IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MICHAEL HOWARD WOLF,

Respondent.
_____/

Supreme Court Case
No. SC04-1374

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

RESPONDENT'S REPLY BRIEF

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Michael Howard Wolf, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

SUMMARY OF THE ARGUMENT

During 2001 and 2002 the Respondent's staff mistakenly deposited six distinct checks into his operating account that should have been deposited into his trust account. While deposited in the operating account portions of these monies were negligently used for purposes other than their entrustment. All clients received their portion of these checks prior to intervention by the Bar. While employee error is at the root of the problem, the Respondent has accepted full responsibility for these mistakes.

The Referee has recommended that a three year suspension should be handed down by the Court. This recommendation is completely out of line with existing case law and precedent. While a suspension is warranted for the matters at hand, that suspension should be more carefully tailored to fit the severity of the errors in this case. It is respectfully submitted that a thirty day suspension, coupled with three years of trust accounting probation is a more appropriate sanction under the facts of this case.

ARGUMENT

I. A THREE YEAR SUSPENSION FROM THE PRACTICE OF LAW IS AN INAPPROPRIATE SANCTION FOR A LAWYER WHO UNINTENTIONALLY PLACES CLIENT MONIES INTO HIS OPERATING ACCOUNT, RATHER THAN HIS TRUST ACCOUNT.

The only issue on appeal is the appropriateness of the sanction being recommended by the Referee. In this case it is agreed (or at least not disputed by the Bar on appeal) that the Respondent, on six occasions during 2001 and 2002, mistakenly deposited client trust funds into his firm's operating account.[1] It was also admitted by the Respondent that at times portions of these trust monies were negligently used for purposes other than their entrustment. The Referee found the Respondent had unintentionally applied client monies for purposes other than their entrustment and found him guilty of various trust account rule violations. RR4 & 7. It is the Respondent's position that the appropriate sanction for the Respondent's misconduct is a thirty day suspension from the practice of law, coupled with three

[1] While the testimony at trial was that his nonlawyer staff made his bank deposits, the Respondent continues to acknowledge that he is ultimately responsible for the handling of trust monies in his law firm. RR4. It is also important to note that these settlement deposits included money that not only belonged to the client, but also included attorneys' fees and costs that were due and owing to the Respondent on that particular case. For example the McLaughlin deposit included $3,330.00 in legal fees and $45.80 in costs. TT 47. Also see the settlement statement introduced at trial as TFB Exhibit 3. Giving appropriate credit for these fees and costs, the Respondent did not convert McLaughlin's settlement monies on the day they were deposited, as alleged by the Bar in its brief, but did use at least $1,268.47 of her money for no more than seven days.

years of trust accounting probation and that the Referee's recommendation of a three year suspension is excessive under the facts of this case.

This Court has consistently held that there is a distinction between the negligent handling of trust funds and the intentional conversion of client funds. Compare The Florida Bar v. Schiller, 537 So. 2d 992 (Fla. 1989) [Disbarment presumed for intentional theft]; The Florida Bar v. Weiss, 585 So.2d 1051, 1053 (Fla. 1991) [Six month suspension for negligent mishandling of trust account]. Notwithstanding this longstanding differentiation, the Bar in its brief tries to blur the distinction between these two lines of cases to support its position that a long term suspension is warranted in this case. However, a closer look at the Bar's precedent reveals that these cases are not similar to the case sub judice. For example, the Bar relies on The Florida Bar v. Mason, 826 So. 2d 985 (Fla. 2002). In Mason the lawyer was found guilty of intentionally transferring trust funds to her operating account to cover deficits in her operating account. Id., 986-987. In fact there were eighty two such transfers over a year and a half period of time. Id. The Bar, in its brief, points out that in approximately the same time frame that was audited in both cases,[2] there were six misdirected deposits in the matter at hand. Further, the Referee and the Court found that Mason had intentionally moved money from his trust account to his operating account knowing that it was being

[2] Two years in Mason and four months shy of two years in this case. RR at 2; Mason at 986.

misused or misapplied to his own purposes and not those of his clients. In this case the Referee has made a specific finding, unchallenged by the Bar, that his actions were unintentional. Thus, the two year suspension meted out in Mason for serious misconduct does not appear to apply to the facts of this particular case.

Likewise in the Anderson opinion, cited by the Bar, the Court found that the lawyer "knew what she was doing and did for a period of time as alleged in the complaint deliberately and willfully disregarded her fiduciary responsibility" to her clients and their money.[3] The Florida Bar v. Anderson, 395 So. 2d 551 (Fla. 1981). Unfortunately, the opinion is devoid of a detailed discussion of the misconduct of the exact facts, but the indication that the misconduct occurred "for a period of time" is clearly distinguishable to the six isolated deposits in this case. Id. The lawyer in Anderson received a two year suspension which is less than the three years recommended by the Referee herein.

The Bar does cite to one case that is a negligent use of trust funds and has a three year suspension ordered by the Court. The Florida Bar v. Whigham 525 So. 2d 873 (Fla. 1988). However, the Court explained that Whigham was a case of grossly negligent handling of the trust account. Id. at 874. While the Court did not discuss the range of shortages that were found, it did note that over the two year

[3] The Bar, at page 15 of its brief, pointed out that the Anderson Referee did not find any "criminal intent," but the remainder of the opinion makes it clear that the acts were "deliberate and willful." Anderson at 551.

period that the trust account was audited there were multiple overdrafts and NSF checks and that all of this occurred while on trust accounting probation. Id. at 873.[4] A subsequent disciplinary order distinguished Whigham by noting that the three year suspension in that case was for "gross negligence in the management of his trust account." The Florida Bar v. Adler, 589 So. 2d 899, 901 (Fla. 1991). The lawyer in Adler received an eighteen month suspension for negligently handling his trust account. It appears that the length of the suspension was increased to eighteen months due to a significant prior disciplinary record.[5] The Respondent herein has a prior public reprimand for matters not related to his trust account and not a suspension. Accordingly, the Adler eighteen month suspension is sterner than that needed in this case.

The Bar urges this Court to impose a rehabilitative suspension but fails to justify the need for same. Presumably, the Bar does not believe that the Respondent is currently rehabilitated. However, the Referee disagreed as she found interim rehabilitation as a mitigating factor. RR 7. She based this finding on the fact that the activity in question occurred almost four years ago and since

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[4] Whigham received a public reprimand coupled with trust accounting probation in 1985 for the negligent handling of his trust account. Obviously not having learned his lesson because he had similar violations in both cases, this second case resulted in a sterner sanction. Id. at 873.

[5] Adler was suspended for 90 days for fraudulently backdating documents. Id. at 900.

that time the respondent has continued with a course of psychotherapy but more importantly he "has taken steps to improve his accounting procedures and improved his employee oversight." RR 7. The Referee also noted that the Respondent attended the Bar's trust accounting workshop, post the events in question, and was looking into technology as a way of improving his book keeping practices. RR 6. The Respondent has taken affirmative steps to be rehabilitated and a rehabilitative suspension is not warranted under the circumstances of this case.

CONCLUSION

The Respondent in this case admitted that on six distinct occasions monies that should have been deposited into his trust account were mistakenly deposited into his operating account and that some portion of these deposits were not initially used for their intended entrustment. While lawyers have been publicly reprimanded for this type of misconduct, others have been suspended for various lengths of time depending on the severity of the trust accounting errors. The majority of the cases cited by the Bar are for a systematic and continuing pattern of the negligent or intentional handling of trust monies. The case herein concerns a very focused error that was repeated on six occasions with all clients being fully reimbursed prior to any action by the Bar.

A careful review of the appropriate precedent leads to the conclusion that a thirty day suspension, coupled with three years of trust accounting probation is a more appropriate sanction under the facts of this case.

WHEREFORE the Respondent, Michael Howard Wolf, respectfully requests that the Court reject the Referee's sanction recommendation and instead impose a thirty day suspension from the practice of law, coupled with an appropriate three year term of trust accounting probation and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 710822

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via hand delivery on this ____ day of August, 2005 to Michael David Soifer, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale,

FL 33309 and via U.S. mail to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief 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 McAfee.

_____

KEVIN P. TYNAN