IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NO. SC 01-952
TFB FILE NO. 2001-70,370(11P)

OMAR JAVIER ARCIA,

Respondent.
_____/

RESPONDENT'S REPLY BRIEF

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ARGUMENT

A SUSPENSION OF AT MOST SIX MONTHS, RATHER THAN THE THREE YEARS RECOMMENDED BY THE REFEREE, IS THE APPROPRIATE DISCIPLINE FOR RESPONDENT'S CONDUCT IN THE CASE AT BAR.

The discipline in this case should be determined by reference to this Court's past decisions on misconduct similar to that at bar, not on a smattering of cases from other jurisdictions or unreported consent decisions from this state. When, as here, this Court has set precedent for the discipline to be imposed for misconduct by Florida lawyers, those are the decisions that should be followed, not a few decisions from other jurisdictions with different disciplinary rules of procedure, rules of conduct and precedent. Similarly, unreported consent decrees approved by this Court should not trump firm decisions rendered by this Court in contested disciplinary proceedings.

Accused lawyers, referees and counsel for the parties should be able to rely on precedent decided by this Court when considering the discipline to be imposed for misconduct. For cases involving diversion of funds within a firm, not involving misappropriation of trust funds, this Court has set down a range of discipline from thirty days to one year. *Florida Bar v. Cox*, 655 So.2d 1122 (Fla. 1995); *Florida Bar*

v. Gillin, 484 So.2d 1218 (Fla. 1986); *Florida Bar v. Stalnaker*, 485 So.2d 815 (Fla. 1986); *Florida Bar v. Childers*, 582 So.2d 617 (Fla. 1991); *Florida Bar v. Bradham*, 446 So.2d 96 (Fla. 1984); *Florida Bar v. Herzog*, 521 So.2d 1118 (Fla. 1988), and *Florida Bar v. Farver*, 506 So.2d 1031 (Fla. 1987). For this Court to adopt the draconian approach taken by the foreign jurisdiction cited by bar counsel, or for that matter, to adopt the harsh and unprecedented three year suspension recommended by the referee, would be to "change the rules of the game" by departing from past disciplines and imposing unprecedented and new, discipline. If this Court feels that it must depart from the decisions cited above and impose a new rule, then such a position should not be applied retroactively. Rather, this Court should do as it did in *Florida Bar v. Breed*, 378 So.2d 783 (Fla. 1980), where this Court "[gave] notice, however, to the legal profession" that in the future, it would deal more harshly with the conduct before the Court that day than it had in the past.

The *Breed* case involved a lawyer's misuse of clients' escrow funds. The referee had recommended that Mr. Breed be disbarred. The accused lawyer argued that the referee's recommendation was out of line with past disciplinary decisions and this Court agreed. It reduced Mr. Breed's discipline to two years notwithstanding the fact that he had shortages in his trust account which, at times, exceeded $40,000.00.

After noting that Mr. Breed correctly argued that similar misconduct before the Court had not resulted in disbarment, this Court stated on page 785 of its opinion that:

> We recognize that each case must be assessed individually and in determining the punishment we should consider the punishment imposed upon other attorneys for similar misconduct. To totally ignore these prior actions would allow caprice to substitute for reasoned consideration of the proper discipline. However, we agree with the referee that misuse of clients' funds is one of the most serious offenses a lawyer can commit. We find that in this instance, a two-year suspension with proper proof of rehabilitation before readmission is the appropriate penalty. We give notice, however, to the legal profession of this state that henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured.

The Bar asks this Court to "totally ignore" its past decisions on misconduct similar to Mr. Arcia's and to suspend him for three years. To accept this argument would "allow caprice to substitute for reasoned consideration...". As argued on pages 6 through 23 of Respondent's initial brief, a suspension of, at most, six months is the appropriate discipline for the misconduct before the Court today. The three years recommended by the referee is three times longer than the longest discipline imposed by this Court for diverting funds from a firm. *Florida Bar v. Farver*, 506 So.2d 1031 (Fla. 1987) and *Florida Bar v. Ward*, 599 So.2d 650 (Fla. 1992) (one year suspensions).

The five foreign disciplines cited by the Bar from sister states, Respondent humbly submits, should not form the impetus for this Court to depart from past

precedent in deciding the instant case. They are but five examples of decisions in jurisdictions with different procedural rules, different codes of ethics and different precedent. For example, unlike Florida, in New York a disbarred lawyer is not required to take the entire bar exam. Only the Multistate Professional Responsibility Examination is required. See, Rule 3-5.1(f) and 22 New York Code of Rules and Regulations, Section 603. The Florida Bar is not only asking this Court to "totally ignore" its prior disciplinary decisions, but to substitute therefor the decisions of the courts of other jurisdictions.

The first foreign decision cited by bar counsel was *In the Matter of Thompson*, 991 P.2d 820 (Colo. 1999). Citing firm past precedent, the court disbarred Mr. Thompson. In Colorado, unlike Florida, rather than departing from past precedent, the court adhered to its own precedent and entered an order of disbarment.

In *In the Matter of the Disciplinary Proceeding Against Selden,* 107 Wn.2d 246, 728 P.2d 1036 (1986), the Washington Supreme Court disbarred a lawyer for conduct far more serious than that at bar. Mr. Selden continued to improperly take money from his firm even after his prior misconduct had been discovered and he had been fired from the firm. *Supra,* pp. 249, 256. As the Court stated:

> Incredibly, he then stole yet additional funds after his firm discovered his misappropriations and fired him.

Additional aggravating factors were Mr. Selden's misstatement to the firm about the amount of money he had misappropriated (he told them it was $2,000 rather than $6,800), and his concealing client ledgers from the firm. pp. 249, 255.

The Bar's reliance on the New Jersey decision, *In the Matter of Siegel*, 627 A.2d 156 (N.J. 1993) is equally misplaced. Over a three year period, Mr. Siegel submitted thirty-four false requests for disbursements, Count I, and obtained an additional $4,500 in false disbursements from the firm in Count II. He also gifted to himself $53,000 from a client without the firm's knowledge and without procedures allowing him to do so. As to the latter charge, the court did not discipline him because it was not clearly and convincingly improper. Mr. Siegel's conduct was far worse than was Mr. Arcia's . As set out on page 165 of the court's opinion, Mr. Siegel repeatedly submitted bogus client expense vouchers to companies that had done personal work for him. They included disbursements to his personal landscaping service, his tennis club, theater tickets, his personal legal fees, dental expenses and sports memorabilia. This was not an instance, like the case at bar, of a lawyer earning legal fees and then keeping the money. This was an instance where the lawyer falsified expense vouchers and took money from the firm to pay his own expenses. While Mr. Arcia's conduct was improper, it did not rise to the level of seriousness that Mr. Siegel's misconduct entailed.

In the Matter of Salinger, 88 A.D.2d 133 (N.Y.A.D. 1982), the lawyers' conduct was similar to that at bar. However, in New York, unlike Florida, the court had firmly and unequivocally previously stated that conduct such as Mr. Salinger's would result in disbarment. The New York court followed its past precedent in imposing discipline.

The last case from a foreign jurisdiction cited by the Bar is *Attorney Grievance Commission of Maryland v. Nothstein*, 480 A.2d 807 (Md. 1984). As was true in Mr. Siegel's case, Mr. Nothstein submitted false expense vouchers to his firm, resulting in taking over $40,000 from them. In disbarring Mr. Nothstein, the Maryland Supreme Court relied on its past unequivocal decisions.

All five of the cases cited by the Bar from foreign jurisdictions were decisions in which the deciding court relied on past precedent in its state. Mr. Arcia asks this Court to do likewise; to rely on its past decisions. The pertinent Florida opinions call for a suspension of at most, six months.

As it did at final hearing, on page 18 of its answer brief, The Florida Bar relied on this Court's decision in *Florida Bar v. Benchimol*, 681 So.2d 663 (Fla. 1996) as support for a three year suspension. *Benchimol* was discussed on page 18 of Respondent's initial brief. Basically, the Court disbarred Mr. Benchimol because he stole client trust funds in addition to diverting fees belonging to his former firm. There

is no allegation before the Court today that Mr. Arcia in any way misused client trust funds. This is an important distinguishing factor between *Benchimol* and the case at bar.

The Florida Bar also relies on five consensual disciplines: three voluntary disciplinary resignations from the bar and two consent judgments for suspensions for three years as support for the referee's recommended discipline. Respondent respectfully submits that, with the exception of those rare cases where an individual is trying to show that The Florida Bar is engaging in selective prosecution, consent judgments are not the proper basis on which to impose disciplinary sanctions. Resignations in lieu of discipline and consent judgments can be entered into for myriad reasons. The accused lawyer's age, health, or financial resources may force him or her to agree to a discipline that would have been reduced had there been a full evidentiary hearing. The records before this Court on consent judgments are limited to the facts that the parties agree upon. There may be circumstances, such as dropped charges, that are outside the record but which dramatically influence the respondent lawyer's willingness to seek a full and fair hearing.

Keeping in mind that there are factors not in the record that may have forced the accused lawyer to enter into the consent judgments and resignations discussed below, Mr. Arcia will attempt to distinguish the consensual disciplines argued by the Bar. The

first of these cases, *Florida Bar v. Scian,* reported as table case, 659 So.2d 1090 (Fla. 1995) was discussed on page 14 of the Bar's brief. Mr. Scian agreed to a three year suspension for depositing almost $38,000 belonging to a firm client into his personal account, for directing insurance companies to pay to him rather than the firm approximately $4,500 and for diverting approximately $16,250 in fees from his firm. By far, the most egregious conduct engaged in by Mr. Scian was his depositing almost $37,800 belonging to his client, Bayfront Medical Center, into a personal account. In short, Mr. Scian stole clients' money. That factor alone distinguishes the case at bar from Mr. Scian.

Mr. Scian received a three year suspension for stealing clients' monies. The Bar is asking this Court to impose the same discipline on Mr. Arcia, who did not misuse clients' funds, as that meted out to Mr. Scian. Mr. Scian's misconduct was far worse and, therefore, the discipline that Mr. Arcia receives should be materially less than that imposed on Mr. Scian.

Unlike Mr. Arcia, Mr. Scian also had a prior disciplinary record, i.e., a suspension, at the time of his consent judgment.

In the second case discussed by The Florida Bar, *Florida Bar v. Ellis,* reported as table case, 675 So.2d 122 (Fla. 1996), Mr. Ellis's three year suspension was retroactive to the beginning of his emergency suspension some ten months earlier.

A review of the *Ellis* file indicates that he pled guilty to numerous trust account violations. He received clients' funds into trust (apparently, Mr. Ellis had his own trust account) and then did not properly disburse the funds to others. There were numerous instances of his failure to honor letters of protection. There were also at least two instances where he remitted false affidavits, i.e., statements under oath to his firm, falsely stating the number of hours that he worked. There was at least one instance where he told the firm that the file had been closed because the client could not be found when, in fact, Mr. Ellis had collected fees on behalf of the client. Finally, there was an allegation that he forged a client's name to a document. Added to his litany of offenses was the fact that he did not maintain an IOLTA trust account and that he falsely attested under oath on his Bar dues statement that he followed the Bar's trust accounting rules.

None of the above cited offenses is present in the instant case. Mr. Ellis's case is so far removed from the case at bar that it is no support for the Bar's argument. The discipline that Mr. Arcia receives should not even begin to approach the three year suspension meted out to Mr. Ellis.

On pages 17 and 18 of its brief, the Bar refers to three voluntary disciplinary resignations by lawyers. The first of these, *Florida Bar v. Barnett*, reported as table case, 675 So.2d 929 (Fla. 1996), was for a three year disciplinary resignation (not a

five year resignation as mistakenly stated in the Bar's answer brief). In Mr. Barnett's petition for disciplinary resignation, he proclaimed his innocence of the charges pending against him. He also claimed innocence in a new case filed against him which had not yet risen to the referee level. After asserting that he "exercised poor judgment" in his affairs, he made the following statement:

> Faced with a myriad of personal problems, I choose this disposition of my bar related encounters so that I may direct my energies and resources in areas that require my absolute and undiverted attention.

We do not have the full record on Mr. Barnett's case. His election of a disciplinary resignation for three years, not the five years minimum that disbarment requires, should not be considered a basis to support a three year suspension against Mr. Arcia. Perhaps, Mr. Barnett resigned knowing full well that the new case brought against him would mandate disbarment even if he were not disbarred in his pending disciplinary proceedings. Perhaps, had he contested the Bar's proceedings, he would have received a short term suspension. We will never know.

The *Barnett* case is a perfect example of why consensual disciplines should not form the basis for imposing disciplines in a contested case.

The second disciplinary resignation relied upon by the Bar, *Florida Bar v. Lynne*, reported as table case, 606 So.2d 1167 (Fla. 1992) was, in fact, for five years. In his petition for disciplinary resignation, Mr. Lynne acknowledged that he was

accused of falsifying records and files including those relating to the disbursements of funds. Mr. Lynne agreed to cooperate in determining "inaccuracies in trust accounts" and to "cooperate with the Client Security Fund." Mr. Lynne admitted to violating Rule 5-1.1 of the Bar's trust accounting regulations.

Obviously, Mr. Lynne's offenses involved the misappropriation of trust funds. Otherwise, why would he be admitting to violating the Bar's trust accounting rules and offering to cooperate with the Bar's Client Security Fund? Once again, the Bar is citing a trust account defalcation case as support for a harsh discipline in a diversion of fee case.

The last disciplinary resignation case cited by the Bar is *Florida Bar v. Rigal*, Supreme Court Case No. 95,793; Florida Bar File No. 99-71,557(11E). Mr. Rigal was convicted after jury trial of four separate felony violations, including Scheme to Defraud (a first degree felony), Grand Theft in the Third Degree (a third degree felony), Grand Theft in the Second Degree (a second degree felony) and "offense against intellectual property by modifying data in a computer without authority to do so" (a second degree felony). The record is silent as to specifically what funds were stolen and what computer records were altered.

Regardless, Mr. Rigal's case is distinguished from that of Mr. Arcia's by virtue of his four felony convictions. Those convictions resulted in an automatic suspension

from the bar and Mr. Rigal is precluded from even seeking reinstatement or readmission until his civil rights are restored. That process could not even begin until the completion of his five year probation.

None of the Bar's five consensual disciplines are analogous to the case at bar. They involved either misuse of trust funds or felony convictions. In no instance is there a complete record before the Court such that a fair comparison of those cases with Mr. Arcia's can be made. Accordingly, they should be disregarded.

The cases cited by the Respondent in pages 6 through 21 of his brief are the cases that this Court should rely upon in determining discipline. *Florida Bar v. Cox*, 655 So.2d 1122 (Fla. 1995) is the case most clearly on point. Mr. Cox received a thirty day suspension, a "serious punishment". *Cox*, 1123. *Florida Bar v. Stalnaker*, 485 So.2d 815 (Fla. 1986) resulted in a ninety day suspension for conduct analogous to Mr. Arcia's. Certainly, Respondent should receive no discipline longer than that imposed in *Florida Bar v. Gillin*, 484 So.2d 1218 (Fla. 1986), a six month suspension.

The Bar correctly states on page 31 of its brief that full restitution was not made until the eve of trial. But, $35,000 in restitution was made in November 2000. And, the final payment was two years ahead of schedule.

The Bar also incorrectly describes the nature of Respondent's character witnesses' testimony on page 31 of its brief. Mr. Martinez has known Mr. Arcia since the latter's first day of law school and Mr. Suarez has known him since 1998.

On page 33, the Bar once again argues that Respondent improperly pled the Fifth in these proceedings. Respondent dealt with this issue on pages 37 and 38 of his brief. The Bar incorrectly asserts that Mr. Arcia invoked the Fifth while seeking affirmative relief. Mr. Arcia was only defending himself in these proceedings. The Bar glosses over the fact that every document they needed for this case had been provided to them before they even filed their complaint. Hence, there was no obstruction of evidence.

CONCLUSION

This Court's past decisions mandate a suspension for Mr. Arcia of no longer than six months. To accept the Bar's arguments, that these prior decisions should be ignored, is to "allow caprice to substitute for reasoned consideration of the proper discipline." *Breed*, 785. The foreign cases cited by The Florida Bar all refer to firm precedent in those states. Precedent in Florida mandates a rejection of the referee's recommended three year suspension. The consensual disciplines cited by the Bar are all clearly distinguishable and should be disregarded by this Court in its consideration of the proper discipline to be imposed.

The referee's recommendation that Respondent should be suspended for three years should not be accepted by this Court. In lieu thereof, this Court should suspend Respondent for a period of time no longer than six months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Reply Brief was delivered by hand to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and copies were mailed to William Mulligan, 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 3rd day of September, 2002.

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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