IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL HOWARD WOLF,

Respondent.
_____/

Supreme Court Case No. SC04-1374

The Florida Bar File No. 2002-51,204(17G)

THE FLORIDA BAR'S ANSWER BRIEF

MICHAEL DAVID SOIFER, #545856
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, Suite 900
Fort Lauderdale, FL 33309
(954) 772-2245

JOHN ANTHONY BOGGS, #253847
Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR., #123390
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules Regulating The Florida Bar

Florida Standards for Imposing Lawyer Sanctions

PRELIMINARY STATEMENT

Throughout this Answer 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 held on February 1, 2005, will be designated as TT ___, (indicating the referenced page number). The Appendix attached to this brief will be designated as A ___ (indicating the referenced page number). The Florida Bar will be refereed to as "the Bar." Michael Howard Wolf will be referred to as "respondent".

STATEMENT OF THE CASE AND FACTS

In the interest of accuracy, and to ensure the record is complete, The Florida Bar offers the following supplement to respondent's statement of the case and facts.

The referee found in Count I of the complaint that respondent misappropriated client monies, thereby violating Rules 4-1.15(b); 4-1.15(d); 5-1.1(a); 4-1.15(a); 5-1.1(d) and 5-1.1(e)(2) (RR 6). The referee found in Count II that respondent commingled his monies with those of his clients, and in Count III that respondent failed to keep proper record keeping procedures for trust accounts (RR 7). As set forth in Count I, respondent represented the complainant, Viki McLaughlin in a personal injury case which settled for the amount of $10,000.00. On or about October 9, 2001, Respondent deposited the $10,000.00 settlement check into his operating account instead of his trust account (RR 2; TT 39-40; A 1-5). Prior to the deposit of the settlement check, the operating account had a negative balance of -$732.34 (TT 38; A 1-3). Accordingly, only $9,267.66 of the settlement proceeds were credited to respondent's bank account. Without McLaughlin's authorization, respondent had used the $732.34, which created the said deficit, for his personal health insurance, monthly banking fees and a transfer of funds to his personal checking account (TT 41). The remaining McLaughlin settlement proceeds which were deposited into his operating account were applied as follows:

On October 10, 2001, $500.00 was transferred to respondent's personal bank account, and respondent wrote a check to his firm for $2,000 (TT 42; A 1-3). On October 12, 2001, $1,000.00 was transferred to respondent's personal bank account (TT

44; A 1-3). On October 15, 2001, the following occurred: a $5.00 bank charge was debited from the account, respondent wrote a check in the amount of $396.00 to City National, for which he had no specific recollection but believed was possibly used for business taxes, and a preauthorized withdraw was made in the amount of $10.93 for respondent's membership fee to Itex Corporation (TT 44-45; A 1-3). On October 16, 2001, a check in the amount of $2,000, made payable to McLaughlin's doctor cleared from his operating account. This was the only payment made by respondent up to this point that was related to the McLaughlin case (TT 45).

According to the Settlement Statement executed by Ms. McLaughlin, McLaughlin's share of the settlement proceeds was $4,624.20. Respondent was authorized to receive an attorney's fee of $3,330.00 plus reimbursement of advanced costs in the amount of $45.80 for a total of $3375.80 (TT 47; A 6-7). Respondent actually used $4,644.27, for the aforesaid expenditures that were unrelated to the McLaughlin case (TT 50-51). When he wrote the proceeds check to McLaughlin in the amount of $4,624.20, there was only $3,355.73 in his checking account, which was insufficient to cover the check (TT 52-53). Respondent assumed the bank would honor the check and charge respondent an overdraft fee (RR 4; TT 53). However, the bank refused to honor the check and thereafter, respondent gave the proceeds to McLaughlin in cash.

Respondent's operating account, in which he deposited client trust funds, was consistently overdrawn and had shortages on numerous dates (RR 4; TT 29).

Respondent relied on his bank to pay his checks even when there were insufficient funds in his account (RR 4; TT 29). Respondent wrote settlement checks to his clients without verifying if there were sufficient funds in his account because he believed his bank would honor the checks even if there were insufficient funds (TT 52-53, 65-78). The referee in her report held that although there was not a loss to the client, the incident with Ms. McLaughlin was not an isolated incident (RR 8). Respondent admits that this occurred on six distinct occasions during 2001 and 2002 (Respondent's Initial Brief, page 8). Furthermore, respondent committed the bad accounting practices while a prior problem with the Bar was being addressed (RR 8). In prior Bar Discipline (Case Number SC00-1521), respondent was sanctioned with a public reprimand and probation for violating several Rules Regulating The Florida Bar arising out of respondent's plea agreements in 2 criminal proceedings. As probation, respondent was ordered to enter into a Florida Lawyers Assistance contract, continue his psychological treatment and attend regular meetings of Gambler's Anonymous. Respondent testified that he was going into his second year of treatment in the beginning of 2001, the year most of the incidents in the instant matter occurred (TT 143-144; A 17-26).

With respect to the five other incidents, separate from the McLaughlin matter, where client funds to be held in trust were deposited into respondent's operating account:

1. On July 12, 2001, a check in the amount of $10,000.00 was deposited into respondent's operating account. This $10,000.00 was the proceeds of a settlement of an uninsured motorist claim on behalf of respondent's clients Errol and Tanya Mitchell, and

should have been deposited in respondent's trust account (TT 62-64). Prior to the deposit of the Mitchell funds, respondent's operating account had a balance of $27.43 (TT 65; A 8-10). Mitchell's share of the settlement proceeds was $6,524.20, and the proceeds check was written on July 27, 2001 (TT 65-66). However, on July 25, 2001, the balance in respondent's account was only $1,048.58 (TT 76). The account balance had been reduced as follows: After the Mitchell funds were deposited, Respondent wrote a check to his law firm in the amount of $3,500.00, which cleared his account on July 16, 2001, and wrote another check on July 12, 2001, for $2,000 as the settlement proceeds to an unrelated client, Rose Henderson (TT 66-69; A 8-10). On July 19, $2,000.00 was transferred to respondent's personal checking account. On July 20, 2001, a check in the amount of $478.85 was paid to the Southern District Court for a matter unrelated to the Mitchell case, and on July 19, 2001, respondent wrote a check for $1,000.00 to the Internal Revenue Service for payment of taxes unrelated to the Mitchell case (TT 73-74; A 8-10). Respondent deposited $4,500.00 to his account on July 26, 2001, but was still short in the account by $975.62 to cover the Mitchell check (TT 77-78; A 8-10). The bank statement (A 8-10) shows that respondent was charged an overdraft fee for the proceeds check that was tendered to Mitchell.

2. On November 16, 2001, a check from respondent's operating account was written to client Ray Swift in the amount of $4,200.00 as proceeds from a settlement in a Workers' Compensation case (TT 78-79). The day before, on November 15, 2001, the balance in respondent's account was only $4,085.66. The next day when the check was

written, $3,700.00 had been transferred from respondent's operating account to his personal account, leaving a balance in the operating account of only $385.66 (TT80).

3. On February 6, 2001, a check in the amount of $2,800.00 was deposited into respondent's operating account. The $2,800.00 was the settlement proceeds of a bodily injury claim on behalf of respondent's client Marc Raphael, and should have been deposited in respondent's trust account. When respondent deposited that settlement check into his operating account, his account had a negative balance of $17,620.13. The Raphael funds were applied to reduce the negative bank balance, to $14,820.13 (TT 93-95; A 11-14).

4. On March 7, 2001, a check in the amount of $9,000.00 was deposited into respondent's operating account. The $9,000.00 was the settlement proceeds of a personal injury claim on behalf of respondent's clients Harry and Shirley Slovin, and should have been deposited in respondent's trust account. When respondent deposited that settlement check into his operating account, his account had a negative balance of $19,424.96, and the Slovin funds were applied to reduce the negative bank balance to $10,424.96 (TT 96-99; A 15-16).

5. On January 18, 2002, a check in the amount of $11,747.80 was deposited into respondent's operating account. The check was made payable to respondent and his client Alice Roche and should have been deposited in respondent's trust account (TT 100-101).

Respondent asserts in the Statement of the Case and Facts in his initial brief (page 5) that the referee clearly found that respondent's misuse of client funds was unintentional. However, in addressing the issue of intent, the Referee stated the following in the Referee's Report, in pertinent part:

"Case law supports the imposition of suspension under these circumstances The Florida Bar v. Mason, 826 So.2d 985 (Fla. 2002). The key here is the malicious intent element. The evidence is clear and convincing that Mr. Wolf violated the Rules Regulating The Florida Bar, however he did so without the requisite intent" (RR 7).

The Referee's Report further states in pertinent part:

"A 'bad case' of commingling personal and trust account funds is not theft. "Sloppy accounting procedures is not theft." The Florida Bar v. Simring, 612 So.2d 561 (Fla. 1993). Transferring money from a trust account to cover operating account shortages warrants a suspension not disbarment where there is not an intentional attempt to steal from clients and there was no monetary loss to them. The Florida Bar v. Anderson, 395 So 2d 551 (Fla. 1981)." (RR 8).

Thus, it is submitted the referee actually found that respondent did not have a "malicious" intent to steal from clients in misappropriating client funds such as to warrant disbarment, but found respondent's conduct egregious enough to warrant a 3-year rehabilitative suspension and require a retaking of the ethics portion of the Florida Bar examination. (RR 7-8).

SUMMARY OF THE ARGUMENT

Respondent in this case was found to have misappropriated client trust funds, and he has admitted to depositing client trust funds into his operating account, thereby subjecting his operating account to the trust accounting rules. Moreover, respondent admitted he violated the rules cited in the Bar's complaint. The referee found that respondent misappropriated client monies and commingled his monies with those of his clients, but did not intend to steal client funds. Respondent's operating account was consistently overdrawn and he knew client trust funds were deposited into his operating account on more than a few occassions. Respondent relied on the overdraft protections provided by his bank to cover the shortages in his account. However, one of respondent's clients complained to the Bar because the bank did not honor a check respondent gave her.

This Court has held a bar disciplinary action must serve 3 purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct. Furthermore, the discipline must have a reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The recommendation by the referee in this case adheres to the purposes of lawyer discipline. In addition, existing case law dictates that an attorney who misappropriates client trust funds, when such misappropriation is not willful or intentional, should receive a rehabilitative suspension. Given respondent's conduct, the discipline given in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee in this case

properly recommended a 3-year suspension and the requirement that he retake and pass the ethics portion of the Florida bar examination when applying for reinstatement.

ARGUMENT

I. RESPONDENT'S MISAPPROPRIATION AND COMMINGLING OF CLIENT TRUST FUNDS, AND OTHER TRUST ACCOUNT VIOLATIONS WARRANT THE 3-YEAR SUSPENSION RECOMMENDED BY THE REFEREE.

While a referee's findings of fact should be upheld unless clearly erroneous, or without support in the record, this Court is not bound by the referee's recommendations in determining the appropriate level of discipline. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994). Furthermore, this Court has stated the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. The Florida Bar v. Grief, 701 So.2d 555 (Fla. 1997); The Florida Bar v. Wilson, 643 So.2d 1063 (Fla. 1994). In The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), this Court held 3 purposes must be in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter others attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. The Florida Bar v. Sweeney, 730 So.2d 1269 (Fla. 1998); The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997). In the instant case, the referee's recommendation of a 3-year suspension is supported by existing case law

and the Florida Standards for Imposing Lawyer Sanctions while conforming to the purposes of lawyer discipline.

The Referee found that, along with several other violations of trust accounting rules, respondent misappropriated client monies and commingled his monies with those of his clients (RR 6-7). This Court has stated the misuse of client funds is unquestionably one of the most serious offenses a lawyer can commit with disbarment the appropriate sanction. The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). However, this Court has held a lengthy rehabilitative suspension is appropriate discipline when an attorney does not willfully or intentionally misappropriate funds for personal use but was grossly negligent in the management of his trust account. The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988) [3-year suspension]; The Florida Bar v. Mason, 826 So.2d 985 (Fla. 2002) [2-year suspension].

In addressing the issue of intent, the Referee stated the following in the Referee's Report, in pertinent part:

"Case law supports the imposition of suspension under these circumstances The Florida Bar v. Mason, 826 So.2d 985 (Fla. 2002). The key here is the malicious intent element. The evidence is clear and convincing that Mr. Wolf violated the Rules Regulating The Florida Bar, however he did so without the requisite intent" (RR 7).

The Referee's Report further states in pertinent part:

"A 'bad case' of commingling personal and trust account funds is not theft. "Sloppy accounting procedures is not theft. The Florida Bar v. Simring, 612 So.2d 561

(Fla. 1993). Transferring money from a trust account to cover operating account shortages warrants a suspension not disbarment where there is not an intentional attempt to steal from clients and there was no monetary loss to them. The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981)" (RR 8).

Thus, it is submitted the referee found that respondent did not have a "malicious" intent to steal from clients in misappropriating client funds such as to warrant disbarment, but found respondent's conduct egregious enough to warrant a 3-year rehabilitative suspension and require a retaking of the ethics portion of the Florida Bar examination (RR 7-8).

The Referee's Report found support for the imposition of the instant suspension in The Florida Bar v. Mason, 826 So.2d 985 (Fla. 2002). In that case, an attorney represented a client in a claim for damages against the manufacturer of breast implants. The attorney settled the claim for $50,000, which was paid in 3 installments of $5,000, $22,500, and $22,500. From the first installment, the attorney withheld $2,264.54 in fees and costs and disbursed the rest to the client. The attorney withheld $10,100 in fees and costs from the second installment and forwarded the remainder to the client. Then, the attorney sent the client 2 checks for $500 and $4,750, which represented a refund of attorney's fees. The attorney withheld $5,062.50 from the third installment and forwarded the remainder to the client. The client returned the check to the attorney and filed a complaint with the Bar. Mason advised the Bar that the client's settlement proceeds were in her trust account. The Bar conducted an audit of the attorney's trust account and

discovered a shortage of funds owed to that client in the amount of $2,893.23, and a total shortage of at least $37,987.88. From January 1, 1996 through July 31, 1998, the attorney made 82 transfers from her trust account to her operating account totaling $252,000 without reference to client or matter. The 82 transfers created shortages in the attorney's trust account. The referee found 2 aggravating factors and 6 mitigating factors applicable. There was no evidence her clients ultimately sustained any loss. This Court approved the referee's recommendation of a 2-year suspension.

This Court held Mason was clearly distinguishable from the more egregious misappropriation cases, which would warrant disbarment, because the attorney's errors were due to mistakes in accounting practices and she was not attempting intentionally to steal from her clients. In the instant case, it is submitted that the referee's finding that respondent committed the misappropriation without the requisite "malicious intent" was a direct reference to this holding in Mason (RR 7).

The referee also cited The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981) as the basis for finding that a suspension, and not disbarment, is appropriate when there is not an intentional attempt to steal from clients and there was no monetary loss to them (RR 8). In Anderson, the respondent was given a 2-year suspension for misappropriating trust funds of clients, failing to keep adequate trust account records and issuing checks for which sufficient funds were not available. It was determined that respondent had no criminal intent, the misappropriated funds were reimbursed, and no client was ultimately financially deprived.

In The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988), an attorney was on probation and failed to submit his quarterly reconciliations. The Bar performed an audit of his trust account, which revealed overdrafts, checks returned for insufficient funds, mathematical errors on client ledger cards, a lack of monthly reconciliations, and commingling of his personal funds in his client trust account. The attorney also had a shortage in his trust account. However, none of the attorney's clients complained to the Bar. The attorney admitted all of the allegations and the referee recommended a 3-year suspension, restitution, and the attorney not be allowed to have a trust account once reinstated to the Bar. This Court held there was gross negligence in the management of the attorney's trust account, but no willful misappropriation of funds by the attorney. Therefore, this Court held the attorney's misconduct did not warrant disbarment and found it significant that no client demanded money and 3 of the attorney's clients testified on his behalf at the final hearing. This Court also noted, in approving the referee's recommended discipline of a 3-year suspension, that the attorney pled guilty to the charges and cooperated with the Bar.

In the instant case, respondent, like the attorneys in Mason and Whigham, was, at the very least, grossly negligent in the management of his operating account, where he deposited client trust funds. Respondent subjected his operating account to the rules regulating trust accounts by depositing client trust funds into the account. Furthermore, respondent deposited client trust funds into his operating account on 6 occasions. Respondent testified that he was aware of each of these deposits at some point in time,

either prior to or at the time the proceeds check was issued to the client and he took no steps to rectify the accounting and transfer the funds to his trust account (TT56-62). Respondent relied on his bank to pay checks when there were insufficient funds in his account (TT53). Respondent's account was overdrawn so often he referred to the telephone calls from his banker informing him his account was overdrawn as his 7:30 a.m. wake-up call (TT56-57).

Similar to this respondent, the attorneys in Mason and Whigham were not employing proper trust accounting procedures thereby causing the shortages in their trust accounts. Unlike the case at bar, the attorney in Whigham did not have a client submit a complaint to the Bar and in fact, 3 clients testified on the attorney's behalf at the final hearing. The complainant in this case specifically complained to the Bar about the incident.

The referee in this case found 1 less mitigating factor and 2 more aggravating factors than that found by the referee in Mason. The attorney in Whigham received a 3-year suspension and the attorney in Mason received a 2-year suspension. There is no doubt this respondent's misconduct merits a rehabilitative suspension. The cases of Whigham and Mason provide guidelines for the length of the applicable rehabilitative suspension in this case. Given respondent's egregious conduct in this case, the referee was proper in recommending a 3-year suspension. The referee's recommendation in this case falls well within the discipline this Court has given other attorney's for similar misconduct.

In The Florida Bar v. Corces, 639 So.2d 604 (Fla. 1994), an attorney debited a client trust account for $6,755.83 and used the client funds to pay personal bills. The attorney began to repay the money approximately 2 months later and was able to repay the money in 20 months. The attorney admitted his guilt to several of the alleged violations, but denied the personal use of the client trust funds was intentional. The referee held the attorney's conduct was intentional, but found the mitigating factors rebutted the presumption that disbarment was the appropriate sanction. The referee recommended a 1-year suspension. This Court held that although the attorney was found guilty of intentionally misappropriating client trust funds, he had been cooperative and restitution of the client trust funds had occurred prior to the Bar's investigation. Moreover, there had been no client injury or client complaint and the incident was isolated. The mitigation rebutted the presumption that disbarment was the appropriate sanction. In contrast to Corces, the instant respondent did have a client complain and the shortage in his account was not an isolated incident. Respondent continually had shortages in his account and more than a few times, deposited client trust funds into his operating account. In Corces, this Court rejected the referee's recommendation of a 1-year suspension and held a 2-year suspension was more appropriate because a 1-year suspension was insufficient to deter other attorneys from engaging in similar conduct or protect the public.

The Florida Standards for Imposing Lawyer Sanctions Standard 4.1 deals with the proper sanctions for an attorney failing to preserve client property. Standard 4.12 suggests suspension is the appropriate discipline when a lawyer knows or should know

that he or she is dealing improperly with client property and causes injury or potential injury to a client. In this case, the referee found respondent misappropriated his client's trust funds and commingled his personal funds with client monies. Therefore, a suspension is the appropriate discipline in this case. The existing case law also suggests the suspension warranted for respondent's misconduct is a rehabilitative suspension as opposed to a short-term suspension, which does not require proof of rehabilitation for reinstatement.

When considering the discipline delineated in The Florida Standards for Imposing Lawyer Sanctions, any applicable mitigating or aggravating factor must be considered. The referee in the instant case found in mitigation respondent's personal or emotional problems, timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to the disciplinary board or cooperative attitude toward proceedings, unreasonable delay not caused by the respondent and demonstrated prejudice in the delay, and interim rehabilitation. In aggravation, the referee found prior discipline, dishonest or selfish motive, a pattern of misconduct, and respondent's substantial experience in the practice of law. Based on existing case law and the Florida Standards for Imposing Lawyer Sanctions, the appropriate discipline for respondent's misconduct in this case is a rehabilitative suspension.

Respondent knew his account was consistently overdrawn and client trust funds were deposited into his operating account, but he failed to address the problems properly and he committed the bad accounting practices while addressing a prior problem with the

Bar. Respondent's pattern of allowing his operating account to operate consistently with a shortage and the depositing of client trust funds into his operating account demonstrate the appalling nature of his misconduct and the dangerous manner in which he handled those client trust funds.

Existing case law and the Florida Standards for Imposing Lawyer Sanctions support the referee's recommendation. Considering the cases cited above and the mitigation and aggravation the referee found in this case, the proper length for respondent's rehabilitative suspension is 3 years. This Court should approve the referee's recommendation of a 3-year suspension and approve the referee's report in this case.

CONCLUSION

This Court should approve the referee's report in this case and respondent should be suspended for a period of 3 years and be required to obtain a passing score on the ethics portion of the Florida Bar Exam, in the event the respondent petitions for reinstatement, because the referee's recommendation as to discipline is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions, while conforming to the purposes of lawyer discipline.

Respectfully submitted,

MICHAEL DAVID SOIFER, #545856
Bar Counsel
The Florida Bar
Cypress Financial Center
5900 N. Andrews Avenue, Suite 900
Ft. Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY true and correct copies of The Florida Bar's Answer Brief have been furnished by regular U.S. mail to Kevin P. Tynan, co-counsel for respondent, 8142 North University Drive, Tamarac, Florida 33321 and to Staff Counsel, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 on this _____ day of _____, 2005.

_____
MICHAEL DAVID SOIFER

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

Undersigned counsel hereby certifies The Florida Bar's Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

_____
MICHAEL DAVID SOIFER