IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Appellant,

vs. Case No. SC03-1900

KENNETH D. KOSSOW,

Respondent, Appellee.

_____/

ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar petitions for review of a Referee's recommended sanction that Respondent, Kenneth D. Kossow, receive a public reprimand. The Florida Bar is seeking a 90-day suspension of Mr. Kossow's license to practice law. This Court has jurisdiction over this matter by operation of Article V, §15 of the Florida Constitution.

Throughout this Answer Brief, the Respondent/Appellee will be referred to as either Mr. Kossow or Kossow. The Complainant/Appellant will be referred to as either The Florida Bar or The Bar. In terms of record citations, the symbol "RR" will refer to the Report of the Referee. The symbol "T" will refer to the transcript of the final hearing, followed by page references. Exhibits introduced below will be referenced by number, Mr. Kossow's Unconditional Plea of Guilty and other pleadings will be referred to by name.

STATEMENT OF THE CASE AND FACTS

This appeal arises from a disciplinary complaint The Florida Bar bought against Mr. Kossow on October 23, 2003, in connection with The Florida Bar File No. 2002-51,006(17C). On April 13, 2004, he admitted to his violation of Rule 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation] of the Rules of Professional Conduct by entering a written, sworn unconditional plea of guilty setting forth specified facts. The overall gist of the admitted facts was that following his receipt of an October 25, 2001 firm memorandum that, inter alia, prohibited its associates from doing outside legal work—Kossow had nonetheless accepted some new outside business and represented non-firm clients for the benefit of his own, pre-existing private law practice. (Unconditional Plea of Guilty).

In light of Mr. Kossow's unconditional guilty plea, the Final Hearing held before the Honorable Jane Deutsher Fishman on April 28, 2004, was focused on the issue of appropriate sanction for the admitted violation. Mr. Kossow had submitted a hearing memorandum contending that, under all the relevant circumstances, his post-October 25, 2001 conduct warranted a public reprimand. (Hearing Memorandum). For its part, The Florida Bar came to the Final Hearing asking the Referee to recommend that Mr. Kossow's license to practice law be suspended for three (3) years. (T 5).

At the Final Hearing, The Bar introduced testimony from Pamela Kaufman and Paul Cook of the Hunt, Cook law firm in Boca Raton, Florida. Mr. Kossow's evidentiary presentation consisted of recalling Ms. Kaufman, his own testimony, and the unopposed introduction of a number of documentary exhibits.

Ms. Kaufman's testimony established she was the office administrator of the Hunt, Cook law firm where Mr. Kossow—then age 31 or 32, began working as an associate attorney in early July, 2001. (T 7-8, 60-61). Due to his tax law experience, including his L.L.M. degree in taxation, Mr. Kossow was hired by the firm's principals to do sophisticated tax work in the firm's transactional department at an annual salary of $135,000. (T 8, 19, 66). His employment at Hunt, Cook was memorialized by a simple letter that confirmed his agreed-upon annual salary. (T 43). There was no detailed employment contract. (T 19, 43). At the time of his interview and hire,-- Mr. Kossow had been a sole practitioner for roughly six (6) months. (T 60). The name of his independent law firm was Emergent Solutions Group (later to be known as Emergent Law Practice, P.L.). (T 60; Plea, page 1). Mr. Kossow disclosed the nature and extent of his private law practice during his interview with Hunt, Cook. (T 61). Mr. Kossow was hired with the explicit understanding that he was expected to generate 150 billable hours a month.

(T 9). He was also hired subject to a 90-day probationary period. (T 21). From the very start, and continuing throughout and beyond his probationary period, Mr. Kossow's billable hours were significantly below the firm's expected quota. (T 9-10, 67).

On October 25, 2001, Ms. Kaufman circulated a memorandum to all the firm's associates, including Mr. Kossow, requesting each to prepare a list identifying any matters in which they were providing legal representation to anyone who was not specifically set up as a firm client. (Exhibit 1). The October 25th memorandum also contained a sentence prohibiting the providing of legal services in any capacity other than as an employee of Hunt, Cook. (Exhibit 1). The purpose of the October 25th memorandum was to establish a firm-wide policy, in writing, to govern the conduct of associates as it pertained to legal work done on "outside matters". (Exhibit 1; T 16). Mr. Kossow responded, as requested, with e-mails indicating he (personally) was the plaintiff in two breach of contract actions; was providing ongoing representation in a guardianship matter; and was representing Armstrong Lock and Security Products (a friend's company) in several breach of contract actions against Kissimmee Open MRI, North American, Rainbow Apparel, United Theatres, and Vingage. (Exhibit 2).

Subsequent to the expiration of his 90-day probationary period at the end of September 2001, Mr. Kossow accepted the firm's "offer" that he transfer

to the estate planning section at the adjusted annual salary rate of $100,000. (T 21, 53). These changes in the area of his work focus and salary level took place in early to mid-November of 2001. (T 11, 66-67).

After receiving the firm's October 25, 2001 memorandum prohibiting associates from "moonlighting", Kossow accepted new matters and represented non-Hunt, Cook clients on behalf of his independent firm, Emergent. (Plea, page 2; T 79). He did not disclose this outside work to his employer.

Mr. Kossow's conduct of engaging in undisclosed moonlighting, contrary to the dictates of the October 25th policy memo, came to the attention of Hunt, Cook in early January of 2002, when office mail procedures resulted in the interception of a non-firm client retainer check payable to Emergent and an engagement letter that had been prepared by Mr. Kossow after the dissemination of the Hunt, Cook memorandum. (T 54; Plea, page 2). Hunt, Cook confronted Kossow with the intercepted retainer check and engagement letter on or about January 3, 2002, and this resulted in the termination of Kossow's employment. (T 31, 32). Mr. Kossow derived approximately $18,500 in "moonlighting" fees subsequent to receiving the October 25, 2001 memo prohibiting outside legal work. (T 69).

At the time of the April 28, 2004 final hearing, Mr. Kossow was 35 years

of age, married, and supporting a family. (T 69, 70). His educational background was shown to include a Bachelor of Science degree in Accounting, with honors from the University of Florida; a Juris Doctorate degree, awarded in 1994 with honors, from the University of Florida; and a 1995 L.L.M. degree in general taxation and estate planning from New York University. (T 57, 58). His subsequent work experience as an attorney included roughly 2 years employment with the Miami office of the Kirkpatrick Law Firm (an international firm based out of Pittsburgh); followed by approximately 3 years employment in the Miami office of Holland and Knight doing estate and tax planning. (T 58-60; hearing memorandum). He acknowledged the wrongfulness of his conduct of taking on new matters on behalf of Emergent and representing non-Hunt, Cook clients, in violation of his employer's October 25, 2001 policy memorandum. (T 73, 76, 79). He testified to being currently employed as a wealth strategist for Bank of America, and expressed his belief and concern that the loss of his law license would have adverse ramifications on his professional life. (T 77, 84).

On May 3, 2004, the Referee issued her Report with extensive fact-findings. (RR, pages 1-10). The Referee noted Mr. Kossow had been admitted to The Bar since 1994, and had no prior disciplinary record. (RR, page 5). It was the Referee's recommendation that Kossow, consistent with

his unconditional plea of guilty, be found guilty of violating Rule 4-8.4(c) of the Rules Regulating The Florida Bar. (RR, page 4). As to disciplinary measures, it was the Referee's recommendation that Kossow receive a public reprimand and be required to pay The Florida Bar's costs in the proceedings. (RR, page 4).

The sole aggravating factor found by the Referee was that Mr. Kossow's conduct had been dishonest and selfish. The Referee expressly declined to find two aggravating factors urged by Bar counsel [vulnerable victim and Mr. Kossow's failure to make restitution to the Hunt, Cook firm of fees earned by "moonlighting" and for firm resources that he supposedly misappropriated or "wasted"]—explaining that neither factor had been adequately established by the evidence presented at the hearing. (RR, pages 5, 6). The Referee concluded that Hunt, Cook was "…hardly a 'vulnerable' victim such as an unsophisticated client"; and further stated, "…much of the loss and/or bad feeling between the parties here might have been avoided by clearer communication between the parties from the outset of their relationship, a burden which should fall at least equally on the firm of experienced lawyers as on the Respondent, a newly hired associate." (RR, page 6). Apart from the lack of evidence reasonably quantifying the asserted loss of "wasted resources", the Referee remarked the hearing evidence had

indicated that Hunt, Cook wanted no part of the clients Mr. Kossow had disclosed in response to the October 25th memorandum; the firm had not ever made a demand for a portion of any of the "outside" fees earned by Kossow; and the firm had never sought restitution for any supposed "waste". (RR, page 6). The Referee further observed the hearing evidence had not established the existence of any such "waste" or theft of firm resources; and that The Bar had not charged Mr. Kossow with any theft act or other crime. (RR, page 6).

In mitigation, the Referee found, inter alia, that Mr. Kossow had made full disclosure to The Florida Bar and been cooperative and forthcoming; that his dishonest conduct had not resulted in harm to any client of Hunt, Cook or to any member of the public; that his expressed remorse and embarrassment were genuine; that he was a young, relatively inexperienced attorney whose post-October 25th moonlighting conduct appeared to stem more from a flawed understanding of what his obligations were to Hunt, Cook, than from any malice or intent to harm the firm; that his prior, favorable employment experiences at law firms larger and more structured than Hunt, Cook had ill-prepared Kossow to cope with the demands of a hectic firm that expected him to supervise himself; that he was now working successfully as a wealth strategist for Bank of America; and that the nature of his dishonest conduct essentially amounted to a failure to maintain

personal integrity without spillover features that had demeaned the courts or the justice system, or deprived any client of access to the courts. (RR, pages 7, 8).

On or about June 22, 2004, The Bar timely filed a Petition for Review contesting the Referee's sanction recommendation; and urging this Court to, instead, order that Mr. Kossow's law license be suspended for ninety (90) days. The Bar filed its Initial Brief in July of 2004. Mr. Kossow now responds with his Answer Brief.

SUMMARY OF THE ARGUMENT

The Referee's recommended disciplinary sanction of a public reprimand should be approved or adopted by this Court since the Referee's recommendation is amply supported by extensive case-specific findings of fact, substantial findings of mitigation, and the finding of but a single aggravating factor inherent in the admitted violation. Furthermore, the recommended disciplinary sanction falls within the ambit of a level of discipline permitted by existing case law and the Florida Standards For Imposing Lawyer Sanctions. Mr. Kossow acknowledges the seriousness of his admitted ethical violation; but strenuously disputes The Bar's efforts to claim, without evidentiary support, that his misconduct involved any misappropriation of firm fees or theft of firm property or gave rise to a duty to make restitution to Hunt, Cook. The Bar did not meet its burden of demonstrating that the Referee's disciplinary recommendation, or supportive findings of mitigation and aggravation, were clearly erroneous or without record support.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS AN APPROPRIATE DISCIPLINE AND SHOULD BE APPROVED BY THIS COURT, GIVEN THE SOLID RECORD BASIS FOR THE REFEREE'S SUPPORTING FACTFINDINGS AND FINDINGS OF MITIGATION AND AGGRAVATION.

In this appeal the Referee's recommended findings of fact or recommendation as to guilt for the violation of Rule 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct are not at issue. The Bar's Initial Brief, however, does challenge the Referee's recommended discipline. Specifically, The Bar contends that Mr. Kossow's law license should be suspended for ninety (90) days because his admitted "moonlighting" conduct purportedly also encompassed: (1) the misappropriation of law firm fees belonging to Hunt, Cook; and, (2) a theft of firm resources. The critical deficiency with The Bar's assertions of fee diversion and theft-of-firm-resources is that this type of conduct was neither admitted by Mr. Kossow nor proved by The Bar at the final hearing. The Bar also faults the Referee for refraining from entering certain claimed aggravating findings urged below, including the characterization of the Hunt, Cook firm as a "vulnerable victim" who had suffered harm; the notion that Mr. Kossow's misconduct caused a "waste" of firm resources; and

faulting Mr. Kossow for not making restitution to Hunt, Cook. After hearing and considering the evidence, the Referee legitimately and properly declined The Bar's invitation to enter findings of aggravation that were not clearly established by evidentiary proof.

Analysis

In bar discipline proceedings, evidence of the lawyer's charged misconduct must be established by the proof standard of clear and convincing evidence. Florida Bar v. Neu, 597 So.2d 266, 268 (Fla. 1992). Findings of fact made by the Referee carry a presumption of correctness and are to be upheld unless "clearly erroneous or without support in the record." Florida Bar v. Summers, 728 So.2d 739, 741 (Fla. 1999); Florida Bar v. Arcia, 848 So.2d 296, 299 (Fla. 2003). A Referee's findings of mitigation and aggravation likewise are presumed to be correct and deserve to be upheld unless clearly erroneous or without record support. Florida Bar v. Wolis, 783 So.2d 1057, 1059 (Fla. 2001); Florida Bar v. Barley, 831 So.2d 163, 170 (Fla. 2002); Florida Bar v. Arcia, supra at 299.

As it relates to disciplinary recommendations, this Court does not generally engage in second-guessing a Referee's recommended discipline as long as that discipline has a reasonable basis in existing case law and the Florida Standards For Imposing Lawyer Sanctions. See, Florida Bar v.

Mason, 826 So.2d 985, 987 (Fla. 2002); Florida Bar v. Poplack, 599 So.2d 116, 118 (Fla. 1992), (a referee's recommendation on discipline is afforded a presumption of correctness); Florida Bar v. Niles, 644 So.2d 504, 506-507 (Fla. 1994), (a recommendation on discipline will be presumed correct unless the recommendation is clearly erroneous or not supported by the evidence). Yet, the Court necessarily reserves a broader scope of review in connection with disciplinary recommendations than afforded to finding of facts because the ultimate responsibility to order the appropriate punishment rests with the Court. Florida Bar v. Cox, 655 So.2d 1122, 1123 (Fla. 1995); Florida Bar v. Poplack, supra at 118. On numerous occasions this Court has observed that appropriate discipline meets the criteria of serving the following three (3) purposes:

> [F]irst, 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; 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; and, third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Florida Bar v. Poplack, supra at 118.

Flawed and Unsubstantiated Assertions of Theft of Firm Resources, Fee Diversions, and a Duty to Pay Restitution

On page 5 of the Initial Brief, The Bar asserts that Mr. Kossow "…used firm resources in furtherance of his clandestine activities for the benefit of himself and Emergent." Not surprisingly, there is no citation to any record basis for this assertion. The Bar makes similar assertions at pages 8, 9, and 16 of its Brief—faulting the Referee for not making a finding that Mr. Kossow committed a theft of firm resources. The Referee was entirely within reason and prerogative, on this record, in concluding that clear and convincing evidence of Mr. Kossow causing a "waste" or theft of firm resources was not established by Paul Cook's sketchy and vague testimony about Kossow e-mailing himself documents, copying treatise materials, or speaking with other associates about their cases. (RR, page 6; T 33-36).

On pages 7, 8, and 16 of its Initial Brief, The Bar contends that the Referee's recommended sanction of a public reprimand is not appropriate, i.e., consistent with existing case law, because Mr. Kossow misappropriated or diverted legal fees from Hunt, Cook. Again, The Bar's assertion does not comport with the evidentiary record. Again, there is a tell-tale lack of any record citation to even a single demonstrated instance where Mr. Kossow "took a fee" from or approached any Hunt, Cook client on behalf of Emergent. Instead, The Bar asserts Kossow "misappropriated law firm fees" solely on the basis that he did not subsequently volunteer the fees he had earned from outside clients to Hunt, Cook. The Referee concluded,

correctly, that Kossow's wrongful moonlighting activity did not result in a demonstrated diversion or theft of Hunt, Cook fees when the record evidence indicated the law firm had wanted no part of the various outside clients Kossow had disclosed upon receiving the October 25th firm memorandum; when the firm had not ever made a demand for a portion of any of the outside fees earned subsequent to October 25th; and The Bar had not charged Kossow with any act of theft or other crime. (RR, page 6; T 40, 51, 61-65).

Plainly, if Mr. Kossow's admitted and proven conduct [of doing outside work for outside clients in violation of the October 25th policy memorandum], did not, ipso facto, qualify as a theft of firm fees or firm resources—there would arise no legitimate basis for Hunt, Cook to receive restitution payments. Moreover, The Bar's assertions about restitution also presuppose an evidentiary record establishing a restitution amount. To her credit, Ms. Kaufman of the Hunt, Cook firm acknowledged that any estimate she could offer as to the cost of Kossow's activities would be far too speculative to possibly be appropriate. (T 14). While Mr. Cook was eager to suggest a loss range perhaps incurred by the law firm, his stated rationale was blatantly speculative. (T 36, 37). The Referee correctly concluded that the evidentiary showing made at the formal hearing did not support The

Bar's contentions re: "waste", theft, or the appropriateness of any restitution figure Mr. Kossow should be responsible for. (RR, page 6). Under the particular facts of this case, Mr. Kossow deserves no condemnation for not paying restitution.

The Referee's Recommended Discipline Enjoys a Reasonable and Appropriate Basis

Mr. Kossow submits that under the Florida Standards and existing case law, the appropriate sanction for his violation of Rule 4-8.4(c) is a public reprimand. The Referee found Kossow's ethical violation to be, in essence, a "failure to maintain his personal integrity". (RR, page 8). Such conduct is properly viewed as coming within Florida Standard 5.13, which reads "Public Reprimand is appropriate when a lawyer knowingly engages in any other [than criminal] conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law."

Alternatively, in the unlikely event that this Court accepts The Bar's contention that the suspension "norm" of Standard 7.2 is more applicable than Standard 5.13, Mr. Kossow maintains that the recommended sanction of public reprimand remains appropriate given his lack of intent to steal from or malice toward the firm; the absence of potential or actual injury to any client, member of the public, or the judicial system; and the existence of

strong mitigating factors including his full disclosure to The Bar, and remorse. Assuming, arguendo, that Mr. Kossow's conduct is to be gauged by Standard 7.2's provisions, the strong showing of mitigating factors found by the Referee, coupled with the comparative lack of aggravating factors, would operate to firmly support public reprimand as an appropriate sanction under the circumstances. The Florida Bar contends otherwise only by ignoring the Referee's valid and extensive findings of mitigation.

Nor is The Bar's position realistically supported by its asserted reliance on the cases of Florida Bar v. Gillin, 484 So.2d 1218 (Fla. 1986); Florida Bar v. Cox, supra; and Florida Bar v. Arcia, supra. In Gillin, supra, for example, the suspended attorney's misconduct included diverting firm funds paid to him by a firm client, with the intent to steal money from his partners. In other words, Gillin, supra, is readily distinguishable from the case at bar because it involved a true theft-of-firm fee situation. The Gillin Court accepted the Referee's recommendation of a 6-month suspension.

Florida Bar v. Cox, supra, is an instance where a so-called "moonlighting" associate attorney also used firm letterhead to correspond with firm clients for the purpose of convincing some of them to directly pay him firm fees. The Referee recommended Mr. Cox receive a 30-day suspension for engaging in a pattern of dishonest and deceitful conduct, as

well as for his conduct of diverting firm money into his personal account. On appeal, this Court affirmed the recommended sanction. It rejected Mr. Cox's assertion that his discipline should be limited to the receipt of a public reprimand because his conduct did not, among other things, cause any actual or potential injury with respect to either the law firm or his "outside clients". Cox, supra, fully appears to involve a more egregious or extensive form of "moonlighting" than present in the case at bar because Cox was "preying" on existing firm clients and diverting firm fees to his personal account. Also, the Cox opinion, unlike the case at bar, provides no hint that the Referee had found it appropriate to make key findings of mitigation such as a lack of any intent by Mr. Cox to steal from or injure the firm; his full disclosure and cooperation with The Bar; or his remorse.

The facts in Florida Bar v. Arcia, supra, are so egregious [theft by a long-time, trusted associate attorney of approximately $62,000 from law firm over a period of up to 2 years] that the case has little to no relevance to Kossow's sanction issue. This Court deferred to the referee's recommendation that Mr. Arcia's law license be suspended for 3 years; but announced the principle that future cases involving the theft of firm funds would carry a presumption of disbarment just as in cases involving stealing from clients.

The fact that The Bar tries to make a case for suspension by relying on

the aforementioned cases containing more egregious fact patterns and less mitigation findings than present in Mr. Kossow's disciplinary case further illustrates the soundness of Mr. Kossow's contention that the Referee's disciplinary recommendation of a public reprimand struck the necessary and required balance of being fair to the public; fair to Mr. Kossow; and yet severe enough to deter others who might be prone or tempted to become entangled in a like violation.

Accordingly, Mr. Kossow urges this Court to approve the Referee's recommended discipline.

CONCLUSION

Based on the foregoing argument and authorities, Mr. Kossow urges this Court to approve the Referee's recommended disciplinary sanction of a public reprimand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Answer Brief have been furnished by U.S. Mail delivery to Lillian Archbold, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Ft. Lauderdale, FL 33309; and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 on this ____ day of September, 2004.

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

I HEREBY CERTIFY that this Answer Brief is submitted in 14-point, proportionately spaced, Times New Roman font; and that the accompanying computer disk has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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