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 ANSWER BRIEF

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

TABLE OF CONTENTS

Page(s)

TABLE OF CASES AND CITATIONS

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. __.

SUMMARY OF THE ARGUMENT

Imposing a correct disciplinary sanction for lawyer misconduct is more an art than an exact science. However, precedent and the Florida Standards for Imposing Lawyer Sanctions set forth a guideline for Referees to fashion a sanction that is appropriate for a given fact pattern. In this case the three year suspension does not follow the Court's guidelines and should be overturned as to the length of the suspension. The Respondent is in agreement with the probationary terms recommended by the Referee.

The true issue in this case is what sanction is appropriate for a lawyer who is victimized by a thieving employee who steals from the lawyers trust account by forging the lawyers signature to trust account checks and then creates a masterful paper trail to hide this theft with the created documentation even fooling an experienced Bar auditor. The Bar attempts to cast this case as something else in an effort to support the Referee's sanction recommendation. The Referee found that this is not a case of intentional theft, although the Bar refers to several cases where there were intentional thefts. Further, this is not a case of grossly negligent misuse of client funds for the benefit of the accused lawyer, although, the Bar again cites to several cases of gross negligence to support the Referee's recommendation.

Previously, this Court has reviewed cases that involved a rogue employee who either negligently caused trust accounting problems or where that employee

engaged in an intentional theft of client trust monies and has treated these types of cases differently than if the lawyer was the individual who had caused the negligent misuse or who had stolen the money. The Referee's recommended sanction fails to take these cases into account and instead punishes the Respondent herein as if he was the person who misused trust funds and personally benefited therefrom.

The Respondent in this case fully recognizes that his supervision of his nonlawyer employee fell below the standards set by this Court and that his own failure to follow all of the trust accounting procedures prevented him from catching his employee's misdeeds sooner and fully understands that some form of suspension is warranted herein. However, he respectfully asks this Court to recognize that he has already been suspended for more almost ten months and that lawyers who have personally, albeit negligently, misused client trust funds have been suspended for less time than that ten month period and significantly less than the three years recommended by the Referee.

ARGUMENT

I. A THREE YEAR SUSPENSION FROM THE PRACTICE OF LAW IS AN IMPROPER SANCTION FOR A LAWYER, WHEN A NONLAWYER EMPLOYEE STEALS MONEY FROM THE LAWYERS TRUST ACCOUNT, WHICH THEFT IS DISCOVERED APPROXIMATELY TWO MONTHS AFTER THE DEFALCATION OCCURRED.

The Bar in its Answer Brief avoids the most crucial question in this case in an attempt to secure a sterner sanction than what should be imposed under existing case law. The true issue in this case is what sanction is appropriate for a lawyer who is victimized by a thieving employee[1] who steals from the lawyers trust account by forging the lawyers signature to trust account checks and then creates a masterful paper trail to hide this theft with the created documentation even fooling an experienced Bar auditor. This Reply Brief will focus on the factual discrepancies between the record and the positions asserted by the Bar in its Answer Brief and will then discuss the applicable precedent that establishes that a much shorter suspension than that recommended by the Referee is the appropriate sanction in this case.

1. Factual issues.

The Bar correctly recites the case law that it is the Respondent's burden to show that the facts as recited in the Report of Referee are "clearly erroneous and lacking in evidentiary support." The Florida Bar v. Canto, 668 So.2d 583 (Fla.

[1] Tammy Campbell.

1996). The Bar also reminds that merely showing conflicting evidence in the record is not enough to meet this burden and must instead show either a lack of record evidence to support the Referee's findings or prove that the record evidence clearly contradicts those findings. The Florida Bar v. Sweeney, 730 So. 2d 1269 (Fla. 1998). A careful analysis of the major issue still in dispute by the Bar (Campbell's theft and cover up) will indicate that while the Report of Referee is silent on the issue, the Referee's comments during the final hearing,[2] the Respondent's testimony, the admissions made by the Bar's auditor[3] and the factual evidence presented clearly and convincingly establish that Campbell stole at least $84,000.00 and then purposefully covered her tracks by mislabeling the trust account records that she maintained for the Respondent. While the Complaint filed by the Bar (and the earlier Petition for Emergency Suspension) claim that the Respondent personally converted client monies, the Bar submitted no evidence at either trial to support this claim, and in fact the Referee clearly extracted that admission from the Bar's auditor during the final hearing in this case.[4]

---

[2] See Initial Brief at pages 15 and 16.

[3] See Initial Brief at page 15 and TT 84-88.

[4] Referee: "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: "Right." TT 74, l. 8. Also see page 15 of the Initial Brief.

The primary argument advanced by the Bar on appeal is that since the Referee's Report does not state that Campbell stole the money, then the Respondent must lose this point on appeal. However, the Bar points to no portion of the record that contradicts the evidence and testimony discussed at great length in the Initial Brief. In fact, the best the Bar can do on the intent issue is call the Campbell theft a "red herring."[5] Answer Brief at p. 15. While the Respondent has consistently admitted that he did not maintain completely proper trust accounting records or completely follow all of the required trust accounting procedures, that does not make him a thief. Nor does the fact that shortages existed in his trust account establish that he misappropriated client funds. At trial the Bar claimed there was a shortage in the Respondent's trust account of a certain amount and the Respondent documented the major reason for same was the $84,000.00 stolen by Campbell and that the remaining shortage was caused by an approximate $14,000.00 overpayment to Dr. Rex Allen and that costs (wire transfer fees charged to individual closings) and personal monies left on deposit made up the difference on the shortage figure. No where in the Bar's Answer Brief or during the trial does the Bar attempt to refute the overpayment to Dr. Allen or that the

[5] They do this even though their auditor ultimately testified in agreement on all of the checks and monies the Respondent testified were attributable to either the Campbell real estate closing or went to pay a Campbell obligation not included in her closing statement. If it was not on the closing statement the funds in question did not belong to her and every dollar spent for another purpose was a theft.

wire transfer fees and personal money on deposit in the trust account did not cover the gap between the funds stolen by Campbell and the shortage claimed by the Bar.

The Bar next tries to liken this case to that found in The Florida Bar v. Simring, 612 So. 2d 561 (Fla. 1993). However, there is no similarity between the two cases. In Simring the lawyer personally stole trust money belonging to his clients and asserted the defense of "sloppy record keeping" as a defense to his large shortages. However, the Court rejected this argument based upon all of the evidence in the case inclusive of persistent fluctuating shortages, where the money went (to the Respondent) and that Simring engaged in "intentionally improper trust accounting procedures" to avoid documenting his own thefts. Id., 566-567. In the case before the Court the only person engaging in "intentionally improper trust accounting procedures" was Campbell to hide the fact that she had stolen money from the trust account. While it is true that the Respondent had an obligation to properly supervise his staff, and bears a responsibility for not catching Campbell sooner than he did (about two months) the record below clearly established that her defalcations were well hidden and fooled the Bar's auditor also.[6]

A comment must also be made concerning the Bar's argument regarding the expenditure of funds from the trust account to satisfy the Respondent's personal

[6] It seems the Bar would also like to argue that "gross negligence," standing alone, could also support a finding of intent. Simring and existing case law does not support this proposition. It was the combination of elements, heavily weighted to the persistent shortages that established intent in Simring.

obligations from monies that he had left on deposit in his trust account. As the Report of Referee notes the Respondent commingled his monies with those of his clients which means he had his own money in the trust account. While it did not belong in the trust account, it was his money and could be properly applied to his own personal obligations without converting client funds as it was his money paying his obligations.

While the Bar's Answer Brief takes some license with other facts set forth in the Bar's complaint but not necessarily proved during the trial, the major issue in this case is how to evaluate the root cause of the shortage. It is the Respondent's position as supported by the record in this case that the Allen overpayment and the Campbell thefts are the root cause of the shortage. The Bar has presented no evidence to the contrary.

2. Sanction.

When dealing with misappropriation of client funds there are three major lines of precedent. They can be divided into intentional theft cases, personal negligent misuse cases and cases involving trust shortages caused by third parties. The Bar's brief focuses the line of negligent misuse cases and also cites to several intentional theft cases. However, the Bar's brief does not discuss in any detail this third line of cases, which fits the facts of this case as the shortage caused herein

was caused by his nonlawyer employee.[7] The Bar primarily relies upon four cases and each of these will be discussed in some detail below.

The first case relied upon by the bar is 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. Further, the Referee and the Court found that Mason had intentionally moved money from her trust account to her operating account knowing that it was being misused or misapplied to her own purposes and not her client's purposes.[8] In this case the Referee has made a specific finding that the Respondent's 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

---

[7] The trial testimony also shows that the Allen overpayment was caused by Campbell releasing a replacement check prior to having the first check returned.

[8] While the opinion also discusses that some of the movement of money was negligent and not intentional, the Court has recently affirmed that they believe the Mason case is an intentional use case. See The Florida Bar v. Wolf, Slip Op., Case No. SC04-1374 (Fla. 2006).

clients and their money. The Florida Bar v. Anderson, 395 So. 2d 551 (Fla. 1981). Unfortunately, the opinion is devoid of a detailed discussion of the misconduct or the exact facts. 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 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.[9] 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

[9] 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.

eighteen months due to a significant prior disciplinary record.[10] The Respondent herein has no prior disciplinary record (other than the related emergency suspension). Accordingly, the Adler eighteen month suspension is sterner than that needed in this case.

Lastly, the Bar relies upon The Florida Bar v. Whitlock, 426 So. 2d 955 (Fla. 1983). Upon first blush Whitlock appears to be a negligent misuse case but it is really a grossly negligent misuse case wherein the lawyer abdicated all control over his trust accounts (and presumably other office accounts) to a nonlawyer without any supervision for almost a year and a half. Id. Further, even when he was undergoing an audit by the Bar he continued to mismanage his bank accounts. Id. The Supreme Court in reviewing a Report of Referee that recommended disbarment found several mitigating factors and decided that this lawyer should be suspended for three years. Id. The differences between Whitlock and the case presently before the Court are very clear. The Respondent in this case discovered Campbell's defalcations prior to any intervention by the Bar and all matters referenced by the Bar in its complaint appear to be from a time period prior to the start of the audit. Further, the Respondent self reported his problems to his underwriter (who ultimately reported it to the Bar) and was aware of Campbell's actions prior to the Bar becoming involved in the case. Lastly, the testimony at

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

trial was that the Respondent did not meet *all* of his obligations vis-à-vis trust accounting procedures and record keeping. In Whitlock, there was a total abdication of the lawyers trust accounting supervisory obligations and had he maintained at least some semblance of control perhaps he would have discovered his trust accounting problems prior to Bar intervention. In the case at hand Campbell's actions in hiding her misconduct prevented the Respondent from discovering the trust accounting issue until Mr. Suncar made his fateful phone call.

The Bar in its Answer Brief takes no position on the primary cases relied upon by the Respondent and fails to discuss same. Thus, it appears that the Bar would agree with the proposition that if the Court affirms the fact that the appropriate sanction should be found from the line of cases where the trust accounting shortages are caused by third parties, that the cases cited by the Respondent would form the basis for the Court's ruling in this case. The Initial Brief discusses The Florida Bar v. Armas, 518 So. 2d 919 (Fla. 1988) in some detail, but it is important to remind the Court that in Armas the lawyer established that the trust shortages 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 violations. Armas received a public reprimand and two years of trust accounting probation.

The Initial Brief also discussed The Florida Bar v. Borja, 609 So. 2d 21 (Fla. 1992), wherein a lawyer received a one year suspension from the practice of law when there was a shortage caused by his legal secretary stealing from the law firm's trust account (and guardianship accounts). Id., at 22. As was related in the Initial Brief, this case is more severe than the case at hand due to the fact 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.[11]

It is also important to note that the Bar's Brief takes no issue with the Respondent's claim that any suspension ordered by the Court should be made nunc pro tunc the date of his emergency suspension. It appears that the Bar has conceded this point and that any sanction should provide appropriate credit for time already served on suspension. The Florida Bar v. Behrman, 658 So. 2d 95 (Fla. 1995).

[11] Borja's extensive disciplinary record (three public reprimands and a private reprimand over a four year period) further enhanced the sanction being meted out by the Court. Id., at 23.

CONCLUSION

The Respondent is mindful that any trust account irregularity is a cause for serious review of an attorney's actions. In the case at hand this Respondent has been suspended on an emergency basis for almost ten months and will probably reach the year mark prior to resolution of this case. The Referee below did not believe that the Respondent intentionally misused client trust monies but did find that he failed to properly supervise his non lawyer employee, Campbell. This finding is inconsistent with any claim that the Referee did not believe that Campbell stole monies from the Respondent's trust account. The Respondent understands that his actions warrant a sanction from this Court, but requests that such sanction be commensurate with his actions which do not warrant the three year suspension recommended by the Referee.

WHEREFORE the Respondent, Jerry Arthur Riggs, Sr., respectfully requests that the Court reverse the Referee's sanction recommendation, impose a suspension from the practice of law no greater than ninety days, nunc pro tunc the effective date of this Court's Order of Emergency Suspension with automatic reinstatement and with any and all appropriate trust accounting probationary requirements deemed necessary by the Court and grant any other relief that this Court deems reasonable and just.

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 February, 2006 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 version of the brief that was electronically filed was scanned and found to be free of viruses, by McAfee.

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. 71082