IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

CASE NO. SC10-1332
TFB NO. 2009-10,287(13B)

v.

WILLIAM HENRY WINTERS
Respondent.
_____/

THE FLORIDA BAR'S INITIAL BRIEF

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In this Brief, the Complainant, The Florida Bar, will be referred to as "The Florida Bar" or "the Bar." The Respondent, William Henry Winters, will be referred to as "respondent."

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC10-1332 and Supreme Court Case No. SC10-1333 held on March 21 -24, 2011 and March 28, 2011. "SH" will refer to the transcript of the sanctions hearing held on June 8, 2011. "Exh." or "Exhs." will refer to exhibits presented at the final hearing and sanctions hearing by both The Florida Bar and respondent. The parties cooperated in the presentation of exhibits, in order simplify and avoid duplication in the presentation of evidence, and did not distinguish which party offered the exhibit for purposes of numbering. "ROR" will refer to the Final Report of Referee dated July 19, 2011, which included the referee's Findings of Fact. "IR" will refer to other items such as correspondence and other pleadings filed with the referee as noted in the Index of Record.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE

This case involves the taking of law firm files by Respondent Winters, for his "personal use" when he left the employment as an associate of the Law Offices of Richard Mulholland and Associates ("Mulholland Firm") in June 2001. (ROR 12, 14). Respondent had been an associate for the Mulholland Firm for approximately fifteen years when he decided to leave the practice and start his own firm with Marc Edward Yonker, who had also been an associate at the Mulholland Firm. (Exh. 8; TR 63-70, 93, 206-207).

This case was consolidated for trial with the complaint against Marc Edward Yonker, SC10-1333, TFB File No. 2009-10,288(13B). The disciplinary case was deferred due to civil litigation by Richard Mulholland against Winters and Yonker that concluded in June 2008. Respondent appealed a verdict of $1,470,453.00 in damages for civil theft. (Exhs. 22, 26, 27). The judgment was overturned due to lack of proof "that the theft was connected to the loss of [Mulholland's] clients." *Winters v. Mulholland*, 33 So. 3d 54, Fla. 2010. (Exh. 27). Yonker did not appeal and paid the judgment in the amount of $676,386.32. (Exhs. 22, 24, 25). Despite the reversal, the Second District Court of Appeal stated, "There is no real question that these activities constitute the unauthorized use of Mulholland's client files, misappropriation, fraud and deception. Thus, Mulholland did prove that a 'theft'

occurred." *Winters v. Mulholland*, 33 So. 3d 54, Fla. 2010. (Exh. 27).

Yonker left the firm on Friday, June 15, 2001 without notice. Respondent left the firm on or about Friday, June 22, 2001 without advance notice. (TR 89). Respondent took over the representation of approximately12 former Mulholland clients. (Exh. 12, 13; TR 124-126, 685-687). Yonker took over the representation of approximately 64 Mulholland clients. (Exhs. 4, 5, 6, and 10; TR 216-217).

The allegations against respondent involve conduct surrounding his departure from the Mulholland Firm. Respondent Winters was charged with a violation of Rule 4-8.4(b) (commission of criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rule 4-8.4(d) (conduct prejudicial to the administration of justice). The alleged violation of Rule 4-8.4(b) is based on Fla. Stat. § 812.014(1) (2001). It was alleged respondent committed theft by taking client case files from the Mulholland Firm without permission or authorization to remove client case files belonging to the Mulholland Firm. A review of the closing statements of the clients "taken"[1] by

[1] The term "taken" is used herein because this is the word used in correspondence to adjusters and others to inform them that the Mulholland firm no longer represented clients and to direct all future correspondence to the new address. See Exh. 8, TR 85-89, 200-201. Winters admitted to signing a letter on behalf of

Yonker reveals the substantial aggregate value of the personal injury claims. When respondent left the Mulholland firm, he kept possession of "less than ten" client files. (ROR 10; TR 96-98). These filed were not returned until after a Writ of Replevin was served on June 29, 2001 by Mulholland seeking the return of the files. (Exh. 14; TR 96-98). The files were returned on or about July 3, 2001 (Exh. 14A; TR 98). Most of the files taken were for lucrative cases, including one case that settled for approximately five million dollars ($5,000,000.00). (TR 68, 474-475, 619-620, 685-688). In 2001, Florida's theft statute provided:

> A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either **temporarily or permanently**: (a) Deprive the other person of a right to the property or a benefit from the property; (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Fla. Stat. § 812.014 (1) (2001) (emphasis added). To obtain or use the property of another, one must take or exercise control over the property or is engage in "conduct previously known as ... conversion." Fla. Stat. § 812.012(3)(a) and (3)(d)1 (2001).

In a colloquy between the referee and respondent's counsel, respondent's counsel acknowledged that respondent's conduct of temporarily taking the files is a

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Yonker (Exh. 8 at WYM 3169) to an insurance adjuster.

conversion:

> THE REFEREE: "… What do you call that when you take somebody else's property and copy it? I mean, is there such a thing as a - - are you allowed to borrow somebody else's files? Isn't it a technical violation of the conversion statute when you temporarily take it, even if you give it back?"
>
> MR. SMITH: I think that's certainly arguable, Judge, and I understand your point. And I would concede to you that under the literal language of the statute that that would equate to a conversion."

(TR 904-905).

The referee further stated in relation to the "personal use" of the Mulholland Firm files that, "under Chapter 812.014 that there was … a presumed value … [that] would result in the conduct being a possible violation of that Statute to-wit: a second degree misdemeanor." (ROR 11). The Referee went on to state that there was a "technical" violation of the rules for, "the personal use of the files of the Mulholland Firm." (ROR 12). The referee also indicated that there was a "technical violation of the conversion statute." (TR 902-905). The referee found that this "technical" violation supported a finding of guilt for Rule 3-4.3 (misconduct and minor misconduct); and a not guilty finding for Rule 4-8.4(b), Rule 4-8.4(c) or Rule 4-8.4(d). The referee recommended a sanction of admonishment for minor misconduct. The Florida Bar requests that this Court find that respondent violated Rule 4-8.4(b), 4-8.4(c) and 4-8.4(d), and impose a ninety

day suspension as a sanction. The referee also found that respondent violated Rule 4-7.10(f) (firm names and letterhead-partnerships – 2001 Rule).

The referee ruled in favor of respondent on essentially every disputed factual issue and stated, "The Court finds that Mr. Mulholland's testimony is not reliable in any instances where witnesses refuted Mr. Mulholland's version of the facts." The Florida Bar does not challenge the findings of fact by the referee. However, this Court is asked to consider admissions and undisputed facts that, although relevant to this review, were omitted in the report of referee. This Court is also asked to consider certain evidence on which the referee did not make a specific finding and apparently did not consider relevant for mention in the report. The referee acknowledged he omitted certain facts and stated, "The portions of the evidence not mentioned in the Findings of Fact were not considered relevant for mention." (ROR 2).

The most significant facts that the referee failed to mention involve the admitted misrepresentation by respondent that mislead the Mulholland Firm into believing that Marc Yonker was still working with the firm when he had been actively and secretly signing Mulholland Firm clients to new fee agreements. (TR 82-85). Marc Yonker testified that this misrepresentation and departure from the firm without notice was intended to provide him "unimpeded" access to

Mulholland Firm clients. (TR 197-203). The referee also omitted mention of the fact that respondent only returned the Mulholland Firm files in his possession after a Writ of Replevin had been served requiring the return of the missing files. (TR 96-99, Exhs. 14, 14A). Although the report of referee relied on testimony of former Mulholland employee John McCue regarding his findings that it was the practice of the Mulholland Firm to "control the files," the report failed to mention that respondent was considered by McCue and other Mulholland Firm employees to be the "hatchet man" to enforce firm policies including the prohibition on taking firm files upon termination of employment. (ROR 8; TR 68-70, 571-573, 711, 718-720; Exh. 46 – Robert Dietz deposition at 23-29).

At the sanctions hearing the referee requested the parties to attempt to interpret his verbal ruling and to agree on a proposed report of referee based on his verbal ruling. (SH 124-125). The parties were unable to agree and submitted separate proposed reports. The Florida Bar submitted a proposed report of referee with a cover letter outlining the areas of disagreement. (IR 167- the Bar's June 28, 2011 letter). The proposed report of referee submitted by The Florida Bar suggested specific findings as to the Rules and Standards. The areas of disagreement between The Florida Bar and the report proposed by respondent were discussed in the June 28, 2011 transmittal letter to the referee from The Florida

Bar. (IR 167- the Bar's June 28, 2011 letter). The Bar generally requested specific findings as to the Rules and Standards. The letter articulated the Bar's requested approach of a addressing each issue in the case:

> First, as a general approach to the proposed Report of Referee, The Florida Bar has drafted the proposed Report in an attempt to comply with the guidance provided by the Referee Manual, and Rule 3-7.6(m). Enclosed is a copy of the Referee Manual, revised June 2010, prepared by the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida. As stated in this manual on p. 11, "a comprehensive report of referee under Rule 3-7.6(m) is beneficial to the supreme court so that the court need not make assumptions about the referee's intent or return the report of referee for clarification. The report should address each issue in the case and cite to available case law and standards, including aggravators and mitigators, for the referee's recommendations concerning guilt and discipline. *See* the Court Comment to Rule 3-7.6." A sample Report of Referee is included on pages 14-18. The Florida Bar has attempted to address all the Rules, Standards and case law presented at the Sanctions Hearing and has proposed specific language. Respondent's version has, to a great extent, avoided addressing the specific Rules, Standards and case law. The Florida Bar believes the lack of specificity advocated by Respondents is contrary to guidance provided by the Supreme Court.

(IR 167- the Bar's June 28, 2011 letter).

As to the identification of applicable standards, the Bar requested the referee to identify Standard 7.2 as the applicable standard, which states "Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the

public, or the legal system." Fla. Stds. Imposing Law. Sancs. 7.2. (IR 167- the Bar's June 28, 2011 letter). Additionally, the Bar requested that the report identify the consideration and rejection, by the referee, of Standard 5.12, which states "Suspension is appropriate when a lawyer knowingly engages in criminal conduct … that seriously adversely reflects on the lawyer's fitness to practice," because of a finding that the conduct, although knowing, did not seriously adversely reflect on the lawyer's fitness to practice. Fla. Stds. Imposing Law. Sancs. 5.12. (IR 167- the Bar's June 28, 2011 letter).The Bar requested that the referee include the suggested language because it appeared to accurately represent the ruling made by the referee and clearly articulates the legal issue, now subject to *de novo* review by this Court.

Despite this request by the Bar, the referee chose not to identify any applicable standard for specific misconduct. (ROR 13-15). The referee also chose not to articulate why he chose not to identify any applicable standards as to the specific misconduct. (ROR 13-15).

As to the recommendation of not guilty as to Rule 4-8.4(b) and 4-8.4(c) the Bar requested that the referee articulate his reasoning and that the report should indicate that the referee made a finding that respondent's action did not, "reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." R. Regulating Fla. Bar 4-8.4(b). (IR 167- the Bar's June 28, 2011 letter). Similarly,

the Bar suggested that the report of referee should indicate that the referee made a finding that Respondents' conduct did not involve, "dishonesty, fraud, deceit, or misrepresentation." (IR 167- the Bar's June 28, 2011 letter). The Bar requested that the referee include the suggested language because it appeared to accurately represent the verbal ruling made by the referee and clearly articulates the legal issue, now subject to *de novo* review by this Court.

Despite this request by the Bar, the referee chose not to further explain why he recommended a finding of not guilty as to Rule 4-8.4(b) and Rule 4-8.4(c). (ROR 12-13). It appears that the referee did, in fact, draw conclude that the conduct did not reflect adversely on the respondent's honesty, trustworthiness or fitness as a lawyer or to involve dishonesty, deceit or misrepresentation. (ROR 12-13).

Additionally, although the referee acknowledged that Winters and Yonker kept their departure plans "secret," the referee simply ignored and failed to directly address the misrepresentation by respondent that Yonker had called in sick on Monday, June 18, 2001, when respondent knew Yonker had in fact terminated his employment without notice. (ROR 11-12; TR 82 -85, 196-200, 544-546, 612-615). Winters did not dispute participating in this misrepresentation, and was aware that Yonker would not return after leaving the Mulholland Firm on Friday,

June 15, 2001. (TR 82-85). This misrepresentation assisted Yonker in having "unimpeded" access to Mulholland Firm clients prior to the discovery by Mulholland that his employee had left the firm and was actively and secretly signing Mulholland Firm clients to new fee agreements. (TR 82-85, 196-200; IR 153 – the Bar's Memorandum of Law for Sanctions as to Winters). During the period of "unimpeded" access from June 15, 2001 t0 June 19,2001, Respondent Yonker signed approximately 43 former Mulholland Firm clients to new fee agreements. (Exh. 4; TR 201-203).The referee characterized the "secret plans" of Winters and Yonker as having "been a reasonable, if not necessary, step" in order to leave the firm. (ROR 11).

The referee emphasized lack of harm, specifically "any negative monetary effect," to clients or the public and the lack of proof of damage to the Mulholland Firm. (ROR 9-10, 12, 14-15). The referee also relied on the absence of as specific rule, as Rule 4-5.8 (Procedures for Lawyers Leaving Law Firms) was not adopted until 2006, in the determination of the appropriate sanction. (ROR 14-15). The referee also relied on the argument presented by respondent that The Florida Bar had, in the past, treated similar conduct with a grievance committee admonishment for minor misconduct in two separate cases. (ROR 14-15). The referee relied on these cases, which were not reviewed by this Court, as precedent to support his

recommendation. (ROR 15; IR 153 – the Bar's Memorandum of Law for Sanctions as to Winters).

The referee found one aggravating factor. Respondent received prior discipline in TFB No. 2004-11,581(13D). (ROR 15; Exh. 30). In 2005, Respondent agreed to accept a Grievance Committee Report of Misconduct and Admonishment. (ROR 15; Exh. 30). Respondent Winters was not diligent and had poor communication with a client regarding post settlement negotiation of provider claims for payment. (ROR 15; Exh. 30).The referee found one mitigating factor for character and reputation in the legal community. (ROR 15; SH 120).

The Florida Bar filed a complaint against Respondent Winters on July 8, 2010. A final hearing was held on March 21, 2011 through March 24, 2011 and March 28, 2011. On April 5, 2011, after considering the evidence and arguments, the Referee issued written findings of fact, without recommending any specific Rule violations. On July 19, 2011, the Referee issued his final Report of Referee, which incorporated his previous findings of fact. The Report of Referee was considered by the Board of Governors of The Florida Bar at its July, 2011 meeting. The Board of Governors voted to seek review of the Referee's finding and conclusion that Respondent be found not guilty of violating Rule 4-8.4(b), Rules 4-8.4(c) and Rule 4-8.4(d) of the Rules Regulating The Florida Bar. The Board of

Governors voted to seek review of the recommended sanction and to request a suspension of 90 days. The Bar does not challenge the factual findings made by the Referee. On September 12, 2011, The Florida Bar filed a Petition for Review of the Report of Referee. Pursuant to Rule 3-7.7, the jurisdiction of this Court is invoked.

SUMMARY OF THE ARGUMENT

Respondent Winters committed theft when he took law firm files for his "personal use" when he left the employment as an associate of the Mulholland Firm. When respondent left the Mulholland Firm, he kept possession of "less than ten" client files. These filed were not returned until after a Writ of Replevin was served on June 29, 2001 by Mulholland seeking the return of the files. The files were not returned until July 3, 2001. The files taken were for the most lucrative cases in the Mulholland Firm, including one case that settled for approximately five million dollars ($5,000,000.00).

In addition to the theft, respondent informed clients of his planned departure while he was still working at the Mulholland Firm, or while he retained the files after departure from the firm. Respondent admitted he secretly solicited clients and "could have" obtained agreement for future representation while still a Mulholland Firm employee. Several clients acknowledged agreeing to future representation in advance of Winters' departure from the Mulholland Firm.

Respondent Winters also assisted fellow departing associate Yonker in concealing his departure from the Mulholland Firm from Friday June 15, 2001 through Tuesday, June 19, 2001 in order to assist Yonker in having "unimpeded" access to Mulholland Firm clients. Yonker signed new fee agreements with

approximately 43 former Mulholland Firm clients by the time the Mulholland firm learned of his departure. The referee characterized the "secret plans" of Winters and Yonker to, "have been a reasonable, if not necessary, step" in order to leave the firm. The Florida Bar suggests the conduct of secretly meeting with clients and signing them to new fee agreements while working for the Mulholland Firm or while in possession of the client files after departure from the Mulholland Firm, as a matter of law, reflects adversely on the lawyer's honesty trustworthiness, or fitness as a lawyer.

In *Florida Bar v. Kossow*, 912 So. 2d 544 (Fla. 2005), this Court identified a bright line policy condemning unauthorized misuse of firm resources. This Court stated in *Kossow*,

> Kossow's conduct towards the firm was disloyal and deceitful. An attorney who uses firm resources to place his or her pecuniary interests over those of the firm engages in misconduct that indubitably calls into question the attorney's fitness to practice law…

Id. at 548. The Florida Bar relied on *Kossow* in arguing that theft of firm resources deserved serious discipline. The referee recommended that respondent was not guilty of violating Rule 4-8.4(b) (commission of a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or

misrepresentation), or Rule 4-8.4(d) (conduct prejudicial to the administration of justice). The referee recommended a finding of guilt for Rule 3-4.3 (misconduct and minor misconduct). The referee also found that respondent violated Rule 4-7.10(f) (firm names and letterhead-partnerships – 2001 Rule), for which the referee recommended that respondent receive an admonishment for minor misconduct. The Florida Bar requests that this Court find that respondent violated Rule 4-8.4(b), 4-8.4(c) and 4-8.4(d), and impose a ninety day suspension as a sanction.

STANDARD OF REVIEW

The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *Florida Bar v. Nicnick*, 963 So.2d 219, 221 (Fla. 2007). If the referee's findings are supported by competent, substantial evidence, then this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Florida Bar v. Porter*, 684 So.2d 810, 813 (Fla. 1996).

Where there are no disputed genuine issues of material fact and the only disagreement is whether the undisputed facts constitute unethical conduct, the referee's findings present a question of law that the Court reviews *de novo*. *Florida Bar v. Brownstein*, 953 So.2d 502, 510 (Fla. 2007). The determination of whether the referee's finding of facts support a finding that respondent violated Rules 4-8.4(b), 4-8.4(c) and 4-8.4(d) is subject to *de novo* review.

As to discipline, although a referee's recommendation is persuasive, this Court does not pay the same deference to this recommendation as it does to the findings of fact because this Court has the ultimate responsibility to determine the appropriate sanction. *Florida Bar v. Kossow*, 912 So.2d 544, 546 (Fla. 2005). Generally speaking, this Court will not second-guess a referee's recommended

discipline as long as that discipline has a reasonable basis in existing case law or in the Florida Standards for Imposing Lawyer Sanctions. *Id*.

ARGUMENT

I. THE FINDINGS OF FACT SUPPORT A VIOLATION OF RULE 4-8.4(b), RULE 4-8.4(c) AND RULE 4-8.4(d)

The referee recommended that respondent was not guilty of violating Rule 4-8.4(b) (commission of a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), or Rule 4-8.4(d) (conduct prejudicial to the administration of justice). The Bar submits that this recommendation is in error, as a matter of law, and that respondent's conduct violated these rules.

Rule 4-8.4(b)

Rule 4-8.4(b) provides that, "A lawyer shall not: commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." The theft of firm files by respondent constitutes a criminal act within the scope of the rule. The Florida Bar suggests that this theft inherently "reflects adversely" on respondent Winters' "honesty, trustworthiness, or fitness as a lawyer in other respects." The Florida Bar requested the referee to articulate why he recommended a not guilty finding on this rule. In particular, Bar Counsel requested that the referee articulate if he believed that the theft by respondent did

not reflect "adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." (IR 167- the Bar's June 28, 2011 letter). It appeared to The Florida Bar that this was in fact the basis for the decision by the referee. Despite this request, the referee chose to remain mute on this important issue. (ROR13-15).

The Criminal Act

Respondent Winters was charged with a violation of Rule 4-8.4(b) based on Fla. Stat. § 812.014(1) (2001). It was alleged that respondent committed theft by taking client case files from the Mulholland Firm without permission or authorization to remove or copy the client case files belonging to the Mulholland Firm. When respondent left the Mulholland firm, he kept possession of "less than ten" client files. (ROR 10; TR 96-98). These filed were not returned until after a Writ of Replevin was served on June 29, 2001 by Mulholland seeking the return of the files. (Exh. 14; TR 96-98). The files were returned on or about July 3, 2001. (Exh. 14A; TR 98). The files taken were for the most lucrative cases in the Mulholland Firm, including one case that settled for approximately five million dollars ($5,000,000.00). (TR 68, 474-475, 619-620; 685-688).

The 2001 Florida theft statute provides:

> A person commits theft if he or she knowingly obtains or uses,

> or endeavors to obtain or to use, the property of another with intent to, either **temporarily or permanently**: (a) Deprive the other person of a right to the property or a benefit from the property; (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Fla. Stat. § 812.014 (2001) (emphasis added). To obtain or use the property of another, one must take or exercise control over the property or is engage in "conduct previously known as ... conversion." Fla. Stat. § 812.012(3)(a) and (3)(d)1 (2001).

In *Florida Bar v. Kossow*, 912 So. 2d 544 (Fla. 2005), this Court identified a bright line policy condemning unauthorized misuse of firm resources. The Florida Bar relied on *Kossow* in arguing that theft of firm resources deserved serious discipline. Although the referee did not clearly label the conduct of respondent as outright theft, he stopped short of finding it was not theft. The referee decided to essentially create a new classification of conduct by indicating that respondent Winters engaged in what can be termed a "technical" theft.

Although the referee did not clearly label the conduct of respondent as theft, he left little doubt that there was a theft by conversion. The referee stated in relation to the "personal use" of the Mulholland Firm files that, "under Chapter 812.014 that there was … a presumed value … [that] would result in the conduct being a possible violation of that Statute to-wit: a second degree misdemeanor."

(ROR 11). The Referee went on to state that there was a "technical" violation of the rules for, "the personal use of the files of the Mulholland Firm." (ROR 12). The referee also indicated that there was a "technical violation of the conversion statute." (TR 902-905).

During a discussion with Bar Counsel about *Kossow*, the referee essentially stated that he considered the misuse of firm resources, as in *Kossow*, to be a theft and that, "If that scenario were in a Bar exam and the question was, was there any theft and you said no, you would probably fail on that question, wouldn't you?" (SH 91). Following a discussion of *Kossow*, the referee further stated at the sanctions hearing, "With regard to the appropriation of the use of the files, I guess Justice Lewis will be agreeing with me that it's a technical violation. I think it is a technical violation as I find the findings of fact…." (SH 122).

The conduct of Respondent Winters, in this case, constituted theft. He returned the Mulholland Firm files only after the service of a Writ of Replevin. (Exh. 14; TR 96-98). As the Referee noted, the Mulholland Firm sought to "control the files." (R0R 8). The strict policy of file ownership was enforced to the extent of seeking criminal prosecution for those who removed files upon their termination of employment. (ROR 8). The firm policy for departing lawyers not to remove files could not have been plainer. Respondent Winters, as the "hatchet

man," enforced this policy on behalf of the Mulholland Firm; he was clearly aware of firm policy against removing firm files without authorization. (TR 68-70, 571-573, 711, 718-720; Exh. 46 – Robert Dietz deposition at 23-29). Respondent not only knew the firm policy against retaining firm files upon departure, he actively helped enforce it. He knowingly and intentionally violated firm policy and the law. Respondent misused firm resources by taking the files from the Mulholland Firm. Although the referee found no proof of quantifiable damage to the Mulholland Firm, such proof is not necessary for a violation of the theft statute or Rule 4-8.4(b).

The Mulholland Firm owned the client files and the contents within those files. (TR 95-96). As stated in *Dowda & Fields, P.A. v. Cobb*, 452 So. 2d 1140 (Fla. 5th DCA 1984),

> Attorneys [and law firms] normally maintain an office file relating to matters involving professional services for a particular client as to a particular matter. This is commonly referred to as that client's files but it only relates to that client and the file and its contents is the personal property of the attorney [or law firm].

Dowda, 452 So. 2d at 1142. The Mulholland Firm was deprived of the benefit of the client files when the files were removed, albeit temporarily, from the Mulholland Firm. Further, the Mulholland Firm files were appropriated by

Respondent Winters for his "personal use." (ROR 10-12). The information was obtained in furtherance of the goal to solicit and represent Mulholland Firm clients, if for no other reason, than to deprive the Mulholland Firm access to the files in the critical period of time when respondent was out signing up firm clients. A lawyer leaving a law firm has no right to expect to the client files without an agreement to do so. *See Donahue v. Vaughn*, 721 So. 2d 356, 356-357 (Fla. 5th DCA 1998). Respondent's actions constitute theft under § 812.014.

It has been held that it is not necessary for a person to deprive another of exclusive possession of their property in order for there to be a conversion, nor does conversion require that the property have any specific value. *Warshall v. Price*, 629 So. 2d 903, 904 (Fla. 4th DCA 2003). In *Warshall*, Dr. Price was an employee of a physician, Dr. Warshall. Dr. Price obtained a list of Dr. Warshall's patients' names, addresses, phone numbers and insurance information before his employment was terminated. *Id*. at 904. Dr. Price then opened his own office and immediately sent a form letter to over 500 of Dr. Warshall's patients indicating that he had opened his own practice and would appreciate the completion of an enclosed medical records release form. *Id.* Over 300 of Dr. Warshall's patients completed the form, which caused their records to be transferred to Dr. Price. *Id.* Dr. Warshall sued Dr. Price for conversion. Dr. Price stated that a cause of action

for conversion was improper as a matter of law because was never denied possession of the patient list as he only took a copy of the list from the computer, and because the patient list had no actual value. *Id.* The appellate court stated:

> ... the trial court did not recognize that Warshall's patient list could be of greater value if it was used to solicit his patients. That would indicate that the patient list does have value in the sense that without the list, fees from those patients could not be obtained.
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> ***
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> Like the plane tickets in *Tourismart*[2] it is undisputed that the paper Warshall's patient list was printed on was worth very little. However, the income that Warshall's patient list represented arguable made even a *copy* of the list a very valuable piece of property.

Warshall, at 905 (emphasis in original).

In June 2001, after Respondent Winters left the Mulholland Firm, he had possession of Mulholland Firm client files, without the authorization or knowledge of Richard Mulholland. (TR 95-96, 549-551, 622, 632). At all times, Respondent Winters knew that the files he took were the property of the Mulholland Firm. (TR 95-96). Respondent's expert witness, Wally Pope, acknowledged that in 2001 it was widely known that client files belonged to the law firm. (TR 748-749). On or

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[2] *Tourismart of America, Inc. v. Gonzales*, 498 So. 2d 469 (Fla. 3d DCA 1986).

about June 28, 2001, Richard Mulholland filed a Replevin action against Respondent Winters to get the files back in the Circuit Court in and for the Thirteenth Judicial Circuit of Florida, Case Number 01-CA-005452. (Exh. 14; TR 96-98, 549-551, 622, 632). On June 29, 2001, a Writ of Replevin was issued ordering Respondent Winters to return the files in his possession. (Exh. 14, TR 96-98). On July 3, 2001, Respondent Winters returned eight (8) client files that were in his possession. (Exh. 14A; TR 98).

There is no dispute that Respondent Winter took the files without the permission of the Mulholland Firm. He intentionally and temporarily deprived the Mulholland Firm of the files and therefore acted intentionally in violation of § 812.014. *See, Daniels v. State*, 587 So. 2d 460 (Fla. 1991). There is no dispute that respondent was aware of the firm policy against removing firm files upon departure from the firm. He was, in fact, the "hatchet man" who had previously enforced this policy against other former employees. (TR 68-70, 711, 718-720; Exh. 46 – Robert Dietz deposition at 23-29).

In June 2008, a jury found Respondent Winters guilty of civil theft by clear and convincing evidence in *Richard Mulholland v. William H. Winters and Marc E. Yonker*, in the Circuit Court in and for the Thirteenth Judicial Circuit of Florida, Case Numbers 01-CA-005452, 01-CA-005545, 03-CA-002502, and 05-CA-

005054. (Exh. 22). A final judgment was entered against Respondent Winters. (Exh. 26). However, Respondent Winters appealed the final judgment. The Second District Court of Appeal of Florida issued an opinion, wherein it stated,

> Winters … retained several other paper files for a short period of time after he left Mulholland's firm….
>
> There is no real question that these activities constitute the unauthorized use of Mulholland's client files, misappropriation, fraud, and deception. Thus, Mulholland did prove that a "theft" occurred.

Winters v. Mulholland, 33 So. 3d 54, 57 (Fla. 2d DCA 2010). (Exh. 27). The Second DCA reversed the judgment against Respondent Winters solely on the issue of causation. In the present matter, Respondent Winters has been charged with criminal theft. Unlike civil theft, causation to support damages is not an element of theft by conversion. *See, Winters*, 33 So. 2d at 57.

Although the referee was careful to point out that he did not rely on the opinion in *Winters v. Mulholland*, this disregard can not diminish the precedential value of the *Winters* opinion. (ROR 4). Bar Counsel argued that the opinion had precedential legal significance that should have been considered by the referee in the application of the appropriate legal standard of theft in relation to removal of client files from the Mulholland Firm. (TR 871-875). All that is needed is a temporary or permanent deprivation or appropriation of property belonging to

another. Such "personal use" was found by the referee to have occurred in this case, and is supported by clear and convincing record evidence.

Reflects Adversely on the Lawyer's Honesty, Trustworthiness, or Fitness as a Lawyer

This Court, in *Kossow*, has given clear guidance on the significance of the misuse of firm resources:

> An attorney who uses firm resources to place his or her pecuniary interests over those of the firm engages in misconduct that indubitably calls into question the attorney's fitness to practice law, and such ongoing and intentional misconduct by an attorney justifies serious discipline.

Kossow, 912 So. 2d at 548. Respondent's conduct fits the realm of conduct discussed in Kossow. The "personal use" of the files by respondent, in itself, reflects adversely on his honesty, trustworthiness, or fitness as a lawyer.

The theft was part of a pattern of deceitful conduct towards the Mulholland Firm. In addition to the theft, respondent informed clients of his planned departure while he was still working at the Mulholland Firm, or while he retained the files after departure from the firm. Respondent admitted he secretly solicited clients and "could have" obtained agreement for future representation while still a Mulholland Firm employee. (TR 90-93). Several clients acknowledged agreeing to future representation in advance of Winters' departure from the Mulholland Firm. (Exh. 46 at Elem Miranda deposition; TR 89-90, 686-687). One of these clients, Bruce

Murakami, settled for approximately $5,000,000.00. Respondent informed Elem Miranda of his impending departure and solicited future representation, during a client visit in his office at the Mulholland Firm. (TR 89-90; Exh. 46 at Elem Miranda deposition). Winters admitted that he "could have" obtained agreements for future representations with Mulholland Firm clients prior to his departure from the Mulholland Firm, however, he was unable to produce any of the fee agreements despite request by The Florida Bar. (TR 93, 110-112; IR 31-Respondent's Response to Bar's Request to Produce, #1).

Mulholland Firm client Alisha Edwards provides one example of the deceitful conduct by respondent. Winters visited Ms. Edwards at her apartment without the knowledge on the Mulholland Firm. (TR 110). The referee found that Ms. Edwards signed a new fee agreement with Winters. (ROR 7). Respondent admitted that he may have signed a new fee agreement with Edwards prior to leaving the Mulholland Firm or informing the firm of his planned departure. (TR 110-112). Respondent left the employment of the Mulholland Firm on or about June 22, 2001. (TR 89). Respondent was uncertain if he may have retained a portion of the Mulholland file for Ms. Edwards after leaving the Mulholland Firm. (TR 99). Ms. Edwards eventually returned as a Mulholland Firm client and signed another fee agreement with the Mulholland Firm, on June 27, 2001, after meeting

with Mulholland Firm paralegal, Cathy Burney. (TR 439-440,486-487; Exh. 33 at RMF 15-RMF 16). The testimony about this incident involving Winters' secret meeting with Edwards at her apartment, the signing of a fee agreement with him, and her subsequent return as a Mulholland client is disputed, in part. Ms. Edwards testified that Winters misrepresented that Mulholland was retiring. (TR 481). Cathy Burney, the paralegal who worked on the file, testified that when she met with Ms. Edwards on June 27, 2001, Winters contacted her on her cell phone, swore at her in a "deranged" manner and told her "to leave his f'ing client alone." (TR 443-445). She also testified that much of the file was missing and that she prepared a letter to be sent to Winters requesting the return of missing documents in the file. (TR 447; Exh. 33 at RMF 32-RMF 33). Winters admitted meeting with Ms. Edwards at her apartment. (TR 110). Winters admitted to making the call to Ms. Burney and advising her not to speak with Ms. Edwards, but denied using profanity. (TR 110-112).

The referee appears to have discounted the testimony of Ms. Edwards and Ms. Burney as to any misrepresentation by Winters. The referee stated, in general terms as to all of the various alleged misrepresentation by both Winters and Yonker, that, "The Court has considered the testimony on the issue of misrepresentation regarding the law firm and to the clients. The testimony does not

establish by clear and convincing evidence that the representations were made by either Mr. Winters or Mr. Yonker." (ROR 9). Despite this finding by the referee, the testimony concerning the Edwards solicitation by Winters remains relevant to his deceitful conduct in misleading the Mulholland Firm. Winters secretly solicited the Mulholland Firm clients while he remained employed at the Mulholland Firm. Although this is deceitful conduct, the referee considered it to "have been a reasonable, if not necessary, step" in order to leave the firm. (ROR 11-12).

The referee considered this secretive conduct by respondent in soliciting and signing Mulholland Firm clients to new fee agreements to be acceptable, and wrote:

> During the presentation of evidence there has been a theme presented by The Florida Bar that the Respondents secretly planned their departure from the law firm. The fact that the Respondents did not share their plans with Richard Mulholland or other in the firm does not fit as a violation of any provision of the Rules of The Florida Bar. Given the operating procedure/history of the Mulholland law firm in dealing with individuals who announce their plans to leave, **the not sharing of plans appears to have been a reasonable, if not necessary step**."

(ROR 11) (emphasis added). In essence, the referee condoned the self-help nature by respondent as justified given the dynamics of the Mulholland Firm and long-standing practice that client files were not to be taken by departing attorneys from the firm. The Florida Bar suggests the conduct of secretly meeting with clients and

signing them to new fee agreements while working for the Mulholland Firm or while in possession of the client files after departure from the Mulholland Firm, as a matter of law, reflects adversely on the lawyer's honesty trustworthiness, or fitness as a lawyer.

The Florida Bar requests this Court reject the approval of such conduct by the referee. The Florida Bar suggests that theft of the Mulholland Firm files, taken into account along with respondent's deceptive conduct, reflects adversely on the lawyer's honesty trustworthiness, or fitness as a lawyer in violation of Rule 4-8.4(b).

Rule 4-8.4(c)

The conduct that supports a violation of Rule 4-8.4(b) also supports a violation of 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The Bar incorporates herein the argument made in the previous section in order to avoid unnecessary repetition. Even if this Court considers the "personal use" of the Mulholland Firm client files by Winters after his departure not to be a theft under Fla. Stat. § 812.014(1) (2001), the same conduct remains dishonest, deceitful and involves misrepresentation to the Mulholland Firm. Rule 4-8.4(c) was the agreed upon Rule in the *Kossow* consent judgment upon which the sanction was based. *Kossow, supra,* at 545. Similarly, in *Florida Bar v. Shankman*,

908 So. 2d 379 (Fla. 2005), an attorney was dishonest with his fellow law partners about the receipt and undisclosed retention of fees. Although, there was not a finding of theft in violation of Rule 4-8.4(b), the conduct was considered dishonest and deceitful in violation of Rule 4-8.4(c). *Id.*

In addition to the deceit and dishonesty referenced in the previous section addressing Rule 4-8.4(b), the referee also heard testimony about the conduct of Winters in misleading Mulholland by informing him that Yonker had called in sick on Monday, June 18, 2001, when he knew that Respondent Yonker never planned to return. Yonker left the firm on Friday, June 15, 2001 and began a dedicated effort to secretly sign Mulholland Firm clients to new fee agreements.(TR 196 - 200, 612 -615). He kept his departure secret in order to have "unimpeded" access to Mulholland Firm clients. (TR 196 – 200). Winters did not dispute assisting in this misrepresentation; he was aware that Yonker would not return to the Mulholland Firm after leaving on Friday, June 15, 2001. (TR 82-85, 544-546). The referee did not specifically address this testimony. It appears that he either considered the testimony to be irrelevant, or considered Winters' conduct to be a "**reasonable if, not necessary, step**." (ROR 11). In either case, this conduct "indubitably calls into question the attorney's fitness to practice law." *Kossow, supra*, at 548. Respondent's conduct is a violation of Rule 4-8.4(c).

In this case, the referee made it clear that he disapproved of the manner in which the Mulholland Firm was operated. The referee also made it clear that he considered the deceptive conduct directed towards Richard Mulholland during departure from the Mulholland Firm to be acceptable conduct. The referee described the firm as being run by Mulholland in an "autocratic manner." (ROR 7). However, the fact that Richard Mulholland may have run his firm in an "autocratic manner" should not be permitted to justify or sanction the illegal and deceptive self-help engaged in by Respondent. (ROR 7).

Rule 4-8.4(d)

The conduct that supports a violation of Rule 4-8.4(b) and Rule 4-8.4(c) also supports a violation of Rule 4-8.4(d) (conduct prejudicial to the administration of justice). In upholding a violation of Rule 4-8.4(c) and Rule 4-8.4(d), this Court has "clearly stated that 'basic, fundamental dishonesty … is a serious flaw, which cannot be tolerated' because dishonesty and a lack of candor 'cannot be tolerated by a profession that relies on the truthfulness of its members.'" *Florida Bar v. Head*, 27 So. 3d 1, 8 (Fla. 2010) (citing to *Florida Bar v. Rotstein*, 835 So. 2d 241, 246 (Fla. 2002)). This Court further stated, "Dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole." *Head*, 27 So. 2d at 8; *See also*, *Florida Bar v. Machin*, 635 So. 2d 938 (Fla. 1994).

The theft and deceptive conduct by respondent inherently is conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d).

II. A NINETY (90) DAY SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S MISCONDUCT

The referee recommended an admonishment for minor misconduct. Based on the evidence presented and the factual findings made by the referee, the Bar submits that based on the Standards for Imposing Lawyer Sanctions and the case law, the appropriate sanction for respondent's misconduct is a 90-day suspension from the practice of law.

It is apparent from the findings and remarks by the referee, that he considered the unauthorized retention of the Mulholland Firm files by respondent to be a conversion in violation of the theft statute. (ROR 10-12). It is also apparent that the facts support a finding of theft and unauthorized use of firm resources by respondent. (ROR 10-12; TR 96-98; Exhs. 14, 14A). What is not apparent is how the referee reconciled this theft and unauthorized use of firm resources with the applicable rules, caselaw and standards to justify the recommendation of an admonishment for minor misconduct. Instead of directly addressing the specifics of the applicable rules, caselaw, and standards to be considered in imposing sanctions, the referee avoided mention and analysis of these areas. (ROR 13-14).

The referee ignored the factors this Court has recognized as being essential to a thorough sanctions analysis, despite the Bar's request and specific references to Rule 3-7.6 and the referee manual. (IR 167 – the Bar's June 28, 2011 letter).

Caselaw

The referee based his recommendation on the three objectives of attorney discipline articulated in *Florida Bar v. Lord*, 433 So. 2d 983, 986 (Fla. 1983): (1) fairness to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer; (2) fairness to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and (3) deterrence to others who might be prone or tempted to become involved in like violations. *Id.* at 986.

The referee cited to *Lord* and the preface to The Standards for Imposing Lawyer Sanctions as the legal support for his recommended sanction. The referee failed to address and distinguish other pertinent case law and the specific factors to be considered in imposing sanctions. The general policy set forth in *Lord* should be the introduction to a sanctions analysis, not the sole basis for a sanctions analysis.

The referee also relied on four primary factors in minimizing Respondent's conduct: lack of harm to clients or the public (ROR 10-12, 15-16), lack of quantifiable damages to the Mulholland Firm (ROR 12), the adoption of Rule 4-5.8

in 2006 (ROR 14-15), and reliance on grievance committee action in two cases involving admission for minor misconduct (ROR 15; IR 155 – Respondents' Memorandum of Law for Sanctions). None of these factors provide a reasonable basis in existing case law or in the Florida Standards for Imposing Lawyer Sanctions to support the recommended sanction. The lack of harm to clients and lack of quantifiable damage to the former law firm was rejected as a minimizing factor by this Court in *Kossow*. The adoption of Rule 4-5.8 in 2006 does not excuse violation of Rules 4-8.4(b), 4-8.4(c) and 4-8.4(d) in 2001. It is this Court that has responsibility to set policy and precedent for lawyer discipline, and a grievance committee minor misconduct pursuant to Rule 3-5.1 does not constitute case law to support the recommendation of the referee.

In *Florida Bar v. Machin*, 635 So. 2d 938, 940 (Fla. 1994), this Court recognized that a lack of precedent does not excuse misconduct. Specifically, this Court stated,

> Machin's conduct in this case is so obviously prejudicial to the administration of justice, we find it hard to believe that he claims ignorance of the impropriety of the trust offer simply because he was unable to find authority addressing the precise situation with which he was confronted. We take this opportunity to emphasize that when an attorney recognizes a certain course of conduct may have ethical implications, the fact that there is no precedent directly on point should not be considered authorization to engage in the questionable activity.

> As *Machin* notes, the Preamble to the Rules of Professional Conduct recognizes ethical problems may arise from conflicts between a lawyer's responsibility to a client and the lawyer's special obligations to society and the Preamble goes on to provide:
>
> > The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.
>
> When confronted with possible ethical conflicts, it is the lawyer's obligation to look to the rules of professional conduct and discipline for guidance. While it always may not be clear that a specific course of conduct is proscribed by the rules, an attorney must use sound judgment in applying these ethical standards to a given set of facts.

Id. at 940 (quoting to R. Reg. Fla. Bar. Ch. 4 Preamble).

The Court in *Machin* also noted that an attorney with concerns about prospective conduct may request an ethics opinion from The Florida Bar. *Machin*, 625 So. 2d at 940. Respondent, in this case, presented no evidence suggesting he sought any advice from The Florida Bar or otherwise, regarding the appropriate conduct for departing the Mulholland Firm. Apparently, respondent also did not consult then-existing Florida Ethics Opinion 84-1 (withdrawn January 20, 2006). At the time of respondent's conduct Ethics Opinion 84-1 provided guidance as to the customary practice to be followed by associates departing from a law firm. The

Opinion defines the limits of appropriate conduct by a departing associate and states that if "the associate and the firm cannot agree on the form of content of the joint letter or notice, the only communication to the client from the associate should be a notification that the associate is no longer affiliated with the firm. The notice may reflect the associate's new address, but may not solicit a response from the client regarding disposition of the client's files." Fla. Eth. Op. 84-1 (1984) (withdrawn January 20, 2006). The significance the referee placed on the absence of Rule 4-5.8 in 2001 should not be considered a license to engage in the misconduct committed by respondent. (ROR 14). It appears that the referee completely discounted the significance of the Ethics Opinion. (ROR 14). However, even respondent's expert witness, Wally Pope, acknowledged that in evaluating customary practice for departing a law firm in 2001 the Ethics Opinion was "part of the body" of what would be considered customary practice. (TR 735-736). Although, an Ethics Opinion may not form the basis of discipline, neither should it be treated as an orphan. It was not customary practice in 2001 to have a secret plan of departure and engage in theft of law files.

It is the position of The Florida Bar that theft of files and misuse of firm resources is conduct that is inherently dishonest and reflects adversely on respondent's honesty, trustworthiness and fitness to practice law and is, thereby,

prejudicial to administration of justice. The legal profession relies on a fundamental belief in the rule of law. The rule of law requires that the legal process be followed. The misuse of firm resources by respondent may be considered by the referee to have been "necessary" for the benefit of the clients; however, such a finding does not require the referee to disregard the importance of the legal process available to respondent. It is unknown what harm, if any, would have resulted to the client if respondent would not have taken the files. The issues related to post departure file access could have been addressed through litigation, if necessary. Although litigation is not an appealing option, it is preferable to the abandonment of the legal process and implementation of theft as a device for self-help. If the legal profession condones illegal self-help by members of the Bar, it can only serve to erode the perception of our profession and to undermine the ability of society to have faith in and to abide by the rule of law. This Court has made a clear policy statement that a breach of the duty of loyalty to an employer law firm and unauthorized use of law firm resources deserves serious discipline, even if there is no harm to clients and no quantifiable damage to the employer. *See, Florida Bar v. Kossow*, 912 So. 2d 544 (Fla. 2005). The misrepresentation to Mulholland concealing the departure of Yonker and the unauthorized use and taking of law firm files by respondent was a breach of the duty of loyalty and

constituted unauthorized use of law firm resources which should be sanctioned accordingly. (IR 153 – the Bar's Memorandum of Law for Sanctions as to Winters).

This Court stated in *Kossow*,

> An attorney who uses firm resources to place his or her pecuniary interests over those of the firm engages in misconduct that indubitably calls into question the attorney's fitness to practice law, and such ongoing and intentional misconduct by an attorney justifies serious discipline.

Id. at 548. In *Kossow*, the Court reversed the Referee's recommendation of a public reprimand and ordered a thirty- day suspension. The Court stated that the 30-day suspension "could actually be considered lenient." *Id.* at 547. Kossow represented clients outside of the firm and devoted time to representing these clients that should have been devoted for the benefit of the firm. Although the Referee found that no theft of firm resources occurred, the Court considered this conduct to be "blatantly dishonest and deceitful." *Id.* at 546. The Court further discounted the referee's finding that there was no quantifiable damage to the firm, and stated,

> It does not matter that Kossow's use of the firm's time and resources to represent nonfirm clients, contrary to the firm's stated policy, may not be quantifiable to an exact amount. It is unquestionable that by using the firm's equipment, materials and time … Kossow misappropriated the resources of the firm that employed him, thereby compromising the good of the firm

to his own financial ends.

Id. at 546. This Court also discounted the significance of lack of client harm and cited to *Florida Bar v. Cox*, 655 So. 2d 1122 (Fla. 1995) for support of its position. This Court concluded that,

> Kossow's conduct towards the firm was disloyal and deceitful. An attorney who uses firm resources to place his or her pecuniary interests over those of the firm engages in misconduct that indubitably calls into question the attorney's fitness to practice law, and such ongoing and intentional misconduct by an attorney justifies serious discipline.

Kossow, 912 So. 2d at 547-48.

In the concurring opinion, Justice Lewis admonished that,

> … we must not fail to advise the bench and bar that this type of extra-employment conduct, when contrary to a law firm's policy, simply cannot be condoned and will face appropriate sanction. Time, materials, and resources are firm assets and when misappropriated under circumstances such as these in conducting a separate practice of law of secreting firm clients it is most certainly a form of theft.

Id. at 550.

The conduct of Respondent Winters, in this case, constituted theft. He returned files only after the issuance of a Writ of Replevin. (Exh. 14A; TR 98). As the Referee noted, the Mulholland Firm sought to "control the files." (ROR 8). The strict policy of file ownership was enforced to the extent of seeking criminal prosecution for those who removed files upon their termination of employment.

(TR 68-70, 191-192, 216, 220-221, 571-573; Exh. 46 – Robert Dietz deposition at 23-29). The firm policy for departing lawyers not to remove files could not have been plainer. Respondent Winters, as the "hatchet man" enforced this policy on behalf of the Mulholland Firm; he was clearly aware of the firm's policy. The Court has clearly stated that such conduct, regardless of lack of harm to the client or lack of quantifiable damages to the firm, is deserving of a serious sanction. *Kossow*, 912 So. 2d at 549; *Cox*, 655 So. 2d at 1123.

Furthermore, Respondent Winters cooperated with Respondent Yonker in concealing Respondent Yonker's departure from the law firm by telling Richard Mulholland that Respondent Yonker was sick on June 18, 2001, when he knew that Respondent Yonker never planned to return. Respondent Yonker sought time to have an opportunity to have "unimpeded" access to the Mulholland Firm clients. The Court has shown no tolerance for such dishonesty. Justice Lewis, in his concurring opinion, stated that the Referee in *Kossow*, had an almost "bitter reluctance to find aggravation" despite dishonest and selfish conduct. *Kossow*, 912 So. 2d at 548. The fact that Richard Mulholland may have run his firm in an "autocratic manner" cannot justify excusing the illegal and deceptive self-help engaged in by Respondent. (ROR 7).

In *Florida Bar v. Arcia*, 848 So. 2d 296 (Fla. 2003), the Court ordered a

three year suspension for an associate attorney who engaged in theft of funds from his employer. Arcia secretly represented clients and took fees without informing his employer. The Court determined that this conduct amounted to theft and announced that, in the future, theft of funds from a law firm will carry a "presumption of disbarment." *Id.* at 299. The Court also recognized that a law firm employer can expect that there is a trust that "law firms must place in their attorneys as professionals to act as representatives of the firm." *Id.* at 300.

In *Florida Bar v. Shankman*, 908 So. 2d 379 (Fla. 2005), Shankman was suspended for 91 days for deceptive practices with his law firm partners. Although Respondent did not engage in theft, he did remove assets from the firm without firm knowledge and also received a bonus from a client not disclosed to his firm. In mitigation, the Referee described the firm as a "financial disaster." *Id.* at 382. The Referee found that the failure to disclose receipt of funds by Shankman as an act of "self-help," but did not rise to the level of theft. *Id.* Despite a finding that Shankman did not engage in theft, the Court reversed the Referee's recommendation of a 90-day non-rehabilitative suspension.

The referee relied on *Florida Bar v. Brinn*, TFB No. 2003-11,634(13D), and *Florida Bar v. Shaffer*, TFB No. 2001-11,850(6B), as support for the recommendation of an admonishment for minor misconduct. (ROR 15; IR 155 –

Respondents' Memorandum of Law for Sanctions). *Brinn* and *Shaffer* were both admonishments approved at the grievance committee level. They were never approved by this Court and have no value as precedent. It is the function of this Court, and this Court alone, to establish the precedent for lawyer discipline. The unreviewed action of a grievance committee cannot, and does not, provide a reasonable basis in existing case law in support of the recommended discipline.

The Florida Bar suggests that the referee ignored the bright line guidance provided by the *Kossow* case, along with the other cases cited in this brief. Instead, the referee relied upon unreviewed grievance committee action. The recommended discipline of admonishment for minor misconduct has no reasonable basis of support in existing case law.

Standards

The recommended discipline of admonishment for minor misconduct also has no reasonable basis of support in the Standards for Imposing Lawyer Sanctions. The referee's report is void of any references to the Standards, despite request by the Bar for inclusion of the Standards in his report.

Standards 7.2 and 5.12 are applicable in this case. Standard 7.2 states, "Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a

client, the public, or the legal system." Fla. Stds. Imposing Law. Sancs. 7.2. The Supreme Court has indicated that the type of conduct engaged in by respondent inflicts injury on the legal system. In *Kossow*, this Court specifically found this standard applicable to similar conduct and stated,

> We similarly conclude that Kossow's conduct towards the firm was disloyal and deceitful. An attorney who uses firm resources to place his or her pecuniary interests over those of the firm engages in misconduct that indubitably calls into question the attorney's fitness to practice law, and such ongoing and intentional misconduct by an attorney justifies serious discipline. Therefore, we conclude that a thirty-day suspension is the minimum discipline that should be imposed upon Kossow for his unethical and dishonest dealings with the firm. This conclusion is consistent with Florida Standard for Imposing Lawyer Sanctions 7.2, which provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury to the public, a client, or the legal system. Without question, Kossow intentionally violated his professional duty to the firm, and his misappropriation of firm time and resources harmed the firm. We caution that in the future, the discipline imposed may be harsher for attorneys who represent outside clients in violation of firm policy, misuse their firms' resources to represent those clients, and act dishonestly by failing to disclose those clients to their firms.

Kossow, *supra*, at 547-48. In this case, respondent knowingly and deliberately maintained possession of the files. He knew they were in his possession after he left the employment of the Mulholland Firm. He also knew the firm policy on

keeping control over the files. The necessary intent does not require knowledge that his conduct would violate the Rules, only knowledge that he had the files. A fact to which Winters admitted. (TR 95-96). In *Florida Bar v. Smith*, 866 So. 2d 41 (Fla. 2004), this Court recognized that the determinative factor is "whether the attorney deliberately or knowingly engaged in the activity in question." *Id.* at 46.

Standard 5.12 states, "Suspension is appropriate when a lawyer knowingly engages in criminal conduct . . . that seriously adversely reflects on the lawyer's fitness to practice." Fla. Stds. Imposing Law. Sancs. 5.12. The type of conduct engaged in by Respondent Winters seriously adversely reflects on his fitness to practice law for which suspension is appropriate. Respondent engaged in criminal conduct by taking the Mulholland Firm files and returning them only upon the issuance of a Writ of Replevin. (Exhs. 14, 14A; TR 98). The Florida Bar suggests that the recommended discipline of admonishment for minor misconduct has no reasonable basis of support in the Standards for Imposing Lawyer Sanctions.

Ninety Day Suspension

The recommended discipline of admonishment for minor misconduct is not appropriate as a matter of law. Rule 3-5.1(b) (1)(E) provides the following disqualification: "In the absence of unusual circumstances misconduct shall not be regarded as minor if any of the following conditions exists: the misconduct

includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent." R. Regulating Fla. Bar 3-5.1(b)(1)(E).

The conduct of respondent was inherently dishonest, deceitful and a misrepresentation. Therefore an admonishment is inappropriate. The referee provided no explanation as to whether any unusual circumstances existed to justify deviation from the disqualifying conduct.

The request for a ninety day suspension is based on the case law and standards cited herein. The reason that the requested discipline for Respondent Winters is more than that requested for Respondent Yonker is because Winters had more experience, he was the "hatchet man" enforcing the Mulholland Firm policy of file retention, he has prior discipline, and he removed and retained the files until a Writ of Replevin was served.

CONCLUSION

The record evidence and the factual findings of the Referee support a finding that in addition to the Rule violations found by the Referee, Respondent violated Rules 4-8.4(b), 4-8.4(c), and 4-8.4(d). The Bar submits that the Referee's findings and conclusions that Respondent did not violate Rules 4-8.4(b), 4-8.4(c), and 4-8.4(d) be disapproved. As to discipline, the Bar submits that Respondent should be suspended from the practice of law for 90 days. Respondent should be assessed

the costs of this proceeding.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by UPS Delivery, Tracking Number **1Z E32 77W 22 1000 2268**, to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1900; electronically filed at e-file@flcourts.org; a true and correct copy by regular U.S. Mail to **Donald A. Smith, Esq.**, Counsel for Respondent, at Smith, Tozian & Hinkle, P.A., Suite 200, 109 N. Brush St., Tampa, FL 33602 and via email to dsmith@smithtozian.com; by regular U.S. Mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar,

651 E. Jefferson Street, Tallahassee, FL 32399-2300, all this **7th** day of **October**, 2011.

_____

Henry Lee Paul
Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

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Henry Lee Paul
Bar Counsel