IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

KENNETH DAVID KOSSOW,

Respondent-Appellee.
_____/

Case No. SC03-1900

The Florida Bar File
No. 2002-51,006(17C)

THE FLORIDA BAR'S REPLY BRIEF

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PRELIMINARY STATEMENT

Throughout this Reply Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR ___ (indicating the referenced page number). The transcript of the Final Hearing will be designated as TT___, (indicating the referenced page number).

THE FLORIDA BAR'S STATEMENT OF THE CASE AND OF THE FACTS

A. STATEMENT OF THE CASE

The Florida Bar will rely upon the Statement of the Case as previously set forth in its Initial Brief. The contents of same are based upon, and corroborated by, the pleadings and documentation contained in the record on appeal.

B. STATEMENT OF THE FACTS

The Florida Bar will rely upon the Statement of Facts previously set forth in its Initial Brief. The statement was based upon the record on appeal, including the Report of Referee and the testimony as set forth in the transcript of the Final Hearing, as well as all reasonable and logical inferences and deductions drawn as a product thereof.

The Respondent's presentation of the facts is somewhat accurate. However, some elaboration is required to provide a more complete and accurate reflection of the record.

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. The Respondent's unconditional guilty plea denotes a guilty plea to misconduct following the October 25, 2001, firm-wide memorandum. At various times during the testimony of Pamela Kaufman and Joseph Cook, Esq., the Respondent's trial counsel clarified for the record that the

testimony elicited be confined to the Respondent's post October 25, 2001, conduct. TT 5, 14, 80. Therefore, the findings contained in the Report of Referee concerning the Respondent's outside law practice (RR 2, 7) should also have been limited to the Respondent's post October 25, 2001, misconduct.

SUMMARY OF THE ARGUMENT

The Bar respectfully submits that based upon the evidence presented, the Referee should have recommended a suspension of ninety (90) days as an appropriate sanction for the Respondent's admitted violation of Rule 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation]. This argument was fully presented in the Bar's Initial Brief and will not be reargued here other than to point out that it is the Bar's position that the evidence presented to the Referee clearly and convincingly proved that the Respondent acted knowingly and with the requisite intent, and even with the existence of mitigating factors, warranted a more serious sanction.

ARGUMENT

A SUSPENSION OF AT LEAST NINETY (90) DAYS, RATHER THAN THE PUBLIC REPRIMAND RECOMMENDED BY THE REFEREE, IS THE APPROPRIATE DISCLIPLINE FOR RESPONDENT'S CONDUCT IN THE CASE AT BAR

The discipline in this case should be determined by reference to this Court's past decisions on misconduct similar to that at bar. This Court has stated on many occasions that it has broad discretion in reviewing a Referee's recommended discipline. See, e.g. The Florida Bar v. Poplack, 599 So. 2d 116 at 118 (Fla. 1992). A review of this Court's past decisions shows that the Referee's recommendation in this case is clearly off the mark and should not be adopted.

Respondents, Referees and counsel for the parties should be able to rely on precedent decided by this Court when considering the discipline that should be imposed for misconduct. For cases involving dishonesty, fraud, diversion of firm fees and misappropriation of firm resources, not involving misappropriation of trust funds, this Court has set down a range of discipline of a suspension from thirty (30) days to three (3) years. The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986); The Florida Bar v. Poplack, 599 So. 2d 116 (Fla 1992); The Florida Bar v. Cox, 655 So. 2d 1122 (Fla. 1995); and The Florida Bar v. Arcia, 848 So. 2d 296 (Fla. 2003).

The case of The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992), involved a violation of Rule 4-8.4(c). In Poplack, this Court upheld a thirty day

(30) suspension with an eighteen month (18) month period of probation as a sanction for a lie that was **not** related to Poplack's practice of law. The Court stated:

> We find it troubling when a member of the Bar is guilty of misrepresentation or dishonesty, both of which are synonymous for lying. Honesty and candor in dealing with others is part of the foundation upon which respect for the profession is based. The theme of honest dealing and truthfulness runs throughout the Rules Regulating The Florida Bar and The Florida Bar's Ideals and Goals of Professionalism. Poplack at 118.

In consideration of Aggravating and Mitigating factors, the Court noted Poplack's absence of a prior disciplinary history, personal or emotional problems resulting from a broken marriage, good character or reputation, and rehabilitation. The Court in Poplack, distinguished this case as one that did not involve an attempt to perpetrate a fraud on the court nor did it involve a false statement made under oath. However, after such consideration, the Court still upheld a suspension of thirty (30) days followed by an eighteen (18) month period of probation.

The Respondent asks this Court to ignore its past decisions in conduct involving dishonesty that, in this case is directly related to the Respondent's practice of law. The Referee found that Respondent's conduct did not harm any client of the firm or a member of the public. (RR 8) . The Bar contends that the Respondent arguably presented a lesser amount of mitigation than in Poplack.

In cases involving dishonesty and misrepresentation toward an employing law firm in connection with "moonlighting," this Court has upheld a Referee's recommendation of suspension. See The Florida Bar v. Cox. 655 So. 2d 1122 (Fla. 1995), in which Cox appealed the Referee's sanction of a thirty (30) day suspension, and unsuccessfully argued that a public reprimand would be an appropriate sanction.

Cox, as with the Respondent in the instant case, did not contest the allegations contained in The Bar's complaint, including accepting cases without the knowledge or consent of the firm, violating the firm policy against unauthorized outside legal employment, and denying said misconduct when confronted. Cox argued that his representation of his outside clients did not result in any conflicts of interest nor actual or potential injury to any client. In recommending a thirty (30) day suspension instead of a public reprimand, the Court found that:

> 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. Cox continued to engage in unauthorized legal employment even after he was specifically warned against it, and even more importantly, willfully deceived the firm about his conduct. Cox at 1123.

Similarly, the Referee found the Respondent guilty of violating Rule 4-8.4(c), pursuant to the Respondent's Unconditional Guilty Plea entered on April 13, 2004. RR 4. Moreover, the Referee found the following:

> After receiving the October 25, 2001, memo, and while continuing to work for the firm, the Respondent accepted some new business and represented clients for the benefit of his private law practice in violation of the firm policy stated in the October 25th memo. Respondent failed to disclose this outside work to the firm. RR 2, 2.

Thus, it would appear that the Referee in the instant case completely disregarded this Court's decision in Cox.

In The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986), the attorney was suspended for six (6) months for the mishandling of certain fees which a client paid directly to him, rather than to the law firm in which the attorney was a partner. Gillin, as a partner, contended his actions of having the client pay him directly would aid in resolving a dispute he had with the firm regarding the fee distribution formula. Gillin took twenty five thousand dollars ($25,000) in fees and eventually made restitution. The Referee found that no party suffered any real damage.

Once again, the Respondent in the instant case cannot even venture to make an argument to justify his receiving eighteen thousand five hundred dollars ($18,500) in fees from his outside law practice during the six (6) month period of his employment with Hunt, Cook, and not remitting same to the firm, or of his misuse of firm resources in furtherance of his outside practice. The Respondent as

an associate of only a few months with the firm cannot claim any entitlement or right to same.

On pages 14 and 15 of The Respondent's Answer Brief, the Respondent trivializes the three (3) page transcribed testimony of Joseph Cook, Esq., about the misuse of firm resources and misappropriation of fees, referring to it as "sketchy and vague"

> The Witness: What he did is he systematically over six months, day in and day out, misrepresented. He took over 5,000 from us. He e-mailed to himself. He set up his own law firm, and used all our own documents to do it. He set up his office in two separate offices, so you could not see the screen on his computer. I remember the one office, the furniture in it was so oddly configured. But the second office, it was the most peculiar configuration for furniture, and nobody would have configured it that way, unless they had a reason to place their computer in such a way so you couldn't see the screen. He had 1,500 emails with 5,000 attachments. That in six months. That takes a lot of time. And so that is how he was spending his time as he was doing this stuff, so there was a significant amount of outrage about how we had been – how we had been deceived, and how he had conducted himself." (TT 33-34.)
>
> The Witness: And the same thing with the associates. The associates who spent hours of time discussing with him files and legal concepts that basically he was using for his outside things. They would talk about it and say, they can't believe that they were used that way." (TT 36).
>
> Q: "Have you been able to quantify the monetary loss that the firm has incurred as a result of Mr. Kossow's conduct?"
>
> The Witness: "I would say it has been quantified to about – he had 75 hours. He was supposed to do a minimum of 150 hours. It is 50 percent of the salary that we paid him, and it would be the use – it

> would be the use of the administrative personnel for hours and hours and hours, copying the books for his library that he had us just copy, the treatises that he would use for his home library, and then the wasting of the additional time that associates consulted – he consulted with the associates in the firm, or they were giving him tips on how to handle those outside cases." (TT 36-37).

The Respondent admitted that he was aware of the firm's policy contained within the October 25, 2001, memorandum, and actively continued his clandestine activities to the detriment of the firm.

The Florida Bar v. Arcia, the most recent and seminal of the cases cited involving dishonesty and misappropriation of firm funds, was discussed in two sentences, on pages 17 and 18 of the Respondent's Answer Brief. In its Initial Brief, the Bar explained the significance of Arcia for cases involving dishonesty and misappropriation of firm fees and resources. To argue the significance of Arcia further herein, as the Bar did before the Referee at the Final Hearing and in its Reply Brief, would be to unduly belabor a point that is spread indelibly throughout the record and existing case law.

CONCLUSION

The Respondent entered an Unconditional Guilty Plea to a violation of Rule 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]. This Court's past decisions mandate a suspension as an appropriate sanction. The Referee's recommendation that the Respondent should be publicly reprimanded should not be accepted by this Court. Accordingly, the Bar respectfully submits that this Court should enhance the sanction to at least a ninety (90) day suspension and affirm the costs awarded to the Bar by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply Brief have been furnished via U.S. mail to Chandler R. Muller, Counsel for Respondent, Muller & Sommerville, P.A., 1150 Louisiana Avenue, Suite 2, P.O. Box 2128, Winter Park, Florida 32790-2128; David A. Henson, Counsel for Respondent, 4 West Main Street, Ste. 9, Brevard, North Carolina, 28712; and to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this ____ day of October, 2004.

_____
LILLIAN ARCHBOLD

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

Undersigned counsel hereby certifies that the Reply Brief of the Florida Bar is submitted in 14 point, proportionately spaced, Times New Roman font, and that the computer disk filed with this Reply Brief has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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LILLIAN ARCHBOLD