IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 95,890
[TFB Case Nos. 1998-30,674 (09F) and 1998-30,729 (09F)]

v.

JULIUS L. WILLIAMS,

Respondent.

Case No. 94,111
[TFB Case Nos. 1998-31,467 (09F) and 1998-31,494 (09F)

_____/

THE FLORIDA BAR'S ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 253847

AND

PATRICIA ANN TORO SAVITZ
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida 32804-6314
(407) 425-5424

ATTORNEY NO. 559547

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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 December 18, 1998, shall be referred to as "T", followed by the cited page number(s).

The Report of Referee dated February 23, 1999, will be referred to as "ROR", 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 Respondent Ex. _____, followed by the exhibit number.

STATEMENT OF THE CASE AND FACTS

On February 9, 1998 and March 9, 1998 the Ninth Judicial Circuit Grievance Committee "F" found probable cause against the respondent in Case Nos. 1998-30,674 (09F) and 1998-30,729 (09F), respectively. The Bar filed a two count Complaint against the respondent on April 27, 1998 and it was assigned Supreme Court Case No. 92,890. The Honorable Robert A. Young was appointed as referee on May 12, 1998. The respondent filed his answer to the Bar's Complaint on June 24, 1998.

On July 13, 1998 and August 10, 1998 the Ninth Judicial Circuit Grievance Committee "F" found probable cause against the respondent in Case Nos. 1998-31,467 (09F) and 1998-31,494 (09F), respectively. A status conference was held on September 22, 1998, and also on that date the Bar filed an Amended Complaint in Case No. 92,890. The respondent filed his answer to the Amended Complaint on October 12, 1998 and the final hearing was set for October 22, 1998. The Bar filed a two count Complaint against the respondent on October 14, 1998 regarding Case Nos. 1998-31,467 (09F) and 1998-31,494 (09F) and it was assigned Supreme Court Case No. 94,111. The Honorable Robert A. Young was also appointed as referee in Case No. 94,111 on October 26, 1998.

On October 19, 1998, a Joint Motion for Continuance of the Final Hearing

in Case No. 92,890 was filed, and the referee entered an order on October 22, 1998 granting the continuance. On November 6, 1998 the Bar filed a Motion to Consolidate Case Nos. 92,890 and 94,111. The final hearing in Case No. 92,890 was rescheduled to December 18, 1998. The referee entered an order granting the consolidation on November 10, 1998. The respondent filed his answer to the Bar's Complaint in Case No. 94,111 on December 2, 1998.

The final hearing in both cases was conducted on December 18, 1998. The referee issued a proposed report of his findings and recommendations on January 25, 1999. A discipline hearing was held on February 11, 1999 and the referee issued his final report on February 23, 1999. With respect to Count I in Case No. 92,890 (Julien Matter), the referee found the respondent guilty of violating Rules 4-1.3, 4-1.4 and 4-1.5 of the Rules Regulating The Florida Bar. In Count II in Case No. 92,890 (Trust Accounting Violations), the referee found the respondent guilty of violating the following Rules Regulating The Florida Bar: 4-1.15(d), 5-1.1(c), 5-1.1(d), 5-1.2(b) and 5-1.2(c). With respect to Count I in Case No. 94,111 (Simmons Matter), the referee found the respondent guilty of violating R. Regulating Fla. Bar 4-8.4(g) and in Count II (Wheaton Matter), the referee found the respondent guilty of violating Rules 3-4.3 and 4-8.4(g) of the Rules Regulating The Florida Bar.

The Bar filed an Affidavit of Costs on March 1, 1999 and the respondent filed his Objection to the Affidavit of Costs on March 24, 1999. The Board of Governors of The Florida Bar considered the referee's report at their April 1999 meeting and voted not to appeal the referee's findings or recommendations. The respondent filed his Petition for Review of the referee's report on April 26, 1999 and he filed a Motion for Extension of Time to File Brief on May 20, 1999. The respondent's request for an extension was granted and he was permitted to and including June 26, 1999 in which to submit his initial brief.

The respondent filed his Initial Brief on June 27, 1999. On June 29, 1999 the Supreme Court Clerk's Office directed the respondent to submit an amended brief in that his original filing was incomplete and did not comply with the Rules of Appellate Procedure. The respondent filed his Amended Initial Brief on July 12, 1999, and this brief is the Bar's response to the respondent's amended initial brief.

The Florida Bar does not include a Statement of the Facts in this brief in that the respondent has recited the referee's complete findings of fact in pages 2 through 6 of his Amended Initial Brief.

SUMMARY OF THE ARGUMENT

In this case the referee's findings of fact are not in dispute. In his initial brief, the respondent argues that the referee's recommendations as to guilt in three of the four counts are not supported by substantial, competent evidence. However, the respondent has not cited anything to support this assertion other than his own testimony. A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Summers, 728 So. 2d 739, 741 (Fla. 1999). In this case there is sufficient evidence in the record to support the referee's findings as to guilt. Accordingly, the respondent's argument is without merit.

The respondent also asserts that the referee's recommended discipline is too harsh and that the referee improperly considered his prior disciplinary history and, therefore, excessively increased the level of discipline recommended. However, the Florida Standards for Imposing Lawyer Sanctions and case law provide for a review of a respondent's prior disciplinary history prior to imposing any discipline recommendations. Further, authority exists for increasing the level of discipline based upon prior, similar offenses. Finally, existing case law supports the referee's recommended discipline in this case.

ARGUMENT

I. THE REFEREE'S RECOMMENDATIONS AS TO GUILT ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

With respect to Count II of the Bar's Complaint in Case No. 92,890 regarding the respondent's trust account violations, the referee found the respondent guilty of violating the following Rules Regulating The Florida Bar: 4-1.15(d) for failing to comply with The Florida Bar Rules Regulating Trust Accounts; 5-1.1(c) for failing to preserve for a period of six years the records of all trust accounts; 5-1.1(d) for failing to maintain the minimum required trust accounting records and follow the minimum trust accounting procedures; 5-1.2(b) for failing to maintain the minimum required trust accounting records; and 5-1.2(c) for failing to follow the minimum required trust accounting procedures. (ROR, p. 6). These violations resulted from the respondent's partially missing trust accounting records and incomplete trust account record keeping procedures. The respondent contends that because he testified at the final hearing (T, pp. 87-89) that he had produced all the trust account records he had and that the missing records had been misplaced, that there was no evidence he did not keep the required records and the referee should not have found him guilty of those rules

violations. The referee specifically found that although the respondent provided some records, there were no ledger cards or journals for the clients, there were no monthly reconciliations or comparisons for the trust account, and ten months of bank statements and the canceled checks for 1995 and one month in 1997 were missing. (Bar Ex. 12; ROR, p. 3). The Bar would point out that this represents a substantial amount of missing records. It should be noted that the referee also found the respondent not guilty regarding rules 4-1.15(a) regarding commingling, 4-8.4(g) for failing to respond to the bar, and 5-1.1(a) regarding misuse of client funds, finding that "while it is impossible to tell how respondent used his trust account, there is no evidence he misappropriated any client funds." (ROR, p. 6).

Rules 5-1.1 and 5-1.2 of the Rules Regulating The Florida Bar require that attorneys keep specific records regarding their trust accounts including, but not limited to, bank statements, canceled checks, deposit slips, client ledger cards and trust journals. Rule 5-1.1(c) requires attorneys to maintain records pertaining to the funds or property of clients for a period of not less than six years subsequent to the final conclusion of the representation of a client relative to such funds or property. Through his testimony the respondent has admitted he has violated Rule 5-1.1(c) because some of his trust account records cannot be located (T, pp. 87-89, 116-117). The rules do not allow for a reconstruction of trust account records at

some later date. Rather, Rule 5-1.1(d) states, "minimum trust accounting records **shall** be maintained and minimum trust accounting procedures **must** be followed by all attorneys practicing in Florida who receive or disburse trust money or property" (emphasis added). The Bar's chief auditor was accepted by the referee at the final hearing as an expert in the field of accounting with expertise in trust account audits and compliance determinations (T, p. 72). The auditor testified that he was unable to complete an audit nor could he reconstruct the trust account history due to the respondent's missing records (T, pp. 72-74). Further, the respondent's failure to conduct monthly reconciliations and comparisons and incomplete or inadequate information on his check stubs further contributed to the auditor's inability to conduct a meaningful audit (T, pp. 74-75; 78-81). The respondent's missing records and incomplete trust accounting procedures led the auditor to conclude that the respondent's trust account was not in compliance with The Florida Bar's rules governing trust accounts (T, pp. 81-82). Clearly, the documentary evidence, or lack thereof, and the opinion of a qualified expert in trust account compliance support the referee's findings of guilt as to Rules 4-1.15(d), 5-1.1(c), 5-1.1(d), 5-1.2(b) and 5-1.2(c).

With respect to Count II of the Bar's Complaint in Case No. 94,111, the respondent contends at page 8 of his initial brief that the referee should not have

found him guilty of violating R. Regulating Fla. Bar 3-4.3 because his conduct in issuing a worthless check to an employee (which he later made good) was not found to have been deliberate. Further, the respondent claims that Rule 3-4.3 is "so vague and ambiguous that no one could know what conduct is prohibited by the rule." Rule 3-4.3 prohibits an attorney from engaging in conduct that is unlawful or contrary to honesty and justice. Regardless of whether it was deliberate or not, the evidence shows that the respondent issued a paycheck to his employee with a worthless office check (Bar Ex. 8; T, pp. 89-90). The referee found that "writing a worthless check on his office account was unlawful and contrary to honesty [3-4.3]." Issuing worthless checks is a very serious ethical violation, especially when it affects an attorney's clients and employees. The Florida Bar v. Kassier, 730 So. 2d 1273, 1276 (Fla. 1998). The respondent simply should have known that any issuance of a worthless check by an attorney is improper and prohibited by the ethical rules which govern all attorneys in Florida.

With respect to Count I in Case No. 92,890, the referee found the respondent guilty of violating the following Rules Regulating The Florida Bar: 4-1.3 for failing to act with reasonable diligence and promptness in completing the Julien bankruptcy; 4-1.4 for failing to keep Mr. Julien reasonably informed about the status of his case and promptly comply with reasonable requests for

information; and 4-1.5 for entering into an agreement for, charging, or collecting an illegal, prohibited, or clearly excessive fee. The respondent claims at page 8 of his initial brief that the record shows that work was performed on behalf of Mr. Julien and that contact was made with Mr. Julien. In support of his contentions, the respondent cites to his own testimony. At the final hearing the respondent's former client, Gregory Julien, and Mr. Julien's subsequent attorney, Irwin Sperling, testified that the respondent did not file Mr. Julien's bankruptcy action, did not communicate with Mr. Julien subsequent to the initial retainer, and did not respond to Mr. Julien's repeated inquiries about his case (T, pp. 20, 26-27, 35). The referee's acceptance of witness testimony over that of the respondent's testimony does not render his findings as to guilt as erroneous. The referee is in a unique position to assess the credibility of witnesses, and the referee's judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect. The Florida Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999). In the present case, there is sufficient record evidence to support the referee's findings of guilt as to Rules 4-1.3, 4-1.4 and 4-1.5.

II. THE REFEREE PROPERLY CONSIDERED THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY IN RECOMMENDING THE DISCIPLINE TO BE IMPOSED.

The referee states in his report at page 8 that his recommendations as to discipline were based upon all of the violations found in Case Nos. 92,890 and 94,111 taken along with the respondent's prior disciplinary history. The respondent has received discipline on three prior occasions. In The Florida Bar v. Williams, Case No. 83,978 [TFB Case Nos. 93-30,749 (09E) and 93-31,661 (09E)], the respondent was admonished under R. Regulating Fla. Bar 3-5.1(a) for failing to properly communicate, on behalf of a client, with a principal in a real estate closing. In The Florida Bar v. Williams, Case No. 87,053 [TFB Case No. 95-31,085 (09E)], the respondent received a public reprimand for neglect and inadequate communication with a client in a probate matter. In The Florida Bar v. Williams, Case No. 87,911 [TFB Case No. 95-30,408 (09E)], the respondent was suspended for twenty (20) days followed by a one (1) year period of probation regarding a two count complaint. In one count the respondent was found guilty of neglect for failing to advise the clerk's office to cease preparation of the record in a client's appeal causing the clerk's office to incur over $1,000 in costs which the respondent did not pay until over three years after the fact. In the second count the

respondent was found guilty of misrepresentation and failing to cooperate with the Bar regarding an investigation into the appellate costs incurred by the clerk's office as described in the first count of the complaint. As a condition of probation, the respondent was to undergo an office procedures and record keeping analysis by and under the direction of the Bar's Law Office Management Advisory Service (LOMAS) and fully comply with and implement any recommendations made by LOMAS.

The respondent has received a prior admonishment, a public reprimand and a 20-day suspension followed by a one year period of probation. The referee found in the present matter that the violations found against the respondent taken alone would not warrant a suspension, but that in light of the respondent's prior disciplinary history a stronger discipline is warranted (ROR, pp. 7-8). Under the Florida Standards for Imposing Lawyer Sanctions, as promulgated by the Supreme Court of Florida and used by referees in determining the appropriate level of discipline to recommend, a prior disciplinary history is considered an aggravating factor [Standard 9.22(a)]. Despite the respondent's assertion in his brief that there is no pattern of escalating misconduct, it is clear the respondent's past and present violations constitute cumulative misconduct. When considering the appropriate penalty in attorney discipline matters, the Court considers prior misconduct and

cumulative misconduct as relevant factors. The Florida Bar v. Adler, 589 So. 2d 899, 900 (Fla. 1991). In the respondent's prior disciplinary cases, like the instant matter, he was found guilty of neglect, inadequate communication with clients, and failing to cooperate with the Bar. 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, 298 (Fla. 1995). The referee considered the respondent's prior violations along with the violations in the case at hand and found as aggravation an escalating pattern of misconduct [Standard 9.22(c)], multiple offenses [Standard 9.22(d)], bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency [Standard 9.22(e)], and substantial experience in the practice of law [Standard 9.22(i)] (ROR, p. 8). The referee also found two mitigating factors present: absence of a dishonest or selfish motive [Standard 9.32(b)] and a timely or good faith effort to make restitution regarding his employee Wheaton [Standard 9.32(d)]. Existing case law and the Florida Standards for Imposing Lawyer Sanctions provide for a respondent's prior disciplinary history to be considered in aggravation and the Supreme Court of Florida uses such history in rendering a final disciplinary order. Accordingly, the referee appropriately considered the respondent's prior disciplinary history in

recommending the discipline to be imposed in this case.

III. THE REFEREE'S RECOMMENDED DISCIPLINE IS APPROPRIATE UNDER EXISTING CASE LAW.

The respondent asserts in his brief that the referee's recommended discipline is too harsh. The referee has recommended that the respondent be suspended for one (1) year and thereafter until he passes the ethics portion of the Florida Bar examination and otherwise demonstrates proof of rehabilitation; that the respondent be placed on probation for three (3) years if he is reinstated, with the conditions of probation requiring the respondent to successfully complete a trust accounting workshop and at least for the first two years of his probation that the respondent provide monthly trust account records and reconciliations to a person designated by The Florida Bar; and payment of the Bar's costs. In attorney discipline proceedings, the Supreme Court will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law. The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997). Given the respondent's prior disciplinary history and the facts of the instant matter as well as existing case law, the referee's discipline recommendations are appropriate.

In light of the attorney's prior similar misconduct in The Florida Bar v. Morrison, 669 So. 2d 1040 (Fla. 1996), the attorney was suspended for one (1)

year, he was required to make restitution to the client, and to pass the ethics portion of the state bar examination as conditions precedent to reinstatement, for neglect, inadequate communication with a client, and failing to respond to the Bar. The attorney had previously received a public reprimand and was placed on a one (1) year period of probation.

In The Florida Bar v. Barbone, 679 So. 2d 1179 (Fla. 1996), an audit of the attorney's trust account revealed several substantial shortages and overages and many of the documents required by the Bar to be retained for a six-year period could not be produced by the attorney. The attorney received a six-month suspension and a two-year period of probation if reinstated with regular, unannounced trust accounting reviews at least three times a year at the attorney's expense. The attorney was also required to take and pass the ethics portion of the Bar exam and to continue to retain a certified public accountant to provide the Bar with quarterly reports showing compliance with the trust accounting rules. In aggravation, the attorney had a prior public reprimand with a one-year period of probation and a prior thirty-day suspension, and the attorney's misconduct occurred when he was on probation for similar violations. In mitigation, it was determined the attorney lacked a dishonest or selfish motive and just prior to the final hearing he had retained an accounting firm to maintain his records.

In The Florida Bar v. Weiss, 586 So. 2d 1051 (Fla. 1991), the attorney was suspended for six months for gross negligence in handling client trust accounts through failing to properly supervise his accountant's work. No client suffered any financial injury, there was no evidence the attorney knowingly converted and misappropriated funds, the attorney fully cooperated with the Bar, and the attorney had no prior instances of misconduct in 28 years of practice.

Gross negligence in managing trust accounts warranted a three-year suspension from the date of a temporary suspension in The Florida Bar v. Whigham, 525 So. 2d 873 (Fla. 1988). The attorney had been previously publicly reprimanded and placed on probation for one year for negligently commingling trust funds with personal funds, having overdrafts, trust account shortages and incomplete records. The attorney had failed to submit to the Bar certain reconciliations which were required by his probation in the prior matter and this caused a trust account audit. The audit revealed further missing records, overdrafts and shortages. Although gross negligence in the management of his trust accounts was found, there was no evidence of willful misappropriation of funds and that his subsequent violations resulted from his original mistakes which were never completely corrected. No clients suffered any financial injury and three of the attorney's clients testified before the referee that the attorney had represented their

interests satisfactorily. In addition to the three-year suspension, the attorney was barred from ever having a trust account in the practice of law should he be reinstated.

In The Florida Bar v. Adler, supra, the attorney received an 18-month suspension for commingling his own funds with client trust funds, use of trust funds for purposes other than the purposes for which they were entrusted to him, and failing to keep adequate trust account records. The attorney had a prior 91-day suspension for participating in the fraudulent backdating of documents in order to obtain a tax deduction for a joint venture in which he was an investor. Although the attorney's prior discipline did not involve trust account violations, the referee "factored in" the attorney's prior discipline and multiple trust account violations in the subsequent case in recommending an 18-month suspension. Like the case at hand, Adler had substantial missing trust account records and inadequate record-keeping procedures. However, the respondent has prior discipline involving trust account violations whereas Adler's prior discipline did not involve similar violations. The referee could have recommended a suspension longer than one (1) year as the case law supports it.

In his report in the instant matter, the referee determined that:

Clearly the aggravating factors outweigh the mitigating factors and

> the chronic and repetitive nature of the respondent's violations warrant a period of suspension longer than his last one. Respondent has shown that he has not discharged, and is unlikely to discharge his professional duties to his clients and the legal profession properly. His trust accounting procedures remain virtually nonexistent and he continues to fail to respond to inquiries of The Florida Bar. (ROR, p. 9).

The Court, in rendering discipline, considers the respondent's previous history and increases the discipline where appropriate. The Florida Bar v. Morrison, supra. In the present case, the referee found that the respondent has not learned from his prior disciplinary sanctions, and that a longer suspension is required. A one-year suspension is appropriate under existing case law and will hopefully encourage the respondent's reformation which his prior suspension and probation have clearly not accomplished.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and recommendations as to guilt and enter an order suspending the respondent for one (1) year and thereafter until he passes the ethics portion of the Bar exam and otherwise demonstrates proof of rehabilitation, that the respondent be placed on probation for a period of three (3) years upon his readmission with the requirements that he successfully complete a trust accounting workshop and that for at least the first two (2) years of his probation the respondent provide monthly trust account records and reconciliations to a person designated by The Florida Bar, and that the respondent pay the Bar's costs in prosecuting these matters which currently total $2,585.25.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

(904) 561-5600
ATTORNEY NO. 253847

AND

PATRICIA ANN TORO SAVITZ
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida 32804-6314
(407) 425-5424
ATTORNEY NO. 559547

By: _____
FOR: PATRICIA ANN TORO SAVITZ
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief 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, Julius L. Williams, Post Office Box 580012, Orlando, Florida, 32858; 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 _____ day of August, 1999.

Respectfully submitted,

By: _____
For: Patricia Ann Toro Savitz
Bar Counsel

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THE FLORIDA BAR,

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APPENDIX TO COMPLAINANT'S ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 253847

AND

PATRICIA ANN TORO SAVITZ
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida 32804-6314
(407) 425-5424

ATTORNEY NO. 55954

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COMPLIANCE WITH RULE 9.210(a)(2)

The undersigned hereby certifies that the foregoing brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point Times New Roman.

By: _____

For: Patricia Ann Toro Savitz
Bar Counsel
ATTORNEY NO. 559547