IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

Case No. SC02-1488
TFB File No. 2000-11,868(13F)

DAVID S. SHANKMAN,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, David S. Shankman, will be referred to as "Respondent" or "Mr. Shankman."

"TT" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC02-1488 held on December 23 and 24, 2003.

"SH" will refer to the transcript of the sanctions hearing before the Referee in Supreme Court Case No. SC02-1488 held on April 2, 2004.

"RR" will refer to the Amended Report of Referee dated April 29, 2004.

"TFB Ex." will refer to exhibits presented by The Florida Bar and "Respondent's Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee held on December 23 and 24, 2003.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

"Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Sanctions.

JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Article V, Section 15, of the Constitution of the State of Florida.

STATEMENT OF THE CASE

Neither party appealed the Referee's findings of fact.

The Referee's findings of misconduct were precisely set forth in his Report of Referee. They were:

> [COUNT ONE] The Bar established by clear and convincing evidence that the Respondent violated Rule 4-1.7(b) and Rule 4-8.4(a) by taking cash from his client and Rule 4-1.8(a) after the Firm had agreed to the reduced fee and Rule 4-4.1(a), Rule 4-8.4(a) and Rule 4-8.4(c) by Respondent and Hatmaker keeping quiet about the bonus. RR 9.
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> * * *
>
> [COUNT TWO] The Bar proved by clear and convincing evidence that the Respondent violated Rule 4-5.4(a) by paying a 7% fee to a non-lawyer as a bonus and Rule 4-8.4(c) by failing to inform his former firm of the fee from the active KAPTZAN case he took with him without their knowledge along with the other five clients omitted from the list of clients. RR 12.
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> * * *
>
> [COUNT THREE] The Florida Bar established by clear and convincing evidence that the Respondent violated Rule [4-1.3] by failing to timely file a response to the Defendant's Motion for Summary Judgment in LAUNDY VS. CONTEC . . . .

STATEMENT OF FACTS

Much of the Bar's statement of facts includes statements that, while they support the Bar's position on appeal, were not found by the Referee. Respondent, therefore, feels constrained to supplement the Bar's findings of fact as set forth below.

The Referee specifically found as to Respondent's unhappiness with the firm's operation, as discussed on page 4 of the Bar's brief, that:

> Respondent was unhappy with the way the Firm was operating and concerned over the joint debt (Tr-Vol. 1, P. 70, L. 8). Respondent and another partner, Debra Metzler, sought legal advice regarding their options with regard to the partnership in the Summer of 1999 (Tr-Vol. 1, P. 93, L. 16). Respondent and Ms. Metzler were advised that they should work out a compromise or risk the creditors calling in the loans. Because Respondent was concerned that he would be responsible for paying more than his share of debt, he made a proposal to the Firm that in the future, each shareholder would pay his/her own costs and expenses, then keep the surplus of the fees generated. The three remaining partners of the Firm proposed that each shareholder would be responsible for the costs associated with that shareholder's legal practice, and that surplus revenues generated by a shareholder's practice would either be applied to the shareholder's proportional share of debt or be distributed or paid by the Firm to the Shareholder. In December 1999, the Firm adopted a Shareholders Agreement, which Respondent did not sign (Tr.-Vol. 1, P. 66, L. 6 and TFB Exh. 9).

The Florida Bar mistakenly put in its statement of facts that Respondent "refused to sign the agreement . . . ." That is not quite accurate. He refused to sign a preliminary draft. The Referee specifically found on page 10 of his report, however,

> The other shareholders had entered into a formal written agreement. The Respondent had *neglected* to do so. RR 10 (emphasis supplied).

In fact, Mr. Shankman was on vacation in New York when the agreement was signed by the others. TT 97, 308.

The Referee also found that Respondent was

> Dissatisfied with the shareholder's agreement because it did not address the issue of indemnity for a partner who paid off his share of the debt. RR 4.

The Referee did not find that Respondent acted improperly in regard to any referral fee, including that paid to Mr. McAnnally. The Referee's sole finding in this regard was that:

> The firm also negotiated a reduced fee of $5,000 to the referring attorney [Mr. McAnnally]. RR 7.

The Bar properly stated on page 6 of its Statement of Facts that Respondent suggested to Mr. Newman that Mr. McAnnally receive a reduced referral fee and Mr. Newman did not object. Mr. Shankman's suggestion, however, was predicated upon his client's feelings that Mr. McAnnally deserved no more than $5,000 for his limited

participation and the scant amount of time that he spent on the case. TT 253, 355, 356.

The Bar correctly states on page 7 of its Statement of Facts that on or about February 28, 2000, Mr. Shankman picked up from the defendant the two settlement checks cut in the Hatmaker case. It was required by the defendant, TECO, that Respondent and Mr. Hatmaker pick up the checks at TECO's offices. While there, Mr. Hatmaker was to pick up his tools also. TT 241-243, 370-371.

While both the Referee and the Bar correctly state that Mr. Shankman placed the $20,000 gift from Mr. Hatmaker in the ceiling of his house, the testimony is unrebutted that the money was first placed in a lockbox and then placed in Mr. Shankman's ceiling for security purposes. TT 382.

The Bar mistakenly states on page 8 of its Statement of Facts that Mr. Hatmaker was employed as a rental associate earning $22,000 per year at the time that he gave the gift to Mr. Shankman. That confusion, while reasonable, is attributable to the fact that Mr. Hatmaker testified at final hearing that he had secured such employment. There is no evidence he was working there in February 2000. TT 254.

While the Referee found that Respondent should not have accepted the gift from Mr. Hatmaker, Mr. Hatmaker was adamant that the $20,000 gift was his idea, was

spontaneously arrived at, and that he wanted Mr. Shankman to have the money. TT 241, 245.

On page 11 of the Bar's Statement of Facts, it states that Mr. Shankman did not share any portion of the Kaptzan settlement fees until after his conduct was discovered. In fact, Mr. Shankman advised Ms. Metzler of the Kaptzan matter by telephone conversation in late May 2000, shortly after Kaptzan settled. TT 76-79.

The Referee specifically found the following regarding Respondent's conduct in the Kaptzan matter:

> In mitigation of the Respondent's self help, it is clear that other shareholders were receiving benefits unbeknownst to him from the firm, for example: cars and insurance paid for by the firm (Tr.-Vol. 3, P. 287, L. 12, L. 15) A glaring example is the managing partner's [Mr. LeVine] alimony deductions even though the firm was not able to pay the payroll that month (Tr.-Vol. 3, P. 289, L. 11, L. 24). RR 11.

At the sanctions hearing, the Referee specifically noted that Respondent's partners did not "have clean enough hands . . ." to share in the Hatmaker bonus. SH 91. No restitution to the firm was ordered.

The only misconduct found by the Referee regarding the Kaptzan case was Respondent's paying 7% of the first Kaptzan installment as a bonus to a non-lawyer and his failing to inform his former firm of the Kaptzan fee along with his taking five other clients without informing the firm of that fact. There was no finding by the

Referee that those other five files were not properly handled ultimately regarding the fees. In fact, there was no evidence taken regarding those five files at all. There is nothing in the record to indicate whether any of the five files, which were never named, resulted in any fees to Respondent or, if they did, whether the firm ever received its just portion of those fees.

As to the Laundy case, the Referee found only that Respondent was guilty of a lack of diligence, in violation of Rule 4-1.3, in his handling of the Laundy matter. With all due respect, this is a simple negligence finding not warranting significant discipline. The Referee rejected a finding that Respondent made any misrepresentations in his pleadings filed in court. He specifically found that

> The Florida Bar did not establish by clear and convincing evidence that the Respondent violated Rule 4-3.3 and 4-8.4(a) by misrepresenting a specific fact in pleadings filed with the Federal Courts. The Bar did not provide evidence that was credible that the Respondent made any specific misrepresentations of a specific fact to the Court, which was false. RR 13.

The Referee made no findings that any of Respondent's actions caused financial harm to the shareholders of his former firm.

The Referee rejected the Bar's allegations that Respondent either misappropriated or intentionally deprived his former partners of any revenue.

The Referee did not find that Respondent engaged in a scheme intended to mislead the shareholders in his firm in order to deprive them of funds.

SUMMARY OF ARGUMENT

This Court has said on numerous occasions that a Referee's recommended discipline will be upheld unless it is without reasonable basis in Florida jurisprudence. Specifically,

> We will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law. *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997).

There are numerous cases that support the Referee's recommended discipline. As discussed in sections A and C of Respondent's argument, they include *Florida Bar v. Cox*, 655 So.2d 1122 (Fla. 1995) (30 days suspension); *Florida Bar v. Childers*, 582 So.2d 617 (Fla. 1991) (90 days suspension); *Florida Bar v. Stalnaker*, 485 So.2d 815 (Fla. 1986) (90 days suspension); *Florida Bar v. Herzog*, 521 So.2d 1118 (Fla. 1988) (10 days suspension); *Florida Bar v. Bradham*, 446 So.2d 96 (Fla. 1984) (30 days suspension); and *Inquiry Concerning a Judge re: Davey*, 645 So.2d 398 (Fla. 1994) (public reprimand).

When the Referee's recommended discipline is compared to the mitigation involved in this case, particularly the Referee's finding that Respondent's conduct was out of character for him, that his former partners did not have "clean hands," and that Respondent's conduct occurred four years ago, a 90-day suspension is the

appropriate discipline to be imposed. This is particularly true when the Referee specifically considered and rejected the necessity of proof of rehabilitation. SH 89, RR 17.

Despite the Bar's arguments to the contrary, the Referee did not find any misappropriation of firm funds by Respondent. Nor did he find that Respondent intentionally deprived his former firm of any funds. In fact, the testimony was that any funds that Respondent received from Hatmaker or Kaptzan, even had they been reported to the firm, could have only been used in two ways: first, to give Respondent a bonus or, secondly, to reduce Respondent's share of the firm's indebtedness. TT. 100. While the Referee clearly criticized Respondent's self-help measures, he found that Respondent's conduct was "out of character for him" and was attributable to "the stress surrounding the firm's financial situation." RR 17.

The Referee's recommendation that Respondent be suspended for 90 days should be adopted by this Court. This is the longest suspension that can be imposed without requiring proof of rehabilitation. The Referee specifically considered and rejected any requirement that Respondent prove rehabilitation before reinstatement at the end of his suspension. SH 89, RR 17.

ARGUMENT

THE NINETY-DAY SUSPENSION FOLLOWED BY TWO YEARS PROBATION AS RECOMMENDED BY THE REFEREE IS THE APPROPRIATE DISCIPLINE TO BE IMPOSED IN THIS CASE IN LIGHT OF THE REFEREE'S FAILURE TO FIND ANY MISAPPROPRIATION.

A. THE REFEREE'S RECOMMENDATION MUST BE FOLLOWED BECAUSE IT IS "CLEARLY [ON] THE MARK."

The only issue before this Court is the propriety of the Referee's recommendation that Respondent receive a 90-day suspension and two years' probation for his misconduct. The Bar has not appealed the Referee's findings of fact or his conclusions of law. The Bar has the burden of proving the Referee's recommendation is "erroneous, unlawful, or unjustified." R.Reg.Fla.Bar 3-7.7(c)(5). The Bar has failed to meet its burden and the Referee's recommendation that Respondent be suspended for 90 days should be upheld.

This Court has set forth a firm rule that a referee's recommended discipline will not be reversed as long as there is some basis for that recommendation. For example, in *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997), this Court stated:

> We will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law.

Similarly, in *Florida Bar v. Dunagan*, 731 So.2d 1237, 1242 (Fla. 1999), the Court held that:

> The referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not "clearly off the mark". *The Florida Bar v. Vining*, 707 So.2d 670, 673 (Fla. 1998).

The Referee's recommendation that Respondent receive a 90-day suspension, as argued in section C below, is reasonably based on existing case law and is not "clearly off the mark." Accordingly, it must be upheld.

This Court's rule regarding referee's recommendations as to discipline is well-reasoned and should be followed. There are many factors inherent in a referee's recommended discipline. Case law is but one of them. Unlike this Court, a referee is in a position to observe the witnesses testifying and, perhaps even more importantly, to study the respondent as he or she testifies. Such an advantageous position, i.e., sitting in the "cat bird seat" as the famous Red Barber often stated during his illustrious career as a baseball announcer, gives the referee a superior position to make decisions on subjective matters. As stated in *Florida Bar v. Tauler*, 775 So.2d 944, 946 (Fla. 2000):

> However, this Court has recognized that the referee "occupies a favored vantage point for assessing key considerations–such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse, and

> rehabilitation (or potential for rehabilitation)," and therefore the Court "will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law." *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1977).

This is not a case where a referee blithely signed a proposed referee report without stating his thoughts on the record. Specifically, starting on page 87 of the April 2, 2004 dispositional hearing transcript, the Referee made his observations known to counsel and to Respondent. Comments made by the Referee include:

> I don't think that this conduct arises nearly to the level of *Arcia* [*Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003)]. I don't think it arises to the level of *Davey* [*Inquiry Concerning a Judge re: Davey*, 645 So.2d 398 (Fla. 1994)]. *Arcia* was a long period of time of activities. A real well-documented embezzlement scheme that was entered into [with] malice aforethought, designed and planned for years. What I saw and heard, came to believe in this [Mr. Shankman's] particular case is that decisions were being made by people in the Newman firm on self-help. I have a hard time with the concept that one partner [Mr. LeVine] would be paying alimony, that they don't have a hard enough time to make the payments for the salaries that month. SH 87.
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> * * *
>
> All right. What I found was that this partnership was a financial disaster. . . . The firm had acquiesced on Mr. Shankman's demands for more money out of it, and I saw a change in his attitude during those two days we had the hearing. He was a lot less defensive the last day than he was the first day.

> I didn't see anything in the pleadings or the defense of this case that indicates that he [Mr. Shankman] was trying to obstruct the Bar, lie to the Bar. I think I tried to make it clear in my [preliminary] report that I was not by clear and convincing evidence convinced that Mr. Hatfield (sic) was taking part in some scheme, although he financially gained to it. *I don't think that he [Mr. Shankman] should have to go through rehabilitation.* SH 88, 89 (emphasis added).

As to mitigation, the Referee found the following:

> I think he did represent his clients well. He's maintained his business [his new firm] well. I think he did cooperate with the Bar as far as reasonable and no priors. SH 95.
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> * * *
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> I found he had some truthful remorse. I didn't see any the first day, but I think the more he sat there and listened to people talk . . . especially the second day, you could see the remorse. SH 95.
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> * * *
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> Interim rehabilitation. SH 95.
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> * * *
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> I think, like everybody said, he was a good lawyer. SH 95.
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> * * *
>
> I find that this was out of character caused by the stress. SH 95, 96.

In his Amended Report of Referee, signed on April 29, 2004, Judge Freeman confirmed his rulings from the bench. He added, as special emphasis, however, the following thoughts:

> I further find that Respondent's prior firm was a financial disaster. I find that *Respondent's conduct was out of character for him* and was caused by the stress surrounding the firm's financial situation.
>
> I have specifically considered the issue of rehabilitation and, based on the evidence presented and my observations of the Respondent, I do not think that he should have to go through rehabilitation proceedings. RR 17.

The referee in disciplinary proceedings sits as this Court's eyes and ears. While this Court does indeed have the ultimate responsibility in determining discipline, *Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994), on subjective evaluations it must rely on the referee's observations and recommendations. Here, the referee presiding over these proceedings, The Honorable Thomas B. Freeman, is a well-seasoned jurist. Judge Freeman carefully observed partners LeVine and Metzler as they testified. He obviously scrutinized Mr. Shankman as he testified and distinctly observed the change in demeanor by Mr. Shankman over the two days of final hearing on December 23 and December 24, 2003. He asked Mr. Shankman "hard questions." TT 445, 439-448. He listened to Mr. Shankman's acknowledgment of making mistakes, and of his acceptance of responsibility for his conduct. He listened to Mr. Shankman's promises

not to repeat his misconduct. SH 412. And then Judge Freeman specifically considered and rejected the necessity of requiring Respondent to go through rehabilitation proceedings. SH 89, RR 17. He further found that Mr. Shankman's conduct was out of character due to the stress of the firm's financial situation. RR 17. These are incredibly important factors to be weighed in determining the discipline to be imposed. Because a 90-day suspension is the maximum that can be imposed without proof of rehabilitation, the Referee's recommendation must be upheld.

As this Court stated in *Tauler, supra*, the referee's "favored vantage point . . ." in recommending discipline must be followed unless it is completely without basis. Here, the Referee's recommendations are well-grounded in the law and, therefore, should be followed.

B. THERE WAS NO FINDING OF MISAPPROPRIATION.

Mr. Shankman is not guilty of misappropriation.

The Referee did not find Mr. Shankman misappropriated any funds.

Neither of the partners testifying against Mr. Shankman, Mr. LeVine and Ms. Metzler, accused him of stealing funds.

Mr. Hatmaker was insistent that the $20,000 that he gave to Mr. Shankman was a gift. He has never, ever, strayed one inch from his assertions. TT 235, 236, 245, 254.

Mr. Shankman was found to have violated Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] for his "keeping quiet about the bonus" that he received from Mr. Hatmaker (Count One) and for "failing to inform his former firm . . ." of the Kaptzan fee and omitting the other five clients from the list of cases that he gave to his firm (although it must be stressed that none of those five cases were named nor was it ever brought into the record how much, if any, fees were obtained from those cases).

The Referee specifically found that:

> I was not by clear and convincing evidence convinced that Mr. Hatfield (sic) was taking part in some scheme, . . . SH 89.

Inherent within that finding was the Referee's rejection of the Bar's position, and Ms. Snow's testimony and Beth Maringelli's sworn statements, that Mr. Hatmaker and Mr. Shankman hatched a scheme to defraud the firm out of any money. He specifically found that Respondent's misconduct in this regard was failing to inform the firm of his receipt of the $20,000 gift.

The evidence overwhelmingly supported the Referee's finding that there was no agreement either before, during or after the Hatmaker mediation for Mr. Shankman to receive extra compensation. They were actively preparing for trial. TT 223, 360. They did not expect the mediation to succeed. TT 224, 361. In fact, the mediation almost fell through anyway because, after a $195,000 figure had been reached, TECO would not give Mr. Hatmaker a journeyman rating. TT 237, 367.

The idea of a bonus to Mr. Shankman first arose in Mr. Hatmaker's mind immediately after mediation when he and Mr. Shankman were smoking celebratory cigars and having been at the Green Iguana. TT 240, 241.

Mr. Shankman was "taken aback" when he received Mr. Hatmaker's gift. In fact, Mr. Shankman "blew. . . off" Mr. Hatmaker's previous assertion that Mr. Shankman deserved a bonus. TT 245. There had been no discussions of any figure prior to the day Mr. Hatmaker handed Respondent an envelope with the gift in it. TT 245, 373, 375.

Mr. Hatmaker explained his giving a gift to Mr. Shankman during final hearing. He told Judge Freeman that Mr. Shankman had done "a great job" and that Mr. Shankman "took on a case that nobody else was willing to take." TT 241. Mr. Shankman never showed a lack of interest in the case simply because Mr. Hatmaker might lose. TT 222. Simply, put, Mr. Shankman believed in Mr. Hatmaker. TT 218.

Under the firm's December 30, 1999 agreement (TFB Exh. 9), even had Mr. Shankman reported the $20,000 gift to his partners and had they considered it income, he would have gotten all of it back as a bonus. He had already received an $18,400 bonus for the income he brought into the firm for the month of February (which exceeded the income brought in by all three of the other partners without the $20,000 included) and adding the $20,000 to that sum would have just increased his bonus to $38,000.

Debra Metzler, the managing partner at the time the December 30, 1999 agreement was signed and in February 2000, testified that the thrust of the new agreement was:

> Q. Exactly. How did this change the compensation structure, this being the December 30th, 1999, agreement?
>
> A. Well, it said that after expenses and debt are met, the shareholder is going to be entitled to what is essentially their net profit. TT 100.
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> * * *
>
> It was my [Ms. Metzler's] intent that you could take a bonus if we were secured enough to know that you had other regular income coming in; that you satisfied your debt at least for that month in which you were taking the bonus; and that there was some structure for long-term plaintiffs' revenue to cover the portion of what I call the long-term debt, the lease and those sort of things. TT 101.

Ms. Metzler acknowledged that partner Newman got a $13,000 bonus for February 2000. She further acknowledged that his bonus was not attributable to any particular case, but was attributable to the total amount of income that he brought in the month of February. When asked if Mr. Newman got the bonus because he made his "nut" she responded, "That's correct." TT 102.

Mr. Shankman received an $18,400 bonus for the revenue he produced in February 2000. That revenue included the Hatmaker case. If another $20,000 revenue had come in which had been attributable to the Hatmaker case, since all of the expenses from that case had already been paid, Mr. Shankman would have received the entire corpus as an additional bonus because it, like the $18,400, exceeded his "nut."

Ms. Metzler testified that in February 2000, Mr. Shankman collected $67,404.10 in revenue for the firm, of which $49,650.92 were fees and $17,753 were costs. TT 106, 107. Throwing Mr. Hatmaker's gift into the hopper would have increased the fees collected total to $89,650.92.

Mr. Shankman collected more fees for the firm in February 2000, only the second month that the new agreement was in force, than the fees collected by the rest of the partners and associates in the firm put together. TT 109. In the month of February, Ms. Metzler collected $5,820 in fees. Mr. Newman collected $21,201 in

fees (and he received a $13,000 bonus for his efforts) and Mr. LeVine collected $1,892 in fees. TT 108.

Had the $20,000 gifted to Mr. Shankman by Mr. Hatmaker been counted as fees, Mr. Shankman's revenue for the month of February 2000 would have been increased by an additional $20,000 and, therefore, his bonus would have been increased by a like amount.

While the firm had the option of requiring Mr. Shankman to apply his fees towards the firm's gargantuan $400,000 debt, it clearly was not requiring the partners in February 2000 to do that. Mr. Newman got a $13,000 bonus and Mr. Shankman got an $18,400 bonus.

The Referee specifically noted that the December 1999 shareholders agreement resulted in each shareholder being responsible only for his or her costs (RR 4)

> And that surplus revenues generated by a shareholder's practice would either be applied to the shareholder's proportional share of debt or be distributed or paid by the Firm to the Shareholder. RR 4.

In other words, the Referee essentially found that had Respondent reported the $20,000, all of the money would have been used for his benefit. It either would have been bonused out to him ("paid by the Firm to the Shareholder") or it would have been used to pay down his "proportional share of the debt." The fact that Mr.

Newman was paid a $13,000 bonus (after bringing in $21,000 in fees) and that Respondent was paid an $18,400 bonus (after bringing in $49,000 in fees) showed that the firm was not interested in applying surplus revenues to its debt structure.

The Referee also observed:

> In mitigation of the Respondent's self help it is clear that other shareholders were receiving benefits unbeknownst to him from the firm, for example: cars and insurance paid for by the firm. (Citations omitted.) A glaring example is the managing partner's alimony deductions even though the firm was not able to pay the payroll that month. (Citation omitted.)

The evidence adduced at trial established when there was insufficient money to pay debts or salaries to the partners of the firm, Mr. LeVine, then the managing partner, was having the firm continue to pay his alimony expenses. TT 84. The Referee rejected the theory that Mr. Hatmaker's gift to Respondent was a scheme that was developed prior to his February 2000 mediation. The Referee inherently rejected the Bar's theory that Respondent misappropriated the funds when he found that the only dishonesty, fraud, deceit or misrepresentation involved was Respondent's failure to report the money to the firm. There is no misappropriation of funds in this case.

Similarly, the Referee found no misappropriation in Kaptzan case. There, as was true with the Hatmaker gift, he found Respondent's misconduct was limited to a failure to report the Kaptzan fee.

This is consistent with the arrangement that Respondent made with the Ruden, McCloskey firm to the effect that any fees collected by Respondent that the former firm had a claim on would be held by Ruden, McCloskey for future payments to the firm. TT 334. Although an agreement had not been reached with the firm by Mr. Shankman regarding the fees to be paid at the time Kaptzan settled in April 2000, it was already the intent of the parties that any funds belonging to the firm would be held by Ruden until an arrangement was reached. In fact, that is exactly what happened. On December 28, 2000, the parties reached an accord. TFB Exh. 10. In that accord, Respondent agreed to pay $110,000 as his proportional share of the firm's $400,000 debt. All funds collected by Respondent after he left belonging to his former firm were applied towards that $110,000 figure. That same day the Ruden firm delivered to Newman, LeVine a check for $47,760. R. Exh. 3. These were funds collected by Ruden on the cases that Respondent brought from the Newman, LeVine firm. If Kaptzan had been considered Newman, LeVine collected fees, then it would have increased that figure proportionately. Within 30 days of payment of the $47,760 to Newman, LeVine, an additional $37,541.99 was paid to the firm on the Simmonds case (for a total of approximately $85,300). TT 120, 121. Within one year of Simmonds money being paid, Respondent satisfied his entire $110,000 obligation to the firm.

Ms. Metzler testified that it was always Mr. Shankman's intent to pay his share of the firm's indebtedness. TT 125.

If the Kaptzan money had been collected for Newman, LeVine's benefit, it simply would have increased the $85,300 paid within 30 days of the agreement with the firm, i.e., it would have been applied to Mr. Shankman's share of the indebtedness.

Mr. Shankman testified that they considered the fees collected for her starting in April 2000 as being for a new case. TT 332, 391, 391. Ms. Kaptzan paid $1,000 to the Newman, LeVine firm for representation in an unemployment compensation hearing. The whistleblower action developed by Respondent arose out of the case. It was Respondent's belief that this was a new case that he carried over to Ruden.

Mr. Shankman did, in fact, write off $373.58 in costs attributable to Ms. Kaptzan. TFB Exh. 4. Of that sum, $350 was the firm's standard Westlaw fee. Because Mr. Shankman did not use Westlaw on her case, he felt a write-off was appropriate. TT 390, 391.

The Referee specifically found that the Kaptzan money should have been reported to the firm and for failing to do so, Respondent violated Rule 4-8.4(c). The Referee did not find any misappropriation.

C. A NINETY-DAY SUSPENSION FOLLOWED BY TWO YEARS PROBATION IS

THE APPROPRIATE DISCIPLINE TO BE FOLLOWED IN THIS CASE.

The Referee's recommendation that Respondent be suspended for 90 days is the appropriate discipline to be imposed in this case. The Referee's recommended discipline should be followed unless it is clearly off the mark. As indicated by the cases cited below, the Referee's recommendation is in line with the discipline imposed by this Court for similar transgressions in the past. This is particularly true when, as here, there is substantial mitigation, including the Referee's specific finding that Mr. Shankman's

> conduct was out of character for him and was caused by the stress surrounding the firm's financial situation. RR 17.

As discussed in section A above, the Referee specifically considered and rejected the necessity of rehabilitation prior to reinstatement. SH 89, RR 17.[1] The cases relied upon by the Bar in arguing for a two-year suspension are all cases involving misappropriation. There has been no such finding in the case at bar.

The Referee's recommendation of a 90-day suspension is supported by this Court's past decisions. Perhaps the most significant is *Florida Bar v. Cox*, 655 So.2d 1122 (Fla. 1995). Mr. Cox received a 30-day suspension for violating:

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[1]Suspensions lasting 90 days or less do not require proof of rehabilitation prior to reinstatement. Rule 3-5.1(e).

> (1) Rule 4-1.7(b) for representing clients without the knowledge of the law firm for which he was working, which could have limited his exercise of independent professional judgment in the representation of those clients . . .;
> (2) Rule 4-1.1(a) for representing clients without the knowledge or consent of the law firm for which he was working and for concealing the fact from that firm and in some cases denying such representation; and
> (3) Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation pertaining to his performance of work for clients without the consent or authorization of the law firm in attempting to conceal the representation of those clients. p.1122, fn. 1.

Mr. Cox's conduct is actually more serious than that found by the Referee to have been committed by Mr. Shankman.

Mr. Cox admitted that he engaged in "moonlighting" while an associate at his law firm and that, upon being confronted with his improper activities, he "initially denied" the allegations that he represented outside clients and that he collected fees from them. In other words, when he was confronted, he lied. No such conduct is involved in the instant case.

Mr. Cox was engaged in a long-term course of conduct. As an aggravating factor, Mr. Cox continued to engage in his improper activities even after he was warned not to do so. p.1123. Respondent's two incidents of misconduct occurred in late February and April 2000.

Mr. Cox appealed the referee's recommendation and sought a public reprimand. The Court rejected his arguments. In so doing, it stated:

> We find that Cox's misconduct is consistent with other disciplinary cases where suspensions have been imposed. For example, in *Florida Bar v. Stalnaker*, 485 So.2d 815 (Fla. 1986), and *Florida Bar v. Childers*, 582 So.2d 617 (Fla. 1991), we suspended the attorneys for ninety days for diverting client fees which were intended for the law firm to their own personal accounts. In another case, *Florida Bar v. Bradham*, 446 So.2d 96 (Fla. 1984), the attorney was suspended for 30 days for dishonesty in relations with his law partners. Finally, in *Florida Bar v. Herzog*, 521 So.2d 1118 (Fla. 1988), the attorney received a 10-day suspension for engaging in deceptive billing practices.
>
> Although Cox's conduct may not have caused serious harm to the clients or to the firm where he was employed, the facts reflect a pattern of intentional misconduct and deception which warrants serious punishment. . . . Consistent with the aforementioned cases, we believe a 30-day suspension is an appropriate discipline for Cox given his dishonesty and misrepresentation towards his employer and his clients, as well as his misconduct in diverting fees to his personal account. p.1123.

Mr. Shankman's discipline will be three times longer than that imposed on Mr. Cox. This, despite the fact that the Referee found that Mr. Shankman's misconduct "was out of character for him and was caused by the stress surrounding the firm's financial situation."

Florida Bar v. Childers, 582 So.2d 617 (Fla. 1991), also involved a factual situation very similar to the case at bar. Ms. Childers received a $950 check that was made out to her personally but which unquestionably belonged to her law firm. She diverted the funds into her personal savings account. The referee recommended that she be suspended for 90 days. The Bar appealed the referee's recommendation and sought a three-year suspension. In rejecting the Bar's argument for a long-term suspension, the Court agreed with the referee's recommendations. This Court specifically considered as mitigating factors that

> Childers acknowledged her error and cooperated fully in these proceedings. This is her first offense, for which she expressed remorse, and she presented testimonials from several people who found her action in this instance totally out of character in a one-time unexplainable aberration. Neither her former firm nor any of its clients suffered any harm from this incident, and as the referee pointed out, the only person hurt by her conduct was Childers, herself. p. 618.

As was true with Ms. Childers, Mr. Shankman has acknowledged his error (while never acknowledging misappropriation of funds, he freely acknowledged to the Referee that he made mistakes. TT 412, 444), he cooperated fully with the Bar in its investigation. This is his first offense, and the Referee specifically found his conduct was out of character for him. As was true with Ms. Childers, neither Mr. Shankman's former firm nor any of his clients suffered any harm from his conduct. (As Ms.

Metzler testified, had the Hatmaker gift and the Kaptzan fees been reported to the firm, the money only could have been used for a bonus for Mr. Shankman or to defray his share of the firm's indebtedness. TT 100, RR 4. In fact, he paid off his entire debt to the firm.)

The Court in *Cox* also referred to *Florida Bar v. Stalnaker*, 485 So.2d 815 (Fla. 1986). Mr. Stalnaker received a 90-day suspension for diverting fees from his firm. Apparently, Mr. Stalnaker's conduct began in 1979 or early 1980 and extended through August 1981. He

> systematically diverted a portion of the legal fees being generated by him for the professional association from the association to his own personal bank account and use without informing the bookkeeper or principals, Jones and Morrison. p. 815.

Unlike Mr. Shankman, Mr. Stalnaker was a salaried employee of the firm, not a partner. Like the Respondent in the instance case, Mr. Stalnaker was the "main generating source of cases and legal financial revenue for the firm . . . ." The Court did find, however, that Mr. Stalnaker thought he had the permission of the president of the firm to divert fees. There was no proof of that. In suspending him for 90 days, the Supreme Court observed

> While Stalnaker exercised extremely poor judgment by handling his financial arrangements as he did, his actions fall

> short of a deliberate attempt to steal from the association. p.817.

Similarly, Mr. Shankman may have used poor judgment but his actions fell short of misappropriation. His discipline, therefore, should be no longer than Mr. Stalnaker's.

Deceptive billing practices, including misrepresentation to clients, resulted in a ten-day suspension in *Florida Bar v. Herzog*, 521 So.2d 1118 (Fla. 1988). In upholding the referee, the Supreme Court Stated on p.1119 of its opinion:

> Although there was conflicting testimony concerning each of the disputed issues, "the referee, as our fact finder, properly resolves conflicts in the evidence." *The Florida Bar v. Hoffler*, 383 So.2d 639,642 (Fla.1980). The referee heard all of the witnesses, judged their demeanor and credibility, and reviewed all of the evidence. Findings of fact will be upheld unless they are without support in the record or clearly erroneous. *The Florida Bar v. Stalnaker*, 485 So.2d 815 (Fla. 1986).

The Referee found that Mr. Herzog "misrepresented to the clients what they were actually paying for . . ." and that he made restitution of at least $10,000 to his former firm after he left them. As was true with the Newman, LeVine firm, the management of financial matters was "somewhat lax."

In essence, Mr. Herzog was deceiving the clients and the firm by charging "exorbitant costs" to the client and then adjusting his bills subsequently. In other

words, he was overcharging his clients as well as deceiving his firm. The former aspect of Mr. Herzog's misconduct, i.e., overcharging his clients, is not present in the case before the Court today. The Court found this conduct to be "unethical and reprehensible." p. 1120. Yet, his suspension did not require proof of rehabilitation. Neither should Mr. Shankman's.

The 30-day suspension imposed on Joseph Bradham for "dishonesty in his relations with his law partners . . ." supports the Referee's recommendation in the case at bar. In *Florida Bar v. Bradham*, 446 So.2d 96 (Fla. 1984), this Court suspended Mr. Bradham for 30 days for conduct involving a violation of former Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility. That rule prohibited a lawyer's engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

While not a lawyer disciplinary case, this Court's public reprimand of a judge in *Inquiry Concerning a Judge re: Davey*, 645 So.2d 398 (Fla. 1994), should be considered in the case at bar. Judge Davey, after leaving his old firm, misrepresented the status of cases that he took with him. Later, upon being asked about a case that the firm had discovered, Judge Davey indicated improperly that there were no others. His reason for doing so was his fear that the firm would not honor its termination agreement with him and he was holding the recovered funds as security. pp. 400, 401.

In publicly reprimanding Judge Davey, the Court noted that the record, as is true with Mr. Shankman:

> suggests that his misconduct was an isolated incident–an aberration–produced by the highly-charged law firm breakup. p. 409

The Court noted that Judge Davey's admission of wrongdoing and his expressions of remorse are mitigating factors. Those factors are present in Mr. Shankman's case and should be viewed as similar weight.

As mentioned above, the Referee specifically considered and rejected the requirement of proof of rehabilitation before reinstatement. In so doing, he listed numerous mitigating circumstances. They included, pursuant to Rule 9.32 of the Florida Standards for Imposing Lawyer Sanctions, the following: absence of a prior disciplinary record. Rule 9.32(a); full and free disclosure to disciplinary board and cooperative attitude towards proceedings, Rule 9.32(e); character or reputation, Rule 9.32(g); interim rehabilitation, Rule 9.32(j); and remorse, Rule 9.32(l). RR 16, 17.

Respondent, 40 years old at the time of the final hearing, was a member of The Florida Bar since 1992. He practiced law in Ohio from 1989 until 1991. TT 439, 440. He has never been previously disciplined.

There is no doubt that Mr. Shankman completely cooperated with The Florida Bar throughout these proceedings. There has been no allegation to the contrary. The

Referee specifically found that Mr. Shankman did "cooperate with the Bar as far as reasonable . . . ." SH 95.

It is clear that Respondent possesses an excellent reputation in the legal and business community. The Referee found "everybody said, he was a good lawyer." SH 95. This, perhaps, is an understatement. Mr. Hatmaker could not say enough good things about his lawyer.

Similarly, Patricia Kaptzan lauded Mr. Shankman's legal ability. Ms. Kaptzan was referred to Respondent by her daughter-in-law, a human resource professional, who had retained Mr. Shankman in the past. TT 205. She was quite satisfied with the manner in which he handled her case. She was so pleased with his services that she has recommended him to her new employer and they have retained Mr. Shankman on several occasions. TT 213.

At the dispositional hearing, Mr. Shankman presented the oral testimony of two other clients, J. Whitney Markowitz and Frank Johnson and the affidavit testimony of two others. All attested to Respondent's legal ability and good character.

Mr. Markowitz is a member of the Colorado and California Bars. He was admitted to the Colorado Bar in 1994 and in California in 1997. He first met Respondent in early 1997 when he went to work for a corporation as an assistant general counsel. In the year 2000, he went to work for a different corporation as

senior vice president and general counsel. Mr. Markowitz's new position "was a significant step up in career for me . . . ." SH 9. He needed a lawyer that he could depend on "100 percent" and, therefore, he brought Mr. Shankman in to do the firm's outside legal work. SH 10. Mr. Shankman not only does some of the "best legal work I have seen, . ." but he is also very good at counseling in general. He described Mr. Shankman as a "top-notch" lawyer. SH 11. Mr. Shankman also relates "very well to our 6,000-plus employees. SH 13.

Perhaps most relevant to the proceedings before the Court today is Mr. Markowitz's testimony about Mr. Shankman's billing practices. Specifically, Mr. Markowitz found Respondent to be "incredibly reasonable with respect to his billing." SH 12. Mr. Markowitz pointed out that Mr. Shankman writes off a bill or parts of a bill at times and frequently does not bill for discussions with individuals in the firm.

It is this latter testimony that belies the Bar's entire theory that Respondent is a greedy and dishonest individual.

Mr. Markowitz flew to Tampa solely to appear at Mr. Shankman's sanctions hearing. He did so without being reimbursed for his expenses. SH 15, 18. He believes that Mr. Shankman is "absolutely" an ethical lawyer and he refers clients to Mr. Shankman frequently. SH 15.

Frank Johnson is a non-lawyer client of Mr. Shankman's. He is director of human resources of a company with approximately 300 employees. He has been in management a substantial portion of his adult life. SH 21.

Mr. Johnson testified that he met Mr. Shankman in late 1998. At that time, Mr. Shankman was representing the company by which Mr. Johnson was employed. Mr. Shankman has continued to work for the company ever since. SH 22.

Mr. Johnson characterized Mr. Shankman as being "a very reputable person . . ." and one who "always has the company at heart." He noted that Mr. Shankman was "excellent with people, and he really does a good job." SH 23. Mr. Johnson has recommended other clients to Mr. Shankman. He would not do so if he had any qualms about Mr. Shankman's integrity or his ethics. SH 24.

As was true with Mr. Markowitz, Mr. Johnson found Mr. Shankman's billing practices to be "very professional." SH 23.

Admitted into evidence at the sanctions hearing were affidavits from Anna Borges and from Nancy A. Kimbrell, two other clients of Respondent's. Ms. Borges is director of human resources for the Doral Golf Resort and Spa. She has known Mr. Shankman since 1994 and has worked with him for seven years. She testified that Mr. Shankman is a "lawyer who puts our [the client's] interest first . . . ." While she was aware that Mr. Shankman had been found guilty of misconduct, she maintains her

belief that he is "an extremely ethical lawyer and one whose integrity is beyond question."

Ms. Kimbrell testified in her affidavit that she, too, found his ethics and his work product to be "above question or reproach." She believes his "integrity is unquestionable."

The testimony from these clients supports the Referee's finding that Mr. Shankman's reputation in the community constitutes a mitigating factor in any discipline to be imposed. More importantly, however, it corroborates the Referee's finding that Mr. Shankman's conduct in his dealings with the Newman, LeVine firm was out of character for him and was due to the stress of dealing with the "financial catastrophe" of the firm.

The testimony of Respondent's clients also shows that he is no threat to the public, and most importantly, his clients. It is axiomatic, but it still bears repeating, that the purpose of disciplinary proceedings is to protect the public and the integrity of the courts. *DeBock v. State*, 512 So.2d 164, 166 (Fla. 1987). Mr. Shankman is not a threat to the public welfare or to the integrity of the courts. The conduct before the Court today will not be repeated. Simply stated, it is aberrational conduct, attributable to a specific period of stress, and will not be repeated.

DeBock emphasizes that disciplinary proceedings are not designed to punish the lawyer. p. 167. If such is true, there is no need to require proof of rehabilitation before Mr. Shankman resumes the practice of law.

The testimony of Mr. Shankman's current partner, Dennis Leone, warrants special consideration by this Court. Mr. Leone has been a member of The Florida Bar since November 1995. In May 2001 he went to work for Ruden, McCloskey in Tampa and met Mr. Shankman while at that firm. In July 2003, they formed a partnership. That partnership was the fruition of discussions beginning during the holiday season in 2002. SH 36.

Their partnership includes a third partner, Matt Westerman, who also met Mr. Shankman at the Ruden, McCloskey and he went to work with Mr. Shankman in March or April 2003.

Both Mr. Leone and Mr. Westerman were well aware of the charges against Mr. Shankman before they went to work for him. They knew full well that the allegations against Mr. Shankman included dishonest dealings with his former partners. Notwithstanding that knowledge, they have sufficient faith in Mr. Shankman's ethics, integrity and fair dealings that they set up a partnership with him. They are with him through thick and thin.

These two young lawyers know, really know, Mr. Shankman. They, more than anybody else, stand to lose if Mr. Shankman is devoid of integrity. They, however, know he is an honest person. Mr. Leone, in extremely emotional testimony that the Referee had the vantage point of observing, and which does not come through on the dry record, was heartfelt and convincing in his belief in Mr. Shankman's integrity. SH 30-50. This testimony, and the Referee's perception of it, should lend great weight to this Court in his deliberations on the necessity of suspending Respondent for more than 90 days.

The Referee found interim rehabilitation. While this might be considered an insignificant finding in light of the Referee's observation that Respondent's conduct was out of character, and in light of the testimony from numerous witnesses that Respondent is a person of good moral character, it is meaningful in one major sense; it has now been four and one-half year's since Respondent's misconduct took place. In essence, the Bar is now asking the Supreme Court to suspend Respondent and require him to prove rehabilitation for misconduct that occurred over 50 months ago. During that time, Respondent has practiced law without any disciplinary problems whatsoever. He has already proved rehabilitation.

A second factor in the determination of interim rehabilitation is Respondent's acknowledgment of wrongdoing. This was elaborated on by Mr. Leone in his

testimony at the sanctions hearing. During extremely emotional testimony, see, e.g., SH 38-40, Mr. Leone talked about Respondent's admissions of wrongdoing. SH 40, 41. Mr. Shankman completely disclosed the nature of the disciplinary proceedings (which did not include misappropriation of funds) and the status of his disciplinary proceedings prior to Mr. Leone and Mr. Westerman becoming his partners. SH 41, 42.

Acknowledgment of wrongdoing, such as what really occurred, and full disclosure to others who have a right to know, are tangible manifestations of interim rehabilitation.

Remorse. The Referee observed at the sanctions hearing

> I found he had some truthful remorse. I didn't see any the first day, but I think the more he sat there and listened to people talk . . . I think the first–I think the second–especially the second day, you could see the remorse. SH 95.

During a dialogue with the Referee, Mr. Shankman, in sincere teary testimony, TT 445, expressed his remorse to the Court for the misconduct that he was guilty of committing. TT 412, 444, 446. Once again, the sincerity of that testimony cannot be determined through reading the cold, objective record. The Referee, however, was in the perfect vantage point to appreciate the sincerity and the depth of Mr. Shankman's remorse. Mr. Shankman acknowledged "poor judgment" in accepting the gift from

Mr. Hatmaker. TT 444. He promised that such conduct would not happen again. He observed to the Referee that the disciplinary proceedings he was undergoing were "not only a learning lesson but [were] a life-changing event . . . ." TT 444, 445.

He also pointed out to the Referee that while he was not versed at all in running a law office while at Newman, LeVine, in his new firm he operates differently than his old firm did.

> All my bills are paid in my law firm. I manage my law firm's money. All those bills get paid. There is–everybody has access to all the financials, and I give–and I distribute them. TT 445.

The case law and the mitigating factors present in this case show that the Referee was right on the mark in his recommendations. His recommendations are reasonable and should be followed.

The cases cited by the Bar in its brief are not on point. They are off the mark and should not be followed.

At the outset, the Bar's repeated use of language to the effect that Respondent intentionally deprived his firm of funds is not language used by the Referee and does not represent the Referee's findings. As argued above, there was no finding of misappropriation in the case at bar. The Referee found no scheme, i.e., no premeditated plan, by Respondent and Mr. Hatmaker regarding the $20,000. SH 89.

Inherent within his ruling is the conclusion that Mr. Hatmaker's gift to Respondent was spontaneous. Respondent's offenses regarding the firm were limited solely to failing to report it.

By far, the case cited by the Bar that is most inappropriate in the case at Bar is *Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003). Mr. Arcia, a well-paid associate at a law firm that had a specific policy against outside legal work, admitted to depriving the firm of approximately $62,000 in legal fees during an 18-month to two-year period. During that time the referee found that

> Arcia solicited about 10 to 20 clients or potential clients by, among other things, intercepting telephone calls directed to the firm. On several occasions, Arcia deposited fees he had obtained [into his own account]. Further, even though the firm's practice was for a partner to open all mail, Arcia would sometimes intercept the mail and take checks payable to Arcia P.A..
>
> Arcia also induced some of the firm's clients to deliver payments of fees to the Arcia P.A. by claiming he was a partner of the firm, and by preparing misleading documents such as stationery and other materials . . . . At least once, Arcia filed a pleading in federal court suggesting that he and a partner of the firm were representing a client when, in fact, the partner had no knowledge of the representation.
>
> Arcia used firm resources during office hours to conduct his fraudulent activities, and admitted that he viewed the firm as a competitor of the Arcia P.A.

On three different occasions, Mr. Arcia was given the opportunity to admit his misconduct. He refused to do so. His "misconduct accelerated until he was fired."

The referee noted that Mr. Arcia's conduct was "a theft of firm funds and possibly client funds."

There was very little mitigation in Mr. Arcia's case. As the Supreme Court noted on page 299 of its opinion:

> The referee's choice of words in finding the rehabilitation and remorse mitigators demonstrate that the referee did not give them much weight. . . . The referee stated that he "saw little if no outward appearances of remorse or emotion. . . ." Earlier in the report, the referee stated: "[Arcia] still thinks that he is very clever and 'slick'. . . ."

The Supreme Court upheld the referee's recommendation that Mr. Arcia be suspended for three years.

The Bar in the instant case is seeking almost as harsh a discipline for Mr. Shankman as was imposed in the *Arcia* case. The factual findings, however, are not even remotely similar. For example, the referee specifically found that Mr. Arcia, an associate, stole from the firm and possibly from his clients. This scheme continued for two years and would have continued unabated but for the fact that he was caught. When given the opportunity to acknowledge his misconduct, he lied on three separate occasions. Finally, when he appeared before the referee, Mr. Arcia gave the referee

the impression that he was "slick" and "clever." The referee found little meaningful rehabilitation or remorse.

Unlike Mr. Arcia, Respondent has not been found guilty of any misappropriation. All of the funds that he received, $20,000 from Mr. Hatmaker as a gift and the funds he received from Kaptzan as fees, were funds to be used for Mr. Shankman's benefit. The only discretion the firm had with those funds was to either to give it to him as a bonus or apply it to his proportionate share of the firm's debt–which the firm was clearly not doing in February 2000. Unlike Mr. Arcia's two-year scheme, Mr. Shankman's conduct occurred twice, within an eight-week span. Unlike Mr. Arcia, the Referee found that Mr. Shankman exhibited true remorse and that his conduct was out of character for him.

Simply put, *Arcia* should not even be part of the discussion in the case at bar.

Florida Bar v. Gillin, 484 So.2d 1218 (Fla. 1986), is also inappropriate. Mr. Gillin was suspended for six months by the Supreme Court for conspiring to steal $25,000 in fees from his firm. He changed the fee structure with his client, charging her far more than originally intended, and then told her that after forwarding her recovery to her, she was to send back $12,500 to him in the form of a check payable to Contemporary Cars. Mr. Gillin then used those funds to make a $1,000 down payment on a 1984 Porche (at that time a new car) and the dealership refunded the

balance to him. It was only after the client became concerned about payment the second $12,500 to Mr. Gillin that his scheme was discovered.

Unlike the case before the Court today, at least some portion of the $25,000 that Mr. Gillin intended to steal belonged to his partners pursuant to their fee distribution formula. None of the funds that Mr. Shankman received from Mr. Hatmaker or from the Kaptzan case belonged to the firm. They were either to go to Mr. Shankman as a bonus or were to be used to defray his share of the firm's $400,000 debt. No restitution to the firm was ordered.

The one-year suspension meted out in *Florida Bar v. Ward*, 599 So.2d 650 (Fla. 1992), was for Mr. Ward's using his expense account draws to steal money from the firm to pay his personal debt. Specifically,

> Between March 15, 1989 and August 4, 1989, Respondent used expense account draws to make unauthorized withdrawals of funds in excess of $12,000 from his law firm's operating account to repay debts and to purchase furniture for his home.

The referee found that Mr. Ward engaged in conduct involving dishonesty, fraud, deceit or misrepresentation for defrauding his associates. It is also significant that upon being confronted with his misconduct he initially denied it. Later that day, however, he acknowledged wrongdoing. Mr. Ward obviously submitted fraudulent expense vouchers in an attempt to steal money from his firm. He was specifically

found guilty of theft. He received a one-year suspension. It would be entirely inappropriate to suspend Respondent based on the *Ward* case when there was no theft found and when the money would have gone to Mr. Shankman under any circumstances.

Florida Bar v. Farver, 506 So.2d 1031 (Fla. 1987), is not support for the Bar's position either. The facts are not set forth in the *Farver* except to the extent that it was found that he "intentionally deprived his law firm of fees . . . ." In the dissent, however, it is pointed out that Mr. Farver was arrested and charged with grand theft. Apparently, he made restitution in the amount of $6,671. Although it is repetitious, Respondent must once again emphasize that he was not found guilty of theft.

An equally important factor distinguishing Mr. Farver's case from that of Mr. Shankman is the referee's failure to find any matters in mitigation except no prior disciplinary history. Judge Freeman, however, found numerous elements of mitigation. Perhaps had Mr. Farver had the mitigation before the Court in Mr. Shankman's case, he would not have received a one-year suspension.

Respondent objects to the Bar's arguing as aggravation on page 12 of its brief factors not found by the Referee. Specifically, Standards 12.1(a) and (b). Respondent did not involve Mr. Hatmaker in any misconduct. Mr. Hatmaker specifically testified that the gift was his idea and that it was nobody else's business.

When asked about it by Ms. Snow, Mr. Hatmaker was under no obligation to tell her. He felt it was his business, not hers. TT 247, 250.

There was no testimony in the record whatsoever indicating that Mr. Shankman urged or in any way directed Mr. Hatmaker to lie.

Standard 12.1(b) refers to actual harm to clients or third parties. The Referee did not find this factor to be relevant to the case. In fact, the Referee found no intentional deprivation of fees when he found no misappropriation. He found the firm to have unclean hands. SH 91. Once again, it bears repeating that the dishonesty, fraud, deceit or misrepresentation involved in the case at bar was limited to failure to report the Hatmaker gift and the Kaptzan fees. Even Ms. Metzler testified that the firm only had discretion to apply funds made over the lawyer's "nut", which Respondent easily made, to the lawyer's indebtedness or for a bonus. Either way, the money was to be used for Mr. Shankman's, not for his three partners.

CONCLUSION

David Shankman is a lawyer who, during a less than two-month period, made two mistakes regarding his receipt of funds on his cases. He is also guilty of two minor incidents of making a poor decision on responding to a motion for summary judgment in another case and on one occasion giving his secretary a bonus based on a percentage of fees received. In essence, Mr. Shankman is a good person who, as

the Referee found, acted out of character due to the stress caused by his former firm's financial situation. RR 17. The Referee specifically considered the issue of rehabilitation and based on the evidence before him and, perhaps more importantly, his observations of Mr. Shankman, rejected the requirement of rehabilitation after reinstatement from his suspension.

The Referee's recommendations as to discipline should be upheld. This Court has specifically stated that its referee holds a superior vantage point on such subjective matters as gauging a respondent's remorse and potential for rehabilitation. This Court has ruled on many occasions that a referee's recommended discipline should be upheld unless it is clearly off the mark. There are numerous cases which show that Judge Freeman's recommended discipline is appropriate. His recommendation should be adopted in full by this Court.

The Florida Bar's appeal of the Referee's recommended discipline should be rejected and Mr. Shankman should receive a 90-day suspension from the practice of law followed by two years' probation with conditions as set forth by the Referee.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Answer Brief were mailed to Jodi Anderson, Bar Counsel, The Florida Bar, 5521 West Spruce Street, Tampa, Florida 33607, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this 13th day of September, 2004.

JOHN A. WEISS

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

Undersigned counsel does hereby certify that the Answer Brief in The Florida Bar, Complainant, v. David S. Shankman, Respondent, Case No. SC02-1488, TFB File No. 2000-11,868(13F), 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 Anti-Virus for Windows.

_____

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