IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DAVID S. SHANKMAN

Respondent.
_____/

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

INITIAL BRIEF
OF
THE FLORIDA BAR

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES
PAGE

RULES REGULATING THE FLORIDA BAR
RULES OF DISCIPLINE

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

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."

"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 Exh." 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.

STATEMENT OF THE FACTS AND OF THE CASE

STATEMENT OF THE CASE

The Florida Bar filed a three count Complaint in this matter on July 9, 2002. By Order dated July 25, 2002, The Honorable Thomas B. Freeman, County Court Judge, in and for the Sixth Judicial Circuit, was appointed as Referee in this case. The final hearing was held on December 23 and 24, 2003. On February 27, 2004, the Referee issued a Report of Referee finding the Respondent guilty.

On April 2, 2004, a sanctions hearing was held in this matter. On April 29, 2004, the Referee issued an Amended Report of Referee finding Respondent guilty of violating the following Rules Regulating The Florida Bar: **Rule 4-1.3** (a lawyer shall act with reasonable diligence and promptness in representing a client); **Rule 4-1.7(b)** (a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation); **Rule 4-1.8(a)** (a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest

adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto); **Rule 4-4.1(a)** (in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person); **Rule 4-5.4(a)** (a lawyer or law firm shall not share legal fees with a nonlawyer); **Rule 4-8.4(a)** (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another); **Rule 4-8.4(c)** (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and **Rule 4-8.4(d)** (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice). (RR 9, 12, 13, 14).

The Referee recommended that Respondent be suspended from the practice of law for a period of 90 days and receive two years of probation with the conditions that Respondent pay Ann Snow the sum of $4,000.00, that Respondent

submit to random, semi-annual audits of his firm's operating account books during each year of probation, and that Respondent pay the Bar's costs in these proceedings. (RR 14-15).

The Amended Report of Referee was considered by the Board of Governors of The Florida Bar at its meeting which ended on May 28, 2004. The Board of Governors voted to file a Petition for Review of the Referee's report and to seek Respondent's suspension from the practice of law for a period of two years, in addition to the conditions of probation recommended by the Referee. The Florida Bar filed a Petition for Review of the Referee's report with this Court on or about June 28, 2004. Pursuant to Rule 3-7.7, this Court has jurisdiction.

STATEMENT OF THE FACTS

As to Count I of the Complaint, the Referee found that in or about March of 1997, Respondent joined three lawyers, Debra M. Metzler, Max Mitchell Newman, and Robert Alan LeVine, to form the law firm of Newman, LeVine, Metzler & Shankman, P.A. in Tampa, Florida, hereinafter referred to as the "firm." (TT 7). Respondent was a shareholder in the firm from March of 1997 until his departure in March of 2000. (TT 8). Newman, LeVine, and Metzler concentrated their practice in the area of workers compensation, while Respondent concentrated his practice in the area of labor and employment law. (TT 9). Respondent drew a salary of

$125,000.00 per year from the firm, and Newman, LeVine, and Metzler each drew salaries of $100,000.00 per year from the firm. (TT 9).

Respondent brought his paralegal, Kimberly E. Miller, to the firm, and he later added an associate named Ann Snow and an administrative assistant named Marcy Zucker to create a new labor law department/litigation team for the firm. (TT 11-12). The firm marketed its labor law department to other lawyers by making telephone calls, hosting lunches, and offering to pay a 25% referral fee. (TT 10-11). The high referral fee was intended to attract business. (RR 7). As a result of the firm's marketing efforts, Respondent began to receive referrals of employment-related plaintiff's cases on a contingency fee basis. (TT 10). All referral fee agreements were signed by the client, the referring attorney, and Respondent or some other representative of the firm. (TT 11).

The firm initially operated without formal written agreements between the shareholders. (TT 7-8). By late 1999, the firm had incurred approximately $400,000.00 in debt for which the shareholders were jointly and severally liable. (TT 93, 95). By this time, Respondent's plaintiff's practice was generating regular fees, and Respondent was concerned about paying more than his share of the firm's debt. (TT 70). Respondent was unhappy with the way the firm was operating and how the money was being divided. (TT 70). In October of 1999,

Respondent threatened his fellow shareholders that if he did not receive a bonus in the Orr case, then he could not work for the firm anymore. (TT 298-299).

Respondent and the shareholders proposed different plans regarding how to handle the firm's finances. (RR 4). On or about December 30, 1999, the firm adopted a Shareholder's Agreement that was signed by Newman, LeVine, and Metzler. (TT 96; TFB Exh. 9). Respondent refused to sign the agreement because he was not happy with certain aspects of it. (TT 96-97; TFB Exh. 9). The Shareholder Agreement provided that each shareholder would be entirely responsible for the costs associated with their 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 by the firm to the shareholder. (TT 100; TFB Exh. 9). In or about early 2000, Respondent put into effect a bonus plan for his department. (TT 317-318). Respondent promised to pay his associate, Ann Snow, 20% of the surplus revenues. (TT 317). Respondent also promised to pay 7% to his paralegal, Kimberly Miller, and 3% to his administrative assistant, Marcy Zucker. (TT 317-318). The remaining 70% went to Respondent. (TT 317).

In or about June of 1997, Attorney William McAnnally referred Dale Hatmaker to the firm regarding a labor and employment case. (TT 13, 133-134).

On or about June 19, 1997, a Referral Fee Agreement was executed by Mr. McAnnally, Mr. Hatmaker, and the Respondent which stated that Mr. McAnnally was entitled to a 25% referral fee for referring the case to the firm. (TFB Exh. 1).

Respondent began representing Mr. Hatmaker in June of 1997, and the representation continued through mediation and settlement of the case. (TT 351, 361, 367). At the mediation in February of 2000, the case settled for $195,000.00. (TT 13, 366-367). According to the contingency fee agreement signed by Mr. Hatmaker, the firm was entitled to receive 40% of the settlement for attorney's fees, reflecting a sum of $78,000.00. (TT 257). Respondent represented to Ms. Metzler that it was necessary for the firm to reduce its attorney's fees because Mr. Hatmaker wanted to receive a net recovery of $150,000.00 out of the $195,000.00 settlement. (TT 68, 233). Ms. Metzler did not object to the firm's reduction of attorney's fees. (TT 68). Respondent informed Mr. Hatmaker that the firm would reduce its fees by $38,000.00. (TT 365; TFB Exh. 2). Mr. Hatmaker received $150,000.00, and the firm received $40,000.00 for attorney's fees and $5,000.00 for costs. (TT 354; TFB Exh. 2).

Based on the Referral Fee Agreement, Mr. McAnnally was entitled to receive 25% of the fee, reflecting a sum of $10,000.00. (TT 354; TFB Exh. 1). Respondent suggested to Mr. Newman that Mr. McAnnally's referral fee should be

reduced to $5,000.00 because of the small amount of work that Mr. McAnnally performed in the case, and Mr. Newman did not object to this. (TT 354-355; TFB Exh. 14). The Referral Fee Agreement did not condition payment of the full 25% on participation in the case. (TT 427; TFB Exh. 1). Mr. McAnnally initially rejected Respondent's $5,000.00 offer, but later agreed to accept it. (TFB Exhs. 13, 15). The firm paid Mr. McAnnally a referral fee of $5,000.00. (TFB Exh. 2).

After the Hatmaker case settled, Respondent threatened to leave the firm unless he received a bonus from the Hatmaker case. (TT 15, 71). The firm agreed to pay Respondent a bonus in the amount of $18,400.00 from the firm's $40,000.00 fee. (TT 15, 74).

On or about February 28, 2000, Respondent picked up two settlement checks for the Hatmaker case. (TT 370, 371). One check was for attorney's fees and costs in the amount of $45,000.00 made payable to Newman, LeVine, Metzler & Shankman. (TT 371). The second check in the amount of $150,000.00 was made payable to Dale Hatmaker. (TT 370, 371). Respondent then accompanied Mr. Hatmaker to the bank with the settlement checks because Mr. Hatmaker was unsophisticated, did not have experience in handling large sums of money, and did not have the education to properly invest or manage the money. (TT 371-372).

While at the bank, Mr. Hatmaker gave Respondent an envelope that

contained $20,000.00 in cash, which Respondent accepted. (TT 373). Mr. Hatmaker informed Respondent that this was his "bonus" for doing a good job. (TT 258, 373, 374). Mr. Hatmaker did not inform the firm's other shareholders or Ms. Snow that he gave Respondent a "bonus." (TT 247, 250). Respondent placed the $20,000.00 in cash in the ceiling in his home. (TT 381-382). Respondent failed to disclose to his fellow shareholders at the firm or to Ms. Snow that he received the $20,000.00 cash "bonus" from Mr. Hatmaker. (TT 178, 385-386). Respondent failed to share any portion of this $20,000.00 with his fellow shareholders or Ms. Snow. (TT 385-386, 430). Ms. Snow subsequently discovered Respondent's conduct and disclosed it to the firm. (TT 24-25, 176). At the time Mr. Hatmaker gave the Respondent $20,000.00, he was employed as a rental associate at Nations Rent, earned approximately $22,000.00 per year, and supported one minor child. (TT 215, 256). Although Respondent later developed a friendship with Mr. Hatmaker, they had no relationship prior to the representation. (TT 448-449; RR 8). The Referee found that Respondent took unfair advantage of a vulnerable, emotional person, dependent upon the Respondent for advice and trust in a fiduciary relationship. (RR 9). The Referee further concluded that Respondent should not have taken the money from Mr. Hatmaker, which resulted in a 13% reduction of Mr. Hatmaker's net settlement. (RR 8). Respondent never

offered to return the $20,000.00 to Mr. Hatmaker. (TT 450; SH 28). Respondent reported the cash as income on his tax return. (TT 424). According to Respondent's bonus plan for his department, Ms. Snow was entitled to 20%, or $4,000.00, of the $20,000.00 that Respondent received from Mr. Hatmaker. (TT 378-379; Respondent's Exh. 12). In the Amended Report of Referee, the Referee ordered Respondent to pay Ms. Snow $4,000.00, representing 20% of the funds delivered to Respondent by Mr. Hatmaker. (RR 14-15).

As to Count II of the Complaint, the Referee found that while working at the firm, Respondent began representing a client named Patricia Kaptzan in an unemployment compensation case. (TT 386-387). Ms. Kaptzan paid an initial retainer to the firm in the amount of $1,000.00 for Respondent to represent her at the unemployment compensation hearing. (TT 387). Respondent attended the unemployment compensation hearing with Ms. Kaptzan on February 29, 2000, and Ms. Kaptzan was awarded benefits. (TT 388-389). In early March of 2000, Respondent began working on a second cause of action on behalf of Ms. Kaptzan involving a whistle blower claim against her former employer. (TT 392). On or about March 17, 2000, Respondent left the firm and joined the law firm of Ruden, McCloskey, Smith, Schuster, and Russell. (TT 392-394). At that time, the Kaptzan case was still an open matter. (TT 389). Respondent took the Kaptzan

case with him to the Ruden, McCloskey firm without disclosing it to the shareholders of his former firm. (TT 26, 393).

On March 20, 2000, the firm generated a pre-bill for Patricia Kaptzan v. Refund Service, reflecting the costs associated with the case. (TT 27-28; TFB Exh. 4). On the pre-bill, Respondent hand wrote "W/O," which stood for "write-off," to indicate that the $372.58 in case costs should be written off by the firm. (TT 28, 389-390; TFB Exh. 4). Respondent's handwritten notation gave the firm's bookkeeper the impression that the case was closed, resulting in the case being listed as a closed case in the firm's records. (TT 28). As of March 20, 2000, the Kaptzan case was still an open matter. (TT 389). In a March 27, 2000 e-mail, Respondent failed to disclose to the shareholders at his former firm that he took a total of six active cases, including the Kaptzan case, with him to the Ruden, McCloskey firm. (TT 30; TFB Exh. 3). The omission was a willful act that shows Respondent's intent for self help in the ongoing dispute with his former firm. (RR 11). Respondent's conduct was calculated to remove as many assets as possible from the firm for himself. (RR 10).

On or about April 11, 2000, while Respondent was working at the Ruden, McCloskey firm, the Kaptzan case settled and Ms. Kaptzan signed an Agreement, General Release And Disclaimer. (TT 393-394; TFB Exh. 5). Respondent failed

to disclose to the shareholders at his former firm that he had settled the Kaptzan case. (TT 394). The Kaptzan settlement agreement provided for installment payments. (TT 393). Respondent received the first payment of attorney's fees in the amount of $8,250.00 on or about April 11, 2000. (TT 393; TFB Exh. 5). Respondent shared a portion of the attorney's fees with Ms. Snow in the amount of $1,650.00. (TT 395). Respondent also shared a portion of these attorney's fees with Ms. Miller, his paralegal, who is not a licensed attorney. (TT 183-184). Subsequently, Respondent received additional installment payments of attorney's fees totaling $23,150.00. (TT 395-396; TFB Exh. 5). Respondent did not share any portion of these subsequent payments with Ms. Snow or Ms. Miller. (TT 396). Respondent received a total of $31,400.00 in attorney's fees from the Kaptzan settlement. (TFB Exh. 5). Respondent did not share any portion of these fees with the other shareholders of his former firm until after his conduct was discovered. (TT 394; TFB Exh. 5).

As to Count III of the Complaint, the Referee found that while working at the firm, Respondent began representing Lance Laundy, the plaintiff in a wrongful termination case. (TT 184). On or about December 24, 1998, the defendant, Contec International Limited Partnership, filed a motion for summary judgment. (TT 185). After Respondent received the motion for summary judgment, he had 20

days to file a response. (TT 185). Respondent instructed Ms. Snow to start working on the facts section of the memorandum of law in opposition to the motion for summary judgment. (TT 404). After Ms. Snow completed her portion of the memorandum of law in opposition to the motion for summary judgment, and prior to the expiration of the 20-day time period for filing a response, Ms. Snow had discussions with Respondent about Respondent's completing his portion of the memorandum of law. (TT 186). Ms. Snow put "Post it" notes on Respondent's computer screen and on the double doors to his office to remind him to complete the memorandum of law in opposition to the motion for summary judgment before the 20-day time period expired. (TT 186).

Respondent testified that he believed that the defendant's motion for summary judgment was not timely filed, and therefore he failed to file a response to the motion for summary judgment within the 20-day time period. (TT 405-407). Judge Susan Bucklew then issued an Order granting the defendant's motion for summary judgment. (TT 187). Ms. Snow testified that Respondent created the excuse that the defendant's motion for summary judgment was not timely filed after the summary judgment had been granted. (TT 188). After the granting of summary judgment, Respondent advised his fellow shareholders at the firm of the adverse ruling. (TT 407). Respondent and the other shareholders agreed that they should

put their malpractice carrier on notice of a potential claim. (TT 407-408). The Referee found that Respondent's explanation that he believed Judge Bucklew would strike or ignore the defendant's motion for summary judgment because it had not been timely filed was not plausible. (RR 13). Further, as stated in the Report of Referee, Respondent's excuses and rationales do not justify his conduct, based on his clear duty and obligations to respond to a motion filed against his client in a Federal Court case. (RR 13).

SUMMARY OF THE ARGUMENT

Respondent should receive a rehabilitative suspension from the practice of law for a period of two years, and upon reinstatement be placed on probation for two years with the conditions recommended by the Referee, based upon Respondent's attempt to intentionally deprive his former firm of funds, and for other misconduct. Respondent caused actual financial harm to the shareholders of his former firm by intentionally depriving them of thousands of dollars in legal fees that were paid directly to him by the firm's clients. It was only after being caught that Respondent acknowledged receipt of the money and ultimately entered into a settlement agreement with his firm.

Respondent committed multiple acts of serious misconduct reflecting his dishonest and selfish motives. Respondent obtained a financial benefit by failing to disclose and share with the shareholders of his former firm the fees that he received in the Hatmaker and Kaptzan cases. Respondent also acted dishonestly by failing to disclose to the firm shareholders that he took several active cases with him to his new law firm.

Respondent violated the trust of his fellow shareholders by concealing

information and by engaging in a scheme intended to mislead the shareholders in order to deprive the firm of funds. Respondent's misconduct, therefore, warrants the severe sanction of a two-year rehabilitative suspension in addition to probation with conditions recommended by the Referee.

ARGUMENT

A REHABILITATIVE SUSPENSION FOR TWO YEARS IS THE APPROPRIATE SANCTION FOR RESPONDENT'S INTENTIONAL DEPRIVATION OF LAW FIRM FUNDS FROM HIS PARTNERS, AND FOR OTHER MISCONDUCT, AS SUPPORTED BY THE RECORD HEREIN, THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, AND THE RELEVANT CASE LAW.

In attorney disciplinary proceedings "a referee's findings of fact are presumed correct and this Court will not reweigh the evidence and substitute its judgment for that of the referee as long as the findings are not clearly erroneous or lacking in evidentiary support." The Florida Bar v. Beach, 675 So. 2d 106, 108 (Fla. 1996). A referee's legal conclusions, however, are subject to broader review by this Court than are findings of fact. Id. This Court has broader discretion to review a referee's recommended discipline, because it is this Court's "responsibility to order the appropriate punishment." The Florida Bar v. Niles, 644 So. 2d 504, 506 (Fla. 1994). The Referee in this case recommended that Respondent should receive a suspension for 90 days; 2 years probation with random audits of Respondent's operating account; and $4,000.00 payment to Ann

Snow. (RR 14). A rehabilitative suspension of two years, in addition to the conditions of probation, is the more appropriate sanction, considering the seriousness of Respondent's misconduct.

Respondent intentionally deprived his former law firm partners of thousands of dollars in legal fees that were paid directly to him in the Hatmaker and Kaptzan cases. In the Hatmaker case, the $20,000.00 cash payment that Mr. Hatmaker gave to Respondent was allegedly based on Mr. Hatmaker's great satisfaction with the work that Respondent had performed and the outcome of the representation. (TT 258). The Referee properly concluded that the $20,000.00 payment was based on the representation, and did not appear to be a personal gift because Respondent and Mr. Hatmaker did not have a prior personal relationship. (RR 8). As a result, Respondent was obligated to disclose and share the $20,000.00 payment with the shareholders of his former firm and Ms. Snow. (RR 8). Respondent acted with self interest and greed by accepting the $20,000.00 payment from his client, and by failing to disclose and share the $20,000.00 payment with the shareholders of his former firm and Ms. Snow. (TT 178, 373, 385-386, 430).

In the Kaptzan case, Respondent misled the firm's shareholders by directing the firm's bookkeeper to write off the costs, creating the appearance that the case was closed. (TFB Exh. 4). Respondent then took the case with him to his new law

firm, without the other shareholders' knowledge. (TT 26). Respondent's decision to take the Kaptzan case and several other cases with him to his new law firm without the other shareholders' knowledge was a calculated decision to "remove as many assets as possible from that firm for himself." (RR 10). The Kaptzan case settled shortly after Respondent arrived at his new law firm. (TT 183). Respondent failed to disclose to the shareholders of his former firm that the case had settled. (TT 184, 394). Respondent retained all of the attorney's fees for himself, except for a small portion of the first installment of attorney's fee payments that he shared with Ms. Snow and his paralegal, a non-lawyer. (TT 183-184). After Respondent's conduct was discovered by his firm, he entered into a settlement agreement with the firm. (TT 78-80).

The discipline imposed on Respondent must correspond to the serious nature of his misconduct, and serve as a deterrent to others who might be inclined toward this sort of misconduct. In The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983), this Court defined the objectives of Bar discipline as follows:

> Discipline for unethical conduct by a member of The Florida Bar must serve 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 undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a 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.** (Court's emphasis).

The Florida Standards for Imposing Lawyer Sanctions provide a guideline for determining the appropriate sanction in attorney disciplinary matters.

Standard 9.21 defines aggravating circumstances as "any considerations or factors that may justify an increase in the degree of discipline to be imposed." The Referee found several aggravating factors in his report. (RR 16). The aggravating factors found by the Referee are as follows:

Standard 9.22(b) Dishonest or selfish motive. Respondent failed to disclose to his former law partners the money he received from Mr. Hatmaker, and he failed to inform his former law partners of the fee from the active Kaptzan case that he took with him without his former law partners knowledge. (RR 8, 12). Respondent benefitted financially from both of these transactions.

Standard 9.22(c) A pattern of misconduct. Respondent deprived his former law partners of law firm funds in both the Hatmaker and Kaptzan cases.

Standard 9.22(d) Multiple offenses. Respondent committed multiple acts of misconduct based on his actions in the Hatmaker, Kaptzan, and Laundy cases.

Standard 9.3 lists several mitigating factors which may justify a reduction in the degree of discipline to be imposed. The Referee found several mitigating

factors in his report. (RR 16-17). The mitigating factors found by the Referee are as follows: Standard 9.32(a) Absence of a prior disciplinary record; Standard 9.32(e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings; Standard 9.32(g) Character or reputation; Standard 9.32(j) Interim rehabilitation; and Standard 9.32(l) Remorse.

Although not found by the Referee, Standard 12.1 provides that in addition to those matters of aggravation listed in Standard 9.22, the following factors may be considered in aggravation:

Standard 12.1(a) Involvement of client in the misconduct, irrespective of actual harm to the client. Respondent involved Mr. Hatmaker in the misconduct by having him keep quiet about the bonus that he gave to Respondent. (RR 9).

Standard 12.1(b) Actual harm to clients or third parties. Respondent caused actual financial harm to his former law partners by intentionally depriving them of fees that he received in the Hatmaker and Kaptzan cases.

This Court has provided guidance regarding the appropriate sanction for the type of misconduct committed by Respondent. In many cases this Court has held that an attorney's theft of funds from his law firm employer or an attorney's intentional deprivation of fees paid to his law firm employer constitutes professional misconduct and warrants suspension from the practice of law. The following cases

involved misconduct similar to that of the Respondent herein, but resulted in harsher sanctions than those imposed by the Referee in this case: The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986); The Florida Bar v. Farver, 506 So. 2d 1031 (Fla. 1987); The Florida Bar v. Ward, 599 So. 2d 650 (Fla. 1992); and The Florida Bar v. Arcia, 848 So. 2d 296 (Fla. 2003).

In The Florida Bar v. Gillin, this Court held that a six-month suspension was warranted for an attorney who intended to steal $25,000.00 from the law firm in which he was a partner by depriving the firm of legal fees that were paid directly to him by the client. Gillin, 484 So. 2d at 1220. The referee in Gillin found several factors in mitigation including the fact that no party suffered any real damage, a lack of a prior disciplinary history, Gillin's involvement in church and civic activities, and Gillin's involvement in local Bar functions. Id. The referee recommended that Gillin be suspended for six months, and this Court approved the referee's findings and recommendations. Id. This Court reasoned that "Gillin was well aware he was diverting firm funds behind the backs of his partners." Id. In the instant case, Respondent, like Gillin, was well aware that he was "diverting firm funds behind the backs of his partners" by his actions in both the Hatmaker and Kaptzan cases. Id.

In The Florida Bar v. Ward, this Court held that a one-year suspension was warranted for an attorney who "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." Ward, 599 So. 2d at 651. The referee recommended that Ward be found guilty of violating Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Id. The referee in Ward found several aggravating factors including that Ward violated a trust placed in him by his law firm, that he seized an opportunity to defraud his associates with no plan for undoing the harm, that he initially denied the misconduct, and that the conduct could not be justified from the standpoint of necessity. Id. The referee also found several factors in mitigation including the absence of prior discipline, a good faith effort at restitution, cooperation with the Bar, outstanding reputation in the community, excellent professional adjustment, and remorse. Id. In deciding to impose a one-year suspension, the Court reasoned that "the offense at issue was an aberration that was completely out of character. On the other hand, this was not one incident but several. Therefore, respondent must receive a severe sanction, but we do not believe disbarment is appropriate." Id. at 653.

As in Ward, the Referee in the instant case found that Respondent violated Rule 4-8.4(c) by keeping quiet about the bonus in the Hatmaker case, and by "failing to inform his former firm of the fee from the active Kaptzan case he took

with him without their knowledge." (RR 9, 12). As in Ward, Respondent violated a trust placed in him by the shareholders of his firm, and seized an opportunity to defraud his associates with no plan for undoing the harm. Also as in Ward, Respondent's misconduct consisted of multiple offenses, warranting a severe sanction.

In The Florida Bar v. Arcia, this Court's most recent ruling regarding lawyer theft of firm funds, this Court held that "for purposes of attorney discipline, theft of firm funds is serious enough to warrant disbarment under most circumstances." Arcia, 848 So. 2d at 300. Mr. Arcia, an associate at Zarco & Pardo, P.A., violated the terms of his employment agreement by representing some clients for the benefit of Omar J. Arcia, P.A., a professional association of which he was the sole shareholder and employee. Id. at 297. "On several occasions, Arcia deposited fees he had obtained in representing the firm's clients or prospective clients into the Arcia P.A. bank account." Id. "Arcia never advised the firm of the existence of Arcia P.A. and never provided the firm with any portion of the fees he received." Id. "Arcia admitted to depriving the firm of about $62,000.00 in legal fees." Id.

The referee recommended that Arcia be found guilty of violating Rule 4-8.4(b) for 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) for

engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Id. at 298. The referee in Arcia also found several aggravating factors, including a dishonest or selfish motive, a pattern of misconduct, multiple offenses, vulnerability of the victim, and a bad faith obstruction of the disciplinary proceeding. Id. The referee also found several mitigating factors including lack of a disciplinary history, personal or emotional problems, timely restitution, character or reputation, interim rehabilitation, and remorse. Id. at 298-299. The Court deferred to the referee's recommendation of a three-year suspension in light of the Bar's election not to file a cross-appeal. Id. at 300. The Court emphasized, however, "that future cases involving theft of firm funds will carry a presumption of disbarment." Id. As in Arcia, the Referee in the instant case found aggravating factors including a dishonest or selfish motive, a pattern of misconduct, and multiple offenses. (RR 16). In mitigation, both Respondent and Arcia had no prior disciplinary record, good character or reputation, interim rehabilitation, and remorse. (RR 16-17).

Based on the seriousness of Respondent's misconduct, the relevant case law, and the Florida Standards for Imposing Lawyer Sanctions, Respondent should receive a rehabilitative suspension from the practice of law for a period of two years, in addition to probation with conditions. Respondent violated the trust placed in him by the shareholders of his former law firm by intentionally depriving

them of fees paid by the firm's clients, and this misconduct justifies a rehabilitative suspension, requiring proof of rehabilitation prior to reinstatement, with a two year probationary period, with conditions, upon reinstatement.

CONCLUSION

Respondent should receive a rehabilitative suspension from the practice of law for a period of two years, in addition to probation with conditions. Respondent committed multiple acts of serious misconduct that reflected his dishonest and selfish motives. By intentionally depriving his former law firm partners of thousands of dollars in legal fees, Respondent caused actual financial harm to his former law firm partners and violated a trust placed in him by his law firm.

Dated this _____ day of July, 2004.

Respectfully submitted,

_____
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Florida Bar No. 930180

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this Initial Brief have been provided by Airborne Express, Airbill Number 7532231711 to **The Honorable Thomas D. Hall, Clerk**, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail and U.S. Certified Mail, Return Receipt Requested No. 7003 1680 0006 6185 3994 to **David S. Shankman, Respondent**, c/o John A. Weiss, Counsel for Respondent, at 2927 Kerry Forest Parkway, Suite B-2, Tallahassee, Florida 32308-6825; and a copy by regular U.S. Mail to **John Anthony Boggs, Staff Counsel**, The Florida Bar, 651 E. Jefferson Street, Talahassee, FL 32399-2300, all this 27th day of July 2004.

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Jodi Anderson
Assistant Staff Counsel

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Undersigned counsel does hereby certify that this Initial Brief is submitted in WordPerfect 14 point proportionally spaced Times New Roman font, and the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Antivirus for Windows.

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Jodi Anderson