IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

OMAR JAVIER ARCIA,

Respondent.

_____/

Supreme Court Case
No. SC01-952

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

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.6 of the Rules Regulating The Florida Bar, a final hearing was held on February 7, 2002. All of the pleadings, transcripts, notices, motions, orders and exhibits are forwarded with this report and the foregoing constitutes the record of the case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: William Mulligan
Rivergate Plaza
444 Brickell Avenue, Suite M-100
Miami, Florida 33131

For The Respondent: Louis Michael Jepeway, Jr.
Biscayne Building
19 West Flagler Street, Suite 407
Miami, Florida 33130-4404

II. FINDINGS OF FACT:

On January 29, 2002, this court issued a Stipulated Order on The Florida Bar's Motion for Partial Summary Judgment. Pursuant to that order, this Referee finds that all facts are true as stated in The Florida Bar's complaint to wit:

1. Respondent, Omar Javier Arcia, is and at all times hereinafter mentioned, was a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. Respondent was an employee of the law firm of Zarco and Pardo, P.A. ("firm").

3. During the course of his employment with the firm, Respondent represented some clients for the benefit of Omar J. Arcia, P.A. (" Arcia P.A."), and not for the benefit of the firm.

4. Respondent was the sole shareholder and employee of the Arcia P.A.

5. Respondent's representation of clients on behalf of the Arcia P.A. was violative of his agreement with the firm.

6. The employment agreement between Respondent and the firm provided him with a base salary and a potential bonus at the end of the year. The bonus was totally discretionary.

7. Respondent was not entitled to any additional funds from the firm's clients.

8. Respondent was provided with a copy of the firm's manual which included the instruction that attorneys employed by the firm were prohibited from independently representing clients or prospective clients of the firm.

9. Respondent, nevertheless, solicited and represented clients and/or potential clients of the firm.

10. Respondent solicited the aforesaid clients by, among other means, intercepting telephone calls directed to the firm.

11. In several instances, fees obtained by representing the firm's clients or prospective clients were deposited in bank accounts owned by the Arcia P.A.

12. The transfers of funds to the bank accounts(s) of the Arcia P.A. were carried out without the consent or knowledge of the firm.

13. Respondent also induced some of the firm's clients to deliver payments of fees to the Arcia P.A. by claiming that he was a partner, and by preparing misleading documents, such as letterhead stationary, and other materials indicating a relationship between the Arcia P.A. and the firm.

14. Respondent has admitted that he has deprived the firm of approximately $62,000.00 based upon the foregoing conduct.

Additionally, through testimony and stipulations at the final hearing, this Referee

finds the following:

15. Respondent was employed by the firm from approximately 1995 until he was terminated on September 8, 2000.

16. Respondent was initially employed as a law clerk and subsequently became an associate at the firm upon his passing the bar exam in 1995.

17. Respondent remained an associate at the firm until the time of his termination. Respondent was treated very well and was trusted by the partners of the firm. Partner Robert Zarco testified that he liked the Respondent and that he did not want to hurt the Respondent but thought that a suspension, not disbarment was in order.

18. In approximately December, 1998, Respondent formed the Arcia P.A.

19. Thereafter, Respondent solicited approximately 10 - 20 existing or potential firm clients and accepted payment of fees from them. Respondent also intercepted the firm's mail and took checks made payable to his P.A. The practice of the firm was to have a partner open all mail.

20. Respondent received the firm's manual precluding the independent representation of clients or prospective clients of the firm prior to engaging in the solicitation of said clients.

21. On numerous occasions, Respondent entered into retainer agreements

with clients wherein he listed the firm and Arcia, P.A. as the attorneys being retained when, in fact, the firm was unaware of this representation.

22. Respondent never advised the firm of the existence of the Arcia P.A. nor did he provide the firm with any portion of the fees he received.

23. On at least one occasion, Respondent filed a court pleading in federal court referencing that he and a partner of the firm were representing a client when, in fact, said partner had no knowledge of the representation.

24. Respondent used firm resources during firm business hours to conduct his fraudulent activities.

25. Respondent acknowledged that he viewed the firm as a competitor of the Arcia P.A. while he worked at the firm.

26. The firm entered into a retainer agreement and promissory note with a firm client, Steven Inscore ("Inscore").

27. Subsequently, Respondent revised that original promissory note directly with Inscore to reflect the Arcia P.A. as payee on that promissory note.

28. Respondent had advised Inscore that he had been promoted to partner at the firm and that Inscore should make all payments payable to him from that point forward.

29. Respondent received at least one payment payable to him on said

promissory note with Inscore.

30. Throughout the representation, Inscore believed he was represented by the firm, not the Arcia P.A.

31. Khalid Zaheer ("Zaheer") retained the firm to represent him in a franchise issue.

32. Zaheer approached Respondent to make payment for services provided by the firm to Zaheer.

33. Zaheer attempted to provide Respondent with a check made payable to the firm, but Respondent advised him instead to give him a check made out directly to the Arcia P.A.

34. At Respondent's request, Zaheer submitted a check payable to the Arcia P.A. for the services provided by the firm.

35. Throughout the representation, Zaheer believed he was represented by the firm, not the Arcia P.A.

36. The Florida Bar had other witnesses who were present, in person or by phone, whose testimony was only proffered to this referee, at this referee's request. No mention is necessary as to this testimony, except that the testimony would have been repetitive in that it shows other clients of the firm who were deceived by the Respondent.

37. Respondent's actions constituted a theft of firm funds and possibly could have been theft of client funds also. Respondent fraudulently accepted client payments due the firm by telling the clients to make checks payable to his PA. The firm did not, but could have, requested payment from these clients for the unpaid fees that the Respondent collected by theft and deception. If the firm had requested payment, the clients may have been obligated to pay again.

38. Respondent also advised the firm of his representation of family members and/or friends while employed by the firm.

39. Respondent was advised by the firm that it would be acceptable to represent these family members and/or friends, but was informed that any fees received from them would be made payable to the firm.

40. Respondent received fees from the representation of family members and/or friends and never advised the firm.

41. During the year 2000, Respondent's pattern of solicitation of existing or potential firm clients accelerated up until the date of his termination. One of the reasons that the Respondent's activities accelerated, besides greed, was because of the loss of his wife's income. His wife had left her job because she became pregnant and had a baby.

42. The duration of Respondent's fraudulent activities spanned

approximately 1 ½ to 2 years.

43. During the time that Respondent was engaged in the aforesaid activities, he received bonuses from the firm. There is no question that Respondent did good work .

44. Due to Respondent's actions, the firm suffered significant harm.

45. The firm focused its legal representation primarily on franchise practice.

46. The firm lost numerous H&R Block franchisees, who were existing clients, due to Respondent's fraudulent actions.

47. Respondent also agreed to the representation of a client that brought a conflict of interest to the firm without the firm's knowledge.

48. Additionally, Respondent's actions strained the relationship the firm had with other clients due to his fraudulent activities. The total damage to the firm, both financially and to its reputation, cannot be precisely calculated although a restitution figure of $60,000 was agreed upon by the firm and the Respondent.

49. On three different dates, Respondent was given the opportunity to admit to his wrongful behavior, but on each occasion he failed to do so. Respondent testified that Mr. Zarco did not give him an opportunity to admit his wrongful behavior.

50. In particular, on September 8, 2000, Respondent was given numerous opportunities to admit to his improprieties, but refused to do so until the firm confronted him with clear evidence of their knowledge of the fraud that he committed

upon the firm.

51. On September 8, 2000, when Respondent was confronted with clear evidence of his guilt and asked why he did it, he advised that it was a result of his greed.

52. As a result of Respondent's fraudulent activities, the firm filed a civil action against him and obtained a temporary restraining order against him.

53. Subsequently, the firm and Respondent entered into a settlement agreement wherein Respondent agreed to the repayment of $60,000.00 to the firm.

54. The settlement amount was arrived at through Respondent and the firm's inspection of records evidencing the misappropriations.

55. Respondent requested that the following language be included in the aforementioned settlement agreement with the firm:

"Neither Zarco & Pardo, P.A. nor any of its employees, shall initiate contact or provide any further evidence to the Florida Bar in connection with the Bar Complaint instituted against Omar J. Arcia for the allegations contained in the Subject Lawsuit, except as specifically required by law."

56. On the eve of the final hearing in this matter, Respondent made his final payment, approximately two years early, constituting payment in full of the aforementioned settlement amount.

57. Respondent was not cooperative in the bar proceedings until the very end.

58. Upon the Bar's initial inquiry into this matter, Respondent elected to remain silent.

59. The Bar noticed Respondent for his deposition and Respondent filed a Motion to Quash Notice of Taking Deposition of Respondent.

60. This court issued an order denying Respondent's Motion to Quash Notice of Taking Deposition of Respondent.

61. Due to the aforesaid motion, the Bar did not obtain Respondent's deposition until less than two (2) weeks before the final hearing.

62. At the final hearing on February 7, 2002, Respondent called attorney, Gustavo Suarez ("Suarez"), as a witness on his behalf. Suarez testified that the Respondent was remorseful.

63. Suarez also testified that he helped Respondent set up the Arcia P.A.

64. It was inquired of Suarez why he would help Respondent set up the Arcia P.A. while Respondent was still working for the firm.

65. Suarez stated that Respondent advised him that he was setting up the Arcia P.A. because he was leaving the firm and going out on his own soon.

66. Respondent, in fact, stayed at the firm for almost two (2) years after the Arcia P.A. was incorporated.

67. It is this referee's opinion that the Respondent misled his friend Suarez as to the true purpose of the corporation. The formation of the corporation was part of the Respondent's calculated course of conduct of theft and deception from the firm.

68. Respondent also called Manuel Lopez, Esquire and Juan Martinez, Esquire as witnesses on his behalf. Both attorneys testified as to the Respondent's good character and good work as an attorney. They both testified that the Respondent was remorseful and that his actions were an aberration.

69. This referee saw little if no emotion and no outward signs of remorse from the Respondent as he sat at Respondent's table and as he testified.

70. 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.

III. RECOMMENDATION AS TO GUILT: 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.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED: Respondent is relatively young, married and has two very young children, ages four years and eighteen months. He was twenty nine years old and practicing for approximately five years when he was caught. If not for the fact that the Respondent is young and has two very young children plus some other mitigating factors, this referee's recommendation would be five year disbarment. However, I do believe that the Respondent can be rehabilitated.

Discipline has three purposes:

"...First, the judgment must be 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 the undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be 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 130,132) (Fla. 1970).

It is my recommendation that the Respondent be suspended for a period of three years followed by three years of probation. The three year probationary period is to start immediately following the three year suspension. Probationary conditions for

the three years shall include supervisor reports regarding Respondent's client files, obtaining a passing score on the ethics portion of the Bar exam, reports on trust accounts by a certified public accountant and Respondent shall enter into a rehabilitation contract with FLA for mental health counseling. I base my recommendation on the substantive charges, together with the aggravating and mitigating factors which exist.

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 the 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 has 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. This referee saw little if no outward appearances of remorse or emotion. However, Respondent testified that he was remorseful and so did his friends.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

Age: 30
Married/two children - ages 4 years and 18 months
Date Admitted to the Bar: September 26, 1995
Prior Disciplinary Record: None

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED: I find that the following costs were reasonably incurred by The Florida Bar in these proceedings and should be assessed against Respondent:

Administrative fee Rule 3-7.6(o)(1)(I)	$ 750.00
Attendance of Court Reporter at Deposition on 11/19/01 and transcript	268.70
Attendance of Court Reporter at Deposition on 11/21/01 and transcript	160.80
Attendance of Court Reporter at Deposition on 11/26/01 and transcript	159.35
Attendance of Court Reporter at Hearing on 01/24/02	75.00
Attendance of Court Reporter at Deposition on 01/28/02 and transcript.....	503.45
Attendance of Court Reporter at Final Hearing on 02/07/02.....	180.00
Auditor costs	1,680.36
Investigator costs	507.24

TOTAL: **$4,284.90**

DATED this _____ day of _____, 2002.

_____

Honorable Michael J. Samuels, Referee
Lawson E. Thomas Courthouse Center
175 Northwest 1st Avenue, Room 231
Miami, Florida 33128

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. mail to JOHN A. BOGGS, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, Tallahassee, Florida 32399-2300, LOUIS M. JEPAWAY, ESQUIRE, Counsel for Respondent, Suite 407 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, WILLIAM MULLIGAN, ESQUIRE, Counsel for The Florida Bar, 444 Rivergate Plaza, Suite M-100, Miami, Florida 33131.

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Honorable Michael J. Samuels
Referee