IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NO. SC00-997
TFB NO. 1998-71,527 (11D)

LAVENIA DIANNE MASON,

Respondent.
_____/

RESPONDENT'S REPLY BRIEF ON HER CROSS-APPEAL

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POINT 1

(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.

The Bar's basic argument is that Respondent failed to prove her innocence. For example, in its summary of argument, on page two of its Answer Brief, the Bar states "Respondent has failed to come forward with evidence to prove that all of her conduct was merely due to mistake." (That statement, by the way, is wrong). On page six of its brief, in an attempt to justify the dearth of evidence in the record to support a finding that Respondent intentionally misappropriated funds, the Bar argues that Respondent should have submitted proof of mathematical errors, or mistakes by employees or evidence of defects in supporting documents. The Bar carries its theme one step further on page six when it incorrectly states that "no evidence was offered . . . ." by Respondent to show the nature of the practice or the value of the cases that resulted in the deficit in her trust account. The Bar misses the point of Respondent's argument: she is saying that the Bar failed to prove its case, not the other way around.

The law in Florida is quite clear: the burden is on The Florida Bar to prove misconduct by clear and convincing evidence. The burden is not on the Respondent to prove her innocence. In cases involving misappropriation of trust funds, the Bar has the additional burden of proving the necessary element of intent by clear and

convincing evidence. See e.g., *The Florida Bar v. Burke,* 578 So2d 1099 (Fla. 1991); *The Florida Bar v. Neu,* 597 So2d 266, 268 (Fla. 1992). (Bar "must establish that *Neu* intended to convert his clients' funds, ...")

The Bar relies on three, and only three, items to prove by clear and convincing evidence that Respondent intentionally misappropriated trust funds. First, the Bar points to 82 transfers from the trust account to Respondent's operating account during the period beginning January 1997 and extending through July 1998 (Bar exhibit 7). It is undisputed that the trust account was opened in November or December 1996. While those 82 transfers were not specifically designated as to which clients' fees made up those transfers, The Florida Bar did not point to a single transfer or, for that matter, to a portion of a single transfer, in which it was shown the transfer consisted of anything other than properly transferred fees.

Second, the Bar pointed to the fact that Respondent had deficits in her trust account in June 1998 of $37,987.88 and on July 27 1998 of $33,941.29. As pointed out in *Burke* and *Neu*, above, however, the mere existence of shortages in a trust account does not mean that they were intentionally created.

Finally, the Bar takes a single operating accounting statement (exhibit 8) and points out that there were 17 returned checks (actually there were only twelve; five checks were submitted twice) on that operating account statement. (The Bar goes

outside the record of these proceedings and states on page eight of its brief that only one month of operating account records was available to the Bar and on a footnote on page nine that the Bar only had one month of operating account records. Respondent testified that she believed all operating account records were provided to the Bar. T.71. The Bar does not explain why it only had one month's operating account statement. It certainly had the subpoena power to obtain all of them. It would be very surprising if the Bar's auditor during a one year period of working closely with Respondent and her agents did not obtain more than one month. Simply put, the Bar's statement that it only had one month of operating account records available must be disregarded. For the purpose of this appeal, it must be assumed that January 1998 was the only month that there were any returned check charges. Respondent testified that it was very unusual to have returned checks because of her line of credit. T.70.)

On pages eleven through twelve of its answer brief the Bar asks the Court to note some of the Referee's remarks in the middle of the presentation of evidence. In essence, the Referee wonders why Respondent did not take a different tack in the presentation of her case. The fact that the Referee would have presented the case differently from the Respondent, or that Respondent did not provide him with evidence that he thought would be appropriate in her defense, does not alleviate the Bar of its burden of proving misconduct by clear and convincing evidence.

The Referee, in making his remarks, overlooked one very important factor. It was the Bar's auditor that determined the method of the audit of Respondent's trust account. The Bar and Respondent worked within the framework set up by the Bar's auditor. Immediately after the end of the quote that the Bar placed in its brief, counsel for Respondent made the following statement:

> MR. WEISS: Your honor, neither Mr. Ruga (the Bar's auditor) or Mr. Kaufman (Respondent's auditor) approached it from that prospective.
>
> THE REFEREE: I wasn't suggesting they should.
>
> I was suggesting that Ms. Mason, the one who did the withdrawals under the perception that it was for a particular case would.
>
> I don't know if the accountants could ever do that, but- -
>
> MR. WEISS: All of the statements were provided to the Bar, all the closing statements.
>
> The way it was approached, your honor, was to go back on an individual client basis and see what shortages belonged to the clients and the overwhelming bulk of the problem was determining where the letters of protection in the medical liens belonged.
>
> It was approached from that perspective to see where the shortages were, to make sure that first the clients got their money and then the third party providers got their money. T.67.

In essence, the Referee was wondering why Respondent was not doing The

Florida Bar's job. The Bar did not show the Referee that any of the 82 transfers, or that any portion of them, consisted of improper transfers. It was incumbent on the Bar to prove that. All they did was float a balloon that said there were 82 transfers, there was an ultimate shortage of almost $38,000.00, and that constitutes proof of intentional misappropriation. That is not proof by clear and convincing evidence of intentional misappropriation.

The Bar completely glosses over the fact that during the approximately 17 months that Respondent made those 82 transfers, for a total $252,500.00, that she deposited into her trust account approximately $934,000.00. (exhibit 7). Less than 30% of the total revenue received was drawn down for fees and transferred to Respondent's operating account.

The Bar makes many suppositions on page eight of its Answer Brief based on the January 1998 statement. As pointed out earlier, the Bar at least had available to it all of Respondent's operating account. Regardless, pointing to the monthly statement immediately before her divorce final hearing and arguing that it shows her operating account was in a "deficit position" (for that one month) does not prove that her operating account was in a deficit position at any other time. Nor does it support the Bar's claim, completely unsupported in the record and inconsistent with Respondent's testimony, that she "didn't care where the funds came from." Ironically,

if nothing else, the January 1998 statement shows she had deposits of earned fees being transmitted to her by other firms, e.g., the $25,000.00 initial deposit on January 7, 1996. Those deposits support her testimony that she had no financial problems.

While Respondent has always taken the position that the shortages that occurred were improper and subjects her to discipline, she has steadfastly maintained that they were the result of inadvertence. The Bar has not proven otherwise.

Ultimately, it was determined that of the $252,500.00 Respondent transferred into her operating account during the 17 months at issue, she had a deficit of about $38,000.00. That means she was entitled to at least $214,00.00 of the money that she drew down.

As Respondent argued in her initial brief, this Court stated in *The Florida Bar v. Marable,* 645 So2d 438, 443 (Fla. 1994):

> 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, circumstantial evidence must be inconsistent with any reasonable hypothesis of innocence.

Respondent has presented overwhelming evidence to show a "reasonable hypothesis of innocence." That evidence includes: (1) No returned trust account checks; (2) no financial need-- her husband's temporary support was covering all of her financial needs, she had $100,000.00 in a line of credit to cover her expenses and

she had available if she needed it loans from her relatives (T70, 84, 98, 99); (3) she was undergoing an extremely difficult divorce which began in July 1996 and went to trial in February 1998-- this clearly was a distraction; (4) when Respondent opened her trust account in November 1996 she had never before been a sole practitioner or operated any sort of trust account; (5) no client was financially harmed; (6) Respondent testified that she drew down fees as a result of a ledger kept by her secretary and no evidence was presented by the Bar to show that she was not entitled to the fees in any of the 82 transfers; (7) Respondent testified that much of the problems surrounding the shortages was the result of $1,000.00 medical liens and $1,000.00 advances (T.126). This similarity in advances and liens caused accounting errors differentiating between those cases in which she advanced exactly $1,000.00 and those cases in which she accepted a medical lien for exactly $1,000.00. (See Bar exhibit 6 in which 12 of the unpaid amounts found by the Bar's auditor were exactly $1,000.00); and (8) Respondent intentionally misappropriating funds is absolutely inconsistent with her character. See the testimony of Maggie Rosenbalm (T.226) and Dana Kaufman (T.204).

The Bar cites *The Florida Bar v. Vining,* 761 So2d 1044 (Fla. 2000) for the proposition that a referee's findings of fact carry a presumption of correctness and that they should be sustained unless clearly erroneous or without support in the record.

Respondent argues that the referee's finding of intentional misappropriation is, indeed, without support in the record. Respondent is not merely "pointing to the contradictory evidence ." She is stating that there was not "competent, substantial evidence in the record " supporting the referee's finding. See e.g. *The Florida Bar v. Burke, supra*.

Respondent does not come before this Court urging it to exonerate her for having a substantial shortage in her trust account. She has recognized that her accounting system was inadequate and that she failed to adequately protect some of her clients' money. She recognizes that stern discipline is appropriate. Respondent does, however, urge this Court to remove from her good name the stigma of having intentionally misappropriated funds. The Bar has not met the burden imposed upon it to prove by clear and convincing evidence that her actions were made with intent. In essence, the Bar wants this Court to take the position that shortages in the trust account automatically mean intentional conversion. Such is not the law; such should not be the law; and such is not true in the case at bar.

CONCLUSION

This Court should reject the Referee's finding that the shortages in Respondent's trust account were the result of intentional misconduct. This Court should accept the Referee's recommendation that Respondent be suspended for two years, but as a basis therefore this Court should find that the two year suspension is

appropriate for negligent conduct resulting in the shortage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Reply Brief 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 2nd day of July, 2001.

John A. Weiss

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

Undersigned counsel does hereby certify that Respondent's Reply Brief is submitted in 14 point proportionateley 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 Anti-Virus for Windows.

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John A. Weiss