**IN THE SUPREME COURT OF FLORIDA**

THE FLORIDA BAR,

Complainant,

v.

OMAR JAVIER ARCIA,

Respondent.
_____/

Supreme Court Case
No. SC01-952

The Florida Bar File
No. 2001-70,370(11P)

# ANSWER BRIEF OF THE FLORIDA BAR


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## TABLE OF CONTENTS

**PAGE**





## TABLE OF AUTHORITIES

**PAGE**

Other Authorities:

## STATEMENT OF THE CASE AND OF THE FACTS

The Respondent's guilt was not an issue before the Referee. His conduct was not disputed and, therefore, a hearing was held solely to determine the appropriate discipline. At the conclusion of the hearing, the Referee recommended a three (3) year suspension.

Respondent's presentation of the facts is somewhat accurate. However, some elaboration is required to provide a more complete and accurate reflection of the record.

The Respondent was an associate in the Zarco and Pardo, P.A., firm ("Z & P") from 1995 to 2000. During that time, he engaged in a variety of fraudulent activities which were costly to Z & P. The duration of Respondent's fraudulent activities spanned approximately 1 ½ to 2 years. ( ROR, p. 7). The effects, in addition to the loss of fees, included the loss of clients, the imposition of costs upon Z & P for activities which were solely for his benefit, and the loss of reputation.

Steve Inscore, a Zarco and Pardo client, provided Robert Zarco with the clear indication that a problem with the Respondent existed. Zarco noticed that a check from Inscore was mailed to the firm, but designated the Respondent as the payee. A memo specified that the check for $1,208.33 was the "second payment." (T.17).

Zarco called Inscore to ask him about the check in the amount of $1,208.33.

(T.18). Inscore said that Respondent had advised him that he had been promoted to partner and the check should be payable to Omar Arcia, P.A. (T.18).

Zarco reviewed the firm's computer generated records and determined that Respondent had entered into agreements to represent a number of the Z & P clients for the financial benefit of Omar Arcia, P.A. (T.22).

The computer search answered a question which Zarco had regarding a group of potential clients. Zarco had given a speech to a group of Dunkin Donut franchisees. (T.15). His experience had been that a presentation of that nature usually produced about a dozen clients for the firm. (T.15). In this instance, it had produced only three responses from potential clients. (T.15-16). The computer revealed that there had been more than three responses to Zarco's speech, and that Respondent had apparently decided to represent those clients, for his own benefit.

Zarco spoke to the new Dunkin Donuts clients. (T.23). They told him that they were instructed to send checks made out to Omar Arcia, P.A. (T.23). However, when asked whether he was handling any case that belonged to Z & P, Respondent replied: "Absolutely not." (T.48). As for Inscore's check, he claimed that it was a mistake. (T.19).

Another case which Respondent controlled for his own financial advantage was the divorce of client, Martha Hernandez. Respondent advised Zarco that he wanted to

represent Hernandez, that it was a family matter, and that he would represent her without charge because she had no money. (T.25). Zarco agreed and Respondent represented Hernandez who did pay and Respondent received the fees. (T.25). Respondent represented for his own benefit additional clients of the firm. (T.29, 30, 31, 40, 104). Respondent also utilized firm funds for a trip to California to solicit a new client. (T.29).

Respondent achieved his ends by intercepting telephone calls and the mail. (ROR, p.9). He sought to maintain control over checks mailed to him. (T.85).

Since the firm had prepared promissory notes to enable clients to pay fees over a period of time, Respondent prepared new notes payable to himself. (T.103, 110). For the same reason, he also provided new retainer agreements. (T.110, 21).

On several occasions, Respondent denied that he was engaged in wrongdoing when confronted. He also remained silent during the Bar proceedings "until the very end." (ROR, p.9). Upon the Bar's initial inquiry into this matter, Respondent elected to remain silent. Subsequently, Respondent attempted to prevent the Bar from taking his deposition in this matter by filing his Motion to Quash Notice of Taking Deposition of Respondent. (ROR, p. 9). The Referee issued an order denying said motion. As a result of the above, the Bar did not obtain Respondent's deposition until less than two (2) weeks prior to the final hearing. (ROR, p. 10).

Zarco testified as to the effect upon the firm which extended beyond the loss of fees in particular cases. Respondent created a conflict for Z & P because of a case that he decided to handle without Z & P's knowledge. (T. 39-41). Some clients fired Z & P because of Respondent's conduct. (T. 26-30). Respondent filed a case in the court at West Palm Beach and exposed the Z & P firm to potential liability by listing Z & P as counsel in a case which was unknown to them. (T.31).

On September 8, 2000, after repeatedly concealing the truth concerning his unauthorized representation of Z& P clients and acceptance of fees from said clients, Respondent confessed after Zarco confronted him with knowledge of his improprieties. (T. 44-49).

Respondent offered character witnesses. Juan Martinez, Manual Lopez and Gus Suarez testified on his behalf. (T.115 ff.; 140 ff.; 154ff.). Martinez stated that Respondent told him what he had been doing. He also declared that he would have hired him if he had an available position. (T.127). Respondent did not tell Martinez where he had obtained his clients. (T.132).

Lopez also was told by Respondent of his problematic activities. Lopez advised him to desist and agreed to hire Respondent because of his skills as a lawyer. (T.145). In November 2001, at the time of his deposition, Lopez was not aware that Respondent had engaged in conduct which extended beyond "moonlighting." (T.151,

153).

Suarez had been impressed in the past with Respondent's litigation skills and hired him after learning that Respondent left Z & P. (T.157). Respondent had not revealed to Suarez his intent and actual usage of the P.A. (T.167 ff.)

The referee's recommendations as to guilt were:

> I recommend that Respondent be found guilty of violating Rules 4-8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Conduct. (ROR, p. 11).

## SUMMARY OF THE ARGUMENT

Respondent has not established that the Referee erred by recommending a three (3) year suspension. The Referee's finding of a three (3) year suspension followed by three (3) years probation with special conditions is consistent and in keeping with existing case law for similar fraudulent conduct. The Referee's findings of fact, including all mitigation and aggravation, are supported in the record and should not be disturbed by this Court. Accordingly, this Court should approve the Report of Referee and impose at least a three (3) year suspension followed by three (3) years probation to include the special conditions specified in said report.

## ARGUMENT

### I. RESPONDENT HAS NOT ESTABLISHED THAT THE REFEREE ERRED BY RECOMMENDING A THREE YEAR SUSPENSION.

Respondent has not established that the referee erred by recommending a three year suspension. Pursuant to Rule 3-7.7(c)(5) of the Rules Regulating The Florida Bar, "...the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful, or unjustified." This Court will not interfere with the discipline recommended by the referee if there is a reasonable basis in case law. *See, Florida Bar v. Temmer*, 753 So. 2d 555 (Fla. 1999). An examination of the case law in the context of the facts of this case clearly establishes that at least a three year suspension should be imposed by this Court.

The Respondent was an associate at the law firm of Zarco & Pardo, P.A. ("Z & P"). During his employment, he diverted a number of the firm's clients to his own P.A. His conduct affected the firm adversely, not only because of the loss of fees, but through the loss of clients. Respondent also used the firm's resources to solicit one new client and represent a "pro bono" client who was not. When he was confronted with questions regarding his activities, he was continually evasive. He also indulged in devious behavior to obtain and retain the clients. All of the foregoing is substantiated by an undisputed record.

The diversion of clients and cases was initially indicated by a check received in Z & P's mail. Client Steve Inscore submitted a check for $1,208.33 payable to Respondent. (T.17). Zarco called Inscore who advised that the Respondent claimed he had been promoted to partner and payment should be sent directly to him. (T.18). As a result, Zarco reviewed the firm's computer generated records and determined that Respondent had entered into agreements to represent a number of the Z & P clients for his own financial benefit. (T.22).

The computer search answered a question which Zarco had regarding a group of potential clients. Among them was a group of Dunkin Donuts franchisees before whom Zarco had spoken. His experience had been that a presentation of that nature usually produced about a dozen clients for the firm. (T.15). In this instance, it had produced only three responses from potential clients. (T.15-16).

After viewing the firm's records, Zarco spoke to the new Dunkin Donuts clients. (T.23). They told him that they were instructed to send checks made out to Omar Arcia, P.A. (T.23).

Respondent also defrauded the firm in another manner. In regard to a potential client, Martha Hernandez, Respondent advised Zarco that he wanted to represent her. He also stated that it was a family matter and that he wished to represent her without charge because she had no money. (T.25). In fact, after Zarco consented, Respondent

utilized the firm's facilities, supplies, insurance coverage, etc. to represent Hernandez, but did receive payment from the client. (T.25). He kept all of the payments for attorney fees.

Zarco also spoke at Lake Tahoe to another group of franchisees, who were from the California area. A number of clients were generated by that speech and Zarco asked Respondent to assist him in regard to one of the California cases.

Respondent told Zarco that he wanted to fly to California to meet with a client. (T.27). He was quite insistent and despite the fact that Zarco did not feel that an immediate trip was necessary, he agreed to let the Respondent go. (T.27-28). Zarco later learned that Respondent's real reason for going to California at that time was to contact a potential client, a Jack in the Box franchisee. (T.29). In that manner, the Respondent utilized the funds of Z & P for airfare, hotel accommodations, etc. to pay for his solicitation of a personal client.

In order to justify the trip, Respondent went to see a different client, Jerry Franklin, spokesperson for the H&R Block group. However, Franklin was not present. (T.27-28). Franklin had no prior notice of Respondent's visit and was incensed since he had not been present when the Respondent had arrived unannounced. As a result, he fired the Z & P firm as his counsel, and a number of other clients declined to hire Z&P. (T. 28-29).

Respondent was given a number of opportunities to admit to his misconduct. However, he chose to be evasive and to continue his wrongful, parasitic activities. When Zarco confronted him with Inscore's check, Respondent suggested sending it back after claiming that it was a mistake. (T. 19). He falsely stated that the case had ended because the client did not want to proceed. (T. 43-44).

At a staff meeting on September 8, 2000, Respondent denied that he was working any of the firm's cases. (T. 46). He denied that any other cases of the firm had been referred to him by stating: "Absolutely not." (T. 46).

Respondent repeatedly lied about his wrongful activities when questioned about them. Note the following testimony from Zarco relating to his questions posed to the Respondent and Respondent's answers:

> Then I said, "Let me ask you. Are you running any cases through that P.A.?"
>
> "No, absolutely not."
>
> "Are there any cases that you're handling?"
>
> "No."
>
> "Is the P.A. doing any business?
>
> "No."
>
> "Have you taken any money from anybody, any clients, and

put it in the P.A.?"

"No. I'm just running business expenses."

"How can you run expenses without income?"

"Oh, no. The income is, my wife and I, we take our monthly checks and once in a while, we deposit money into that account as income to the P.A. and then we write expenses out of the P.A."

I said, "Well, you better talk to your accountant about that because I'm really concerned about the legality of that, but all I care about is, are you running any cases out of that?"

"No." (T.48).

Just as Respondent was evasive with his firm, he was not responsive to inquiries from the Bar. (ROR, p.9). Respondent testified that he was cooperative with the Bar, yet he had to be compelled by the Referee to provide his deposition less than two (2) weeks prior to the final hearing. (ROR, pgs. 9-10).

Respondent engaged in many devious acts to facilitate his scheme. He intercepted checks which were payable to him when the mail arrived. (T. 85). He also intercepted telephone calls to obtain clients. (ROR, p. 9).

He received payments from one client by meeting him in Boca Raton. (T. 88).

Respondent replaced promissory notes provided by Z & P for clients (T. 21, 110) and substituted a retainer agreement bearing his name for the Z & P retainer agreement.

Respondent created many problems for the firm. His representation of one franchisee created a conflict for the firm. (T.40). In another case he neglected the client (T.83) which adversely affected the case. Two clients, including an H & R Block executive, fired the firm. (T. 26). Several potential clients backed out of employing the firm and a $10,000.00 retainer had to be returned. Also, Z & P was exposed to liability without their knowledge when Respondent listed them as counsel for one of the parties in a Palm Beach case. (T.31).

The referee's conclusions as to the aggravating and mitigating factors are quite significant, including his reluctance to find mitigation in several of respects:

> I find the existence of the following aggravating factors (some with comments), as set forth in the Florida Standards for Imposing Lawyer Sanctions:
>
> 9.22(b) - dishonest or selfish motive.
> 9.22(c) - a pattern of misconduct.
> 9.22(d) - multiple offenses.
> 9.22(e) - bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. This includes the paragraph in the Settlement Agreement set forth in number 55, page 9 of this report.
> 9.22(h) - vulnerability of victim. The firm placed its trust in the Respondent and gave Respondent access to its clients based on Respondent's position as an attorney at law and as an honest individual.

> As hard as anyone can try, with checks and balances, a trusted employee can deceive its employer, as in this case.
>
> Additionally, I find the existence of mitigating factors (some with comments), as set forth in the Florida Standards for Imposing Lawyer Sanctions:
>
> 9.32(a) - absence of a prior disciplinary record.
> 9.32(c) - personal or emotional problems. Brief testimony was provided by Respondent pertaining to family and financial problems especially after his wife left her job. There was no expert testimony presented.
> 9.32(d) - timely good faith effort to make restitution or to rectify consequences of misconduct. On the eve of trial, Respondent did make restitution in full. The full consequences of his misconduct cannot be stated with specificity.
> 9.32(g) - character or reputation. Respondent did have a few attorney friends testify as to his good character and reputation.
> 9.32(j) - interim rehabilitation. Respondent has provided little evidence to show that he has been rehabilitated from his dishonesty although he had built up a practice in the past year and has been referred cases by other attorneys who have been satisfied with his work.
> 9.32(l) - remorse. The referee saw little if no outward appearances of remorse or emotion. However, Respondent testified that he was remorseful and so did his friends. (ROR, p. 13).

Furthermore, the referee, who is in the best position to judge Respondent's credibility, concluded that:

> It is this referee's opinion that the Respondent still thinks that he is very clever and "slick." As an example, the Respondent testified that he thought that what he did was simply "moonlighting." After questioning, he did a backpedal and admitted it may have been more than just moonlighting (note: the definition of moonlighting in the

> American Heritage College Dictionary, Third Edition, is as follows: The light reflected from the surface of the moon or to work at another job, often at night, in addition to one's full-time job). The definition certainly does not include fraud. In addition, the Respondent led this referee to believe that one of the reasons why he started his activities was because his wife left her job because of pregnancy and the subsequent birth of their child. Upon further questioning, it was evident that his activities started well before his wife was pregnant and that his activities increased after his wife left her job. (ROR, p.11).

As noted in *The Florida Bar v. Stafford*, 542 So.2d 1321 (Fla. 1989), the referee's findings in a disciplinary proceeding should be upheld unless clearly erroneous or without support in the evidence. A review of the record substantiates the referee's findings of fact in this case.

Numerous cases in and outside the state of Florida support the Referee's finding of at least a three year suspension based on the facts in the case at hand.

In *The Florida Bar v. Scian*, *reported as table case*, 659 So.2d 1090 (Fla. 1995), this Court approved a consent judgment for a three (3) year suspension and required the attorney to retake and pass the ethics portion of The Florida Bar exam and to continue to receive counseling prior to petitioning for reinstatement for engaging in the behavior listed below.

Scian, a law firm associate with no prior disciplinary history, deposited into his personal account approximately $37,805.00 belonging to a firm client. Additionally,

Scian directed agents' insurance companies to make payments for firm attorney's fees payable to himself and received approximately $4,500.00 from said agents. Finally, Scian conducted a law practice involving non-firm clients and utilized the firm's resources. Scian collected approximately $16,250.00 in fees for himself through his representation of these non-firm clients. The firm was not aware of Scian's outside law practice, and Scian did not pay any part of the fees he collected from his outside representation to the firm.

It is of crucial importance to note that Scian did not misappropriate any client funds considering that all of the aforesaid client's money remained untouched in Scian's personal account. Within two weeks of being initially confronted about his fraudulent activities, Scian returned the client funds in their entirety.

While both Respondent and Scian were law firm associates that were engaging in the representation of clients without the knowledge of the firm, there are a number of key differences. Considering that Scian did not touch the client's money and returned it in its entirety almost immediately upon request, that constitutes a significant difference in the amounts that were actually misappropriated. The $4,500.00 in fees that Scian diverted from firm clients pales in comparison to Respondent's $62,000.00 theft of fees from existing and/or potential firm clients. The additional $16,250.00 that Scian accepted as attorney fees solely involved non-firm

clients. This particular area of Scian's case would amount to "moonlighting" as it did not involve the surreptitious solicitation of firm clients as in Respondent's case.

Unlike Respondent, Scian handled his Bar matter in a forthright fashion. Scian fully and freely disclosed his records to the Bar and did not attempt to withhold any information. While Scian expeditiously attempted to right his wrongs, Respondent continued to play a game of cat and mouse with the Bar. Respondent did not provide the Bar with any statements until he was ordered to do so by the court. The first statement the Bar obtained from Respondent was his deposition which was provided with less than two weeks prior to the final hearing. Finally, unlike Respondent, Scian did not contest the Bar disciplinary proceedings as he entered into a consent judgment.

Clearly, when one views the different components of *Scian*, it is obvious that Respondent's actions were much more egregious. Even if the total amount of funds mishandled by Scian are tabulated, it still falls short of the client fees that Respondent embezzled from his firm. Accordingly, Respondent's actions warrant at least the same level of discipline as that meted out in *Scian*.

In *The Florida Bar v. Ellis*, *reported as table case,* 675 So.2d 122 (Fla. 1996), this court approved a consent judgment for a three year suspension for theft of firm fees. While Ellis, an attorney with no prior disciplinary history, was an associate at a

firm, he opened up a trust account in his own name and commenced receiving firm fees into said account. Similar to Respondent's case *Ellis* involved numerous misrepresentations and the theft of firm funds. It is important to note that the amount involved in Ellis' theft was at least $20,000.00 less than that of Respondent.

In *The Florida Bar v. Barnett*, *reported as table case,* 675 So.2d 929 (Fla. 1996), this Court entered an order granting Barnett's 5-year resignation from the practice of law. Barnett was a partner at a firm wherein he took unauthorized firm funds. He had no prior disciplinary history and contended that he sincerely believed that the fees he took constituted an equitable entitlement for unique services that he had rendered to the firm. As an associate, Respondent would have a much less arguable claim to fees than that of a partner.

In *The Florida Bar v. Lynne*, *reported as table case,* 606 So.2d 1167 (Fla. 1992), this Court entered an order granting Lynne's 5-year resignation from the practice of law. Lynne was a partner at a firm where he was responsible for not properly accounting for firm funds and for allowing the firm and the firm's auditors to believe that the firm records were adequate. As well, Respondent, an associate, deceived members of his firm and caused firm records to be inaccurate due to his transgressions.

In *The Florida Bar v. Benchimol*, 681 So.2d 663 (Fla. 1996), this Court held

that disbarment was warranted by an attorney's misappropriation of client trust funds, misappropriation of law firm funds, commingling of client and firm funds with personal funds, and his pattern of dishonesty and misrepresentation, notwithstanding his lack of prior disciplinary history. Similarly, Respondent's thefts in the instant case constituted a theft of firm funds and possibly a theft of client funds also. (ROR, pgs. 6-7).

The most significant difference between *Benchimol* and Respondent's case is the total amount of the misappropriations. *Benchimol* involved a total misappropriation of less than $9,000.00 whereas the amount in Respondent's case was more than 7 times greater. In regard to client funds, Respondent accepted client payments due the firm. The firm did not, but could have, requested payment from these clients for unpaid fees. (ROR, pgs. 6-7).

In *The Florida Bar v. Roberto Rigal, Jr.*, Supreme Court case no. 95,793; The Florida Bar file no. 99-71,557(11E), a case pending at referee level where the respondent has signed a written stipulation agreeing to a disciplinary resignation, there is very similar misconduct to that of Respondent. The main difference at this stage is that Rigal has already been criminally prosecuted for his misappropriation of client funds. Rigal was found guilty of four felony counts, including 1 count of scheme to defraud, 2 counts of grand theft, and 1 count of offense against intellectual property by

modifying data in a computer without authority to do so. Rigal's behavior involved the theft of firm funds and his attempts to avoid being discovered. In comparison, Respondent has certainly committed grand theft. The fact that he has not yet been criminally prosecuted does not lessen the gravity of the offense.

In *In the Matter of Todd J. Thompson*, 991 P.2d 820 (Colo. 1999), the Supreme Court of Colorado held that the actions of attorney in misappropriating approximately $15,000 in funds given to him by clients that he should have turned over to his law firm constituted conduct involving dishonesty, fraud, deceit, or misrepresentation, violated accepted standards of legal ethics, adversely reflected on his fitness to practice law, and violated rules governing trust accounts, and warranted disbarment.

Thompson was an associate at his firm who had no disciplinary history. The parties stipulated that he cooperated with the disciplinary authorities by self-reporting, by submitting to an interview with investigative counsel, and by joining in the petition for his own immediate suspension. Thompson claimed that he was suffering from personal and emotional problems during the time of his misconduct. Additionally, he made a timely good faith effort to make restitution to the firm, several witnesses testified that he had a good character and reputation, and he expressed remorse.

Many of the above factors in *Thompson* mirror those in Respondent's case. The main differences are the amount misappropriated and the fact that Thompson self-

reported to the investigative agency. Respondent misappropriated in excess of 4 times the amount involved in *Thompson*.

In *In the Matter of the Disciplinary Proceeding Against James P. Selden, an Attorney at Law*, 107 Wn.2d 246 (1986), the Supreme Court of Washington held that an attorney's misappropriation of $6,810.40 in funds from his law firm warranted disbarment.

Selden misappropriated firm funds from April to October 1983, taking no client funds. Selden made restitution in full. Selden, an associate with the firm, claimed that he only took payments made by clients because he deserved and had been promised a bonus. In mitigation, Selden offered that he had no prior disciplinary record, he was under emotional and financial pressure centered around the dissolution of his marriage, he was remorseful, he since has worked for a law firm that gives him a high recommendation, he sought and received psychiatric treatment, and he cooperated with the bar proceedings.

Respondent offered many mitigating factors similar to those in *Selden*, but Respondent's theft was in excess of 9 times greater and it took place over a much longer period of time. The concurring opinion in *Selden* provided the following compelling language:

> While we have followed a general rule that stealing from clients warrants disbarment, we have not addressed the

> question of the appropriate sanction for stealing from an attorney's employer. To give a more lenient sanction to this type of theft would only serve to encourage theft from an employer rather than a client. It would give the impression that certain types of theft are acceptable. All thefts are reprehensible and, absent extraordinary mitigating factors, warrant disbarment. *Id*. at 259.

In *In the Matter of Steven G. Siegel*, 133 N.J. 162 (N.J. 1993), the Supreme Court of New Jersey held that misappropriation of partnership funds warranted disbarment. The Court lessened the significance of Siegel's mitigation, including personal problems, a prior record which was unblemished and distinguished, and disillusionment with the conduct of other partners at the firm, due to the fact that misappropriation was involved.

The misappropriated funds in *Siegel* amounted to $25,000 whereas in Respondent's case it was over 2 times greater. Additionally, Siegel as a partner had an arguable claim to entitlement to firm funds whereas Respondent did not.

In *Matter of Salinger*, 88 A.D.2d 133 (N.Y.A.D. 1982), the Supreme Court, Appellate Division, held that an attorney who, in a series of separate conversions, appropriated to his own use funds entrusted to him by clients for legal services, which funds were intended for the law firm by which respondent was employed, should be disbarred. The Court concluded that any attorney who converted funds entrusted to his custody is, presumptively, unfit to be a member of the Bar.

Salinger, a managing attorney at the firm, had a previously unblemished record. He made full restitution of the misappropriated funds which were less than $15,000 and no client's case was found to have been mishandled. Yet, the Court was not persuaded that his conduct warranted anything other than disbarment. Once again, the misappropriation in Respondent's case was over 4 times greater.

In *Attorney Grievance Com'n of Maryland v. Nothstein*, 480 A.2d 807 (Md. 1984), the Court of Appeals held that conduct of obtaining in excess of $40,0000 from law firm by submitting false expense claims warrants disbarment. As with all of the cases cited, Respondent's theft was in excess of that in *Nothstein*.

In Respondent's Initial Brief, a number of cases were cited that the Bar will clearly distinguish from the case at hand.

Respondent relies heavily upon *The Florida Bar v. Cox*, 655 So. 2d 1122 (Fla. 1995). In *Cox*, this Court held that a thirty day suspension was an appropriate sanction for dishonesty and misrepresentation toward employing law firm and clients in connection with "moonlighting". While Cox pursued one form of stealing from the firm, this Respondent's activities were much more varied. This Respondent engaged in several different forms of fraudulent misconduct which resulted in substantial costs to the firm. His behavior constituted cumulative misconduct.

Cox was found to have engaged in the representation of "outside" clients. The

Report of Referee in *Cox* reflects that the firm had an informal policy not to engage in outside employment which was not placed in the firm's employment manual until approximately two months before Cox's termination and Cox never reviewed the manual. Additionally, the Report contains no mention as to the amount of fees collected by Cox and restitution was not awarded to the firm as no audit was performed to ascertain the amount of the alleged deficiency. This Court in *Cox* noted that his wrongdoing "may not have caused serious harm to the clients or to the firm..." (at 1123).

On the contrary, Respondent's case is not about "moonlighting". Respondent engaged in the systematic and clandestine representation of existing or potential clients of the firm, not outside clients. Arcia's conduct did cause serious harm to clients and the firm i.e. neglect of a client, clients of Z & P who fired the firm, the use of the firm's resources for travel, etc. and financial deprivation of approximately $62,000.00 of firm funds, as discussed above. Clearly, there are many significant distinctions between *Cox* and the case at hand to support the discipline imposed by the Referee in this case.

In *The Florida Bar v. Stalnaker*, 485 So.2d 815 (Fla. 1986), this Court held that diversion of fees thought to be with permission of president of professional association warrants only suspension for 90 days.

In *Stalnaker*, an associate took a portion of firm fees and gave the rest of them to the firm. The total amount that Stalnaker was charged with taking from the firm was $36,922.00. Stalnaker claimed that the diversion of fees occurred because he thought it was with the permission of the partner who was president of the professional association. The referee found that Stalnaker "found himself in an office that was very disorganized and fairly unproductive monetarily" and that Stalnaker "became the main generating source of cases and legal and financial revenues for the firm" and that he had made restitution to the firm. *Id. at 816.* Additionally, the record in the case illustrated that Stalnaker carried a disproportionate amount of the workload and earned for the firm approximately twice what the partners in the firm generated. This Court found that while Stalnaker exercised extremely poor judgment, his actions fell short of a deliberate attempt to steal from the firm.

Respondent's case involves grand theft. Respondent can offer no entitlement to the fees whatsoever. Finally, testimony at the final hearing established that the business Respondent brought to the firm was a minute fraction of that produced by Mr. Zarco. (T. 58).

In *The Florida Bar v. Childers*, 582 So.2d 617 (Fla. 1991), this Court held that a 90-day suspension from the practice of law is warranted when attorney deposits check made out to attorney, but belonging to law firm, in attorney's personal savings

account.

The theft involved in *Childers* amounted to one check for $950.00. Subsequently, Childers acknowledged her error and fully cooperated in the Bar proceedings. The court found that Childers did not cause any harm to her former firm or its clients, but rather the only person hurt by her conduct was Childers, herself.

*Childers* bares no resemblance to Respondent's case. As noted previously, Respondent engaged in the systematic and clandestine representation of existing or potential clients of Z&P for an extensive period of time. Additionally, Respondent admittedly deprived Z&P of approximately $62,000.00 and there was substantial testimony as to the harm Respondent inflicted upon the firm and its clients. Finally, as mentioned earlier, Respondent has not been cooperative in the bar proceedings. In *The Florida Bar v. Bradham*, 446 So.2d 96 (Fla. 1984), the attorney received a 30-day suspension for dishonesty in his relations with his law partners.

The allegations against Bradham as outlined in this Court's order and the Report of Referee are extremely vague. It is apparent, though, that Bradham was a partner at the firm. As an associate Respondent has no entitlement to a share of the firm's fees. Additionally, the charges against Respondent are well defined and amount to grand theft.

In *The Florida Bar v. Herzog*, 521 So.2d 1118 (Fla. 1988), the Supreme Court

held that attorney's engaging in deceptive billing practices that deprived his firm of unknown amount of fees constituted misconduct warranting ten-day suspension.

Herzog was a shareholder of the firm, not an associate. Additionally, no client complained about his behavior nor did any of them testify at a hearing. Also, in *Herzog*, it was not ascertained whether his billing practices deprived the firm of attorney fees or costs.

*Herzog* is not even remotely similar to Respondent's case. Respondent was not a shareholder of the firm, but rather an associate. A shareholder to a firm could have an arguable position to entitlement to fees whereas Respondent has no argument. Also, the Bar presented the testimony of two clients and Respondent stipulated to the testimony of three others where it was established that he made numerous misrepresentations to them and directed them to inappropriately pay fees directly to him. Finally, Respondent has admitted that he deprived the firm of approximately $62,000.00.

In *The Florida Bar v. Gillin*, 484 So.2d 1218 (Fla. 1986), the attorney was suspended for six months for the mishandling of certain fees which a client paid directly to him, rather than to the law firm in which the attorney was a partner.

Gillin, as a partner, contended his actions of having the client pay him directly would aid in resolving a dispute he had with the firm regarding the fee distribution

formula. Gillin took $25,000.00 in fees and made restitution. Finally, no party suffered any real damage.

Once again, as Respondent was not a partner he can not even venture to make an argument to justify his absconding with $62,000.00 of client fees. As well, there was substantial testimony of the harm Respondent inflicted upon the firm and its clients.

Justice Ehrlich, concurring in part and dissenting in part in *Gillin*, made the following compelling statement:

> It is my opinion that stealing by a lawyer whether from a client, a member of the general public or from his law firm is utterly reprehensible, and that by such act the lawyer has forfeited his position in society as a member of the bar and an officer of the Court, and disbarment is the proper discipline. *Id. at 1221.*

In *The Florida Bar v. Farver*, 506 So. 2d 1031 (Fla. 1987), this court disapproved a sixty day suspension proposed in a consent judgment and imposed a one year suspension. The respondent in *Farver* engaged in one type of theft, namely diverting client's fees to himself. Note that in the instant case the Respondent was far more ingenious. He induced the firm to pay for travel which was for his own benefit. He used the firm (facilities, staff, liability insurance, etc.) to represent a client based upon the lie that she was a non-paying client. He reduced to his own benefit the

representation of clients created by partner Zarco's speeches through interception of mail and telephone calls. His misconduct in that respect was cumulative which requires more severe discipline. *The Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000).

Furthermore, of particular note in the *Farver* case, was Justice Ehrlich's statement when concurring in part and dissenting in part.

> I am of the opinion that the two year suspension urged by the bar is the bare minimum that should be imposed in this case. I have previously set forth my views in the matter of theft by a partner from his firm in *The Florida Bar v. Gillin*, 484 So. 2d 1218 (Fla. 1986), and by an associate from his employer firm in *The Florida Bar v. Stalnaker*, 485 So. 2d 815 (Fla. 1986).
>
> Suffice it to say that absent extenuating circumstances <u>there should be no place in The Florida Bar for lawyers who steal from whomsoever</u>. (at 1032, emphasis supplied).

This court should note that the *Farver* case involved approximately $6,000.00, a small fraction of the subject amount in this case.

In *The Florida Bar v. Ward*, 599 So. 2d 650 (Fla. 1992), the respondent engaged in one form of thievery by taking in excess of $12,000.00 from the firm's

operating account. The respondent did so on several occasions. This Court stated that . . . "this was not one incident but several. Therefore, respondent must receive a severe sanction" (at 653). He received a one year suspension despite minimal aggravation and extensive and non-reluctant findings of mitigation.

Finally, in Respondent's Initial Brief, he selectively referenced a small sampling of trust account cases to attempt to bolster his position. These cases are not factually similar to Respondent's case and should not be viewed as proper authority upon which to base a determination as to the appropriate discipline in this matter.

The Florida Standards for Imposing Lawyer Sanctions ("Standards") was drafted by the Board of Governors of The Florida Bar to assist in the determination of the appropriate discipline in Bar disciplinary matters. Accordingly, there are numerous sections which should be considered in determining the appropriate sanction in the immediate disciplinary case including:

> 4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.
>
> Or
>
> 4.12 Suspension is appropriate when a lawyer knows or should know that he is dealing with client property and causes injury or potential injury to a client.
>
> 4.61 Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client.
>
> Or

4.62 Suspension is appropriate when a lawyer knowingly or intentionally deceives a client, and causes injury or potential injury to the client.

5.11 Disbarment is appropriate when:

(b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or

(f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Or

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

As aggravating and mitigating factors are findings of fact, the referee's findings as to these factors are to be upheld unless clearly erroneous or lacking in evidentiary support. *See, The Florida Bar v. Hecker*, 475 So.2d 1240, 1242 (Fla. 1985). The trier of fact is in the best position to evaluate these mitigating and aggravating factors in this proceeding. Accordingly, the Bar would support the referee's finding of mitigating and aggravating factors as discussed below.

The referee acknowledged certain mitigating factors . (ROR, p. 13). In sum,

the mitigating factors are insignificant as noted:

1) 9.32(a) - absence of a prior disciplinary record. Yes, Respondent has no prior discipline, but as noted previously, many similar disbarment cases involve respondents who have no disciplinary history.

2) 9.32(c) - personal or emotional problems. Brief testimony was provided by Respondent pertaining to family and financial problems. There was no expert testimony presented. The problems that Respondent referenced are common to many in and outside of the legal field. They do not provide an explanation for his devious activities.

3) 9.32(d) - timely good faith effort to make restitution or to rectify consequences of misconduct. On the eve of trial, Respondent did make restitution in full. It does not appear, however, that he has rectified all of the consequences of his misconduct as the firm lost numerous clients due to his deceitful actions.

4) 9.32(g) - character or reputation. Primarily, Respondent's character evidence involved friends who have worked with him since he departed the firm. All of them were unfamiliar with his incorrigible behavior at the firm until after the fact. As noted in *Siegel*,

> Although good reputation, prior trustworthy professional conduct, and general good character are often considered as mitigating factors, their importance is diminished where misappropriation is involved. *Siegel* at 171.

5) 9.32(j) - interim rehabilitation. Respondent provided little evidence to show that he has been rehabilitated from his dishonesty.

6) 9.32(l) - remorse. There is no other position Respondent could take after being confronted with clear evidence of his guilt by his employers. As noted in *Selden*,

> "An attorney's recognition that theft is wrong and his cooperation with a bar investigation do not merit great commendation." *Selden* at

256.

Furthermore, the difference with Respondent's case is that he did not cooperate with the Bar investigation.

As for the appropriate aggravating factors, the referee referenced a number of them. (ROR, p. 13). Based on the previous arguments forwarded by the Bar, the following aggravating factors are plainly applicable on their face:

1) 9.22(b) - dishonest or selfish motive.

2) 9.22(c) - a pattern of misconduct.

3) 9.22(d) - multiple offenses.

4) 9.22(e) - bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency and by attempting to prevent information from being submitted to disciplinary agency.

5) 9.22(h) - vulnerability of victim.

Respondent notes his concerns over whether the Referee improperly cited 9.22(e) as an aggravating factor.

First, he claims that a provision preventing disclosure to the Bar in his settlement agreement with Z&P should not be viewed as an aggravating factor. In review of the record, Mr. Zarco's testimony evidences that Respondent attempted

to include an even more restrictive provision, but due to Z&P's responsibility to the Bar, Mr. Zarco would not agree to it. (T. 56-57). Mr. Zarco's testimony evidences that Respondent took efforts to avoid disclosure to the Bar.

Additionally, Respondent's attempt to use the Fifth Amendment privilege in these proceedings presents the classic "sword and shield" metaphor. A party may not seek affirmative relief and then invoke the Fifth Amendment privilege to avoid giving discovery in a matter pertinent to litigation. *City of St. Petersburg v. Houghton*, 362 So.2d 681 (Fla. 2d DCA 1978). Respondent had expressed his intentions to invoke the Fifth Amendment privilege prior to trial and then to testify at the final hearing. As noted previously, he had to be compelled by the Referee to provide his deposition less than two (2) weeks prior to the final hearing. (ROR, pgs. 9-10). As evidenced, the record supports the Referee's finding that 9.22(e) (bad faith obstruction of the disciplinary proceeding ...) was an appropriate aggravating factor in this case.

## CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that the Report of Referee be approved and that the Respondent receive at least a three year suspension as recommended by the Referee in this cause.

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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 # 3370020124) to **Thomas D. Hall**, Clerk, Supreme Court of Florida, 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 Forest Parkway, Suite B-2, Tallahassee, Florida, 32309-6825, on this _____ day of _____, 2002.

_____

**WILLIAM MULLIGAN**
**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.

_____

**WILLIAM MULLIGAN**

**Bar Counsel**