IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	**)**	
	)	**Case No. SC03-1900**
Complainant-Appellant)		
	)	
v.	**)**	**The Florida Bar File**
	)	**No. 2002-51,006(17C)**
KENNETH D. KOSSOW,	**)**	
	)	
Respondent-Appellee.	**)**	
_____)		

THE FLORIDA BAR'S INITIAL BRIEF

LILLIAN ARCHBOLD, #163996
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, Suite 900
Fort Lauderdale, FL 33309
(954) 772-2245

JOHN A. BOGGS, #253847
Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5800

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PRELIMINARY STATEMENT

The Complainant, The Florida Bar, seeks review of the discipline recommended by the Referee below. The Bar asks this Court to substitute a suspension of ninety (90) days for the public reprimand recommended by the Referee.

The Bar will refer to the Report of Referee as RR, followed by a page reference. The transcript of the final hearing will be referred to as TT, followed by a page reference.

STATEMENT OF THE CASE AND FACTS

These proceedings were initiated as a result of a disciplinary complaint brought against the Respondent by The Florida Bar. Shortly before the Final Hearing in this cause, the Respondent admitted the charges brought against him in The Bar's complaint as evidenced by his Unconditional Guilty Plea. The Final Hearing was, in essence, a dispositional hearing to determine the disciplinary sanction to be imposed.

In the Report of Referee, the Referee recommended that the Respondent be found guilty of violating Rule 4-8.4 (c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct. RR 4. The Referee recommended that the Respondent be publicly reprimanded. The Referee made extensive findings of fact. Unfortunately, the Referee also made other statements clouding actual findings with those of conclusions or suppositions.

The Respondent was admitted to The Florida Bar in 1994. He was hired by the firm of Hunt, Cook, Riggs, Mehr & Miller, P.A. (hereinafter "the firm") in July of 2001 to work in their Corporate/Transactional Division for an annual salary of $135,000. At the time of hiring, the Respondent operated his own law practice, The Emergent Solutions Group (hereinafter "Emergent"). There is a factual dispute as to the firm's knowledge of the Respondent's continued outside law practice and the Respondent's disclosure of the existence of Emergent during his employ. For these reasons, the

unconditional guilty plea admits guilt from October 25, 2001 for his failure to disclose his outside work following receipt of the October 25, 2001, memorandum. The Respondent's conduct prior to the circulation of the firm's October 25, 2001 memorandum was not an issue that was presented to the Referee for consideration.

There is no dispute that on October 25, 2001, the firm circulated a memorandum to all partners and associates advising them that all attorneys "prepare a list of all matters in which you may be providing legal representation on a pro bono basis and/or representation of family or friends, or for any matters which have not been specifically set up as clients of the firm" RR 2. TT 11. The memorandum further advised that "i(n) accordance with the terms of your employment, you should not be providing legal services in any other capacity than as an employee of the firm" RR 2.

The memorandum was circulated in part due to the firm's concerns about the quality of the Respondent's work product, low billable hours, and unavailability. TT 15-16. The Respondent received a copy of this memorandum. The Referee found that "Respondent replied to the memo and furnished all the information that was requested" RR 2. In fact, the Respondent's testimony contradicts said finding . He testified , " . . . but I was actually a little more guilty of violating the rule, because I think I took on a new matter, a small one for Armstrong, an existing client, after

learning of the October 25, 2001, prohibition . . ." TT 79.

In November of 2001, based upon the Respondent's low billable hours and substandard work product, the firm transferred the Respondent to the firm's Estate Planning Division at a rate of pay of one hundred thousand dollars ($100,000) per year, resulting in a thirty five thousand dollar ($35,000) reduction in pay.

In November of 2001, the Respondent knowingly and wilfully continued to operate Emergent in contravention of the firm's policy. In his capacity as counsel for Emergent, the Respondent was contacted by a prospective client in Texas. The Respondent, on behalf of Emergent, and not as an employee of the firm, prepared a letter of engagement dated November 27, 2001, requesting a retainer of seven thousand five hundred dollars ($7,500) payable to Emergent to formally commence the representation. The Respondent did not inform anyone at the firm of this representation, nor did he initiate any efforts to open this client matter as a firm matter.

This client did execute a retainer agreement with Emergent and furnished the Respondent with the requested retainer check via a Federal Express package that was addressed to the Respondent at the firm's address. As part of the firm's mail distribution procedure, the package was opened. When the contents were reviewed and the Respondent's clandestine activities were uncovered, the principals of the firm confronted the Respondent as to whether he was engaging in a private law practice in

contravention of the firm's policy. The Respondent denied the existence of any outside matters until he was presented with the executed retainer agreement and seven thousand five hundred dollar ($7,500) retainer check payable to Emergent. It was only then that he confirmed that he was engaging in his private practice of law in derogation of the firm's policy. When asked by the firm to provide a list of the names of other clients for the purpose of conducting conflict checks, the Respondent refused. The Respondent was then terminated from the firm's employ.

The Respondent used firm resources in furtherance of his clandestine activities for the benefit of himself and Emergent, and to the detriment of the firm. The Respondent testified that he earned approximately eighteen thousand five hundred dollars ($18,500) in earned fees from clients of Emergent from October 25, 2001, through his termination in January of 2002. TT 69. The Respondent did not remit any of the eighteen thousand five hundred dollars ($18,500) in earned fees to the firm and instead retained these monies in their entirety for his own personal enrichment. These were monies that he should have remitted to the firm. Moreover, the Respondent did not offer to reimburse the firm any portion of the eighteen thousand five hundred dollars ($18,500), nor did he offer to reimburse the firm for any other monies or resources used for Emergent. TT 81.

The Referee accepted the Respondent's unconditional guilty plea and found him

guilty of violating R. Regulating Fla. Bar 4-8.4(c) and recommended that he receive a public reprimand.

SUMMARY OF ARGUMENT

In the Report of Referee dated May 3, 2004, the Referee concluded that Respondent Kenneth David Kossow receive a public reprimand. The Referee's

finding of a public reprimand is not consistent with or in keeping with existing case law for similar fraudulent conduct in which a respondent has misappropriated law firm fees. The cases with fact patterns similar to the Respondent's, such as The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986), The Florida Bar v. Cox, 655 So.2d 1122 (Fla. 1995), and The Florida Bar v. Arcia, 848 So.2d 296 (Fla. 2003), resulted in suspensions ranging from thirty (30) days to three (3) years. Accordingly, this Court should reject the recommendation of the Referee and impose a ninety (90) day suspension.

ARGUMENT

I. A SUSPENSION OF NINETY (90) DAYS, RATHER THAN THE PUBLIC REPRIMAND RECOMMENDED BY THE REFEREE, IS THE APPROPRIATE DISCIPLINE

FOR RESPONDENT'S CONDUCT IN THE CASE AT BAR.

The Bar urges this Court to follow its past decisions in similar cases and to reject the Referee's recommendation that the Respondent receive a public reprimand. The Bar argues that a ninety (90) day suspension is the appropriate sanction for his conduct. This Court has broad discretion in reviewing a Referee's recommended discipline, See, e.g., The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992).

The Respondent was an associate at the law firm of Hunt, Cook, Riggs, Mehr & Miller, P.A. (hereinafter "the firm"). During his employment with the firm, the Respondent diverted funds that should have been remitted to the firm. His conduct affected the firm adversely, not only through the loss of earned fees, but also through the use of firm's resources.

When he was confronted with questions regarding his activities, he was not candid with the firm. The Respondent was given a number of opportunities to admit his misconduct and chose to be evasive and continue his wrongful conduct. Specifically, the firm required him to respond in writing on October 25, 2001 to list all matters which he was handling for family members or on a pro bono basis. He provided an incomplete listing. When questioned again directly in January of 2002, he denied handling any outside matters other than those that he had already disclosed.

The Respondent did not offer to pay the firm any portion of the eighteen thousand five hundred dollars ($18,500) in fees earned as a result of his clandestine law practice. TT 80. All of this is substantiated by the record.

The Referee's conclusions as to the aggravating and mitigating factors are significant, including an almost grudging reluctance to find aggravation. The Referee simply found that the conduct was dishonest and selfish, and declined to find any other aggravating factors including harm to the victim, failure to make restitution and "waste" of firm resources. RR 5. The Referee determined that testimony provided by the witnesses of wasted resources consisting of the Respondent's e-mailing himself documents, the copying of treatises, and of talking to other associates about his cases did not establish a theft of firm resources. RR6. Most notably, the Referee refused to find that the eighteen thousand five hundred dollars ($18,500) earned by the Respondent while employed by the firm should have gone to the firm. RR 5. The Referee refused to find any theft of firm resources whatsoever. RR 6.

Perhaps the Referee's recommendation of discipline was the result of giving limited weight to important aggravating factors present in this case. In fact, the only aggravating factor was the finding that the Respondent's conduct was dishonest and selfish. The Referee did not accord harm to the victim, the firm. In the report, the Referee stated that the firm was hardly a "vulnerable" victim such as an

unsophisticated client. RR 6. The Referee determined that "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. . ." RR 6.

The Referee afforded substantial weight to the mitigating factors present in this case including the Respondent's age, relative inexperience in the practice of law, absence of a prior disciplinary record, cooperation during the disciplinary process, character and reputation, and remorse. In mitigation, the Referee also noted that Respondent's conduct has not resulted in any harm to any client of the firm or to any member of the public. RR 8.

In the closing remarks, the Referee stated:

> "And something that really I think became clear and obvious here today is that –I'm not sure that The Bar and the profession has been well served by the development of the practice of law at such a pace and at such a cost that we can no longer depend on our most experienced lawyers to mentor an apprentice or less experienced lawyers. I suppose there is no point hoping that we can go back in time. It can't happen. But it seems to me that there was once a time when everybody that went to law school had a similar education before they got there, and everybody that came out of law school had a similar and very extensive apprenticeship that was served under more experienced lawyers and members of the Bar after they came out. . . and just hearing all this makes me kind of pine a little bit, I guess, for those days when we could offer that to young lawyers. . ." TT 101-102.

This Court's past disciplinary sanctions for analogous conduct supports a

ninety (90) day suspension and is contrary to the public reprimand recommended by the Referee. The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986), The Florida Bar v. Cox, 655 So. 2d 1122 (Fla. 1995), and The Florida Bar v. Arcia, 848 So.2d 296 (Fla. 2003).

In Gillin, the attorney was suspended for six months for the mishandling of fees which a client paid directly to him, rather than to Gillen's firm. Gillen eventually made restitution to the firm in the amount of $25,000 in fees, resulting in no real damage to any party. The Referee considered Gillin's absence of prior disciplinary history, character and reputation, community involvement, and full restitution to the firm in reaching its sanction of a six month (6) suspension.

Unlike Gillin, the Respondent here has failed to remit funds to the firm or otherwise provide restitution in any form whatsoever. The testimony of Joseph Cook and Pamela Kaufman was indicative of the misuse and misappropriation of firm resources. The Respondent has not made restitution to the firm whatsoever for the eighteen thousand five hundred dollars ($18,500) that he earned and pocketed while receiving a generous salary from the firm. At the final hearing, the Respondent failed to acknowledge the misuse of firm resources.

> Q Did you offer to reimburse the firm for costs of copying? For any costs incurred as a result of your downloading of emails and forms?

A What costs are you referring to as far as downloading emails? There were no costs associated with downloading any email. TT 80.

In The Florida Bar v. Cox, this Court ordered a thirty (30) day suspension for the Respondent's "moonlighting" activities. Cox accepted cases without the knowledge and consent of the firm, violating the firm policy against unauthorized outside legal employment and kept some of those fees. Cox initially denied that he engaged in "moonlighting" while employed as an associate with the law firm, and initially denied the fact that he represented those outside clients and collected legal fees from them. The Court found Cox guilty of Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation for his performance of work for clients without the consent or authorization of the law firm and of attempting to conceal the representations. This Court specifically noted on page 1123 that:

> Although Cox's conduct may not have caused serious harm to the clients or the firm where he was employed, the facts reflect a pattern of intentional misconduct and deception which warrants serious punishment. Cox continued to engage in unauthorized legal employment even after he was specifically warned against it, and even more importantly, wilfully deceived the firm about his conduct.

In The Florida Bar v. Arcia, 848 So.2d 296 (Fla. 2003), this Court found Respondent Arcia guilty of conduct involving dishonesty, fraud, deceit or misrepresentation when he violated the firm's employment policy prohibiting

associates from independently representing the firm's clients or prospective clients and retaining the fees earned from said prohibited, clandestine representations for his own enrichment. Arcia generated approximately sixty two thousand dollars ($62,000) while operating his own professional association in contravention of firm policy requiring any fees earned to be submitted to the firm. The firm policy required that any fees generated or earned while employed by the firm must be payable to the firm. The Court found Arcia guilty of Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and of engaging in theft of firm funds. Arcia received a three (3) year suspension followed by a three (3) year period of probation with rehabilitative conditions instead of disbarment due largely in part to mitigating factors including remorse, inexperience in the practice of law, and timely restitution of the full amount diverted from the firm of approximately sixty two thousand dollars ($62,000).

While the facts giving rise to the Arcia case are distinguishable from the Respondent's case at bar, this Court made a very important distinction as to the misappropriation of firm and client funds.

> Conduct such as Arcia's (i.e.- an attorney stealing from a law firm) has been held to constitute grand theft. . .We conclude that, for purposes of attorney discipline, theft of firm funds is serious enough to warrant disbarment under most circumstances. While theft of client funds rends the fundamental bond between a lawyer and the client, theft of firm funds

> breaches the trust that law firms must place in their attorneys as professionals to act as representatives of the firm.

The Florida Standards for Imposing Lawyer Sanctions indicate that suspension is the appropriate sanction for the misconduct in this case. Standard 7.2 recites that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system.

It is clear that the Court utilizes a balancing test when determining the appropriateness of a sanction. Beginning with a presumption of suspension, as the Florida Standards for Imposing Lawyer Sanctions and case law suggest, mitigation is carefully measured and weighed.

In the instant case, the Referee considered the Respondent's absence of prior disciplinary history, inexperience in the practice of law, remorse, and good character and reputation as mitigating factors.

At the final hearing, the Bar informed the Referee that the standards proposed by the Supreme Court indicate that suspension is appropriate unless there is mitigation to consider. TT 87. The presumptive standard is suspension unless there is sufficient mitigation to lessen the discipline. The Referee was afforded the opportunity

to consider the mitigating factors presented, however the Bar contended that those factors were not sufficient to lessen the presumption of a suspension. TT87.

In the instant case, the Respondent has made no effort to effect restitution to the firm for the eighteen thousand five hundred dollars ($18,500) which should have been remitted in conformity with the firm's employment policy. By failing to do so, the Respondent has not fully acknowledged the harm caused by his misconduct or the resulting harm to the firm and the legal profession.

CONCLUSION

The Bar submits that this Court suspend the Respondent for ninety (90) days for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and for the misappropriation of firm funds and resources . The Referee's recommendation of a public reprimand is inconsistent with the case law and standards for imposing lawyer discipline. The examples that the Courts have set need to be upheld in this case and future cases.

Respectfully submitted,

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LILLIAN ARCHBOLD, # 163996
Bar Counsel, The Florida Bar
5900 North Andrews Avenue, Ste. 900
Fort Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was served by Regular U.S. Mail to upon Kenneth D. Kossow, c/o D. Culver Smith, III, Esq., 515 N. Flagler Drive, Ste. 401, West Palm Beach, Florida, 33401 this 21st day of July, 2004 and to Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300.

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LILLIAN ARCHBOLD

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

Undersigned counsel hereby certifies that the Initial Brief of The Florida Bar 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 AntiVirus for Windows.

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LILLIAN ARCHBOLD