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 REPLY 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, Marc Edward Yonker, 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. "AB" will refer to the Answer Brief of respondent.

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

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 conduct of respondent retaining possession of Mulholland Firm files for his "personal use," without the knowledge or authorization of Richard Mulholland, after he left employment of the Mulholland Firm was admittedly a conversion. (TR 94-98, 549-551, 622, 632, 902-905). When respondent left the Mulholland firm, he kept possession of "less than ten" client files. (ROR 10; TR 94-98). 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 94-98). The files were returned on or about July 3, 2001 (Exh. 14A; TR 98). The referee also indicated that there was a "technical violation of the conversion statute." (ROR 10-12; TR 902-905).

The "personal use" of the files by respondent, in itself, reflects adversely on his honesty, trustworthiness, or fitness as a lawyer. In addition to the theft, respondent secretly 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. Some 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). Respondent also engaged in deceptive and deceitful conduct by aiding Yonker's "unimpeded" access to actively and secretly sign Mulholland Firm clients to new fee agreements by not conveying to Mr. Mulholland or the firm that Yonker had left employment with the firm until June 19, 2011, when he knew that 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, 2011. (TR 82-85).

These facts are either included in the report of referee or are undisputed. The determination of whether these facts constitute a violation of Rules 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) is subject to *de novo* determination by this Court.

The Florida Bar takes the position that the type of self-help, theft and deceit engaged in by respondent is a fundamental violation of the trust reposed in members of the Bar and that it reflects adversely on respondent's honesty,

trustworthiness, and fitness as a lawyer.

Respondent seeks to justify his conduct by casting blame on his employer. He suggests that theft is merely "technical," and therefore not a violation of the disputed rules. He suggests that this Court should discard the precedent of *Winters v. Mulholland*, 33 So. 3d 54, 57 (Fla. 2d DCA 2010). The Florida Bar has always acknowledged that the referee was free to disregard the description of the facts as stated by the Second District Court of Appeal, however, he is still bound to follow legal precedent concerning what constitutes a theft. No legal authority was cited that justifies classifying such conduct identified as "technical" theft, as was done by the referee.

Respondent suggests that Bar Counsel acknowledged that this conduct was not fit for prosecution. (AB 15 citing SH 77-78). This suggestion is incorrect and the citation refers to a hypothetical question posed by the referee in which the hypothetical lawyer inadvertently put "stuff" in his pocket. The facts in this case are clear. There was nothing inadvertent about the conduct of respondent. Respondent acted in a deliberate, knowing and calculated manner. *See Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011). He engaged in theft and deceit. Respondent should be found guilty of violating 4-8.4(b), 4-8.4(c), and 4-8.4(d).

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

In *Florida Bar v. Kossow*, 912 So. 2d 544 (Fla. 2005), this Court identified a bright line policy condemning unauthorized use 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, and such ongoing and intentional misconduct by an attorney justifies serious discipline.

Id. at 548. The Florida Bar relied on *Kossow* in arguing that the conduct in this case deserves serious discipline.

The conduct of respondent retaining possession of Mulholland Firm files for his "personal use," without the knowledge or authorization of Richard Mulholland, after he left employment of the Mulholland Firm was admittedly a conversion. (TR 94-98, 549-551, 622, 632, 902-905). When respondent left the Mulholland firm, he kept possession of "less than ten" client files. (ROR 10; TR 94-98). 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 94-98). The files were returned on or about July 3, 2001 (Exh. 14A; TR 98). The referee also

indicated that there was a "technical violation of the conversion statute." (ROR 10-12; TR 902-905).

The "personal use" of the files by respondent, in itself, reflects adversely on his honesty, trustworthiness, or fitness as a lawyer. In addition to the theft, respondent secretly 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. Some 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). Respondent also engaged in deceptive and deceitful conduct by aiding Yonker's "unimpeded" access to actively and secretly sign Mulholland Firm clients to new fee agreements by not conveying to Mr. Mulholland or the firm that Yonker had left employment with the firm until June 19, 2011, when he knew that 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, 2011. (TR 82-85).

This conduct is precisely the type of dishonest conduct that reflects adversely on the honesty, trustworthiness and fitness as a lawyer. It was this type

of conduct which was chastised by this Court in the *Kossow* case.

Respondent suggests in his brief that The Florida Bar should be precluded from referencing facts not specifically "found" by the referee. (AB 2). The Florida Bar suggests that the Report of Referee should not be reviewed in a vacuum. Respondent's suggestion that The Florida Bar should be limited in discussion only to what was written in the report defies common sense. The report must be read in the context of the record. Reference to the undisputed facts in the record is especially important in this case where the referee consciously chose to avoid discussion of the facts in relation to the applicable rules and conduct specific standards.

The referee referred to the deceptive conduct by respondent towards the Mulholland Firm as "Secret Plans" and summarily dismissed the admitted conduct of respondent as "reasonable, if not necessary." (RR 11-12). This reference can only be understood by reference to the record which reveals the specifics of the referred to secret plans. The secret plans, in part, are established by the undisputed admission of respondent. (TR 82-85, 89-90, 196-203, 686-687). It should also be noted that in his brief respondent regularly referenced matters not specifically "found" in the report. One example is the reference to the good works of respondent, which the referee specifically found not to be a mitigating factor

because it was “unrelated to the practice of law.” (AB 35-36; RR 16; SH 120-121).

The referee made a policy decision that the conduct of respondent did not deserve serious discipline. In making this determination, the referee failed to address the applicable conduct specific standards of 7.2 and 5.12.

Standard 7.2 calls for suspension because the conduct was a knowing violation of a duty owed as a professional and caused injury or potential injury to the public or the legal system. This standard supported the suspension in *Kossow*. In rejecting suspension, the referee disregarded the standard and the case law, and decided that this conduct did not cause injury or potential injury to the public or the legal system.

Standard 5.12 calls for suspension for knowing criminal conduct that seriously adversely reflects on the lawyer’s fitness to practice. In rejecting suspension for the admitted conversion, which equates to theft under Florida law, the referee made a policy decision that such improper use of files did not seriously adversely reflect on respondent’s fitness to practice law.

The Florida Bar suggests that the type of conduct engaged in by respondent runs afoul of the standards and established case law, which support suspension. Theft from, and deceit of, an employer in order to have unimpeded access to firm clients for the pecuniary interest of establishing a competing law practice

inherently calls into question fitness to practice law. The sanction recommended by the referee is not supported by a reasonable basis in existing case law or in the Florida Standards for Imposing Lawyer Sanctions

Respondent's expert, Wally Pope, acknowledged that there was guidance regarding acceptable conduct for attorneys departing from a law firm in the form of Ethics Opinion 84-1. (TR 735-736). The customary practice was to follow Ethics Opinion 84-1 rather than to secretly and deceptively solicit the former employers' clients. In relevant part, the Ethics Opinion, which was in effect at the time of respondent's departure from the Mulholland Firm, stated that when a lawyer is departing a law firm without an agreed upon procedure,

> 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 the disposition of the client's files.

Fla. Eth. Op. 84-1 (1984) (withdrawn January 20, 2006). Further, references to the grievance committee admonishments of *Brinn* and *Shafer* are not precedential and provide no persuasive authority for this Court to recede from the policy articulated in *Kossow*, which supports serious discipline in this case.

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 (ninety 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 2893**, 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 21st day of December, 2011.

_____

Henry Lee Paul
Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE
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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
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