IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LAVENIA DIANNE MASON,

Respondent
_____/

Supreme Court Case
No. SC00-997

The Florida Bar File
No. 1998-71,527(11D)

The Florida Bar's Answer Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

RULES REGULATING THE FLORIDA BAR

STATEMENT OF THE CASE AND OF THE FACTS

The pertinent facts have been set forth in detail by both parties. Most of the facts are contained in a joint stipulation which appears verbatim in the initial brief of each party.

SUMMARY OF ARGUMENT

Respondent has failed to overcome the presumption of correctness of the Referee's findings. There was competent substantial proof of intent to misuse trust account funds. Respondent has failed to come forward with evidence to prove that all of her conduct was merely due to mistakes. In fact, no evidence was offered to support that defensive position. Respondent merely calls upon the Court to accept her bland assertion that her conduct was unintentional.

Respondent has waived the current argument that the Bar must prove criminal intent. If that argument is considered by this Court, it should be rejected. The language of Rule 5-1.1(a) is clear. No proof of criminal intent is required.

None of the cases relied upon by Respondent apply to Bar proceedings. Furthermore, even if criminal intent is required, there is competent substantial evidence to support the Referee's findings of the Respondent's intent. Testimony and authority to support that conclusion are quoted in detail to substantiate the Bar's argument.

ARGUMENT

(The Bar's Answer to the Issue Presented in Respondent's Initial Brief on Cross Appeal)

RESPONDENT HAS NOT MET THE BURDEN OF DEMONSTRATING ERROR IN REGARD TO THE FINDING OF INTENT

Respondent claims that the Referee erred in finding that her conduct was intentional,[1] in regard to the shortages in her trust account, i.e., the violation of Rule 5-1.1(a) of the Rules Regulating Trust Accounts. The salient portions of the Referee's Report follows. Note that the mathematical evidence was part of a joint stipulation appearing in the prior briefs of both parties, including Respondent's initial brief in this cross appeal:

> 1. Following receipt of a grievance from Respondent's client, Ruby Donaldson, The Florida Bar initiated an audit of Respondent's trust account. The audit revealed a shortage of client funds, as more particularly set forth in the stipulations above, which was not limited to Ms. Donaldson. In fact, the balance in Respondent's trust account on June 5, 1998 was $14,544.27; representing a shortage of $2,893.23 just to cover Respondent's obligations to Ms. Donaldson, and a shortage of $37,987.88 to cover her obligations to all clients.
>
> 2. The audit revealed, among other things, approximately 82 transfers from Respondent's trust account in a short period of time. In part, money was transferred from her trust account in order to cover shortages in Respondent's operating account.
>
> 3. Although Respondent has been involved in complex litigation in the area of breast implants, the capacity to handle such difficult

[1] This aspect of the finding is relevant to the appropriate discipline, not to the finding of guilt which was stipulated by the parties.

> litigation does not necessarily translate an equal ability to maintain a trust account as argued by the petitioner. Nonetheless, given the unidentified trust account transfers and their concurrence with operating account shortages, the evidence supports a finding that the resulting shortages in Respondent's trust account were the consequence of intentional conduct rather that gross or simple negligence.
>
> 4. Accordingly, this referee must conclude that Respondent's intentional violation of Rule 5-1.1(a) of the rules regulating trust accounts (misappropriation of client funds) has been proven by the petitioner by clear and convincing evidence.
>
> (ROR. p.3)

There were also many checks issued from the operating account which were returned for insufficient funds (TFB Exh. 8). That was the case in regard to 17 checks during one month alone

The applicable standards for review were set forth in The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000).

> A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See Florida Bar v. MacMillan,* 600 So.2d 457, 459 (Fla.1992); *Florida Bar v. Vannier,* 498 So.2d 896, 898 (Fla. 1986). If the referee's findings are supported by competent substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *See MacMillan,* 600 So.2d at 459. The party contending that the referee's findings of fact and conclusions as to guilty are erroneous carries the burden of demonstrating that there is no evidence in the record to support those finding or that the record evidence clearly contradicts the conclusions. (At 1047).

This court added:

> A party does not satisfy his or her burden of showing that a referee's findings are clearly erroneous by simply pointing to the contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings. *See Florida Bar v. Schultz,* 712 So.2d 386, 388 (Fla. 1998); *Florida Bar v. de la Puente,* 658 So.2d 65, 68 (Fla. 1995). Because the referee was in the best position to resolve this conflict and there is both record and logical support for her conclusion, this Court will not disturb those findings of fact as to guilt. (At 1048).

A case decided by the First District Court of Appeal, cited by the Respondent, also addresses Respondent's burden in this case (assuming arguendo that proof of "criminal intent" is necessary, discussed below). In Board of Regents v. Videon, 313 So.2d 433 (Fla. 1st DCA 1975) the court held that intent to commit larceny may be presumed from the facts and circumstances surrounding the taking. After those facts and circumstances are presented: "It is the incumbent upon the taker to go forward with the evidence and show a lack of criminal intent on his part." (At 435).

The Bar would submit that Respondent's general denial, i.e., that she merely made mistakes, is not sufficient to overcome the presumption of correctness which applies to the facts of this case. Respondent, the Court will note, provides no evidence in support of her claim that she was merely responsible for mistakes

related to her trust account. Respondent offers no evidence of mathematical errors. She offers no evidence of mistakes by any employee. No evidence of bad advice was offered. No evidence of defects in supporting documents was offered. Respondent simply offers no evidence of the source of improper withdrawals.

Respondent argues that it was "reasonable" (p.23) that the nature of her practice and the volume of cases resulted in the deficits. However, no evidence was offered to demonstrate that such was the case.

Intent is an issue in the instant case in regard to the appropriate discipline. Respondent suggests that the Bar must prove something more than mere intent, namely "criminal intent". The distinction is not defined. Nevertheless, Respondent offers a number of cases to support that claim. There are a number of defects in Respondent's argument. First, no argument of this nature was presented to the Referee. Therefore, it is waived. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

Second, Respondent predicates the argument upon cases which have no relation to the Bar's rules or to the Bar cases. No Bar case requires proof of criminal or felonious intent or, as Respondent also argues "specific intent". Rule 5-1.1(a) merely requires proof of misapplication of funds entrusted to that attorney. The rule does not require proof of a crime. The rule specifically states that:

> Money or other property entrusted to an attorney for a specific purpose... is held in trust and must be applied only to that purpose.

Rule 5-1.1(a) also states that the failure to return such funds or property upon demand shall constitute a "conversion". The rule does not require proof of a particular crime or criminal intent or specific intent.

Nevertheless, as stated above, Respondent seeks to argue from disparate cases that any type of administrative hearing requires proof of "criminal intent" and/or "felonious intent" and "specific intent". That grandiose conclusion emerges from Respondent's reference to Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla. 2nd DCA 1966), among other cases. Reid was a real estate broker who was charged with theft of a $3.00 steak from a supermarket. The proof of criminal intent required in Reid, to prove larceny, is not similar to the proof required by Rule 5-1.1(a).

Board of Regents v. Videon, 313 So.2d 433 (Fla. 1st DCA 1975) is equally irrelevant.[2] Videon took some materials from University of Florida premises with apparent consent. His honest belief negated criminal intent. Again the type of proof, i.e, of a crime, required therein is inapplicable to Rule 5-1.1(a), as are

[2] As stated above, the burden of proof is shifted to the Respondent according to Videon, after circumstances of the taking are presented.

several cases cited by the Respondent pertaining to proof of civil theft.

There is competent substantial evidence to support the finding that Respondent intended to use trust funds for her own benefit. Transfers to the operating account were made as needed or desired, without any reference to any case. (TFB Exh. 1). The operating account was in a deficit position. The analysis of one month of records of the operating account available to the Bar revealed the issuance of 17 worthless checks. Obviously, the Respondent didn't care where the funds came from. She clearly attempted to cover the shortages in the operating account, and did not even succeed in that regard.

The Bar would submit that the reasoning set forth in The Florida Bar v. Simring, 612 So.2d 566 (Fla. 1993) applies:

> The respondent argues that the shortages are the result of a bad case of commingling personal and trust account funds, not theft. We find, however, three facts when pieced together show a different picture. First, the records shows that the balance of the trust account had persistent shortages despite the deposit of the respondent's personal funds. Second, the respondent admitted to paying personal obligations from this trust account. Third, the referee found that the exact extent of the respondent's misconduct will never be known because of his "sloppy and *intentionally* improper trust accounting procedures." These three facts of persistent shortages in the trust account, the respondent's constant use of the trust account funds to pay personal obligations, and his "intentionally sloppy and improper trust accounting procedures" establish an intent to misappropriate client funds. The respondent's "sloppy and

> *intentionally* improper trust accounting procedures" cannot be used as a shield to hide his intent to misappropriate trust account funds. Therefore, we find that The Florida Bar established by clear and convincing evidence that the respondent intentionally misappropriated his clients' funds.[3]

While, unlike Simring, Respondent did not pay personal obligations directly from her trust account, she did the same thing by transfers from her trust account to the operating account. Likewise, Respondent in this case, was intentionally sloppy. Her failure to identify a file with transfers out of the trust account was equivalent to having no records at all. Her untenable defense, based upon those circumstances was that she "understood" that she was entitled to the transfers as fees.

Note the following questions and answers referring to the Bar's Exhibit #7.

> BY MS. REYES:
>
> Q. Reading through that, leafing through it, there were transfers made from your trust account into your operating account on a frequent basis, wouldn't you say?
>
> A. Well, I think I stipulated to there were 82 transfers.
>
> Q. But even after –
>
> A. In that period of time or even before then as well.

[3] Respondent claims that the Bar presented evidence of only one month of disbursements from the operating account, despite access to twenty months of those records. The Bar only had one month of operating account records.

Q. But even after January of '98, which you already have stated that you already knew you had problems in your trust account, that's why you had hired the bookkeeper?

A. Right.

Q. You still kept on transferring funds from your trust account into your operating account. Correct?

A. Yes, because I had understood that those were fees that had been earned.

(T. 53-54)

The Referee's reasoning is not always available (nor is it necessarily binding), but in this case the benefit of the Referee's reasoning regarding intent is available:

THE REFEREE:

It strains credibility to tell me that I'm facing a Bar complaint where they are seeking to disbar me, they're going to punch my ticket, and I'm not going to be able to practice law again and I would not take the time to calculate what client did I think on May 5th of '98 I was withdrawing $10,000 for and what client did I think I was – how did I come up with that?

It's one thing to say, you know, here's a mistake. I was entitled to $20,000. I took out 10 and 10 on May 5th and 6th thinking that I was getting back my $20,000, but I didn't realize that on April 28th, I had already taken out $7,000 and I had failed to log that in my log and, therefore, I really was pulling out 7,000 more that I should have.

You would expect that somebody who is facing such a

serious proceeding would have sat done [sic] and compared the accusations with the reality and say, wait a minute. You know, this is where I made my mistake.

It's one thing to come in and say it was a mistake. It wasn't intentional. It was negligence. I just -- I miscalculated, because anybody can say that.

It's another thing to come in and say look, let me show you where the mistakes are and let me show you why -- even if it was not reasonable, understandable that I would make such a mistake.

MR. WEISS:

I'm not sure it's possible, Your Honor.

Regardless of perhaps that's the way the Court would have approached it, neither Mr. Ruga –

THE REFEREE:

It's hard to believe that everybody wouldn't approach it.

If the first accusation is, you have misused your trust account to the person has not misused their trust account, it must come like a slap in the face.

How can you say that I misused my trust account? I have only taken out money that is costs and fees that is associated with cases I have settled. Let me go back and see what happened.

I don't think that it's something that is unusual. I think the unusual part would be to say, I am coming in saying it's all a mistake. It was all withdrawals that had some connection to cases, but I couldn't possibly tell you

> which cases because I really -- I did an accounting, but the accountants aren't going to be testifying and I don't have their figures to show you which case I thought these 10,000 tied up with.
>
> I mean, obviously they're not going to accurately tie up with any case because there is a shortage and everybody has agreed there was a shortage.
>
> But at least, you would think -- you're facing this accusation you would say, let me show you what my thinking was or let me show you where I think the mistake occurred as opposed to, just take my word for it. It is unintentional.
>
> (T. 63-65)

The Referee's logic is clear and sound. It should assist this Court in concluding that Respondent has failed to overcome the presumption of correctness regarding the finding of intent.

CONCLUSION

Based upon the foregoing , the Referee's finding of intentional wrongdoing by the Respondent should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Answer Brief was forwarded via Airborne Express, airbill no. 3370025923, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to John A. Weiss, Attorney for Respondent, at 2937 Kerry Forrest Parkway, Suite B-2, Tallahassee, Florida 32308, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this ____ day of June, 2001.

_____
VIVIAN MARIA REYES
Bar Counsel

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

I HEREBY CERTIFY that the Brief of The Florida Bar 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.

_____
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