IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,Case No. 94,769 & 96,180

TFB No. 98-11,393(6E)

Complainant, 99-11,472(6E)

vs.

IRIC VONN SPEARS,

Respondent.

_____/

INITIAL BRIEF

OF

THE FLORIDA BAR

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not intentionally mislead The Florida Bar about making restitution is clearly erroneous?

ISSUE II: Whether the Referee's recommendation of no additional discipline is clearly inadequate for an attorney who received a previous three-year suspension based on a consent judgment, by claiming restitution of misappropriated funds as mitigation when there had been no restitution, and when this attorney also misappropriated an additional $15,000.00 after the audit in the previous case, if the Bar before entering into the consent judgment, if restitution was made when his misappropriations and failure to make restitution were detected?

ISSUE III: Whether it is mitigating that The Florida Bar relied on Respondent's presentation of copies of checks and transmittal letters which indicated restitution to

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, Iric Vonn Spears, will be referred to as "Respondent".

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case Nos. 94,769 and 96,180 held on October 29, 1999 and November 12, 1999.

The Report of Referee dated January 21, 2000 will be referred to as "RR". The Amended Report of Referee dated February 4, 2000 will be referred to as "ARR".

"Bar's Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case Nos. 94,769 and 96,180.

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

STATEMENT OF THE FACTS AND OF THE CASE

Supreme Court Cases 94,769 and 96,180 were heard by the Referee on October 29, 1999 and November 12, 1999. The Amended Report of Referee was issued February 4, 2000. The Referee recommended that Respondent be found guilty, but that the discipline received by Respondent in a prior consent judgment for a three-year suspension was sufficient to also cover the additional offenses. The recommendation of Referee was considered by the Board of Governors of The Florida Bar in their meeting which ended February 4, 2000, and the Board voted to appeal for disbarment.

Respondent had the three-year suspension in related cases, having entered into a consent judgment in Florida Supreme Court Case No. 92,081 (TFB. Nos. 97-10,783(6E) and 97-11,502(6E)). On January 23, 1998, Respondent signed the Conditional Guilty Plea for Consent Judgment (Bar's Exh. 1). That was subsequently accepted by the Referee in a Report of February 12, 1998 (Bar's Exh. 2), and approved by The Florida Supreme Court on March 5, 1998. Respondent had, among other violations, converted client money to his own use. His three-year suspension began April 5, 1998.

In Case No. 92,081, Respondent was sent a copy of The Florida Bar's Audit Report on August 26, 1997. The audit report was dated August 22, 1997, and

covered the period from January 1, 1995 through April 30, 1997 (Bar's Exh. 4). The audit made it clear that Respondent had misappropriated client money, and listed several clients and the amounts which had been converted. In negotiating for a discipline less than disbarment in Case No. 92,081, Respondent presented to the Bar copies of both checks and letters to the clients from whom he had taken money. He indicated in the letters that those checks had been issued (not "to be issued") to the clients whose money he had misappropriated. The check dates and letter dates also indicated that the checks had already been issued (See Bar's Exh. 5). The largest of the restitution amounts to be made was $5,848.72 owed to Lucille Hill. (ARR, p. 1).

In the instant case, one of the main issues was whether Respondent, during consent judgment negotiations, had intentionally mislead the Bar regarding restitution. The Referee noted that bank records reveal a deposit was made to Respondent's account on September 9, 1997, which would have covered the amount owed to Mrs. Hill. That deposit was sufficient to pay all clients except one, and the Respondent had been given one year in the consent judgment to repay that person. (Bar's Exh.1, p. 14; ARR p. 2). The September 9, 1997 deposit was after The Florida Bar's audit in the three-year suspension case was completed and after Respondent had received the audit report. It was made before the January 23, 1998

consent judgment was executed. In fact, on September 22, 1997, Respondent also deposited another $22,039.00 to his account, an amount which included $15,000.00 from the Carey personal injury case, mentioned below. By October 2, 1997, Respondent had only $4,550.68 left in his account. By October 8, 1997, the account balance was $371.67 (Bar's Exh.12, p. 4). None of the individuals to whom Respondent alleged he had made restitution had been repaid. In addition to converting the money which the Referee saw as a deposit to cover the deficits, Respondent had converted money from the Carey personal injury case. Respondent had quickly "reconverted" the client money addressed in the Bar audit, and more.

As noted, the Referee found that, although Respondent's representation that restitution had been made was incorrect, the misrepresentation was not done intentionally (ARR, p.3). The letters and checks shown to the Bar in support of the claim that restitution was made were dated September 11, 1997 (TR, p. 44, l. 8 - 14). Those items were never sent to the clients. When Respondent signed the consent judgment on January 23, 1998, not only had he not repaid the clients the Bar had discovered in the audit, his account did not have sufficient funds to do so. He also had converted money from another client, Carey. His account had a balance of $169.93, and by January 29, 1998, the daily balance was negative ($2,877.31). (Bar's Exh.12, p. 12).

Although Respondent received the results of the audit, he testified in the instant case that he never reviewed his bank records. In addition, he testified that he has never balanced his account (TR, p. 29, l. 11 - 24). He also claimed he has never reviewed his bank statement (TR, p. 25, l. 4 - 7).

Ms. Hill obtained private counsel, and was successful in recovering the converted money. Respondent was notified by The Florida Bar in a letter dated April 23, 1998, that it had come to the Bar's attention that one of those to whom reimbursement had allegedly been made had not received the restitution when it was allegedly paid (Bar's Exh. 6). In his response to inquiries regarding this failure to make restitution, Respondent claimed that he had relied on a Bar assistant staff counsel who had told Respondent that the Bar had confirmed that all restitution except for a debt of $168.00 to Tellis had been made (Bar's Exh. 7). Joe Corsmeier was the Bar attorney who handled the prior case against Respondent. Mr. Corsmeier testified that he did not tell the Respondent that restitution had been made (Bar's Exh. 21, p. 33, l. 3 - 10). Respondent also claimed that he had relied on the Bar's language in the consent judgment, which indicated that there was one debt to a client outstanding, and states that he therefore concluded the others had received their money (TR p. 41, l. 18-21). He concluded, he says, that because the consent judgment noted only that Tellis did not get her check, the others had (TR p.

45, l. 16 - p. 47, l. 2; TR p. 46, l 5 - p. 47, l. 2; p. 47, l. 24 - p. 48, l.4). The consent judgment was signed on January 23, 1998 (Bar's Exh. 3, p. 17).

Respondent had received a copy of the audit report, which indicated that Ms. Tellis was owed $1,168.16 (TR p. 59, l 14 - 25; p. 63, l. 11 - 15).

Respondent testified that when he found out from an investigator from the State Attorney's Office that a client was saying she did not receive her check, he immediately cut a check for that client (TR p.34, l. 1 - 3). The check was sent by letter dated March 19, 1998, to the attorney who was assisting Respondent's former client, Hill, in trying to recover her money (Bar's Exh. 18). This money was sent prior to the Bar's inquiry about misrepresentations regarding restitution. Respondent claims he did not at that time determine if the others from whom he had wrongfully taken money had received repayment (TR p.24, l. 8 - 18; p.37, l.19 - 24).

On May 20, 1998, the investigator for the State Attorney's Office subpoenaed Respondent's personal account (TR p. 1 - 8). During his investigation, he discovered from a conversation with Respondent's former partner that there was a personal injury file, the Michael Carey file, that seemed a little strange (TR p.85, l. 15 - 25). The investigator found that the Carey settlement check had been deposited into Respondent's personal account rather than into a trust account (TR p. 86, l. 1 - 7). The check for Michael Carey had been issued on September 16, 1997,

and deposited by Respondent into his personal account on September 22 or 23, 1997 (See Bar's Exh. 11; Bar's Exh. 16). By October 8, 1997, the balance in Respondent's personal account was only $371.67 (Bar's Exh. 12, p.4), and Carey had not been paid.

After Respondent became aware that his conduct was being investigated, he paid Mr. Carey $15,000.00 in three increments. The Carey money had been misappropriated in the same month that Respondent told the Bar he had sent checks to reimburse misappropriations detected in the Bar audit (TR p. 96, l. 22 - 25), and after Respondent was sent the audit report.. Respondent signed his client's name to the Carey settlement check, and in the referee proceedings claimed he was authorized to do so (TR p. 133, l. 13 - p. 134, l. 4; TR p.134, l. 15 - 17).

Respondent claims he told the client he could not disburse the funds because the medical bills were in excess of the settlement amount (TR p. 121, l. 1 - 8). No letters of protection had been issued in the Carey case (TR p. 138, l. 5 - 8). The client does recall that Respondent had indicated he would try to negotiate the medical bills with the providers, and was authorized to do that (TR p. 115, l. 2 - 13). Respondent also claims that he told the client he would continue to represent him after a letter of October 15, 1997. In fact, in that letter, Respondent relates that he is aware the client has consulted with other counsel. Respondent also indicates he

will not be able to handle the case, which actually had been settled by Respondent prior to the date of the letter. The letter was sent to Mr. Carey after Respondent had already converted the money from September 16, 1997 through October 8, 1997.

The Referee found that the Respondent never told Mr. Carey that he had already received a check settling the matter, and that the representation had been terminated by letter dated October 15, 1997 (RR, p. 2). Mr. Carey claims that he was not advised that the case had actually settled (TR p. 105, l. 22 - 25). The Referee notes that Respondent's explanation that Michael Carey knew Respondent had the settlement was totally undermined by the October 15 letter (RR, p.3).

In May 1998, Mr. Carey received $4,000.00 in cash from Respondent's wife. (TR p. 107, l. 14 - 21), and then about a month later, he received another two checks (dated 5/27/98), totaling $11,000.00 (TR p. 108, l. 3 - 13; TR p. 110, line 19 - 22; Bar's Exhs.14 and 15). Respondent claims he first paid the $4,000.00 in spite of outstanding medical bills, and then when he found out about the investigation of himself by the State Attorney, he gave up and gave all the money to the client (TR p. 122, l. 6 - 12).

Respondent testified that Carey did not give him permission to use the funds for his own purposes, but did know they were being kept in a safe place for him. (TR. p. 146, l. 13 - 23; Bar's Exh. 19). The funds were far from safe. The account

into which the Carey funds had been deposited had a balance of $371.67 by October 8, 1997, less than a month after Respondent received the funds. On November 18, 1997, the account balance was minus ($290.10). Respondent once again converted client money. Nevertheless, the Referee found Respondent not guilty of committing Rule 4.8.4(b)(commission of a criminal act), noting that Carey received his money six months later, as soon as he confronted Respondent about the matter (RR p.3).

On March 15, 1999, Respondent pled guilty to two counts of grand theft, and one count of petit theft, receiving a withhold of adjudication and two years probation as to count one and one year probation as to count two, to run concurrently (Bar's Exh. 20). That was based on the misappropriations reflected in the case for which Respondent received a three-year suspension.

SUMMARY OF THE ARGUMENT

Respondent falsely represented to The Florida Bar in a previous case that he had made restitution to several clients. Based on that representation, The Florida

Bar recommended to the Referee that Respondent receive a three-year suspension. Respondent did not make restitution, and did not maintain the funds in his personal or a trust account to make that restitution. In fact, within eighteen (18) days of the September 11, 1997 letters shown to The Florida Bar as proof of restitution to clients, Respondent had converted money from another personal injury case. This was after The Florida Bar audit was completed in the prior case and Respondent received the results of that audit, but before the consent judgment was finalized and accepted by the Referee. Respondent intentionally misappropriated this additional $15,000.00 from a client. Respondent should be disbarred.

ARGUMENT

ISSUE I: Whether the Referee's finding that Respondent did not

intentionally mislead The Florida Bar about making restitution is clearly erroneous?

ISSUE II: Whether the Referee's recommendation of no additional discipline above Respondent's prior three-year suspension is inadequate for an attorney who received a previous three-year suspension based on a consent judgment, by claiming restitution of misappropriated funds as mitigation when there has been no restitution, and when this attorney also misappropriated an additional $15,000.00 after the audit in the previous case, but before entering into the consent judgment, if restitution was made when his misappropriations and failure to make restitution were detected?

ISSUE III: Whether it is mitigating that The Florida Bar relied on Respondent's presentation of copies of checks and transmittal letters which indicated restitution to clients, but did not ensure Respondent had done what he represented through documentation?

ISSUE IV: Whether it is mitigating that Respondent was able to misappropriate $15,000.00 after the audit and not be detected promptly because the Bar did not update the audit to determine whether Respondent was misappropriating anew after the audit, after Respondent claimed he made restitution of the misappropriations detected in the audit, and during the Bar proceedings?

The Referee concluded that the Respondent did not intentionally mislead The Florida Bar when he entered into a consent judgment for a three-year suspension. That consent judgment was agreed to by The Bar after Respondent presented evidence to The Bar that he had made restitution of the moneys he had

misappropriated. The Referee's conclusion is not logical. The Respondent claimed that he thought he had mailed the restitution checks, copies of which he had shown to the Florida Bar. The fact that he never detected that they had not been negotiated was explained away by his claim that he did not reconcile his accounts or balance his account books, even after an audit detected his misuse of client money. He also, according to his account, did not do so even after he was confronted with the fact that one of those individuals to whom he allegedly had sent restitution did not receive the check. As evidence of lack of intent, the Referee notes that Respondent deposited sufficient money to cover the checks which were issued. However, the evidence clearly shows that after the deposit, Respondent not only did not maintain enough money in his account to cover those restitution checks, but that he quickly reduced the balance in the account far below those obligations, but also misappropriated several thousand dollars from the Carey case.

Respondent claims he relied on the Bar's consent judgment, which did not show there was still a deficit (except for $168.00) when the consent judgment was executed. The Bar had concluded from Respondent's presentation of checks and letters to clients that Respondent had made restitution, and the mistake of trusting Respondent's evidence was reflected in the consent judgment. Because the consent judgment did reflect one outstanding debt, Respondent claims he relied on the report

and concluded that was the total amount of restitution remaining. He suggests that the continuing and allegedly surprising existence of this one obligation did not cause him to check further to see if perhaps any other misappropriation remained unpaid. Respondent's story is either another of his fictions, or Respondent is so indifferent to his obligation to repay misappropriated money that his excuses should be seen as no excuse at all. Even after the audit was completed, and the problems drawn to Respondent's attention, he did not open a trust account, did not reconcile the personal account into which he had placed, and continued to place, trust money, did not construct or reconstruct client ledger cards. In fact he was so unconcerned and indifferent to the fact that he had been caught misappropriating client money that he settled a case for another client, and placed that money into his personal account. In a matter of weeks after the Bar's audit, he had converted the entire settlement proceeds for Carey, had lied to his client about holding the money to pay medical bills, and did not repay that particular misappropriation until after his theft was detected by an investigator for the Office of the State Attorney. Respondent would have this Court accept his misappropriation after the audit as just another bookkeeping error. The Referee saw it otherwise.

The Referee suggests that since this last theft of client money occurred during the existence of the previous Bar case, and should have been detected by the Bar

and prosecuted as part of the prior Bar action, the prior three-year suspension is sufficient to cover old and new allegations. He notes that had he known about this additional misappropriation, he still would have given a three-year suspension. This is in spite of the fact that the Referee concluded that Respondent lied to his client about settling his case; in spite of the fact that Respondent misappropriated more money after the audit was completed in the prior case, and even though Respondent had an audit report clearly indicating prior misuse of client money.

The Referee seems to suggest that part of the justification for a three-year suspension rather than a recommendation of disbarment is the failure of the Bar to detect the theft in the Carey case. One could almost conclude that a respondent may be able to escape full accountability by using as mitigation that he presented to the Bar copies of checks and letters to clients showing restitution and the Bar did not follow up by demanding more concrete proof.

What the Referee concluded was that he would have recommended the same discipline if the facts presented in the instant case had been presented at the time the consent judgment to a three-year suspension was entered into. In other words, he would have recommended a three-year suspension for an attorney who converted money prior to a Bar audit, who converted more client money after the Bar audit was concluded but before the suspension order was in place, who falsely claimed

that he had paid back the converted money after his misconduct was discovered by the Bar and presented hard evidence to prove it, and who then actually began paying back the money after he was being investigated by the Office of The State Attorney and after a civil case was brought against him. This is an attorney who claims he did not check his records to assure he repaid the converted money because he relied on the Bar audit, who did not amend his trust account practices to avoid further misappropriation, who converted money even aware of prior and receiving a report delineating them. He claims he relied on the Bar audit in concluding he had paid back all but $168.00, but that audit did not cover the period when he stole the last $15,000.00. As an excuse for the last conversion, he relies on a claim he never reconciled his accounts, even after the Bar audit.

The Referee found as mitigation no prior history of discipline (he considered the conduct in the consent judgment, the misrepresentation to The Florida Bar, and the Carey theft as one case, and discounted the suspension as prior conduct). He also found inexperience in the practice of law for this attorney who was in practice five (5) years at the time of the misappropriations, and six (6) years at the time of the consent judgment. He also concluded that there was cooperation with The Florida Bar, notwithstanding the misrepresentations made to the Bar.

This Court has held that "in the hierarchy of offenses for which lawyers may

be disciplined, stealing from a client must be among those at the very top of the list." The Florida Bar v. Golub, 550 So. 2d 1382, 1383 (Fla. 1991). Disbarment is presumed to be the appropriate discipline for misuse of client funds; however, this presemtion can be rebutted by mitigating circumstances. See The Florida Bar v. Shanzer, 572 So. 2d 1382, 1383 (Fla. 1991). As this Court noted in The Florida Bar v. Korones, 25 Fla. L. Weekly, S56, 57 (Fla. January 27, 2000):

> The single most important concern of this Court in defining and regulating the practice of law is the protection of the public from incompetent, unethical, and irresponsible representation. The very nature of the practice of law requires that client place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can report this trust with confidence. The direct violation of this trust by stealing client's money, compounded by lying about it, mandates a punishment commensurate with such abuse. (Citing The Florida Bar v. Ward, 599 So. 2d 650, 652 (Fla. 1992).

Disbarment is the appropriate penalty in the instant case, absent substantial and compelling mitigation. There is no evidence that Respondent's mental faculties were impaired by addiction or family problems. His claimed mitigation amounts to callous indifference to the use of client money at best. The evidence indicates that intentional misuse of client money with repayment only when absolutely necessary is what actually occurred. The appropriate discipline for this attorney is disbarment.

This Court has said that "the misuse of clients funds is one of the most serious offenses a lawyer can commit. Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment." The Florida Bar v. Schiller, 537, So. 2d 992, 993 (Fla. 1989); The Florida Bar v. Tillman, 682 So. 2d 542, 543 (Fla. 1996). The Court noted that mitigation can reduce the discipline, but in Tillman found insufficient mitigation. In Tillman, the referee found lack of remorse, a dishonest or selfish motivation, multiple offenses, and a pattern of misconduct. The referee also found the conversion to be intentional. (Id. at 543). In the instant case, lack of remorse is apparent from the failure to assure repayment of misappropriated money until forced to do so, and the misappropriation even after receiving an audit which reported the specific instances of use of client money. Certainly there is also a pattern of misconduct, along intentional misappropriation in at least the Carey case as evidenced by his misleading the client by referring the client to other counsel when in fact the case had been settled.

Also in The Florida Bar v. McIver, 606 So. 2d 1159, 1160 (Fla. 1992), the Court noted that the misuse of client funds is one of the most serious offenses a lawyer can commit, finding that the misuse of client funds in itself warrants disbarment. Id. McIver had argued that no one had suffered any pecuniary loss, and

the discipline was too severe. The referee in McIver apparently concluded the misappropriation was intentional as opposed to merely being negligent. Id. McIver was disbarred. In the instant case, the Referee concluded that the misrepresentation to The Florida Bar that the restitution had been made was not intentional. However, in the consent judgment to a three-year suspension which the Referee references when saying no new discipline is necessary, there was a finding of criminal conduct, and no statement that the conduct was not intentional. Further, in the Carey case, the Referee labels Respondent's conduct deplorable, and points out that Respondent's explanation that the client knew he had the money was without merit, as was the claim that it was being held to negotiate medical bills. (RR p.3). This misappropriation and the misrepresentation to the client to conceal it was intentional. Disbarment is warranted for Respondent's overall conduct.

CONCLUSION

The Referee's recommendation of no additional discipline over and above the three-year suspension pursuant to a consent judgment in a prior case is

unreasonable. Respondent's misappropriations and misrepresentations to The Florida Bar and to his client, Carey, warrant disbarment.