IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, Complainant,	Supreme Court Case No. SC00-997
vs.	The Florida Bar File
LAVENIA DIANNE MASON, Respondent, _____/	No. 1998-71,527(11D)

REPORT OF REFEREE

I. Summary of Proceedings:

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held and counsel appeared as follows:

For the Florida Bar, Vivian Maria Reyes, Bar Counsel, for the Respondent
For the Respondent, John A. Weiss, Esq.

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged:

After considering all the pleadings and evidence before me, pertinent portions of which are
commented upon below, I find as follows:

Stipulated Facts as to All Counts:

1. Respondent, Lavenia Dianne Mason, is and was, at all times material herein, a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. Beginning in or about May 1994, Respondent represented Ruby Donaldson in a claim for damages against the manufacturer of breast implants.

3. In or about December, 1996, Ms. Donaldson's claims were settled for $50,000.00 which was paid in three installments in the amounts of $5,000.00, $22,500.00 and $22,500.00.

4. The first settlement check in the amount of $5,000.00 was dated December 30, 1996. From that sum, Respondent withheld $2,264.54 in total fees and costs and disbursed $2,735.46 to Ms. Donaldson.

5. The second settlement check in the amount of $22,500.00 was dated August 7, 1997. From that sum, Respondent withheld $10,100.00 in total fees and costs and disbursed $12,400.00 to Ms. Donaldson.

6. On January 8, 1998, Respondent forwarded Ms. Donaldson two checks in the amounts of $500.00 and $4,750.00, each. Said funds represented a refund of attorney fees.

7. The third settlement check in the amount of $22,500.00 was dated December 26, 1997. On or about April 20, 1998, Respondent forwarded Ms. Donaldson a check in the amount of $17,437.50 which represented her portion of the last installment of the settlement proceeds. Ms. Donaldson declined to accept said check, returned it to Respondent, and filed a grievance with The Florida Bar.

8. On or about June 5, 1998, Respondent wrote to The Florida Bar advising that settlement proceeds due Ms. Donaldson had been deposited into her trust account and continued to remain there through Respondent's writing of said letter to The Florida Bar.

9. An audit was conducted of Respondent's trust account identified at L. Dianne Mason P.A., IOTA Trust Account, maintained at Metro Bank, account number 30050279000.

10. That audit disclosed that contrary to Respondent's assertions, the $17,437.50 due Ms. Donaldson was not preserved in Respondent's trust account. In fact, the balance in Respondent's trust account on June 5, 1998, the date of her letter to The Florida Bar, was $14,544.27: that is a shortage of $2,893.23 just to cover Respondent's obligations to Ms. Donaldson.

11. On June 5, 1998, Respondent's obligations to client were at least $52,532.15. The balance in her trust account was $14,544.27; that is a shortage of at least $37,987.88 to cover her obligations to clients.

12. From the period of January 1, 1996 through July 31, 1998, Respondent made eighty-two (82) transfers from her trust account to her operating account for a total of $252,500.00 with no reference as to client or matter. By agreeing to paragraph twelve (12), Respondent is not stipulating that all of the eighty-two (82) transfers were improper, only that they were not designated properly.

13. The aforesaid transfers created shortages in Respondent's trust account.

14. On July 27, 1998, Respondent's obligations to clients were $53,106.02. The balance in Respondent's trust account that date was $19,164.73; that is a shortage

of $33,941.29 to cover obligations to clients.

15. Respondent stipulates that Rule 5-1.1(a) of the Rules Regulating Trust Accounts was violated. Respondent reserves the right to argue, however, that any shortages were the result of negligence. The Bar reserves the right to argue that the shortages were the result of intentional misconduct.

This Referee will address the claims in reverse order for chronological simplicity.

As to Count II

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 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 than 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.

As to Count I

5. The Florida Bar also alleges that Respondent violated Rule 4-8.4(c)(a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the rules of professional conduct.

6. As stipulated to above, Respondent wrote to The Florida Bar on about June 5, 1998 advising that the settlement proceeds due to Ms. Donaldson had been deposited into her trust account and continued to remain there through that date.

7. Although this letter is alleged to have been written in a somewhat "off the cuff" manner as the Respondent purportedly believed that the funds were still there based on her calculation of the amounts received minus the amounts paid out, she conceded in her own

testimony that in late 1997 she realized that there were problems with her trust account and hired a bookkeeper to assist in resolving those problems.

8. Unlike the conclusion that can be drawn from the evidence with regard to Count II, the issue in Count I proves significantly more difficult. On the one hand, Respondent's knowledge of problems with her trust account, dating back at least six months from the date of the letter, weighs in favor of a finding that her representation to The Bar in the June 5, 1998 letter was intentional.

9. On the other hand, a mere suspension of Respondent's intent is not, nor ever should be, sufficient. The Bar bares the burden on proving Respondent's transgression by clear and convincing evidence.

10. A review of the letter in questions, reflects that Respondent's misrepresentation - to
the effect that her client's monies remained in her trust account - comes in the middle of a somewhat lengthy account of the history between her and her client. The letter does not appear to constitute a sophisticated or even an unsophisticated attempt to defraud, mislead or deceive The Florida Bar. Under the strength of this evidence, the Referee concludes that the misrepresentation was the result of gross negligence rather than intentional conduct. In other words, with knowledge that her trust account had significant problems, Respondent failed to verify that this particular client's funds remained in her account.

9. Although Respondent had intentionally misused some of the funds in her trust account, it cannot be said that the evidence establishes to the degree required that she either knew she had misused the funds pertaining to Ms. Donaldson, that those funds were not available, or that she intended to defraud and mislead The Florida Bar in that regard.

10. Based on the evidence presented at the hearing, the petitioner has proven the Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c) by clear and convincing evidence.

III. Recommendation as to Whether or Not the Respondent Should be Found Guilty:

As to each count of the complaint the Referee made the following recommendations as to guilt or innocense:

As to Count I

I recommend that the Respondent be found guilty of violating Rule 4-8.4(c)(of the rules of professional conduct prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation through gross negligence.)

As to Count II

I recommend that the Respondent be found guilty, and specifically that she be found guilty of intentionally violating Rule 5-1.1(a)(of the rules regulating trust accounts).

IV. Recommendation as to Disciplinary Measures to be Applied:

Although it is clear that disbarment is the usual punishment for violations of the nature found herein, I recommend that the 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 transgressions herein.

In making this recommendation, the Referee has considered the following aggravator and mitigators:

I. In Aggravation, the Referee finds:

A) A pattern of misconduct [9.22(c)] - the misappropriations occurred over a period of approximately fifteen months as a result of numerous individual transfers from Respondent's trust account;

B) Submission of false statements [9.22(f)] - the representation to The Florida Bar that Ms. Donaldson's monies remained in Respondent's trust account was inaccurate, although as stated above, the evidence does not establish to the clear and convincing standard that such misrepresentation was anything other than gross negligence.[1]

II 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

[1]It should be noted that even if the referee were to conclude that the statement to The Florida Bar was intentional, given the isolated statement and the fact that it would have to appear to be a "panic response," the recommendation herein would be no different. Such a statement must be viewed in context of the entire letter and be distinguished from overt and calculated attempts to successfully cover a wrongdoing.

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 the setting of a law firm for a good portion of her career, she was a relative newcomer to the status of sole practitioner and the difficulties of handling administrative responsibilities relating thereto;

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(l)] - although Respondent maintains that her misappropriation of client funds was unintentional, contrary to the findings of this referee, her remorse of having caused this situation appears genuine and sincere.

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 the 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 the 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 the 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.

V. Personal History and Past Disciplinary Record:

After finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(D), I consider the following personal and prior disciplinary record of the Respondent, to wit:

Date admitted to Bar: February 1989

Prior disciplinary convictions and disciplinary measures imposed therein: None

Other personal data:[2] Respondent's lack of experience in maintaining a lawyer's trust account, which she opened in the end of 1996.

VI. Statement of Cost and Manner in Which Cost Should be Taxed:
I find the following costs were reasonably incurred by The Florida Bar.

Administrative Fee Rule 3-7.6(k)(1)(I)	$ 750.00
Court reporter attendance fee for September 18, 2000 hearing	$ 60.00
Court reporter attendance fee and cost for transcripts for September 23, 2000 depositions	$ 726.80
Court reporter attendance fee for October 6, 2000 deposition	$ 60.00
Court reporter attendance fee for October 23, 2000 final hearing	$ 120.00
Court reporter attendance fee for November 21, 2000 final hearing	$ 209.91
Court reporter attendance fee for December 19, 2000 hearing	$ 60.00

[2]As was acknowledged on the record, the referee attended law school with the Respondent as well as one of the Respondent's witnesses, Dana Kaufman. In law school, Respondent was known as Dianne Mason and, as a result, the possible conflict was not discovered until the day of the hearing; at which time all parties declined the referee's offer to recuse. During law school, the referee and Respondent were acquaintances but never socialized together. Although it is difficult to make findings of responsibility with regard to anybody who is personally known, those findings are, nonetheless, made in the capacity of Referee without affection or animosity. Likewise, the recommendation for a suspension rather than a disbarment is not influenced in any way by the acquaintance. It would be an unfortunate irony for Respondent to receive a more severe punishment because of the erroneous perception that she has received some form of unwarranted leniency - when she has not.

Auditor's costs		$ 5,125.90
	TOTAL ITEMIZED COSTS:	$ 7,112.61

It is apparent that other costs have or may be incurred. It is recommended at all such costs and expenses together with the foregoing itemized costs be charged to the Respondent.

Dated this _____ day of December , 2000.

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ALEX E. FERRER
REFEREE

I HEREBY CERTIFY that a true and correct copy of the Report of Referee has been served on: Vivian Reyes, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131; John A. Weiss, Attorney for Respondent, 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, FL 32308.

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ALEX E. FERRER
REFEREE