IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NO. SC 00-997

TFB No. 1998-71,527(11D)

LAVENIA DIANNE MASON,

Respondent.
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RESPONDENT'S INITIAL BRIEF ON CROSS-APPEAL AND ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant/Cross-Appellee, THE FLORIDA BAR, will be referred to as such or as the Bar. Respondent, LAVENIA DIANNE MASON, will be referred to as Respondent.

References to the transcript of the final hearing will be by the symbol "T." followed by the appropriate page number. References to the Report of Referee will be by the symbol "RR." followed by the appropriate page number. All of The Bar's exhibits were designated by number and Respondent's exhibits were designated by letter.

JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Article V, Section 15 of the Constitution of the State of Florida.

STATEMENT OF THE CASE AND FACTS

These proceedings commenced in April 1998, when Ruby Donaldson, an elderly client of Respondent's filed a grievance with the Bar. Twenty months later, on December 13, 1999, probable cause was found for further disciplinary proceedings.

On May 4, 2000, the formal Complaint in this cause was filed by The Florida Bar, alleging violations of Rules 4-8.4(c) and 5-1.1(a) of the Rules Regulating The Florida Bar. Prior to the commencement of the hearing before the referee, the parties entered into a written stipulation in which Respondent admitted the following:

1. that there had been an overcharge for attorney's fees on the settlement statement pertaining to one of Respondent's clients, Ruby Donaldson (the client filing the grievance with The Florida Bar);

2. that Respondent corrected the overcharge by sending the client a refund check;

3. that subsequent to the refund, Respondent received and sent additional funds from the settlement which belonged to the client, but the client refused to accept them, and filed a grievance with The Florida Bar;

4. that in response to The Florida Bar's inquiry into the above-noted client grievance, on June 5, 1998, Respondent sent a letter to the Florida Bar in which she indicated that those funds were in her trust account, and available to be forwarded to the client;

5. that as to Ms. Donaldson, there was a shortage in Respondent's trust account (IOTA account) of $ 2,893.23 on the date of Respondent's letter to The Florida Bar;

6. that an audit conducted by The Florida Bar with the cooperation of Respondent, her bookkeeper and her CPA indicated that there was a total shortage in the trust account on June 5, 1998 of $37,987.88 and that on July 27, 1998 there was a shortage of $33,941.28; and

7. that between January 1, 1996 and July 31, 1998, there were a total of 82 transfers totaling $252,500.00 from Respondent's trust account to her operating account. [1] None of the transfers specifically denoted the source of the transfer. Respondent did not agree that any of the transfers were improper.

On October 23, 2000, a hearing was conducted before the Honorable Alex Ferrer, as Referee. T. 1-189. In addition to the written stipulation, The Florida Bar

[1] The written stipulation was introduced as The Florida Bar's Exhibit No. 1 at the hearing. T. 27.

introduced the following documents as exhibits: the June 5, 1998 letter (Florida Bar Exhibit No. 2) in which Respondent stated that the funds to be sent to Ms. Donaldson were in her trust account; all of Respondent's trust account statements from her IOTA account covering the period from December 1996, when she opened her account, through July 1998 (Florida Bar Exhibit Nos. 3, 5, and composite 7); one statement from Respondent's operating account, January 1998 (Florida Bar Exhibit No. 8); and two compilations, one of Respondent's trust account, which reflected the total shortage in Respondent's IOTA account as stipulated to by the parties (Florida Bar Exhibit No. 4), the other a list of client liabilities owed by Respondent as of July 27, 1998 (Florida Bar Exhibit No. 6). T. 29-30, 32, 37, 45-46, 53, 68.

The Bar called only one witness, Respondent. T. 27-72. She testified that at the time she wrote the June 5, 1998 letter to The Florida Bar in response to the client grievance she believed that the funds belonging to this client were still in her trust account. T. 30-31. Respondent denied that she intentionally made a false statement to The Florida Bar, and also denied that the representations made in her letter about the availability of the client's money in the trust account were made with any intent to mislead and/or deceive The Florida Bar. T. 28-29; 35-36. Rather, her only intent was to fully explain the circumstances surrounding the client grievance, i.e., to explain why these funds had not been given to the client (when in fact, they had been but were

refused). T. 35-36. [2]

Respondent's trust account records indicated that she had $39,800 in trust at the end of May 1998. The average balance in Respondent's trust account in June was $26,500.00. (Exhibit 7); T. 161.

Respondent also testified that she did not know the full extent of the shortage in her trust account until approximately July, 1998, when she completed a full audit of her trust account. T. 41-42, 156. She acknowledged that she was aware of some bookkeeping problems in the trust account before the grievance was filed, and that in an effort to straighten out her trust account records, she had hired an accountant in January, 1998. T. 42-43. She believed that the problems were the result of liens filed by health care providers. T.126.

Respondent's trust account was very active, and the record keeping very complex, due to both the sheer number of clients for whom money was being held in trust at any given time, and the fact that the particular types of cases she was handling (and settling) had unique and highly unusual factors relating to the pay out of the settlements. T. 52. Specifically, Respondent was handling a large number of breast implant cases (mass tort litigation) which had multi-tiered fee issues, i.e., there were

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[2] Respondent's exact testimony was that she believed at the time of the June 5, 1998 letter that she had "ample" funds in her IOTA account to cover her obligations to the client. T. 40.

no flat fee cases, rather, every case had different fee structures. T. 52-53. Respondent also testified that another aspect of these breast implant cases which complicated the bookkeeping was the existence of medical liens and/or her advancement of costs in many of the cases. T. 51.

When questioned about why she had made the transfers from her trust account to her operating account, Respondent stated that she had, in fact, earned fees on these cases, and that she was therefore entitled to take these fees from her trust account. T. 54. Eventually, upon completion of the full internal audit, she was able to match monies disbursed from her trust account to her operating account as to individual clients. T. 60-62. Even then, a total reconstruction of the trust account was difficult T. 66. However, Respondent and her bookkeeper, in reviewing the individual client accounts, were able to determine that the bulk of the bookkeeping errors occurred where letters of protection and medical liens were involved. T. 66.

The Bar rested after Respondent testified. T. 72.

As her first witness, Respondent called Margaret Rosenbaum, a General Master in the Family Division of the Circuit Court in Miami-Dade County for the past eight years and a member of the Bar since 1981. T. 73-86. She has known Respondent for approximately 15 years. T. 74. Rosenbaum testified that during the relevant time period of the events which were the basis for the hearing, i.e., the end of summer or

early fall, 1997, through February and March of 1998, "[Respondent] was in the worst shape I've ever seen her [emotionally and mentally]". T. 77. She was aware that Respondent was going through a particularly difficult and acrimonious divorce, and felt it was apparent that Respondent was both traumatized and distracted by those proceedings. T. 77, 80-81. She noted that Respondent was unusually thin, as though she had barely been eating: it seemed like "her spirit was out of her." T. 79-80. On one occasion, Respondent did admit to Rosenbaum that she had hardly been eating at all. T. 79.

Rosenbaum further testified that during the pendency of these divorce proceedings, Respondent was very worried and concerned that the court might give custody of her two youngest children to her ex-husband. T. 81. Although Rosenbaum did not think there was a realistic possibility of this occurring, "That doesn't mean [Respondent] was rational about this." T. 82. Rosenbaum also stated that Respondent was very concerned for her physical well-being due to past physical and emotional abuse from her husband. T. 81.

Finally, Rosenbaum testified that during the entire time period mentioned earlier in her testimony, Respondent never complained or indicated to her that she was having financial difficulties. T. 84.

Respondent then testified in her own behalf. T. 87-176. She corroborated

Rosenbaum's testimony about Respondent's mental and physical state. As Respondent described it, she was not "operating normally", definitely distracted, not eating or sleeping well. T. 96-97. She also elaborated on the effect the divorce proceedings were having on her. T. 91, 96-97. Her ex-husband had been physically, emotionally, and verbally abusive to her during their marriage, compelling her to file for divorce in July, 1996. T. 89-92. She had legitimate concerns for her safety, given the history of abuse. She even believed that her ex-husband was capable of snatching her children. T. 90-92.

Respondent testified that her financial condition was good during the time period in question because the family court judge presiding over her divorce had ordered her ex-husband to pay all her household expenses, including the nanny's salary and the car payment, and to pay her an additional $1,000.00 on top of that. T. 98. She was not having difficulty making ends meet, and her parents were always available if she needed a loan. T. 99. She also had a line of credit at her bank to cover the operating expenses of her firm. T.70.

Respondent testified about her legal experience. T. 100-104. She had clerked during law school for the firm of Markus & Winter, P.A., and after obtaining her license in 1989, continued to work with them. T. 100. Approximately two years later, she left the firm and started a partnership with another attorney, Gordon Watt. T. 101.

About two years later, in 1994, she and Watt became interested in the ongoing breast implant litigation; through referrals, they ended up getting almost 200 of these clients in about one year. T. 101-102. After the partnership was amicably dissolved, she moved to the firm of Mitchell & Associates, bringing her inventory of breast implant cases. T. 103-104. Although the firm was at first enthusiastic about these cases, its interest waned once Dow Corning declared bankruptcy at the end of 1995. T. 104. This led to Respondent's decision to start her own firm, which she opened in December, 1996. T. 104.

At this point, Respondent was completely uninformed about the complexities of maintaining complete and accurate trust account records. She had never taken any courses in law school about trust account regulations or trust account rules. T. 105. She had no responsibility at any of the three firms she worked at for maintaining and/or working with trust accounts. T. 105-06. Though her partnership, Mason & Watt, P.A., had a trust account, it had few transactions and all the bookkeeping in that regard was taken care of by her partner, Watt. T. 105, 219. Even after opening her own practice, Respondent did not take any courses in trust accounting: she simply had no idea how complex it could get. T. 106.

The trust account record keeping system set up by Respondent was primitive, consisting solely of a ledger book and a running tally sheet for fees earned. T. 107.

She did not maintain individual client ledger cards; she did not balance her trust account on a monthly basis, nor did she reconcile her trust account bank statements. T. 110. Rather, she relied on her secretary and the information entered on the fees sheet to let her know what fees she had earned and could withdraw from the trust account. T. 109-110.

By early 1998, Respondent had noticed several mistakes in the trust account bookkeeping, and decided to hire an accountant/bookkeeper, Geeta Sawant, to help her correct the mistakes and clean up her record keeping. T. 111-112. Although significant progress was being made (for example, she began doing reconciliations), as of the end of March, 1998, Respondent was still trying to get her accounting system into compliance with the trust accounting rules. T. 114.

Respondent repeated her belief that at the time she wrote the June 5, 1998 letter to The Florida Bar, there were sufficient funds in her trust account to meet her remaining obligation to the client who had filed the grievance. T. 116.

Respondent then testified about two meetings with Carlos Ruga, the auditor for The Florida Bar. T. 118-122. She fully cooperated with his investigation, turning over all her trust account records to him. T. 122. Prior to their first meeting, Respondent, with the help of Ms Sawant, had determined that the actual shortage in her trust account was approximately $37,000, with about $16,000 owed to individual

clients, the remainder to health care providers (primarily the Center for Arthritis). T. 121. Funds sufficient to meet her client obligations were restored by Respondent to her trust account prior to the first meeting with Ruga, on August 25, 1998. T. 123-124.

The record keeping on the payments to health care providers was especially complex,for two reasons: first, Respondent, in many cases, had helped her indigent clients and those who had no health insurance by advancing all or part of the costs of the medical providers whose assistance in these cases was critical. T. 125-126. Second, the three physicians who owned the Center for Arthritis[3] decided to terminate their partnership, the actual break-up occurring in late 1997 or early 1998 T. 143-145. This resulted in a significant increase in Respondent's trust account record keeping, as she now had to divide what would have normally been one payment on a medical lien into three separate payments, as per the terms of the written agreement reached by the partners. T. 143-145. [4] To add to the confusion, frequently the amount of the advance by Respondent was the same as the amount of the lien still owed, $1,000.00.

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[3] The full name of the facility was actually the Center for Arthritis and Rheumatic Diseases. T. 145.

[4] For example, to pay a $1,000.00 medical lien for medical care provided at the Center for Arthritis, Respondent now had to issue three checks: one to Dr. Rosenbaum for $365.00, one to Dr. Weitz for the same amount, and one to Dr. Ritter for $270.00. T. 143-144.

Prior to her first meeting with Ruga, Respondent had made full payment of all monies known to be owed to individual clients, and before the second meeting occurred (on October 9, 1998), she had made full payment of all monies known to be owed to health care providers. T. 146. As of November 23, 1998, Respondent had resolved all the problems that had developed as a result of her inadequate trust account record keeping. T. 145-147. Since that date, she has had no problems with her trust account. T. 147. With the ongoing help and assistance of her CPA, Dana Kaufman, Respondent set up and now maintains complete and accurate trust account records for each of her clients; this includes having reconciliations performed monthly, and cost ledgers have been placed in every client file as well. T. 147.

Respondent concluded her testimony by reiterating that she never intended to take any money out of her trust account that she had not earned. As for why the trust accounting problems had occurred, she stated that it was due to a combination of factors. First and foremost being her total lack of experience with and knowledge of basic accounting procedures and principles. That inexperience was compounded by her inability to personally supervise the trust account record keeping because of the sheer volume of those records and the personal problems she was having in her private life, specifically, her divorce. T. 148.

Before the hearing concluded, it was also acknowledged on the record that Respondent had no prior disciplinary history. T. 185.

On November 21, 2000, the hearing reconvened for the express purpose of presenting testimony of character witnesses. T. 193-198. The first witness called by Respondent was her accountant, Dana Kaufman. T. 200-208. A Certified Public Accountant and a licensed attorney, he stated that he had known Respondent since law school, a period of almost 17 years. T. 201. Kaufman believed Respondent to be of "high moral character, honest, trustworthy, and forthright." T. 204. He also testified that Respondent had instructed him to fully cooperate with The Florida Bar's investigation, and to turn over "every record" to them. T. 206. Kaufman met with Ruga twice (in addition to Respondent's two meetings with Ruga), and even turned over all his work product to The Bar. T. 206. He concluded his testimony by corroborating Respondent's testimony about adhering to the new trust account record keeping he helped to put in place. T. 207.

The next character witness, Carmen Saito, is the daughter of the complainant. She had originally come to Respondent for representation on a breast implant claim. T. 210. At that time, she was accompanied by Ruby Donaldson, her mother. Saito testified that her mother had passed away shortly before the final hearing, and notwithstanding the pending grievance proceedings, she had decided to retain

Respondent again, this time to handle her mother's estate. T. 210-211. Saito still has "complete confidence" in the ability of Respondent to represent her as an attorney; even though she has heard about the allegations of trust account shortages, Saito still trusts Respondent, and would continue to trust her to receive money on her behalf. T. 212-213.

Gordon Watt, Respondent's former law partner, testified that Respondent is an honest person, and he never had a concern about her integrity or her character while they were partners. T. 219-220. He corroborated Respondent's testimony that he handled the firm's trust accounting while they were partners. T. 219.

General Master Rosenbaum was recalled as a witness, this time to offer character testimony in Respondent's behalf. T. 221. She stressed that Respondent has always accepted responsibility for her actions; to her, it appears that Respondent regards these events as a failing on her part, and believes she (Respondent) is genuinely remorseful. T. 223.

Rosenbaum has never known Respondent to lie, cheat, or steal, and believes that Respondent "is not capable of intentionally taking from someone." T. 226. To the contrary, Rosenbaum sees Respondent as a giving person, "somebody who does for people." T. 226. In Rosenbaum's opinion, Respondent has gone "way beyond what she ought to do for people... [s]he's a giver, not a taker." T. 226.

Respondent also presented affidavits attesting to her good character from two other attorneys, Stuart A. Markus, Esq., and Edward G. Rubinoff, Esq. (introduced into evidence as Respondent's Exhibits F and G, respectively), and concluded her case by again testifying in her own behalf. T. 229, 230-236.

Respondent believes she fully cooperated with The Florida Bar throughout its investigation, stating that she had a cooperative and cordial relationship with Ruga during that process. She personally met with Mr. Ruga twice and her lawyer authorized her to deal directly with him. T. 233-234. She is proud to be a lawyer, and proud to be a member of The Florida Bar. T. 234. She completely understands how her conduct has impacted on the bar and the legal community, and feels as though she has let down the community and the legal profession. T. 234. In retrospect, she realizes that the trust account record keeping was just as important a part of being a lawyer as representing clients zealously in the courtroom. T. 235. She finished her testimony by acknowledging that her conduct was irresponsible, but that she never had any intent to take money from anyone, money that didn't belong to her. T. 236. The hearing ended with the Referee stating he would issue his ruling at a future date. T. 238.

On December 22, 2000, the Referee issued his report. As to Count II of the Bar's Complaint, he found that Respondent intentionally violated Rule 5-1.1(a). As

to Count I, he found Respondent, in writing the June 5, 1998 letter, did not intend to "defraud, mislead or deceive" the Bar. He found Respondent's erroneous statement regarding Ms. Donaldson's funds to be the result of "gross negligence rather than intentional conduct." RR 4, par 10. (The referee's report contains two paragraphs 9 and 10 on page 4. The quoted language comes from the first paragraph 10.)

As discipline, the referee recommended that Respondent be suspended for two years. In so doing, he stated:

> Although it is clear that disbarment is the usual punishment for violations of the nature herein, I recommend that Respondent be suspended for a period of two years and thereafter until Respondent shall prove rehabilitation as provided in Rule 3.5-1(e), Rules of Discipline. Although disbarment is the presumed punishment for acts of misappropriation and misrepresentation (based upon a review of prior opinions from the Supreme Court of Florida), the Respondent in this case has not only suffered from personal and family problems but has shown exemplary conduct as an attorney for the last fourteen years. This isolated incident aside, it is highly unlikely that Lavenia Dianne Mason will violate any rules governing her chosen profession in the future. Moreover, a two year suspension from the practice of law, together with the obligation of proving rehabilitation, is an adequate and sufficiently severe punishment for the transgression herein. (RR5)
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> It should be noted that Respondent's behavior is completely unacceptable and intolerable to the members in good standing of The Florida Bar. That having been said, "the extreme sanction of disbarment has to be imposed only 'in those rare cases where rehabilitation is highly improbable'.

> " Florida Bar v. Tauler 2000 WL 1726764 (quoting Florida Bar v. Kassier, 711 So.2d 515, 517 (Fla.1998)). It can hardly be said that the rehabilitation of Respondent herein is highly improbable. In fact, given the circumstances under which she finds herself as well as the effects of a two year suspension from her source of livelihood, the practice of law, it is "highly improbable" that Respondent will violate again. In that regard, the punishment recommended herein is "fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public of services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, . . . [it is] fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, . . . [it is] severe enough to deter others who might be prone or tempted to become involved in like violations." The Florida Bar v. Pahules, 233 So.2d 130 (Fla.1970). In reaching the recommendations herein, the Referee has reviewed the case law provided by The Florida Bar and Respondent, and has considered the arguments made by both sides regarding similarities and distinguishing factors. (RR 6)

SUMMARY OF ARGUMENT

Respondent argues in her appeal that The Bar has not met its burden of proving that Respondent intentionally misappropriated trust funds by clear and convincing evidence. The only evidence presented by The Bar supporting this charge consisted of its auditor's reports showing the actual existence of shortages and Respondents January 1998 operating account statement. That statement showed a number of returned checks and transfers from the trust account subsequent thereto. There was no evidence in the

record, however, which showed that any of the 82 transfers that Respondent made from her trust account to her operating account were improper. Respondent testified that all of the transfers were, to the best of her knowledge and belief at the time, earned fees. The Bar presented no evidence rebutting her testimony and pointed to no transfers that were not comprised of earned fees.

The Florida Bar has the burden of proving in its appeal that the referee's recommended discipline, a two year suspension, is inappropriate. This court ruled in *The Florida Bar v. Lecznar* 690 So.2d 1284, 1288 (Fla. 1997) that it ("will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw").

The caselaw promigated by this court amply supports the referee's decision. The referee specifically considered the cases cited by The Bar in its arguments in support of disbarment and rejected them. After considering the mitigation shown by Respondent, which the referee specifically listed in his report, including no prior disciplinary history, personal and emotional problems, restitution, inexperience in the practice of law, good character and good reputation and remorse, he rejected disbarment and recommended a two year suspension. His decision is clearly supported by caselaw and is not "off the mark".

In *The Florida Bar v. Wolf,* 605 So.2d 461 (Fla. 1992) a lawyer with a prior

disciplinary record was suspended for two years for conduct similar to Respondent. In fact, her conduct was worse in that Ms. Wolf made material misrepresentations to the court and bounced trust account checks, neither element of which is present in the case at bar.

This Court imposed a one year suspension in *The Florida Bar v. Borja,* 609 So.2d 21(Fla. 1992). Mr. Borja, who engaged in conduct similar to Respondents, had been previously disciplined by this court on four separate occasions. Yet, he was not disbarred. This court rejected disbarment and imposed a three year suspension in misappropriation of trust funds in *The Florida Bar v. Tauler*, *Supra, The Florida Bar v. Pellegrini*, 714 So.2d 448 (Fla. 1998), *The Florida Bar v. Stark*, 616 So.2d 41 (Fla. 1993) and in *The Florida Bar v. Schiller,* 537 So.2d 992 (Fla. 1989).

The referee's recommendation of a two year suspension is amply supported by this Court's past decisions and should be upheld.

ARGUMENT

POINT I
(ADDRESSING RESPONDENT'S APPEAL)

THE REFEREE'S FINDING THAT RESPONDENT'S CONDUCT WAS INTENTIONAL IS NOT SUPPORTED BY THE RECORD, AS THE BAR'S EVIDENCE FELL FAR SHORT OF ESTABLISHING, BY CLEAR AND CONVINCING EVIDENCE, THAT RESPONDENT ACTED WITH INTENT TO VIOLATE THE TRUST ACCOUNTING RULES OF THE FLORIDA BAR.

As stated by Respondent's counsel during his opening remarks to the Referee, there were two issues to be litigated in these proceedings: first, whether Respondent intentionally misled The Florida Bar in her written response to the grievance filed by Ruby Donaldson, and second, whether the shortages in Respondent's trust account occurred as the result of negligence or intentional conduct. In trying to establish proof

of intent, The Florida Bar relied primarily on evidence which merely showed that the acts occurred, i.e., that there were shortages in the trust account. Their evidence, then, is totally circumstantial and does not meet the clear and convincing standard set forth by The Florida Bar v Rayman, 238 So. 2d 594 (Fla. 1970).

On the other hand, Respondent presented unrebutted testimony supporting the exact opposition conclusion: that her conduct, while clearly inappropriate and deserving of disciplinary action, was negligent, even grossly negligent, but was not intentional. The evidence presented by The Florida Bar was woefully insufficient to establish, by the applicable standard of clear and convincing evidence, that Respondent's conduct was intentional. The findings of the Referee on this point cannot be upheld.

The Florida Bar, by the allegations in its complaint, accused Respondent of the misappropriation of money which rightfully belonged to her clients. Specifically, they claim the shortages created in Respondent's trust account were intentionally created by Respondent, by her actions of removing money from her trust account and transferring it to her operating account on a number of occasions during 1997 and 1998.

What The Florida Bar conveniently ignores, and what the Referee failed to properly consider, is the fact that the transfers **consisted of fees earned by Respondent**

and to which she believed she was entitled. The evidence adduced at the hearing actually shows that the improper conduct of Respondent related to the **amount** of money transferred, **not** the transfers in and of themselves, and the lack of adequate trust account record keeping to reflect what monies were being transferred and from which client's trust account. [5]

While The Florida Bar is not held to the same burden of proof required to punish someone criminally for the act of theft, they still had to prove the *sine qua non* of theft: proof of **criminal intent**.

In *Board of Regents v. Videon*, 313 So.2d 433 (Fla. 1st DCA 1975), an employee at the University of Florida was discharged from employment for misappropriating University property (the respondent had taken home 700 pounds of copper wire which **he believed** to be garbage). He testified that he had been told it was all right to do so by another employee who had authority, or at least the apparent authority, to make that representation. The Career Service Commission found that the University had failed to show by the greater weight of the evidence that Videon "had the specific criminal

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[5] On this point, it is important to note that The Florida Bar **never** introduced any evidence to show that Respondent was not entitled to the money transferred into her trust account. This supports Respondent's assertion stated herein, that it was the lack of proper record keeping and the erroneous withdrawal of excessive funds from her trust account that constituted the improper conduct, not the removal of funds *per se* from the trust account.

intent to wrongfully deprive the University of its property", and accordingly, reduced his discharge to a suspension without pay. ***Id.***

In affirming the action of the administrative body, the appellate court stated:

> When a taking or appropriation to one's own use is with an **honest belief** that the taker has the right to take the property (to apply it to his own use), there is no larceny, **even though the taker may have been mistaken**.

Videon, *supra* at 435 (emphasis added).

The *Videon* decision is significant for two reasons: first, the appellate court recognized that in reviewing the propriety of **administrative** action taken against an employee accused of theft, the proper standard is the same as if the person was accused criminally of theft, i.e., not that the standard of proof is the same as in a criminal case, but rather, that the **level of intent** that must be shown is **criminal** intent.

Second, as in *Videon*, Respondent herein testified that she honestly believed the monies she was transferring out of her trust account were, in fact, monies which belonged to her, constituting either fees earned or reimbursement for costs advanced on behalf of her indigent clients and those clients who did not have insurance. The evidence presented at trial shows this belief to have been **very** reasonable, given the number and size of the settlements Respondent had obtained in her breast implant cases,

and the amounts of money she was receiving on a regular basis during the time period in question. [6]

Similarly, in *Reid v. Florida Real Estate Commission*, 188 So.2d 846 (Fla. 2d DCA 1966), a real estate broker's license was suspended because she had shoplifted a steak from a supermarket. The court applied the same standard as did the court in *Videon*, finding that in order to suspend the broker's license, proof of **criminal** intent was needed, which the court recognized to be a "felonious" intent, i.e., "**a conscious purpose to steal that which did not belong to the taker**." *Reid*, *supra* at 847, 854 (emphasis added). [7]

In *Lewis v. Heartsong*, 559 So.2d 453 (Fla. 1st DCA 1990), the appellate court again held that in an action for **civil** theft, failure to allege that the theft was done with

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[6] For example, Ruby Donaldson's settlement was $50,000.00. Other settlements of approximately equal or greater amount, as reflected in The Florida Bar's Exhibit No. 6, included Gloria Auston ($53,000.00), Linda Wickett ($100,000.00), Marion Scarlatti ($47,500.00), Deborah MacFadden ($40,000.00), and Caridad Hernandez ($47,000.00). Additionally, The Florida Bar's Exhibit No. 7, a composite of all Respondent's trust accounts statements from November, 1996 through the end of July, 1998, reflect that more than $972,000.00 was deposited into that account during that period.

[7] In *Reid*, the court's decision to reverse the decision of the Commission suspending the license was actually based on another ground, that because of mental incapacity, the broker could not have formed the requisite criminal intent.

felonious intent was fatal to the complaint. See also cases *Tucker v. Mariani*, 655 So.2d 221 (Fla. 1st DCA 1995), and *Country Manors Association v. Master Antennas Systems, Inc*., 534 So.2d 1187 (Fla. 4th DCA 1989) (applying the same standard of criminal or felonious) intent to a cause of action for civil theft).

In order to determine whether The Florida Bar met its burden of proof in their case against Respondent,[8] this Court, then, must necessarily look to how Florida courts have decided cases where proof of criminal intent was in issue.

Florida's theft statute, Section 812.014, Florida Statutes, has been interpreted as requiring proof of a **specific** intent: merely performing or committing an act is not punishable, unless it was performed or committed **with the intent to accomplish some specific purpose**. Florida courts have uniformly held that, in regard to the theft statute, there must be proof of "*animus furandi*", which means the intent to steal. *See, e.g., Daniels v. State*, 587 So.2d 460 (Fla. 1991); *Proko v. State*, 566 So.2d 918 (Fla. 5th DCA 1990) (specific intent crimes require special mental element over and above mental state required for criminal act itself); *Evans v. State*, 452 So.2d 1093 (Fla. 2d DCA 1984) (a specific intent crime by definition is a crime where the act itself must be

[8] That burden being "clear and convincing evidence", *see The Florida Bar v. Marable*, 645 So.2d 438, 442 (Fla. 1994), *citing Florida Bar v. Rayman*, 238 So.2d 594, 596-97 (Fla. 1970).

accompanied by some intent **other** that then intent to do the act itself).

In her opening remarks at the hearing, counsel for The Florida Bar acknowledged that, in the absence of direct proof (such as an admission), "[t]he only way you can prove intent is basically through a person's...actions". T. 18. While this may make their case harder to prove, it certainly does not relieve The Florida Bar of its burden of proof. The only evidence that the Bar presented to try to prove intent was the mere existence of the shortages (which was the result of negligence and poor record keeping) and Respondent's January 1998 operating account statement. None of the other 20 or so operating account statements in the Bar's possession were entered into evidence. While that statement showed a series of NSF operating account checks (there were never any returned trust account checks), it does not show improper transfer of funds from the trust account to the operating account.

This Court has recognized that circumstantial evidence is often used to prove intent, and is often the only available evidence of a person's mental state. However, in order to be "legally sufficient evidence of guilt", such evidence must be "inconsistent with **any** reasonable hypothesis of innocence." *The Florida Bar v. Marable*, 645 So.2d 438, 443 (Fla. 1994) (emphasis added).

Here, there is clearly a reasonable hypothesis of innocence: Respondent, **never**

having had any formal training in trust account record keeping, **never** having been responsible for keeping trust account records during her first 7 years at practice, **never** having been responsible for keeping trust records at any of the three firms where she worked prior to starting her own firm, simply became overwhelmed by the demands of trust account record keeping, which was not surprising given the number of clients for whom she had to maintain trust accounts and the sheer volume of funds she was receiving on behalf of those clients. [9] It must be remembered: at the time of Ms. Donaldson's complaint Respondent had been a sole practitioner but seventeen months.

In support of this reasonable hypothesis, Respondent testified about the complexity of the record keeping involved in the breast implant cases. In fact, the audit conducted by **The Florida Bar's own auditor** contained numerous inaccuracies, some of which were simple calculation mistakes, others which were most likely caused by the complexity of determining medical liens, reimbursement for costs advanced, and the

[9] In offering this explanation, Respondent does **not** mean to assert that her lack of complete and accurate trust account record keeping is in any way excusable. It most certainly is not, and to that extent, Respondent has already admitted to those allegations and has accepted the fact that the discipline imposed by the Referee, suspension, is warranted. Rather, it was presented at the hearing to counter The Florida Bar's unsubstantiated allegation that her conduct was intentional.

different amount of fees earned in each case. See Respondent's Exhibit D. [10]

Finally, Respondent's behavior once the grievance had been filed is totally consistent with innocence, i.e., that her conduct was negligent. Respondent fully cooperated with The Florida Bar's investigation to the point of providing every document connected with her trust accounts, and even instructing her CPA, Mr. Kaufman, to fully cooperate as well. Her candor with the Bar is exemplified by the fact that she communicated directly with Mr. Ruga rather than filtering her communications through her lawyer. It is hard to believe that an attorney who had **knowingly** and **intentionally** stolen money from their trust account would be so open about providing proof of her misconduct while maintaining a position that their actions were merely negligent (the more logical conclusion being that the attorney, having had their theft uncovered, would admit it rather than deny it). *See, e.g.*, *The Florida Bar v. Tauler*, 775

[10] Again, this is significant evidence supporting Respondent's postion that her conduct was negligent, not intentional. In her response to a written request from Ruga, Respondent presented a reconciliation of 32 client accounts which, according to The Florida Bar's audit, showed either an overage or a shortage. *See* Respondent's Exhibit D. Respondent's reconciliation revealed that in fact, there was **no** overage or shortage in **25** of those accounts, although there were numerous scrivener and calculation errors. As to the 7 accounts for which there was an actual shortage or overage, all were shown to have resulted from scrivener or calculation errors, thus further rebutting The Florida Bar's allegations of intentional misconduct.

So.2d 944 (Fla. 2000). [11]

The Florida Bar failed to establish by clear and convincing evidence that Respondent intentionally misappropriated trust funds. *The Florida Bar v. Neu*, 597 So.2d 266 (Fla. 1992) (Florida Bar failed to prove that shortages in respondent's trust account were result of dishonesty, fraud, deceit or misrepresentation). *See also The Florida Bar v. Burke*, 578 So.2d 1099 (Fla. 1991) and *The Florida Bar v. Lumley,517 So. 2d 13 (Fla. 1987) (there is a distinction between intentional misuse of trust funds and negligence resulting in shortages).*

POINT II
(ADDRESSING THE BAR'S APPEAL)

THE REFEREE PROPERLY RECOMMENDED A TWO YEAR SUSPENSION FOR RESPONDENT; THAT RECOMMENDATION IS SUPPORTED BY PRIOR CASE LAW AND BY THE STRONG EVIDENCE OF MITIGATION IN THE RECORD.

The Bar has appealed the recommended discipline of a two year suspension for Respondent, insisting that disbarment is the only correct punishment. The Bar has the burden of proving that the Referee's recommendation is "erroneous, unlawful, or unjustified." Fla.R.Regulating Fla.Bar 3-7.7(c)(5). The Bar failed to meet its burden,

[11] In that case, the evidence of intentional misappropriation was so overwhelming that Respondent stipulated to a finding of intentional misconduct, and a hearing was held on the subject of discipline only.

and the Referee's recommendation of a two year suspension should be upheld.

In numerous prior decisions, this Court has recognized that a referee's recommended discipline will not be reversed as long as there is a basis for the recommendation:

> We 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, 1288 (Fla. 1997). Again, in *The Florida Bar v. Dunagan*, 731 So.2d 1237, 1242 (Fla. 1999), this Court stated:

> The referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not "clearly off the mark". *Florida Bar v. Vining*, 707 So.2d 670, 673 (Fla. 1998).

The Referee's recommendation that Respondent receive a two-year suspension is reasonably based on existing case law and is not "clearly off the mark." Accordingly, it should be upheld.

The Bar seeks disbarment, notwithstanding the fact that this Court has "repeatedly stated that disbarment is an extreme form of discipline and should be reserved for the most egregious misconduct." *The Florida Bar v. Summers*, 728 So.2d 739, 742 (Fla. 1999); *accord*, *The Florida Bar v. Kassier*, 711 So.2d 515, 517 (Fla. 1998)"[T]he extreme sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable.") *and The Florida Bar v. Cox*, 718 So.2d

788, 794 (Fla. 1998) (disbarment is appropriate where there is a pattern of misconduct and history of discipline).

In this case, Respondent's actions, while negligent and deserving of discipline, simply do not rise to the level of conduct which warrants the "extreme and ultimate" discipline of disbarment:

> We cannot say that the record here establishes that this respondent is one that has been demonstrated within that class of lawyers "unworthy to practice law in this State" as provided in Integration Rule 11.02. Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings.

The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977).

In *The Florida Bar v. Pahules*, 233 So.2d 130, 132 (Fla. 1970), this Court pointed out that the purpose of discipline is threefold: it should be fair to society, it should be fair to Respondent and it should be severe enough to deter others. The two-year suspension recommended by the Referee in this case meets all three purposes. Indeed, the Referee specifically considered Pahules in deciding the discipline to be imposed. His recommended sanction is certainly is harsh enough to deter other lawyers from engaging in similar conduct. A suspension is fair to Respondent in that it imposes a stern discipline while simultaneously encouraging rehabilitation. Applying the "death penalty" of attorney discipline to a case where the attorney has

less than 18 months' experience handling trust accounting, where no client has lost money, where all medical providers have been paid, and where Respondent has already put into place effective measures which will absolutely prevent the kind of misconduct occurring herein from ever happening again, is simply not consistent with either the letter or spirit of the *Pahules* decision.

Further, even if disbarment were possibly an appropriate sanction in this case, the strong evidence of mitigation presented to the Referee in this case removed her offense from one warranting such an extreme punishment. The Referee noted in his Report those elements of mitigation that he felt eliminated disbarment. Specifically:

> In Mitigation, the Referee finds:
>
> A) Absence of a prior disciplinary record [9.32(a)] - Respondent's record since her membership in The Bar in February, 1989, has been beyond reproach;
>
> B) Personal and emotional problems [9.32(c)] - Respondent was certainly affected by the difficulties of maintaining her own sole practice while dealing with a difficult and acrimonious divorce at and around the time of the incidence in question. While Respondent's emotional problems are not an excuse for her behavior, they do constitute an explanation for these isolated, although severe, transgressions;
>
> C) Timely good faith effort to make restitution or to rectify consequences of misconduct [9.32(d)] - in this regard it should be noted that no clients suffered financial losses as a result of Respondent's actions;

D) Inexperience in the practice of law [9.32(f)] - it is significant that although Respondent worked in a setting of a law firm for a good portion of her career, she was a relative newcomer to the status of a sole practitioner and the difficulties of handling administrative responsibilities relating hereto;

E) Character or reputation [9.32(g)] - as reflected in the testimony, Respondent, until this incident enjoyed a reputation for honesty and good character;

F) Remorse [9.32(g)] - although Respondent maintains that her misrepresentation of client funds was unintentional, contrary to the findings of this referee, her remorse of having caused this situation appears genuine and sincere.

Respondent submits that two additional elements of mitigation should have been listed by the Referee: standard 9.32(e), cooperation with the Bar and standard 9.32(j), interim rehabilitation. Respondent's cooperation with the Bar was discussed extensively in Point I of this brief and will not be repeated here. Interim rehabilitation should also be considered in determining discipline. In the three years since these proceedings commenced Respondent has implemented and adhered to a trust accounting system that has eliminated the errors that led to her shortages. The Referee specifically considered the Bar's recommended sanction of disbarment and rejected it. As this Court stated in *The Florida Bar v. Tauler*, 775 So.2d 944 (Fla. 2000):

This Court has recognized that the referee "occupies a favored vantage

> point for assessing key considerations – such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse, and rehabilitation (or potential for rehabilitation),"[citing *Lecznar*].

The Referee, who observed Respondent while she testified, and who "occupies a favored vantage point...", opined that disbarment is not warranted for her misconduct. Respondent urges the Court to affirm his opinion.

The Referee's position that suspension is the appropriate discipline to be imposed has "a reasonable basis in existing case law." *Lecznar*, *supra* at 1288. There are numerous analogous cases in which lawyers received similar or lesser periods of suspension for similar misconduct, or in other cases, more serious misconduct. For example, in *The Florida Bar v. Tauler*, *supra*, the accused lawyer received a three-year suspension after improperly disbursing to herself over $56, 000 in trust funds. Respondent's conduct, in which no clients were harmed or even inconvenienced, does not warrant a sterner discipline than that imposed on Ms. Tauler.

The two year suspension recommended by the Referee is the same discipline imposed by this Court in The Florida Bar v Wolf, 605 So. 2d 461(Fla. 1992) even though Ms. Wolf's misconduct was far more serious than that before the Court today. Ms. Wolf had substantial shortages in her trust accounts over an extended period of time and her offenses included misappropriation of estate funds. Her misconduct continued even after she received notice that she had bounced trust fund checks, a

situation not involved in the case at bar. She was also guilty of a "lack of candor in her testimony as to the reasons for her improper use of trust funds."She even filed a false accounting with the probate court concerning a payment of $8,500 to herself. Finally, she had a prior public reprimand. In short, Ms. Wolf made misrepresentations to the court, bounced trust fund checks and had a prior record, all elements not involved in the instant case, and she received a two year suspension; the Respondent here today should receive no discipline harsher than that imposed on Ms. Wolf.

The mitigation in Wolf is similar in many respects to the instant case. Full restitution was made prior to the finding of probable cause, no client suffered any financial loss, she cooperated with the Bar's auditor, there were marital problems stemming form a "disintegrating marriage" and there was substantial evidence showing Respondent's good character.

If no other case was cited, Wolf would show that the referee's recommended two year suspension was not "off the mark" and should be followed.

The one year suspension imposed in The Florida Bar v Borja 609 So. 2d 21 (Fla. 1992) also supports the Referee's decision in this case. Mr. Borja received a twelve month suspension for numerous violations, including misuse of trust funds, dishonesty, fraud and misrepresentation and failure to abide by the trust accounting

rules, despite the fact that he, unlike Ms. Mason, had been previously disciplined. In fact, he had been previously disciplined four times! he had been privately discipline in 1988 and had received three prior public reprimands in 1990 and 1991. Despite Mr. Borja's prior disciplinary history, the Court rejected the Bar's cries for disbarment, saying on page 23 of its opinion:

> However, while we are not persuaded that disbarment is necessary in this case, we believe a more severe sanction than that recommended by the referee is warranted by Borja's extensive disciplinary record and the fact that Borja misused clients' funds and misrepresented to the Bar the status of his trust account.

As it did in Borja, in The Florida Bar v. Pellegrini, 714 So.2d 448 (Fla. 1998), The Florida Bar v. Stark, 616 So.2d 41 (Fla. 1993) and The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), this court rejected the Bar's demand for disbarment and imposed suspensions instead. Mr. Pellegrini received a three year suspension, as recommended by the Referee, for misappropriation of trust funds and for violating the terms of his emergency suspension order (no emergency suspension was sought by the Bar in the instant case). After acknowledging the Lecznar rule ("we will not second-guess a referee's recommended discipline [if it] has a reasonable basis in existing caselaw") the Court noted that he overcame the presumption of disbarment by mitigation. So did Ms. Mason.

A three year suspension was also imposed in Stark for misappropriating trust funds, for having trust account checks returned for insufficient funds and for practicing after he was temporarily suspended. The latter two factors are not present in the instant case and, therefore, Respondent argues that she should receive a shorter suspension than that was given to Mr. Stark. (Interestingly, Mr. Stark's mitigation was virtually identical to Respondent's: (1) no prior record; (2) personal and emotional problems; (3) attempts to rectify consequences of misconduct; (4) cooperation with The Bar; (5) good character and reputation and (6) remorse. Stark p. 42.

Finally, Mr. Schiller received three years suspension for misappropriation despite the fact that he still had not paid all the shortages in trust that were outstanding (apparently they consisted solely of health care providers).

The three cases The Bar primarily relies on to support its position that the referee was "off the mark" are all distinguishable. For example, in The Florida Bar v. Shanzer 572 So.2d 1382 (Fla. 1991) the accused lawyer still owed $3,643.76 in restitution as of time of the final hearing. Ms. Mason had made full restitution long before probable cause was found.

The Bar's reliance on The Florida Bar v. Tillman 682 So.2d 542 (Fla. 1996) is

similarly misplaced. Ms. Tillman deliberately paid personal expenses from her trust account and drew down excessive and premature fees. Neither of these elements is present in Ms. Mason's case.

Finally, the Bar cites The Florida Bar v. Knowles 500 So.2d 140 (Fla. 1986). Mr. Knowles was disbarred after is was shown that he converted $197,000.00 to his personal use over a four year period and after he pleaded no contest to eight counts of grand theft. Clearly, Mr. Knowles' offenses were far more serious, and lasted far longer, than Ms. Mason's.

The most significant failing in the Bar's reliance on Shanzer, Tillman and Knowles, however, is that all three referees in those cases recommended disbarment! In the case at bar, the referee recommended a two year suspension. As this court did in the Bar's three cited cases, it should adopt the referee's recommended discipline. In other words, the Lecznar rule should be followed.

As previously stated in this brief, Respondent does not come before this Court arguing that she has not engaged in serious misconduct. The fact that she is not contesting the Referee's recommendation that she receive a significant suspension - two years - makes that evident. She argues, however, that her misconduct does not warrant the "ultimate discipline" of disbarment. She is obviously capable of

rehabilitation,[12] and therefore should not be disbarred. Her character witnesses so opined, the Referee inherently found that to be true and the Referee's recommendation should be upheld.

CONCLUSION

The Referee's finding that Respondent's conduct was intentional should be REVERSED. The Referee's recommendation that Respondent be suspended for two years is based on existing law and should be upheld. The Bar has not met its burden of demonstrating that his report is clearly erroneous as to the recommended discipline.

Respectfully submitted,
WEISS & ETKIN

[12] As stated earlier in this Brief, since a proper trust account record keeping was put into place in 1998, Respondent has not had any shortages in that account, not has she had any other problems related to her trust account. Rehabilitation, it seems, has already taken place, at least insofar as adequate steps being taken to prevent the misconduct from re-occurring.

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Answer were mailed to Vivian M. Reyes, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 16th day of May, 2001.

_____
John A. Weiss

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that Respondent's Answer Brief and

Initial Brief on Cross-Appeal is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

_____

John A. Weiss