the company would be able to receive no more than $25,000.00 per month after the second month and then on after submitting a funding request subject to Mr. Jann's approval. In exchange for the line of credit, Mr. Jann would receive 51% of the stock until the line of credit was repaid, with the interest charged at the prime rate plus two percent with a cap of 12% interest. Thereafter, Mr. Jann would receive 30% of the stock.

Mr. Jann wired $150,000.00 to the Respondent's Barnett Bank

trust account, account number 002833049081, on July 25, 1994. In his check register, the respondent noted receipt of the deposit on an unspecified date that was prior to July 25, 1994, and he began issuing checks against the funds as early as July 19, 1994.

Mr. Jann agreed to allow the Respondent to use the $150,000.00 as a revolving line of credit for Action Loss Prevention Specialists, Inc., for the purpose of startup costs and four months of operating expenses as well as legal fees and costs. Action Loss Prevention Specialists, Inc., would be able to access the money only at a maximum rate of $25,000.00 per month from the second month forward and only after submitting a funding request. The funds would not be for Mr. Ballweg's personal use.

GMHR was not aware of this transaction or the Respondent's involvement with ALPS Marketing, Inc. because of the separate trust account he was maintaining.

When ALPS Marketing, Inc. was created, the Respondent was the sole owner and director as well as its attorney. On June 15, 1994, he entered into an employment agreement with ALPS Marketing, Inc., that provided he would be paid $4,166.66 per month. GMHR was entitled to any legal fees paid to the respondent by ALPS Marketing, Inc. as he was prohibited from

other employment.

The Respondent noted the deposit of the $150,000.00 wire on the stub for check number 1058 but did not indicate if he issued check number 1058. He did not date the entry. He then issued check number 1059 on an unknown date to himself in the amount of $15,000.00 to repay money the Respondent advanced Mr. Ballweg for start up costs. The check stub failed to reflect the purpose of the disbursement or the client matter.

The Respondent issued a number of checks made payable to Mr. Ballweg in the total amount of $30,038.00 for draws, advances and expense reimbursements. On July 19, 1994, he issued check number 1061 in the amount of $9,000.00 with the notation "advance". On July 21, 1994, he issued check number 1062 in the amount of $2,000.00 with the notation "advance". On July 27, 1994, he issued check number 1064 in the amount of $6,166.00. On August 30, 1994, he issued check number 1076 in the amount of $1,000.00 with the notation it was for ,a "certified credit card". On September 8, 1994, he issued check number 1077 in the amount of $2,000.00 with the notation it was for "ALPS Marketing, Inc.". On September 22, 1994, he issued check number 1079 in the amount of $4,186.00 with the notation it was for Mr. Ballweg's "October draw". On September 30, 1994, he issued check number 1081 in the amount of $1,500.00 with the notation it was not "Business expenses".

On July 27, 1994, the Respondent issued check number.1063 to Action Loss Prevention Services as a credit line advance in the amount of $56,182.71.

By check number 1065, undated, the Respondent paid $2,000.00 to the Seminole County Democratic Executive Committee as a donation. The check was drawn against Mr. Jann's funds.

The Respondent paid himself a total of $47,150.00 from Mr. Jann's funds. On an unspecified date, he issued check number 1059 in the amount of $15,000.00 for the purpose of reimbursing himself for money he had advanced Mr. Ballweg for start up costs for the corporation. On July 29, 1994, he issued check number 1066 in the amount of $11,000.00 as payment for accrued fees earned prior to January 31, 1994, despite the fact that ALPS Marketing, Inc. was not incorporated until September 1994. On September 15, 1994, he issued check number 1078 in the amount of $21,000.00 with the notation it was for a "Mercedes" automobile that the Respondent purchased for his own use. On October 24, 1994, he issued check number 1083 in the amount of $150.00 for an unspecified reason.

The Respondent also issued check number 1067 in the amount of $2,400.00 against Mr. Jann's funds but failed to indicate on the check stub the date or the identity of the payee.

On August 19, 1994, the Respondent issued check number 1073, from his trust account, to Municipal Credit Union,- for $724.65. There was no client matter or purpose identified but the funds were drawn from those deposited by Mr. Jann.

By check number 1074 dated August 29, 1994, the Respondent paid William Boyd for Mr. Trenary's expenses despite the fact he had no funds on deposit for Mr. Trenary and he used Mr. Jann's money to make this payment. He also paid Mr. Boyd $1,875.00 on December 12, 1994, for "Larry Trenary - fees" by check number 1397 drawn on his Barnett Bank operating account, account number 2833049073.

By check number 1080 dated September 28, 1994, the Respondent paid out $3,000.00 to case "to cover ALPS check". Again, the check was drawn against Mr. Jann's funds.

On November 18, 1994, Mr. Jann wired approximately $200,000.00 to the Respondent's operating account maintained at NationsBank, account number 03603413032, an account over which this legal assistant, Cynthia Long, also had signatory authority. There is no record of these funds ever being transferred to the Respondent's trust account as required since the funds constituted a second loan from Mr. Jann to Mr. Ballweg.

Despite this deposit, the account's ending balance on November 30, 1994, was a negative $9,673.71; and two checks were returned due to insufficient funds.

GMHR learned of this second wire transfer after an employee of the bank called to inquire as to why one of the firm's attorneys was having such a large sum of money transferred to his personal business account. After being confronted, the Respondent, in a memo dated November 28, 1994, to Michael Marder, advised the money was legal fees he earned two years before while a sole practitioner. The Respondent failed to declare any of the money he received as income on his tax returns for 1994.

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On January 5, 1994, the Respondent advised GMHR these same funds were a loan from Mr. Jann.

The Respondent also used Mr. Jann's funds to open a separate checking account for ALPS Marketing, Inc. The Respondent issued check number 1068 in the amount of $10,000.00 from his trust account and used it to open account number 234046599 at Barnett Bank for the company (hereinafter referred to as the ALPS account). The check stub failed to reflect the payee or the issuance date.

The Respondent issued check number 1002 from the ALPS account

on September 22, 1994, to himself in the amount of $3,000.00 for an "Auto Purchase". It was intended to be used to buy an automobile for the corporation and was drawn against Mr.. Jann's funds deposited to the ALPS account. The Respondent sold the corporation his Audi automobile, then used Mr. Jann's funds on deposit in the trust account to purchase a Mercedes automobile for himself.

From the ALPS account, the Respondent issued approximately eight checks to Mr. Ballweg, two of which, check Number 1025 and 1026, were marked as payment for his salary.

The Respondent issued check number 1018 on November 21, 1994, in the amount of $12,762.75 to GMHR as payment for Ed Maddy's legal fees in connection with his dissolution of marriage action. Mr. Jann was not made aware of this disbursement nor was it in any way related to developing business for ALPS Marketing, Inc. Mr. Ballweg paid Mr. Maddy's fees because Mr. Maddy was a friend of one of the corporate principals.

The Respondent never provided Mr. Jann with a detailed accounting of the disbursement of his investment funds and made disbursements that violated the terms of their agreement. The only accounting was his letter of November 6, 1994, written on GMHR letterhead, where he failed to advise Mr. Jann he had repaid himself for a loan he made to Mr. Ballweg for

start up costs and failed to advise Mr. Jann of his total legal fees other than to state they had been minimal. He-told Mr. Jann his role in the corporations was to regulate the distribution of money and coordinate the legal aspects of any contracts entered into. He further stated that in his opinion, Mr. Jann's funds had been used in accordance with the terms of the agreement. In fact, this was not true.

The Respondent's trust account failed to comply with the Rules Regulating The Florida Bar. The check stubs for the period of September 1992, through December 1994, frequently failed to reflect the client identity, payee, date of disbursement, balance, and/or amount of disbursement and did not always reflect deposits. The records on the stubs concerning deposits also failed to reflect the client matter and date. There was evidence of commingling and client funds were at times deposited to one of his two operating accounts.

His two operating accounts, Barnett Bank account number 2833049073 and NationsBank account number 03603413932 had checks returned due to insufficient funds. He opened his operating account at NationsBank on June 3, 1994, and during November 1994, he deposited a total of $208,627.41 and withdrew a total of $220,747.49. He had negative balances on four occasions in that account.

On January 6, 1994, Mr. Marder, Mr. Lenox and GMHR's legal administrator, Scott Ross, met with the Respondent by speaker telephone and asked if he had diverted fees from the firm that it was owed by ALPS Marketing, Inc. They state that the Respondent admitted to having diverted approximately less than $20,000.00. Respondent, however, testified that he did not take or misdirect any of GMHR's funds. He admits he said so in that conversation because he was upset and was trying to calm and resolve the intense acrimonious conversation, conflict and situation.

However, Mr. Ballweg and Mr. Jann testified that Mr. Ballweg had executed promissory notes for each wire transfer to Respondent and Mr. Ballweg was permitted to spend the funds in his discretion. [R. 666, 667, 689]. Mr. Ballweg testified he was shown each and every disbursement made by Respondent concerning these funds from the operating, trust and ALPS Marketing, Inc. accounts, where funds were ultimately transferred. [R. 691]. Mr. Ballweg testified that he specifically authorized each and every disbursement made by Respondent. [R. 690, 691]. In response to the Referee's question, Mr. Jann stated that he had no complaint concerning the way Respondent handled his affairs. [R. 684].

Accordingly, the Referee finds no violation of Rules 3-4.3 (conduct that is unlawful or contrary to honesty or justice).

He is guilty of a violation of 4-1.7(b) and 4-1.8(a) (conflicts of interest). There was also sufficient proof of a violation of Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and Rule 4-4.1(a) (making a false statement of material law or fact to a third person in the course of representing a client). Also, violation of Rule 4-1.15(a) (commingling).

The trust records of Respondent submitted by The Florida Bar amply established that Respondent failed to maintain the minimum required trust accounting records in violation of Rule 5-1.1(c) and (d), and for failing to comply with the Rules Regulating Trust Accounts in violation of 4-1.15(d). Further, the records established that Respondent violated Rules 5-1.2(b) and (c) by not maintaining the minimum trust records and for failing to follow the minimum trust accounting procedures.

The Referee further finds violations of Rule 5-1.1(a) and Rule 5-1.1(g) as there **was** sufficient evidence to find funds were used for purposes not within the initial contemplation of the principals nor within the scope of their business' purpose.

COUNT VII

Respondent represented John Meek in a tax equalization dispute with Mr. Meek's employer, Honeywell. Mr. Meek had been a

long-time, close personal friend of Respondent in Denver, Colorado, dating back to 1983 or 1984. [R. 597, 900]. Due to a series of hardships, Mr. Meek incurred a tax indebtedness which he was unable to pay. [R. 597, 902]. As a result, Respondent loaned Mr. Meek $8,900 in December of 1994. [R. 902]. The loan was interest free. [R. 903]. Thereafter, Mr. Meek paid Respondent $100 towards the loan indebtedness. [R. 597, 902].

Neither Mr. Meek nor his attorney referenced in The Florida Bar's Complaint, Mr. Hickox, provided any testimony or affidavit in support of The Florida Bar's allegations in Count VII of the Complaint. As a result, the evidence adduced at trial proved only that Respondent loaned a close personal friend money in order to pay outstanding taxes and charged no interest for the loan. Therefore, the Referee finds that The Florida Bar failed to prove by clear and convincing evidence violations of Rules 4-1.4(a) and (b), 4-1.7(b) and 4-1.8(a).

COUNT VIII

Respondent represented William Costley in a real estate transaction against a realtor for misrepresentation. [R. 473]. Mr. Costley paid a retainer of $500 to undertake this representation. [R. 473]. The agreement of the parties called for Respondent to bill Mr. Costley at the rate of $125

per hour. [TFB Comp. Ex. 37].

Mr. Costley testified at the hearing before the Referee that he received only one billing statement in the amount of $487.50. [R. 474, 475]. However, Respondent testified that he recalled sending two bills to Mr. Costley, one in May or June of 1993 and one in August of 1993. Respondent testified that the first billing statement was contained in the material confiscated by GMHR at the time of his ejection. [R. 908].

Mr. Costley and Respondent both recall several telephone conversations in the spring and summer of 1993. [R. 488, 904]. In these various conversations, Mr. Costley's recollection was that Respondent indicated that he would be preparing and filing pleadings. [R. 492]. In fact, during a May 18, 1993 conversation, Mr. Costley recalls being told the documents had been filed. [R. 492]. However, it was Respondent's recollection that he advised Mr. Costley of a series of steps which would be necessary and which constituted those things which he would be doing. [R. 904, 905].

Ultimately, the parties agreed to forego litigation due to the expense involved and the fact that Mr. Costley sold the condominium which was the subject of the dispute. [R. 504, 505, 906].

The parties' testimony establishes that a Florida real estate commission complaint was discussed at a December 1993 meeting. [R. 503, 906]. However, Mr. Costley's and Respondent's recollection as to who was to file that complaint differs. Ultimately, a complaint with the real estate commission was not filed. [R. 517].

After the December 1993 meeting, Mr. Costley requested a return of a portion of his fees which he believed Respondent agreed to pay. [R. 513]. However, Respondent testified that he drafted a complaint and that he had expended time sufficient to exhaust the initial retainer and the subsequent bill received by Mr. Costley for $487.50. [R. 905, 907, 909].

Respondent testified that he had offered on two occasions to return the fees to Mr. Costley because he was unhappy. [R. 909]. Based on the testimony and documentary evidence in Count VIII, the Referee finds that The Florida Bar failed to prove by clear and convincing evidence any of the charges related to trust accounting, to wit; 4-1.15(d), 5-1.1(d) and 5-1.2(b). Further, there was insufficient evidence to conclude that Respondent had violated 4-1.5(a) involving a clearly excessive fee. Similarly, there was insufficient evidence to sustain a violation of Rule 4-1.16(d) concerning steps necessary to protect a client's interest upon termination of the representation and Rule 4-8.4(c) for

engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Referee does note that Respondent acknowledged that he could have been more prompt in his dealings with Mr. Costley. [R. 909]. There was also substantial confusion as to what Respondent had done or would do on Mr. Costley's behalf. Therefore, the Referee finds that Respondent did violate Rules 4-1.3 and 4-1.4(a) and (b) dealing with diligence and communication.

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the Complaint, the Referee makes the following recommendations as to guilt or innocence:

Count I	-	Not Guilty as to all rules charged.
Count II	-	Guilty as to 4-1.15(d); Not Guilty as to all other rules charged.
Count III	-	Not Guilty as to all rules charged.
Count IV	-	Not Guilty as to all rules charged.
Count V	-	Not Guilty as to all rules charged.
Count VI	-	Guilty as to 4-1.7(b), 4-1.8(a), 4-1.15(d), 4-1.15(a), 4-8.4(c), 4-4.1(a), 5-1.1(a), 5-1.1(c), 5-1.1(d), 5-1.1(g), 5-1.2(b), and 5-1.2(c)
Count VII	-	Not Guilty as to all rules charged.
Count VIII	-	Guilty as to 4-1.3 and 4-1.4(a) and (b); Not Guilty as to all other rules charged.

IV. Recommendation as to Disciplinary Measures to Be Applied: The undersigned Referee recommends thirty (30) months

suspension, followed by three (3) years probation; and, as a condition of probation, that Respondent be ordered to attend and complete the Florida Bar Trust Account Procedures Course; and, during said probation, that the Respondent be subject to random audits.

V. Recordal History and Past Disciplinary : After the finding of guilt 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: 41

Date admitted to bar: October 16, 1990

Prior disciplinary convictions and disciplinary measures imposed therein: *See The Florida Bar vs Cyrus Alan Cox, 655 So2s* 1122 (1995) (Fla.), thirty (30) day suspension.

VI. Statement of costs and manner in which costs should be taxed :

I find the following costs were reasonably incurred by The Florida Bar.

A.	Referee Level Costs	
1.	Transcript Costs	$ 5,643.05
2.	Bar Counsel Travel Costs	$ 174.22
3.	Referee Travel Costs	$ 347.90
4.	Referee Copy Costs	50.40
5.	Referee Postage Costs	$ 17.86
B.	Administrative Costs	$ 750.00

D. Miscellaneous Costs

1.	Court Reporter Expenses	$ 757.00
2.	Investigator Expenses	$ 1,017.50
3.	Auditor Costs	$ 1,801.80
4.	Witness Costs	$ 1,472.53

TOTAL ITEMIZED COSTS: **$12,032.26**

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 31 day of December, 1996.

The Honorable William T. Swig&t
Referee

Original to The Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

Eric M. Turner, Bar *Counsel*, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801; and

Scott K. Tozian, Counsel for Respondent, 109 N. Brush Street, Suite 150, Tampa, Florida 33602.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CYRUS ALAN COX,

Respondent.

_____/

CASE NO. 88,831

TFB NOS: 96-30,729(09A)
95-31,390(09A)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as Rereree to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, hearings were held on August 19, 20, 21, and September 19, 1996. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to Tile 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 — Rose Ann DiGangi-Schneider and Eric M. Turner

For The Respondent — Scott K. Tozian

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:

Respondent was hired by Martha Skinner to prepare a will for her father, Charles Goethe. [R. 909, 910]. Thereafter, Respondent prepared a will for Mr. Goethe. [R. 911]. Ms. Skinner and Respondent agree that Mr. Goethe executed the will outside the presence of a notary. [R. 912, TFB Ex. No. 23]. In fact, the absence of a notary at the time of the signing of the will was confirmed by an affidavit of Susan B. Melton. [TFB Ex. No. 25]. However, MS. Skinner and Respondent disagree as to whether or not Respondent was present to witness the will. While Ms. Skinner contends that Respondent was not present for the witnessing, Respondent testified that he was present. [R. 912].

The Referee finds that there is sufficient evidence in the record below to conclude that the Respondent was not present for the signing of the will.

Therefore, this Referee finds that Respondent violated Rules 3-4.3, 4-8.4(c) and (d) of the Rules Regulating The Florida Bar by reason of obtaining the improper notarization.

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the Complaint, the Referee makes the following recommendations as to guilt or innocence: **Guilty as to Rules 3-4.3, 4-8.4(c) and (d).**

IV. Recommendation as to Disciplinary Measures to Be Applied: I recommend that the Respondent be suspended for a period of one (1) year, to run concurrent with recommndation of consolidated Case #87,537, The Florida Bar vs Cyrus Alan Cox.

V. Personal History and Past Disciplinary Record: After the finding of guilt 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: 41

Date admitted to bar: October 16, 1990

Prior disciplinary convictions and disciplinary measures imposed therein: See *The Florida Bar vs Cyrus Alan Cox*, 655 So2d 1122 (1995) (Fla), thirty (30) day suspension.

VI. 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	$
	2. Bar Counsel Travel Costs	$
2.	Referee Level Costs *	
	1. Transcript Costs	$
	2. Bar Counsel Travel Costs	$
C.	Administrative Costs	$750.00
D.	Miscellaneous Costs *	
	1. Investigator Expenses	$153.00
	2. witness Fees	$
	3. copy costs	$
	TOTAL ITEMIZED COSTS	$903.00

* Other costs of this case are included in the Statement of Costs set forth in the Referee's Report submitted with consolidated case of The Florida Bar vs Cyrus Man Cox, Case No. 87,536 (TFB Case No. 95-31,066 (09A) and 95-31,390 (09A).

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 31 day of December, 1996.

The Honorable William T. Swigert
Referee

Original to The Supreme Court with Referee's original file.
Copies of this Report of Referee only to:
Eric M. Turner, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801;
Scott K. Tozian, Counsel for Respondent, 109 N. Brush Street, Suite 150, Tampa, Florida 33602.