097

IN THE SUPREME COURT OF FLORIDA

5/18

THE FLORIDA BAR,

Complainant,

v.

IRIC VONN SPEARS,

Respondent.

CASE NOS.: 94,769
96,180

TFB NOS.: 98-11,393(6E)
99-11,472(6E)

RESPONDENT'S REPLY BRIEF

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

A.R.R.	=	Amended Report of Referee dated February 4, 2000
In. Br.	=	Initial Brief of The Florida Bar
R.	=	Transcript of Final Hearing Conducted October 29, 1999
TFB Exh.	=	The Florida Bar Exhibits Introduced at Final Hearing

STATEMENT OF THE CASE AND THE FACTS

This disciplinary proceeding is before this Court based upon Complainant's Petition for Review served February 9, 2000, of the Report of Referee served January 21, 2000. (Petition for Review of Referee's Report at 1). An Amended Report of Referee was served on February 4, 2000 which is not addressed by the Complainant's Petition for Review. The Amended Report of Referee appears to differ from the original report by the correction of a case number on page two of the Amended Report. Under the section entitled "Recommendations as to Whether or not Respondent Should be Found Guilty" in the first sentence of the first paragraph, the Referee corrected "Complaint 94-769" to read "Complaint 92-081" in the amended version. There appears to be no other difference between the two reports.

In Case Number 94,769, the Complainant alleged that the Respondent violated the following Rules Regulating The Florida Bar. Rule 4-1.15(b) (Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); Rule 4-8.1(a) (A lawyer in connection with a disciplinary matter, shall not knowingly make a false statement of material fact); 4-8.1(b) (or fail to disclose a fact necessary to correct a misapprehension known by the person

to have arisen in the matter); and Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation). These alleged rule violations were predicated upon the Complainant's allegation that Respondent failed to make restitution in an earlier disciplinary case before this Court, Case Number 92,081, and misled The Florida Bar about such failure.

The Referee did not find Respondent guilty of any of the referenced violations but instead found that Respondent's representation "while incorrect was not done in an effort to intentionally mislead anyone." (A.R.R. at 3). Thus, Respondent was found not guilty as to Case Number 94,769.

In Case Number 96,180, the Complainant alleged that Respondent violated the following Rules Regulating The Florida Bar. Rule 3-4.4 (Whether the alleged misconduct constitutes a felony or misdemeanor, The Florida Bar may initiate disciplinary action regardless of whether the respondent has been tried, acquitted, or convicted in a court for the alleged criminal offense); Rule 4-1.15(a) (A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated); Rule 4-1.15(b) (Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the

client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); Rule 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); and Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

These alleged rule violations were based upon the Complainant's allegations that in September 1997, Respondent deposited proceeds from a personal injury settlement of Michael Carey into his personal bank account and thereafter depleted those funds, and did not deliver the funds to the client until May 1998.

The Referee found that Respondent did deposit a settlement check into his general account in September and did not deliver the funds until May 1998 when Respondent paid Mr. Carey the entire $15,000 settlement amount thereby waiving his fee. (R. 110, 122; A.R.R. at 2). The Referee ruled that as a result, Respondent violated Rule 4-1.15(a) and (b) and Rule 4-8.4(c). (A.R.R. at 2). The Referee did not find a violation of Rules 3-4.4 and 4-8.4(b). (A.R.R. at 2,3). Based upon these rule violations, the Referee recommended that Respondent be suspended for three years as he was in the earlier Case Number 92,180.

The Complainant has specifically sought review of the

recommendation of discipline and not the findings of fact or findings of rule violations. As a result, Respondent contemporaneously herewith files his Motion to Strike Issues or Arguments I, III and IV of the Complainant's brief as not being properly before this Court.

SUMMARY OF THE ARGUMENT

The Referee's findings below were amply supported by the record. The status of restitution owed by Respondent at the time he signed the Consent Agreement in Case Number 92,081 was clouded in confusion created by an apparent miscommunication between the Complainant's auditor and bar counsel. This confusion considered in conjunction with Respondent's explanation supports the Referee's conclusion that Respondent did not intend to mislead the Complainant concerning restitution when he executed the referenced Consent Agreement.

Further, the discipline recommended by the Referee is appropriate in view of the nature of the misconduct and of the past decisions of this Court.

I. THE REFEREE'S FINDING THAT RESPONDENT DID NOT INTENTIONALLY MISLEAD THE FLORIDA BAR ABOUT MAKING RESTITUTION IS NOT CLEARLY ERRONEOUS.

As a preliminary matter, it must be noted that the Complainant's attack on the Referee's findings of fact is improper because its Petition for Review only designated the appropriateness of the sanction recommendation as the ground for review. Accordingly, there is no jurisdiction for this Court to hear Complainant's argument that the Referee's findings were clearly erroneous and the Court should not consider those grounds in this appeal. (See R. Regulating Fla. Bar 3-7.7(c)(1)). Nonetheless, Respondent will address Complainant's arguments as set forth in its Initial Brief.

The Referee's findings of fact are presumed to be correct. The Florida Bar v. Marable, 645 So. 2d 438, 442 (Fla. 1994). Moreover, because the Referee had the opportunity to personally observe the witnesses, his findings must not be disturbed unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Stalnaker, 485 So. 2d 815, 816 (Fla. 1986). Therefore, the Complainant has the burden of establishing that there was insufficient evidence to support the Referee's finding that Respondent did not intend to mislead The Florida Bar.

Although the Complainant criticizes the Referee's findings as "not logical," it fails to effectively articulate an argument which identifies evidentiary support compelling the conclusion that Respondent intended to mislead The Florida Bar. (In. Br. at 11). In addition, Complainant appears to suggest that the

confusion concerning the inaccuracies reflected in the consent order, which were created in part by The Florida Bar's mistakes, should not have been considered in the Referee's evaluation of the Respondent's intent to mislead The Florida Bar.

However, the Referee's findings resulted from his personal observation of all the witnesses and his assessment of all the evidence adduced. The Referee's finding that Respondent did not intend to mislead the Complainant is supported by the record. In particular, the Referee found that Respondent's explanation was credible and specifically relied upon Respondent's testimony in reaching his conclusion. (A.R.R. at 3).

In order to evaluate the Respondent's state of mind concerning his compliance with the restitution requirements, it is important to consider the facts underlying his communications with The Florida Bar, and in particular, Respondent's interactions with Joseph A. Corsmeier, the assistant staff counsel who was assigned to prosecute his case. The Respondent testified that at the direction of bar counsel, Joseph Corsmeier, he prepared letters and checks dated September 11, 1997, to four clients to whom he owed money. (R. 36, 43; TFB Ex. 5). Those clients and the sums Respondent believed he owed based on the Complainants's audit were as follows:

a)	Jewel Rainey	$ 9.15
b)	Helen Tellis	$ 168.00
c)	Felix Robles	$ 0.72
d)	Lucille Hill	$5,848.73

(Complaint paragraph 5).

On September 11, 1997, Respondent authored a letter to Mr. Corsmeier and hand carried it with copies of the client transmittal letters and restitution checks to Mr. Corsmeier. (R. 36, 41, 44; TFB Ex. 21 at 16-21). Mr. Corsmeier recalled meeting with Respondent and the fact that Respondent provided the letters and checks. (TFB Ex. 21 at 16-18). However, Mr. Corsmeier did not remember his conversation with Respondent. (TFB Ex. 21 at 21).

Conversely, Respondent does remember the conversation which occurred on September 11, 1997 with Joseph A. Corsmeier. Respondent recalls providing copies of letters and checks to Mr. Corsmeier and telling him that they would be mailed later that day. (R. 36). Respondent believed that he mailed the letters to his clients. (R. 45).

On January 23, 1998, Respondent met again with Joseph Corsmeier to sign a Consent Agreement. (R. 21, 46; TFB Ex. 1). Again, Mr. Corsmeier had no recollection of this meeting or their conversation. (TFB Ex. 21 at 24, 27). The Consent Agreement prepared by the Complainant incorrectly indicated that all restitution had been made except $168.48 owed to Helen Tellis. (R. 48, 49, 73; TFB Ex. 1). It appears that Mr. Corsmeier included the $168.48 restitution requirement because he had received a memo from the Complainant's auditor, Debra Davis, which had indicated that Respondent's September 1997 check to Ms. Tellis was deficient in the amount of forty-eight cents. Instead

of including the forty-eight cent figure in the Consent Agreement, which was the amount the auditor believed Respondent still owed, Mr. Corsmeier included the entire amount of restitution originally owed which was $168.48. At the hearing, the Complainant's auditor, Debra Davis, opined that Mr. Corsmeier erred in stating $168.48 in restitution was owed to Ms. Tellis in the Consent Agreement. (R. 73).[1]

When Respondent went to sign the Consent Agreement, he was told by Mr. Corsmeier that he still owed $168.48 to Helen Tellis. (R. 41, 46). When Mr. Corsmeier advised Respondent of this restitution requirement, Respondent did not know his previous check to Ms. Tellis had not been mailed or received. (R. 45). Respondent testified that he did not want to quibble over the amount and he therefore agreed to pay Ms. Tellis One Hundred Sixty-eight Dollars and Forty-eight Cents ($168.48). (R. 48).

Based upon Mr. Corsmeier's statements at the time the Consent Agreement was signed that Helen Tellis' restitution was still outstanding, Respondent assumed that the other three clients, including Lucille Hill, had received their restitution checks. Respondent did not learn of the fact that Lucille Hill had not been paid until he received a call from his ex-partner in March 1998. (R. 34, 49). Respondent then immediately paid Ms.

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[1] Mr. Corsmeier did not remember why he indicated in the Consent Agreement that Helen Tellis was owed $168.48. (TFB Ex. 21 at 22). Complainant's auditor, Debra Davis, testified that she told Mr. Corsmeier by memo that the actual indebtedness to Ms. Tellis was $168.48, forty-eight cents ($.48) more than Respondent indicated in his September 11, 1997 correspondence and check. (R. 72; TFB Ex. 17).

Hill. (R. 50).

The Complainant's auditor also believed an error was made in requiring or allowing Respondent to make restitution to Jewel Rainey for Nine Dollars and Fifteen Cents ($9.15). (TFB Ex. 17). In fact, Ms. Rainey had actually received $9.15 over and above what she was entitled to receive, and thus, owed that amount to Respondent and/or his trust account. (R. 74, 75). By paying Ms. Rainey $9.15, Respondent had given her $18.30 to which she was not entitled. (R. 75). This was yet another error made between Mr. Corsmeier and Respondent in their dealings.

Thus, the record establishes significant confusion surrounding the Complainant's attempts to resolve the restitution issue from the earlier case with Respondent. Undeniably, some of that confusion stemmed from the acts of Complainant's employee. Respondent's misapprehension of the status of his restitution payments were the result of his reliance on The Florida Bar's representations made in the Consent Agreement. Since The Florida Bar, through Mr. Corsmeier, informed Respondent that Ms. Tellis had not received her restitution, he believed that the others had received the checks to which they were entitled.

Respondent did not attempt to mislead the Complainant by signing the Consent Agreement and he denied such an intention at the hearing. In view of this denial, any proof that Respondent had such intent must be established by clear and convincing circumstantial evidence. Yet, circumstantial evidence must be of sufficient quality and quantity to eliminate other reasonable

inferences which are just as consistent with the evidence. Vessel v. State, Dept. of Natural Resources, 487 So. 2d 1134 (Fla. 3d DCA 1986), Kendle v. Viro, 321 So. 2d 572 (Fla. 2d DCA 1975). Complainant cannot eliminate the reasonable inference that Respondent merely relied upon the representations made by The Florida Bar in his Consent Agreement.

The Referee had the opportunity to observe the witnesses and consider their demeanor and credibility and determined the Respondent did not intentionally mislead anyone. The circumstantial evidence to the contrary is insufficient to reverse the Referee on this issue. Therefore, the Referee's finding in this regard must be upheld.

II. THE REFEREE'S RECOMMENDATION OF A THREE-YEAR SUSPENSION IS APPROPRIATE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

The Referee found that Respondent's conduct in this case did not justify the imposition of disbarment. The Complainant argues that the Referee erred in recommending a three (3) year suspension and argues disbarment is the appropriate discipline. While Complainant asserts that disbarment is presumed to be the appropriate discipline for misuse of client funds, this presumption can be rebutted by mitigating circumstances. (In. Br. at 15).

Complainant relies upon several cases in urging disbarment which are either significantly more egregious, or the Court's opinion provides too few facts upon which to make a comparison. Therefore, all such cases are distinguishable from the case at bar.

One case the Complainant cites in reliance on its position that disbarment is mandated is The Florida Bar v. Korones, 25 Fla. L. Weekly S56 (Fla. Jan. 27, 2000). In Korones, the accused attorney converted nearly $125,000 from his uncle's estate for which he was acting as executor. The thefts spanned a three (3) year period from 1989 through 1991. In 1994, Korones submitted a false final accounting to the residual beneficiaries. Although Korones eventually made restitution, this Court noted that the beneficiaries were deprived of their inheritance for ten (10) years, thereby suffering significant injury. Korones also paid his son to avoid disclosure of his misdeeds to The Florida Bar.

The facts in the present case are far less egregious than the conduct that occurred in Korones. Korones pilfered nearly $125,000, depriving the beneficiaries of their inheritance for ten years. In contrast to Korones, Respondent received Mr. Carey's settlement in mid-September 1997 and paid Mr. Carey the entire $15,000 settlement, waiving his fee, in May 1998, eight (8) months later. Korones' actions subsequent to his theft are also distinguishable from this case because in order to conceal his misconduct, Korones paid his son to cover up his thefts. However, in this case, the Referee found Respondent to be cooperative with the Bar, inexperienced in the practice of law, and remorseful.

The Complainant also relies on this Court's decisions in The Florida Bar v. Schiller, 537 So. 2d 992 (Fla. 1989)(attorney suspended for three years for increasing trust shortage over a five-year period which eventually exceeded $29,000) and The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996)(attorney disbarred for unidentified persistent and growing trust shortage, refusal to acknowledge wrongful nature of misconduct and lack of remorse). Both Schiller and Tillman are distinguishable from the present case since the misconduct of these attorneys were the result of a pattern of theft over an extended period of time. In addition, the Court found that Tillman refused to acknowledge her wrongful conduct and lacked remorse.

The Complainant also cites to The Florida Bar v. McIver, 606 So. 2d 1159 (Fla. 1992) and The Florida Bar v. Shanzer, 572 So.

2d 1382 (Fla. 1991) in which the attorneys were disbarred for theft of client funds of indeterminate amounts and time periods. The Complainant's reference to this authority cannot provide meaningful guidance since these cases do not include a discussion of the specific factual misconduct. Accordingly, the Complainant's reliance on these cases is not persuasive.

The Referee's recommendation of a three (3) year suspension is supported by factually analogous authority. In reaching this conclusion, it must first be noted that Respondent's three (3) year suspension in Case Number 92,081 was, while a negotiated plea, on the severe end of the range of discipline appropriate for the misconduct shown in that case. Respondent testified that he dealt directly with Bar Counsel because he could not afford to hire an attorney. (R. 40). Due to his financial situation and his desire to spare his mother and father, he testified that he was willing to agree to anything except disbarment. (R. 40, 42). The parties settled on a three (3) year suspension.

However, similar disciplinary cases suggest that a three (3) year suspension was not the appropriate sanction. For example, in The Florida Bar v. Boland, 702 So. 2d 229 (Fla. 1997) a previously disciplined attorney received a two (2) year suspension for misappropriating client money intended for another attorney even when he had committed numerous other rule violations, had been convicted of multiple D.U.I. offenses and had twenty-two (22) driver's license revocations. Another case in which a two year suspension was imposed is found in The

Florida Bar v. Corces, 639 So. 2d 604 (Fla. 1994). In Corces an attorney who had two prior disciplinary violations received a two (2) year suspension for theft of nearly $7,000 in client money.

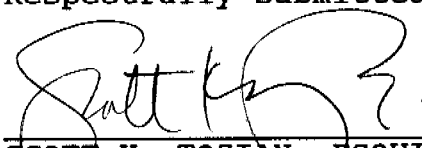
The case most factually similar to Respondent's first disciplinary case is The Florida Bar v. Krasnove, 697 So. 2d 1208 (Fla. 1997). In Krasnove, the accused attorney misappropriated $4,576.40 from his personal injury client and engaged in other misconduct resulting in nine (9) rule violations. In mitigation, Krasnove made restitution, cooperated with the Bar, and exhibited remorse. Even though Krasnove also had a prior public reprimand for misconduct, the attorney received a one (1) year suspension.

It is apparent that the case most similar to Respondent's initial case is the Krasnove case. However, Respondent's situation is even less severe than Krasnove since Respondent had no prior discipline when he received his three (3) year suspension. Given the differences in the prior disciplinary history, Respondent arguably should have received less than a one year suspension in the initial case. The additional misconduct in the present case, especially when considered with the mitigating factors found by the Referee, does not justify disbarment. Rather, a three (3) year suspension, as recommended by the Referee is an appropriate and just sanction.

CONCLUSION

The Referee's findings of fact and recommendation of discipline should be approved by the Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Respondent's Reply Brief have been furnished by regular U. S. Mail to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and true and correct copies have been furnished to Thomas E. DeBerg, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607 and John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, all this 3rd day of April, 2000.

CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief if submitted in 12 point proportionally spaced Courier font.

SCOTT K. TOZIAN, ESQUIRE
Attorney for Respondent