IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JERRY ARTHUR RIGGS, SR.,

Respondent.
_____/

Case No. SC05-973

The Florida Bar File
No.2004-51,307 (17B)

RESPONDENT'S 2nd AMENDED INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Jerry Arthur Riggs, Sr., 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. The symbol "TTES" will be used to refer to the transcript of the final hearing held in the related emergency suspension case. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF CASE AND FACTS

In February of 2004, Rafael Suncar complained to the Respondent that a problem had arisen over whether or not a mortgage had been satisfied from his October 31, 2003 closing. TTES 22-23. The Respondent immediately traveled to his satellite office where his real estate transactions were performed and discussed the matter with Tammy Campbell, his real estate paralegal. TTES 23. Campbell initially informed the Respondent that the Suncar's mortgage was satisfied by a check but when the Respondent informed her that he could locate no such check, Campbell then stated it must have been a wire transfer and that she would look for the wire receipt. TTES 22-23. Rather than look for the wire receipt, she gathered up her belongings, fled the office without informing the Respondent and began looking to retain a criminal defense attorney. TTES 24-25.

At this point in time the Respondent self reported his inability to satisfy the Suncar mortgage and Campbell's suspicious activity to his underwriter, The Attorney's Title Insurance Fund, and began an investigation into what had occurred. The Respondent quickly discovered that Campbell was the source of at least half of the shortage in his trust account and had hidden what appeared to be a bank error that caused the other half of the shortage. TTES 30-49.

The Fund, after conducting a preliminary investigation satisfied the mortgage[1], suspended the Respondent as an agent, took possession of all of his real estate closing files and reported this matter to The Florida Bar.

The Florida Bar initiated an audit of the Respondent's trust account in May 2004 and was informed of the Respondent's position that his nonlawyer employee, Tammy Campbell, had stolen funds from his trust account.[2] The trial testimony on this fact was very clear[3] as was the documentary evidence presented by the Respondent which included cancelled checks, mortgages, satisfaction of mortgages, closing statements, and other bank records to show that Campbell stole monies from the Respondent's trust account and that this constituted the bulk of the shortages noted by the Bar in its audit.[4]

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[1] The Respondent also contributed $10,000.00 of his own personal funds to effectuate the settlement of the foreclosure proceeding on the Suncar home. TT114-115.

[2] The Bar admitted its knowledge of the Respondent's explanation of the trust account irregularities in its Complaint at Paragraphs 52 and 55, but claimed at paragraphs 54 and 55 that this defense was inaccurate .

[3] As the Referee took judicial notice of the prior evidentiary hearing in the emergency suspension case, there was a significant record in this regard. At the emergency suspension hearing, the Respondent and two of his other legal secretaries testified about the facts of this case, Campbell's hasty departure from the Respondent's office and her financial, drug and alcohol problems.

[4] For reasons only known to the Bar, the Bar failed to produce a copy of the actual audit and audit work papers until approximately 30 days prior to the final hearing in this case.

In order to understand how Campbell stole client monies it is important to look at the refinance of her home which was funded through the Respondent's trust account on or about December 16, 2003. Both parties agree that as a result of the refinance she was entitled to receive or have paid out on her behalf $176,474.93. TT67. However, the testimony adduced at trial indicated that $260,546.36[5] was spent on matters attributable to Campbell for an excess payment of $84,071.40 to Campbell or to third parties for the benefit of Campbell. TT68-88. While this point was a central theme to the Respondent's defense of this case, the Report of Referee devotes less than a page of explanation and takes no position on whether Campbell stole more than $84,000.00 from the Respondent's trust account. RR8-9. The Referee did note that there was a pending criminal investigation of Campbell based upon the Respondent's report of this activity to the Hollywood Police Department. RR9. Further, the Referee stated during the trial, in reference to Campbell, that ". . . we can all sit here and agree that she wasn't completely on the up and up, at the very least." TT76, l.1012.

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[5] At the beginning of cross examination William Luongo, the Bar's auditor, agreed that there were only three checks on the Respondent's list of Campbell expenditures that were not initially on the Bar's list. TT68. Luongo later conceded, upon being presented with Respondent's Exhibits two through six that the initially disputed checks should be placed on the Campbell transaction. TT68-88.

While taking no position in his written report (drafted by the Bar) on whether the Bar presented any evidence of an intentional theft on the part of the Respondent, the Referee made numerous comments that he did not believe that the Bar had presented any evidence to indicate an intentional conversion of client trust funds by the Respondent. For example, in questioning Bar Counsel the referee stated that: "And you're trying to paint the picture that Mr. Riggs has done something intentional, but can't quite get all the way there." TT76, l.1-3. Further, the Referee noted that ". . . nobody's come out and said that they're attempting to prove theft." TT82, l. 12-23. In fact, when questioned by the Referee on this point the Bar auditor admitted that he could not testify that the Respondent stole trust funds. TT73, l. 20 to TT74, l.8.

The Bar alleged, in its complaint, that the Respondent had a shortage in his trust account equaling $108,836.00. See TFB Complaint para. 25. However, the Bar's auditor testified to a degree of uncertainty in finalizing his audit numbers due to "large positive balances on one ledger, large negative balances on others" as well as other problems in securing a firm sense of certainty on his audit findings other than he knew there was a significant shortage due to the failure to fund the Suncar pay off. TT p39, l. 17, p. 40, l. 12. In fact, when documents were

presented to the Bar's auditor at the final hearing concessions were made to move large amounts of money to different ledger transactions.[6]

At the hearing held in the emergency suspension case, the Respondent testified that the shortages in his trust account were a combination of Campbell theft, a significant bank error and an overpayment on one real estate closing. However, subsequent investigation changed that presentation as what appeared to be a bank error was actually evidence of a theft by Campbell. It is the Respondent's position that the evidence adduced at both trials shows that Campbell stole $84,071.40 and that there was an overpayment to Dr. Rex Allen, who was overpaid $13,902.87 related to his closing which was held on or about October 23, 2003. TTES 51-53; TT 116-118. The combination of Campbell and Allen are a shortage of almost $98,000.00. The approximate $10,000.00 gap between this figure and the Bar asserted shortage figure is amply covered by funds left on deposit in the trust account by the Respondent of approximately $32,000.00 and other fees and costs not withdrawn from the trust account.[7] In fact the amount of

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[6] Some of these changes relate to the Balboa ($102,471.85), Campbell ($78,239.48), Castillo ($55,833.81), Nieto ($22,405.67) and Riggs Refinance ($102,471.85) client ledger cards. See TFB Ex. B and the testimony related thereto.

[7] The $32,000.00 figure is found at TFB Ex. B, page 14 after making the correction of moving the wire to Home Equity Wire to the Balboa ledger card. See Bar auditor's testimony at TT 89-90. Also included in this were fees owed on the Campbell and Suncar closings and the Bar's misapplication of approximately

commingled monies reduces the shortage figure[8], as did other changes agreed to by the Bar's auditor at the final hearing. However, no adjustments were made by the Bar prior to the final hearing or at the final hearing to indicate the true nature of the shortage figure.

At both hearings the Respondent readily admitted that he had commingled his funds with those of his clients and that at the time of the events in question he did not meet the required minimum for trust accounting practices and record keeping. The Referee, in his Report at pages 9 through 12 finds the Respondent guilty of having violated of R. Regulating Fla. Bar 4-1.3; 4-1.15; 4-8.4(c); 4-8.4(g); 5-1.1(a)(1); 5-1.1(b); 5-1.1(e), 5-1.1(g)(2); 5-1.2(b)(1); and 5-1.2(c). The Referee, at pages 12 and 13 of his Report recommends that the Respondent be suspended for three years (presumably with no credit for time already served on emergency suspension) and that upon reinstatement he be placed on three years of trust accounting probation and attend the Bar's Trust Accounting Workshop, as well as pay the Bar's costs in the amount of $13,729.65.

It should be noted that the Respondent is currently serving an emergency suspension as a result of a Supreme Court Order issued on April 6, 2005 based

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$1,400 in wire fees that should have been placed on the individual closings in which they were incurred. See TFB Ex B p.4-5 and TT 119-120.

[8] In fact, if one was to apply the commingled funds to the shortage figure first, the shortage calculated would be less than the money stolen by Campbell.

upon the same facts referenced above. This matter was originally referred, on a Motion for Dissolution, to the Honorable Joseph Marx, who recommended that the emergency suspension remain in effect until the underlying case could be tried. This recommendation was affirmed by Court Order dated May 3, 2005.

The Florida Bar's Complaint was filed on June 2, 2005 and the Respondent, through counsel, on June 22, 2005, filed his Answer and Affirmative Defenses. The Honorable Joseph Marx was appointed to preside as referee in this proceeding by order of the Honorable Edward H. Fine, Chief Judge of the Fifteenth Judicial Circuit of Florida, entered on June 15, 2005. The Final Hearing was held on Friday, August 19, 2005. The Referee served his Report of Referee on August 30, 2005. The Respondent accepts the Referee's findings of commingling, poor trust account record keeping and a lack of intent on behalf of the Respondent, but seeks review of all other findings of fact and guilt as well as the Referee's sanction recommendation.

SUMMARY OF THE ARGUMENT

A disciplinary action was initiated against a lawyer who self reported a theft from his trust account by a nonlawyer employee to his underwriter, who in turn reported the matter to The Florida Bar. The Bar conducted an investigation and audit for more than a year and then successfully moved for the imposition of an emergency suspension. The lawyer's defense to the emergency suspension and later follow up complaint was that his now former employee was the cause of the shortage in his trust account and that he did not steal any money from his client's or benefit in any way from his former employee's actions. In fact, upon discovery of her defalcations within two months of same occurring, he promptly took action to protect his clients and to correct his improper trust accounting procedures.

The Referee in this case, while finding that there was no intentional theft by the Respondent has recommended a severe sanction that does not fit this Court's precedent and standards. While the lawyer in this case fully understands and acknowledges that he failed to properly follow all of the required trust accounting procedures and record keeping requirements and that he commingled funds and that a sanction should be imposed, his actions do not require the imposition of a three year suspension from the practice of law with no credit for time already

served on an emergency suspension.[9] Rather, under the facts and circumstances of this case a suspension of ninety days nunc pro tunc the date of the emergency suspension is the more appropriate sanction for a lawyer who negligently supervises a nonlawyer employee and that nonlawyer employee steals from his trust account. This is especially true when one takes into account the strong mitigation that is present in this case including the fact that all clients have been made whole.

[9] At the time this brief is written the emergency suspension has been in place for approximately six months.

ARGUMENT

I. A THREE YEAR SUSPENSION FROM THE PRACTICE OF LAW IS AN IMPROPER SANCTION FOR A LAWYER, WHO INADQUATELY SUPERVISES A NONLAWYER EMPOYEE RESULTING IN THAT NONLAWYER STEALING FUNDS FROM THE LAWYER'S TRUST ACCOUNT.

At issue in this appeal is the appropriate level of a disciplinary sanction for a lawyer who fails to properly supervise a nonlawyer employee and fails to personally follow the required trust accounting procedures and record keeping rules[10] resulting in that nonlawyer employee being able to steal client trust funds for her own purposes and hide that fact for no more than two months. The Referee is recommending that the lawyer be suspended for three years, inclusive of three years of trust accounting probation upon his return to the practice of law. It is the Respondent's position that this recommendation is not supported by existing case law and precedent and at most this court should impose a ninety day suspension nunc pro tunc the effective date of the related emergency suspension, with automatic reinstatement.

A. The employee theft.

In February of 2004, Rafael Suncar complained to the Respondent that a problem had arisen over whether or not a mortgage had been satisfied from his

[10] The Referee's concluding remarks on the facts of the case were: "This court finds that Respondent failed to adequately supervise Ms. Campbell and failed to properly maintain his trust account." RR 9.

October 31, 2003 closing. TTES 22-23. The Respondent immediately drove to his satellite office where his real estate transactions were performed and discussed the matter with Tammy Campbell,[11] his real estate paralegal. TTES 23. Campbell initially informed the Respondent that the Suncar's mortgage was satisfied by a check but when the Respondent informed her, after searching for a copy of same, Campbell then stated it must have been a wire transfer and that she would look for the wire receipt. TTES 22-23. Rather than look for the wire receipt, she gathered up her belongings, fled the office without informing the Respondent and began looking to retain a criminal defense attorney.[12] TTES 24-25.

At this point in time the Respondent notified his underwriter, The Attorney's Title Insurance Fund[13], and began an investigation into what had occurred. The Respondent quickly discovered that Campbell was the main source of the shortage in his trust account. However, he was hampered in his investigation of these matters as the Fund took possession of all of his real estate files and later The Florida Bar took possession of his trust accounting records. In fact, the Bar did not

[11] Tammy Campbell was employed by the Respondent and worked at the Respondent's satellite office a block or two from his main law office in Hollywood, Florida, where she performed paralegal, secretarial and bookkeeping services related to the Respondent's real estate closings.

[12] At the time of trial criminal charges for theft and forgery were under investigation by the Hollywood Police Department. RR9.

[13] The Attorney's Title Insurance Fund satisfied the mortgage, suspended the Respondent as an agent and took possession of all of his real estate closing files.

produce a copy of its own audit and audit papers to the Respondent until on or about July 12, 2005 in response to the Respondent's discovery requests, which was almost four months after the Bar sought to secure an emergency suspension. Nonetheless, the following evidence was adduced at trial concerning Campbell's criminal actions.

On or about December 11, 2003, the Respondent assisted in the refinance of Ms. Campbell's home. Pursuant to that transaction and the settlement statement therefore, Ms. Campbell was to receive $79,152.26 for the net proceeds of the transaction. Both the Bar and the Respondent agree with this calculation. However, Campbell took much more than she was entitled to receive and had been taking significant sums from the Respondent's trust account before her closing. This can be shown graphically as follows:

Campbell transactions			
DATE	NUMBER	PAYEE	AMOUNT
10/29/03	1504	Ocwen Federal Bank	$ 3,131.10
10/30/03	1524	Cash (Providian Payoff)	900.00
12/12/03	1619	Ocwen Federal Bank	19,241.36
12/12/03	1620	Wells Fargo Acceptance Corp.	3,164.31
12/16/03	wire	Carrol & Jane Jones	55,833.81
12/16/03	1624	Tammy Campbell	79,152.26
12/16/03	1625	Reliable Mortgage	3,880.00
12/16/03	1626	Robert Hill	10,000.00

Campbell transactions			
DATE	NUMBER	PAYEE	AMOUNT
12/17/03	1627	Tammy Campbell	4,116.16
12/17/03	1629	Tammy Campbell	4,000.00
12/19/03	1630	Tammy Campbell	4,000.00
12/22/03	1631	Tammy Campbell	4,000.00
12/18/03	1632	Citi Financial	3,559.76
12/24/30	1633	Cash (Tammy Campbell)	4,500.00
12/31/03	1646	Tammy Campbell (to savings account)	61,067.60
		Expenditures	$260,546.36
		less deposits	176,474.93[14]
		Shortage/theft	$84,071.40

During the final hearing William Luongo, CPA, the Bar's auditor testified, at the beginning of cross examination, that he agreed with all but three of the disbursements listed above. TT 68. Upon further cross examination concerning the Respondent's exhibits two through six, Mr. Luongo conceded that the remaining three items should be placed on the Campbell ledger. TT 68-88. The

[14] This sum includes the redeposit of $71,116.16, which interestingly did not even cover the money she had stolen up to that time frame. Prior to December 16, 2003, Campbell had stolen $26,436.77. Also on December 16, 2003, she wired another $55,833.81 to pay off a mortgage that was not on her closing statement and paid other items equaling another $13,880.00. No intellectually honest claim can be made that this redeposit in cash with no corresponding notation in the trust account records was anything more than an attempt to hide the earlier thefts and continuing thefts.

Respondent's exhibits two through six included mortgages, satisfactions of mortgages, closing statements, and bank records to show that the foregoing transactions should be attributed to Campbell. Campbell took steps to actively hide her defalcations by re-classing certain transactions to hide their true purpose[15], by directly lying to the Respondent about others and by destroying records before she fled the office.

The Referee in this case listened to the cross examination of the Bar's auditor and made several telling remarks regarding his view of Campbell and the lack of any presentation by the Bar on an intentional theft by the Respondent. The Referee posed the following question to Mr. Luongo: "And I haven't heard anything here that you're able to really articulate for me that you can say with any certainty, under oath, that it's a theft . . ." TT 74, l. 3-7. Mr. Luongo's response was: "Right." TT 74, l. 8. While the Report of Referee (drafted by Bar counsel) makes no mention of an intentional theft by the Respondent, the Referee's

[15] See for example Mr. Luongo's testimony at pages 84-88 wherein he reviewed Campbell's subterfuge in hiding the nature of a $55,833.81 wire transfer to pay off one of her mortgages. The testimony and the exhibits related thereto show that first Campbell tried to make the payoff by placing a firm's client's name on the wire transfer, but that got sent back because the name did not match the account number she provided. Campbell therefore had to put the correct name (Carrol) to transfer the money. However, the Bar in booking the transaction placed the firm client's name on the wire transfer because that is what the other records falsely indicated. One could argue that Campbell's efforts in hiding the true nature of her actions even fooled an experienced bar auditor, thus explaining how she was able to prevent the Respondent from promptly discovering her misdeeds.

comments during summation could not be any clearer on the issue when he stated "I'm not telling you my ruling, as far as my sanction, but I don't think the evidence has risen to the level of that it was intentional. And I don't think it was knowingly."[16] TT 160, l. 2-5.

Interestingly, the Bar chose not to call Ms. Campbell as a witness in the case. While Bar counsel thought of introducing a sworn statement from Ms. Campbell, after objection, they declined to do so. TT 44-48. Thus the only testimony concerning Ms. Campbell's actions came from the Respondent, two of his employees who testified at the emergency suspension hearing, and from the Bar's auditor related to the "paper trail" she left regarding the moneys she took. Interestingly, the Report of Referee, provided by Bar counsel and executed by the Referee, does not make a statement on the Referee's belief, one way or the other, on whether Campbell stole funds from the trust account.[17] RR 8-9. The Referee does make one comment concerning Ms. Campbell's curious redeposit of

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[16] This statement is inconsistent with the Referee's Report at page 9 where the Respondent is found guilty of having violated R. Regulating Fla. Bar 4-8.4(c) [A lawyer shall not engage in conduct involving, dishonesty, fraud or misrepresentation.]. In order to find a violation of this rule the Referee must find that the Respondent acted intentionally. See The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). There was no evidence that any of the Respondent's actions were anything but unintentional or negligent.

[17] One could contend that the Referee's ruling on intent would be inconsistent with a finding that Campbell did not steal from the trust account or was the root cause of the shortage in the trust account.

approximately $71,000.00 but, as is explained above (see footnote 10); this redeposit did not even cover the money she had stolen through the date of the redeposit. The Referee also makes a comment about the last check written out of the trust account, check number 1646 in the amount of $61,067.60, which funds were used to open a savings account for Campbell. According to the unrefuted testimony in this case (both hearings), this was the only check on the Campbell transaction that did not contain the Respondent's forged signature. The unrefuted testimony was that the Respondent helped Ms. Campbell open a savings account and at her request included the Respondent as a signatory. TT 130-131. Well after the events concerning Campbell were discovered, the Respondent was able to withdraw approximately $13,000.00 in March of 2004, which he in turn used to cover some of the shortages in his trust account.[18] TT 131.

While the Bar has chosen to ignore that the Respondent was victimized by a nonlawyer employee, the record in this case is devoid of any testimony or evidence to the contrary. Further, the documentary evidence alone shows clearly and convincingly that Campbell forged the Respondent's name to checks and wire transfers to pay money to herself and for her own benefit and that she took serious

[18] As the Bar's shortage computation concerned December 31, 2003, events occurring in March the following year have no impact on the shortage computation. However, it does help reduce the shortage figure as the Respondent paid client obligations he was unable to meet in December of 2003.

steps to hide her actions which went undiscovered for approximately two months until a client (Suncar) directly informed the Respondent that there was a problem.

B. The other trust accounting issues.

The Bar presented a two Count complaint and the Report of Referee follows this format. Count I discuses the Suncar transaction and that the mortgage payoff of $108,000.00 was not made in a timely fashion. In Count II the Bar discusses the shortage in the trust account during the same time frame as the Suncar transaction and the effect on other client transactions post Campbell's theft from the trust account, as well as commingling and a variety of record keeping and trust accounting procedure violations. While the analysis set forth above directly relates to the shortage referenced in Count II of the Complaint, some comment is necessary on several matters contained in the Report of Referee.

From the outset of this case the Respondent has acknowledged that his office did not promptly satisfy the Suncar mortgage and that the reason this occurred was that there were insufficient funds in the trust account at the time frame referenced by the Bar (December 31, 2003) as well as prior to that date as Campbell stole funds from the trust account. Also from the outset of this case, the Respondent admitted that he commingled and did not properly follow all of the trust accounting procedures and record keeping requirements. Thus, the only issue for resolution during trial on Count II of the complaint was an explanation of the shortage in the

trust account and an explanation for some of the mistakes the Respondent made in his accounting practices. As the Referee's Report points out certain client matters were not promptly paid and two trust account checks were returned in February and March 2004. However, this was during a period of time that the Respondent first discovered Campbell's misdeeds and was trying to ascertain the extent of the damage that she caused. TTES 22-49.

During both hearings the Respondent testified that after Campbell's departure from the law firm he took significant steps to bring his accounting practices into compliance with the rules. See for example TT 128-129. This included using Quickbooks software provided by his title insurer to manage his trust account and also engaged the services of an outside accountant to review all accounting work that he or his staff completes. TT 128-129.

While the Respondent may have been deficient in his supervision of Campbell during late November 2003 through early February 2004, the uncontroverted testimony was that upon discovery of the trust accounting problem caused by Campbell (and his own lack of supervision of her), the Respondent took immediate action to assist the Suncars by defending the foreclosure lawsuit, immediately reported the matter to his underwriter who ultimately paid the claim so the Suncar's would not loose their home and also personally borrowed funds to

add $10,000.00 to the overall settlement made with all parties to the foreclosure case. TT 112-115.

B. The sanction recommendation.

The Referee in this case has recommended a three year suspension from the practice of law with probationary conditions upon the Respondent's reinstatement. The Respondent takes no issue with the probationary conditions and would accept same. However, the Respondent does take strong issue with the length of the suspension being recommended and the fact that he has been given no credit for time already served on the emergency suspension.[19]

The Respondent in this case has already paid a heavy price for failing to catch his nonlawyer employee's defalcations in a more timely fashion and fully understands that had he followed the required trust accounting procedures and kept the required trust accounting records, he may not have been involved in this type of a prosecution. The most factually compelling and similar case is The Florida Bar v. Armas, 518 So. 2d 919 (Fla. 1988). In Armas the lawyer established that the problems were caused by a negligent office manager who had been improperly trained to handle a trust account. Armas was found not guilty of mishandling trust account funds but was found guilty of a lack of supervision and trust recordkeeping

[19] See for example The Florida Bar v. Behrman, 658 So. 2d 95 (Fla. 1995) wherein the Court held that when suspending a lawyer, who was already under emergency suspension, credit should be given for the time served on such emergency suspension.

violations. Armas received a public reprimand and two years of trust accounting probation.

The Case at hand is also similar to The Florida Bar v. Valladares, 698 So. 2d 823 (Fla. 1997). In Valladares an attorney on emergency suspension was found not guilty of intentional theft on the follow up prosecution of the matters referenced in the emergency suspension. However, he was found guilty of the negligent misuse of client funds and record keeping violations. He was placed on a 90 day suspension nunc pro tunc the effective date of his emergency suspension and was automatically reinstated even though he has been suspended for more than 91 days. Id., at 825.

The Referee's recommended three year suspension is even harsher than suspensions handed out to lawyers whose misconduct far exceeded that of this Respondent. For example, in The Florida Bar v. Borja, 609 So. 2d 21 (Fla. 1992), a lawyer received a one year suspension from the practice of law. While there are factual similarities to this case in that Borja was also victimized by his legal secretary stealing from the law firm's trust account (and guardianship accounts). Id., at 22. However, there is a significant difference between Borja and the case at hand, in that the theft from Mr. Borja's accounts were discovered by the Bar during a follow up audit of his firm's trust account, which follow up audit was required as part of a prior disciplinary sanction for having previously failed to meet

his trust accounting obligations. Further, the Court took notice of Mr. Borja's extensive disciplinary record which included three public reprimands and a private reprimand over a four year period. Id., at 23.

In The Florida Bar v. Burke, 517 So. 2d 684 (Fla. 1988), the lawyer was suspended for ninety days for the negligent misuse of client funds and that a second case of the same type of misconduct by the same lawyer approximately three years later resulted in a ninety one day suspension from the practice of law. The Florida Bar v. Burke, 578 So. 2d 1099 (Fla. 1991).[20] There are also several cases where unintentional misuse of client trust funds resulted in a six month suspension from the practice of law. See The Florida Bar v. Weiss, 585 So. 2d 1051 (Fla. 1991) ; The Florida Bar v. Barbone, 679 So. 2d 1179 (Fla. 1996); The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). Also see The Florida Bar v. Fine, 607 So. 2d 416 (Fla. 1992) wherein the lawyer received a ninety day suspension for making a series of transactions by moving funds from his trust account to his operating account, which funds belonged to an estate.

The Weiss opinion is much more egregious than the facts of this case. In Weiss, the lawyer was found guilty of personal gross negligence in the handling of his trust account, with no resulting financial injury to a client and 28 years of

[20] Burke, among other things, deposited a $150,000.00 settlement draft into his personal account.

practice with no prior discipline. Id. at 1052-1053. In Weiss the lawyer was suspended for six months and the Referee in this case is recommending a three year suspension.

Even more interesting are the several cases wherein a lawyer was suspended on fact patterns with significant violations. For example, a lawyer received a two year suspension for making eighty two unidentified transfers from trust to cover operating account shortages, with a specific finding that this constituted the intentional misuse of client funds. The Florida Bar v. Mason, 826 So. 2d 985 (Fla. 2002). The lawyer in The Florida Bar v. Wolf, 605 So. 2d 461 (Fla. 1992), was also suspended for two years on significant intentional misuse of trust monies.

It should also be noted that commingling and inadequate record keeping, even when coupled with unintentional shortages in a trust account, normally warrant a public reprimand. See for example The Florida Bar v. Hosner, 513 So. 2d 1057 (Fla. 1987) [public reprimand plus trust accounting probation for commingling, record keeping and shortages]; The Florida Bar v. Mitchell, 493 So. 2d 1018 (Fla. 1986); The Florida Bar v. Aaron, 490 So. 2d 941 (Fla. 1986).

As in any sanction recommendation it is important to consider the mitigating and aggravating factors that may be present. The Referee at page 14 of his Report discusses mitigation and aggravation and finds that there are three of each factor. On the aggravation side of the equation he finds Florida Standards for Imposing

Lawyer Sanctions, Standards 9.22(a) (prior disciplinary record); 9.22(b) (dishonest or selfish motive); and 9.22(i) (substantial experience in the practice of law). The Respondent does not take issue with the finding of Standard 9.22(i) but would note that at the time of the events in question he had been admitted to the Bar for five years. The Respondent does take issue with the other two aggravating factors as the so called "prior discipline" is the emergency suspension founded on the same facts of this case and a finding of dishonest or selfish motive is inconsistent with a finding that the Respondent's acts were unintentional and did not personally inure to his financial benefit.

The Referee has also found three mitigating factors. They are Florida Standards for Imposing Lawyer Sanctions, Standards 9.32(g) (otherwise good character and reputation);[21] 9.32(k) (imposition of other penalties or sanctions) and 9.32(l) (remorse). The Respondent would also urge this Court to find the following mitigating factors as they are supported by the evidence in this case:

9.32(a) – Absence of a prior disciplinary record, except for the Order of Emergency Suspension related to this case.

9.32(b) - Absence of a dishonest or selfish motive.

9.32(j) - Interim rehabilitation has occurred in the Respondents trust accounting practices.

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[21] The trial testimony included that the Respondent has served our country, first as a Marine and later as a police officer, and that he went to law school after being injured in that employment and became a lawyer as a second career. TT110-111.

The Supreme Court in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. In the case at hand the three year suspension with no credit for time already served on an emergency suspension fails to follow these precepts. However, a ninety day suspension, nunc pro tunc the date of the emergency suspension coupled with the recommended probationary terms would meet all of these criteria.

CONCLUSION

The disciplinary sanction being recommended by the Referee is unduly harsh and fails to take into account existing case law that a lawyer who fails to properly supervise a nonlawyer employee, resulting in that employee being able to steal trust monies, does not warrant a three year suspension from the practice of law. This is especially true when the bulk of the existing case law imposes a public reprimand and trust accounting probation for a lawyer who negligently mishandles his trust account, commingles and fails to follow all of the required trust accounting procedures and record keeping rules. In fact short term

suspensions and/or suspensions of ninety to ninety one days have been imposed when a lawyer is being disciplined for the second time for trust accounting issues.

This is the first time that this Respondent comes before the Court on a lawyer disciplinary matter. The record below firmly establishes that he was victimized by an employee that he trusted and that upon being made aware of a significant problem he took action to correct the problem and protect his clients. While a disciplinary sanction is warranted, the more appropriate sanction is a ninety day suspension from the practice of law, nunc pro tunc the date of the emergency suspension coupled with the recommended probationary terms recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this ____ day of December, 2005 to Lorraine C. Hoffmann, Bar

Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and 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.

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