IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

CASE NO.: SC11-1136
[TFB NO.; 2011-31,479(09B)]

CLINT JOHNSON,

Respondent.
_________________________/

RESPONDENT'S ANSWER BRIEF

CHANDLER R. MULLER, of
LAW OFFICES OF
MULLER & SOMMERVILLE, P.A.
1150 Louisiana Ave., Suite 2
Post Office Box 2128
Winter Park, FL 32790-2128
Telephone: (407) 647-8200
Facsimile: (407- 645-3000
Florida Bar No. 112381

DAVID A. HENSON, of
DAVID A. HENSON, P.A.
4 West Main Street, Suite 9
Brevard, NC 28712
Telephone: (828) 877-6334
Facsimile: (828) 877-6374
Florida Bar No. 330620

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS……………………………………………iii

SYMBOLS AND REFERENCES……………………………...…v

STATEMENT OF THE CASE……………………………………….1

STATEMENT OF THE FACTS……………………………………...2

SUMMARY OF THE ARGUMENT……………………………...….17

ARGUMENT…………………………………………………...19

POINT I
THE REFEREE DID NOT ERR IN FINDING RESPONDENT NOT GUILTY OF VIOLATING RULE 4-8.4(c) WHEN THE BAR'S EVIDENCE DID NOT ESTABLISH HE DELIBERATELY OR KNOWINGLY PARTICIPATED IN THE MIS-HANDLING OF TRUST MONIES...................................19

POINT II
IN LIGHT OF THE RECORD, THE REFEREE APPROPRIATELY REFUSED TO FIND THE EXISTENCE OF DISHONEST OR SELFISH MOTIVE AND BAD-FAITH OBSTRUCTION OF THE DISCIPLINARY PROCEEDING; LEADING THE REFEREE TO CORRECTLY FIND IN MITIGATION THE ABSENCE OF A DISHONEST OR SELFISH MOTIVE, AND GOOD-FAITH DISCLOSURE OF INFORMATION TO THE BAR AND A COOPERATIVE ATTITUDE TOWARD DISCIPLINARY PROCEEDINGS………………………35

POINT III

THE SIX-MONTH SUSPENSION AND PROBATIONARY SANCTIONS RECOMMENDED BY THE REFEREE ARE APPROPRIATE AND AUTHORIZED UNDER THE FLORIDA SANCTION STANDARDS AND REASONABLY SUPPORTED BY EXISTING CASE LAW……………..…41

CONCLUSION………………………………………………………47

CERTIFICATE OF SERVICE………………………………………48

CERTIFICATE OF COMPLIANCE…………………………………...48

TABLE OF CITATIONS

Cases Page

Florida Bar v. Barley, 831 So.2d 163 (Fla. 2003)……………..……..…..22

Florida Bar v. Barrett, 897 So.2d 1269 (Fla. 2005)…………….....……19

Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979)……………………..41

Florida Bar v. Burke, 578 So.2d 1009 (Fla. 1991)………22,28,30,44,45

Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999)……….....…23,27

Florida Bar v. Herman, 8 So.3d 1100 (Fla. 2009)……………….…………36

Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983)……………….……..46

Florida Bar v. Mason, 828 So.2d 985 (Fla. 2002)…………….………28,44

Florida Bar v. Neu, 597 So.2d 266 (Fla. 1996)………...……28,30,44,45

Florida Bar v. Nicnick, 963 So.2d 219 (Fla. 2007)……..……………..19

Florida Bar v. Riggs, 944 So.2d 167 (Fla. 2006)…………...…..23-27,44

Florida Bar v. Smith, 866 So.2d 41 (Fla. 2004)……………….………26

Florida Bar v. Spear, 887 So.2d 1242 (Fla. 2004)……………….…….41

Florida Bar v. Stanton, Case No. SC06-408 (July 2007)..28-30,38,44-46

Florida Bar v. Watson, 2011 WL 6090078 (Fla. 12/8/2011)…….19,23,27

Florida Bar v. Weiss, 586 So.2d 1051 (Fla. 1991)……..…22,28,30,44,45

Rules Regulating The Florida Bar

Rule 3-7.7(c)(5)…………………………………………………………19

Rule 4-8.4(c)………………………………………………..17,21,25-28

Rule 5……………………………………………...5-7,11,13,14,15

Rule 9.22(b)…………………………………………………………...35

Rule 9.22(c)…………………………………………………………..35

Rule 9.22(e)…………………………………………………………..36

Rule 9.32(b)…………………………………………………………..36

Rule 9.32(e)…………………………………………………………..36

Other Authorities:

Lawyer Sanction Standard 4.11……………………..……………..28,43

Lawyer Sanction Standard 4.12……………………………………28,43

SYMBOLS AND REFERENCES

Throughout this Answer Brief, The Florida Bar will be referred to as "The Florida Bar" or "The Bar". The Respondent will be referred to as "Mr. Johnson" or "Johnson", or as the Respondent.

References to parts of the appellate record will be done consistently with the symbols previously identified in The Bar's Initial Brief.

STATEMENT OF THE CASE

Mr. Johnson accepts The Bar's articulation of the Statement of the Case,--except to add that The Bar's position before the referee was to contend he was required to be disbarred for intentionally misappropriating client trust monies. (T 661-662). Not only did the referee recommend a 6-month suspension (in combination with probation) as the appropriate sanction because Mr. Johnson was "guilty of negligence but no more"; the referee alternatively found that even if Johnson's violation conduct was treated as being intentional and knowing,--any presumption of disbarment was rebutted by significant mitigation evidence related to the circumstances of the misappropriation, his cooperation, restitution, and the absence of a past disciplinary record. (ROR-41-47).

STATEMENT OF THE FACTS

Clint Johnson, age 39, is the managing partner and majority shareholder in a small personal injury, family, civil and criminal defense trial firm called Johnson Law Group, PLLC. He opened up the law firm in September of 2006. (T 478). Initially, the firm maintained a single trust account and a single operating account at SunTrust. (T 479, 481). He has no prior disciplinary history; and has been a member of The Florida Bar since 2003.

In 2008, Mr. Johnson moved his law firm's banking accounts from SunTrust to Bank of America. (T 479, 481). That same year, in May, he also started a credit counseling/debt settlement business named Johnson Law Group Debt. (T 289, 481). Even though Johnson's credit-counseling/debt-settlement business has, historically, in fact, focused on debt-consolidation/debt-settlement activity as opposed to the traditional practice of law—he made an uninformed and ill-fated decision, at the outset, to place the credit-counseling/debt-settlement business and its multiple trust and operating accounts under the umbrella of his small law firm and its rudimentary bookkeeping system. Consequently, due to the needless and poorly-conceived intertwining of his credit-counseling/debt-

settlement business with his then 2-year-old law firm, all the debt-client funds maintained in the Debt Management Division trust accounts [to be distinguished from the main 4380 law firm trust account, hereinafter referred to as the "TA-1 account"] are actually disbursed by Johnson Law Group, PLLC on behalf of the debt-clients of Johnson Law Group Debt. All told, Johnson's debt-management business came to have six (6) trust accounts in addition to operating accounts. (T 465).

In a relatively short time frame, his debt-management business experienced tremendous growth. As many as 13,230 of Respondent's debt-clients, through the mechanism of certain debt-management/ processing companies, rely on the timely disbursement of *their* money to their particular creditors from Respondent's multiple debt-management trust accounts. The debt-management money is typically sent by the client with special conditions related to a deal negotiated by the debt management company with the client's creditor(s). For example, a credit-counseling client may enter into an agreement with a credit card company to pay off a $1,000 debt by paying $50 per month on the first of each month for 10 consecutive months. If the client fulfils his or her contractual obligation, the credit card company agrees to waive the balance of the debt and the interest. However, if the client breaches the

agreement by payment of a lesser amount or any late payment,--such a breach can result in the loss of the benefits of the negotiated deal and the forfeiture of any payments already made. The efficacy of these agreements between the debt-client and the creditor is wholly dependent upon the timely payment of an agreed amount. (T 450-451).

Respondent's trust account irregularities in the law firm's TA-1 account, including apparent shortages, became the subject of a Florida Bar investigation dating back to May of 2010 when The Bar responded to a May 4, 2010 Overdraft Report generated by the Bank of America because of two (2) insufficient-funds checks involving different personal injury clients, Brianna Gardner and Jasmine Carr. (TFB Exhibit #7). This was the only overdraft report sent by the bank, and the only time prior to Mr. Johnson's emergency suspension when any clients were even temporarily deprived of their rightful funds. Both Ms. Gardner and Ms. Carr were made whole the next day when the checks were re-presented. (TFB Exhibit #14, Attachment 5-3).

Mr. Johnson first became aware of the 2 returned checks and the reported irregularities in the TA-1 account on **July 5, 2010**. (T 486-487, 490-491). It was on that date that his former bookkeeper/office manager, Ms. Deanna Cintron, came to him during a mid-day break in a trial

proceeding and informed him of the bank's Overdraft Report and The Bar's resulting initiation of an investigation. (T 274-276, 326-327, 487). Also on July 5, 2010, Ms. Cintron first showed him The Bar's subpoena duces tecum requiring him to appear for a July 15, 2010 deposition. (T 276, 487, 490-491). Attached to the subpoena duces tecum were copies of Bar letters that, unbeknownst to Johnson, had been previously mailed to him c/o his law firm. (T 487). Based on the attached letters, and a conversation with The Bar's investigator, Walter Tuller, Johnson believed The Bar's inquiry concerned the 2 NSF checks associated with Gardner and Carr. On the very next day, i.e., July 6, 2010, he was personally served with the grievance subpoena duces tecum requiring him to produce all his trust account records. (T 73).

In the course of responding to The Bar's series of requests for records and information, made in the context of an investigation that expanded to ultimately cover from January 1, 2009 through November 30, 2010, Johnson belatedly came to learn that for much of the audit period, his traditional law firm trust account [the TA-1 account] had apparent shortages, and his bookkeeping system was in serious disarray and non-compliant with Chapter 5 of the Rules Regulating The Florida Bar. (T 500). Further along, he also came to learn his long-term and trusted

employee, Ms. Cintron, was stealing from him throughout 2009 and 2010; concealing financial transactions, trust account transfers and bank statements; and then generally withholding financial information, changing email accounts and circumventing firm procedures in an effort to hide her thefts and other misconduct from Johnson and the accountant he had hired to oversee her work. (T 355, 366-368). He retained the expert services of Pedro J. Pizarro, CPA, a former Bar auditor for over 20 years, to reconstruct his accounting records and get the law firm's TA-1 account in compliance with Chapter 5. (T 417). Mr. Pizarro was trained by Clark V. Pearson, and has conducted thousands of compliance audits on behalf of The Bar. Johnson made full and timely restitution to correct trust account shortages once they became identifiable. (T 117-118). Additionally, Johnson retained a New York accounting firm specializing in debt management accounts to review and correct the debt-management accounts and procedures. (T 450-457). As the result of these and other corrective actions, taken over a period of many months and including the termination of Ms. Cintron's employment at Johnson Law Group. PLLC, Respondent's TA-1 account has been properly balanced and in consistent compliance with Chapter 5 since December of 2010. (T 117, 175, 182, 259, 418-421).

At the final hearing, Clint Johnson described Ms. Cintron as a seemingly trustworthy employee. She was hired as a receptionist in 2003 when Johnson was employed at the Law Offices of Matthew Fenderson, P.A. (T 475-476). After he started Johnson Law Group, her duties included such matters as opening the mail, entering information into the QuickBooks register, making sure trust accounting procedures were being adhered to, and keeping him informed on the bank accounts. (T 483, 496). In preparation for starting Johnson Law Group, he had arranged for her to receive appropriate instruction on how the TA-1 account needed to be handled to be compliant with Chapter 5. (T 477). However, as time went on, he became negligent in overseeing the TA-1 account and supervising Ms. Cintron. (T 496-498). He would simply accept her undocumented assurances that all was in order without routinely examining bank statements and without verifying she was actually preparing the monthly reconciliations and reports she was tasked with preparing. (T 483, 496, 493). While Johnson candidly admitted his failure to exercise reasonable oversight of both the TA-1 account and his bookkeeper—he adamantly denied having any knowledge of the apparent shortages prior to The Bar's investigation; and denied The Bar's accusation that the apparent trust account shortages were caused by him

knowingly taking money from clients and misappropriating it to his own uses. (T 490, 496-500, 551).

Ms. Cintron testified that beginning in 2009 and extending into 2010 she became so overwhelmed by a number of personal problems that she began *both* neglecting her bookkeeping responsibilities and stealing from Mr. Johnson. (T 260-268). By her own estimate or calculation, she admitted stealing some $50,000 from Johnson's law firm operating account in customary increments of $500. (T 261). She would neglect to physically deposit insurance settlement checks into the law firm trust account; yet proceed to use the QuickBooks program to enter a phantom deposit and issue trust checks that would disburse settlement proceeds to client and others. (T 268, 285). Similarly, without having first physically deposited the underlying insurance settlement check into the TA-1 account, she would electronically transfer earned attorney's fee amounts from the firm trust account to the firm operating account. (T 285). She would hide bank statements from Mr. Johnson. (T 268, 295, 310). She wrote duplicative checks and entered duplicate charges for fees. (T 183, 268). She neglected to open firm mail. (T 268). In order to keep trust account checks from bouncing due to her erratic check-depositing, check-writing, and electronic transfers of earned attorney's

fees out of trust, Ms. Cintron began using her ability to electronically access the debt-management accounts at Bank of America to transfer Respondent's earned fee monies (from his debt-management business) into the TA-1 account. (T 268-273, 279, 312). What resulted from this bookkeeping morass was a whole series of irregular transfers into the TA-1 account from Johnson's debt-management operating accounts. (T 272, 279). From time to time when the fund balance in the TA-1 account would allow, Ms. Cintron would make estimated "pay back" electronic transfers of funds from the TA-1 account to various operating accounts. (T 279, 333). She did not say anything to Mr. Johnson about her practice of transferring earned fee income in and out of the TA-1 account to compensate for and cover up the poor performance of her bookkeeping duties. (T 273, 320-321). Time and again, she would respond to Johnson's frequent inquiries by assuring him that she was on top of things and the accounts were in order. (T 321-322, 483). He only learned of the way she had mismanaged his law firm trust account after The Florida Bar's inquiry was well underway and his own TA-1 account records had been reconstructed. (T 273, 551). Ms. Cintron confirmed she delayed alerting Mr. Johnson to the 2 NSF checks and The Bar's commencement of an investigation until the time of their mid-trial

lunch meeting of July 5, 2010. (T 275-276). During the time frame she was stealing from Mr. Johnson, and then trying to conceal her theft and account mismanagement conduct, she found ways to avoid turning over requested financial materials to Johnson, bookkeeper Vince Millen, and Donald Smith, CPA; and to impede Millen's and Smith's ability to have direct communications with Johnson. (T 285-286, 322, 352, 355, 366-372). Before her theft and active concealment conduct was exposed (leading to the termination of her employment) Ms. Cintron also played an active role in the process of reconstructing the trust account records being turned over to The Bar. (T 296-298, 319, 394-398).

Through the testimony of Clark V. Pearson, TFB's chief auditor, The Bar put on evidence that during the audit period of January 1, 2009 through June 30, 2010, Johnson's TA-1 account showed irregularities, including shortages, negative balances, improper transfers into and out of the account, premature disbursements, double-entries, and a lack of required documentation showing regular trust account reconciliations and comparisons. (T 94-95, 109, 124, 134-135, 183). And, based on his review, Pearson confirmed the fact that, during The Bar's audit period, *someone* at Johnson's law firm was transferring substantial amounts of money into the TA-1 account from the debt-management operating

accounts. (T 176-177). He testified Johnson was slow in responding to trust document requests, and the responses were often incomplete. (T 96-97, 101-102). Pearson acknowledged he was unaware of any law or debt-management client of Johnson's either complaining or suffering the loss of a single penny. (T 165, 170). He acknowledged that transfers of Johnson's personal funds into his client trust account to cover a trust shortage would not violate Chapter 5 because such a transfer would actually operate to protect existing client funds from harm. (T 171-172). He acknowledged that transfers of funds back into Johnson's operating accounts (and then disbursed from those accounts on personal iterms) from trust to reimburse the operating account(s) for personal funds temporarily advanced to cover trust shortages would not constitute misappropriations. (T 171-172, 526). He, of course, acknowledged the withdrawal of earned legal fees from trust would not constitute misappropriation. (T 177). He acknowledged Johnson's TA-1 account has been balanced and in continuous compliance with Chapter 5 of the Rules Regulating The Florida Bar as of December, 2010. (T 117, 175, 182). He acknowledged he lacked any personal knowledge that Johnson was, in fact, aware that his TA-1 account was being mishandled by such means as premature disbursements, the taking of unauthorized or

duplicative fees, or fund transfers in and out of the account that lacked documentary support. (T 178, 186). Finally, he acknowledged Ms. Cintron appeared to have engaged in bookkeeping practices consistent with those of an embezzling employee. (T 529).

Notwithstanding the foregoing acknowledgements, Pearson maintained the position that Mr. Johnson was intentionally misappropriating, i.e., stealing, client funds. (T 137, 144, 149, 151-152, 156, 164-165, 178; B-Ex. 16).

Johnson's trust account expert, Pedro Pizarro, testified regarding what was done after he was retained in August of 2010 to be a consultant regarding law firm trust account issues. (T 417, 418). In his retained capacity he reviewed and oversaw the reconstruction of Respondent's TA-1 account records. (T 417-418, 427). It was his testimony that most of the apparent negative balances in the TA-1 account were the result of bookkeeper error in the form of incorrect duplicate charges for fees, compounded by the then-bookkeeper's failure in some instances to make on-time physical deposits of personal injury settlement checks at the bank before proceeding to make her debit and credit entries in QuickBooks (just as if the physical banking deposit had been made). (T 432-434). He testified Ms. Cintron may have made tardy deposits of settlement checks

totaling roughly $97,000. (T 433, 441-433; R-Ex. 40). There were also some instances of duplicative checks; and some instances where disbursements were made against a settlement check that would, for whatever reason, be initially kicked back or rejected by a bank and have to go through a reissuance process. (T 341). These contributing causes of the apparent deficits were discovered during the process of re-creating Respondent's TA-1 account records. Post-discovery, the duplicate charges were duly voided and the amounts were credited back to clients. (T 428). Mr. Pizarro testified to his opinion that the TA-1 account has been balanced and in full compliance with Rule 5 since December of 2010. (T 421, 439). During his extensive review and re-creation of Johnson's TA-1 account records, Pizarro saw no indication that any of Respondent's law clients had been harmed as a result of the bookkeeping irregularities and transfers that had plagued the account. (T 440). Due to all the duplicate charges in the TA-1 account, there were numerous instances of transfers between the TA-1 account and other accounts—including the law firm's operating account. By these transfers, Respondent's operating funds would be deposited in the TA-1 account to cover shortages; then transferred back into one or more operating accounts when whatever short-term need for the interim transfusion

monies had passed.

Steven A. Koenig, a licensed Florida and New York CPA, of the New York accounting firm of S.A. Koenig and Associates CPAs, P.A. also testified before the referee. (T 455). Mr. Koenig testified his accounting firm has extensive experience in providing accounting services to businesses involved in credit-counseling and debt-settlement work. (T 456). His firm was initially contacted in September of 2009 by the Respondent in reference to performing a financial statement audit of his Debt Management Division accounts. (T 456). The initial purpose of the audit was to enable the Respondent to become license-eligible or else maintain the business-license eligibility to conduct his credit-counseling/debt-settlement business in various states. However, when Respondent's trust account issues arose with The Florida Bar, Koenig's firm expanded its audit to include aspects of Chapter 5 compliance as it related to the bank accounts under the Debt Management Division. Covering years 2008, 2009, and most of 2010, and using a national audit standard known as "Generally Accepted Auditing Standard" ["GAAS"], Koenig's firm examined the bank accounts maintained at Bank of America by the Debt Management Division of Johnson Law Group Debt. (T 452, 456-457). The audit performed by S.A. Koenig and Associates

uncovered no evidence of any misappropriation or commingling of debtor funds to suggest Respondent's debt-clients were being placed at risk by Respondent's conduct in handling their funds. (T 454-455, 460-461, 464.

Vince Millen testified to his having done bookkeeping work at Johnson Law Group since October of 2009. Prior to the termination of her employment in January of 2011, he had contact with Ms. Cintron. He found it difficult to obtain account information from her; and eventually came to conclude she was withholding information. (T 352-355) He testified Ms. Cintron was the person at the firm who was tasked with making sure the TA-1 account was in compliance with Chapter 5. (T 358-359).

Donald J. Smith, CPA, testified he had been retained by Johnson to prepare tax returns. He also testified he was certified as a fraud examiner. (T 363). He also experienced difficulty getting Ms. Cintron to provide him with bank statements on the firm operating account. In fact, she stone-walled him for nearly 2 years. (T 369, 387) What little she did provide him in terms of financial records tended to be incomplete. (T 369, 372). It was only in 2011 that he discovered she had provided him a fake e-mail address for the Respondent in late 2008 or early 2009, which

allowed her to intercept the e-mails he would send to Mr. Johnson. (T 366, 368). Mr. Smith expressed skepticism with Ms. Cintron's representation that her thefts were limited to the $50,000 figure she admitted to. (T 373-374). He also expressed skepticism that the account reconstruction figures generated by Ms. Cintron (and subsequently furnished to The Bar) had been accurately matched to the transactions she identified. (T 394-398). He testified Mr. Johnson was an honest, hard-working person, and explained why he held that belief. (T 384).

SUMMARY OF THE ARGUMENT

In Point I, Respondent Johnson maintains the referee committed no error in finding him not guilty of engaging in conduct involving dishonesty, deceit, fraud, or misrepresentation given the lack of clear and convincing evidence that he knowingly and deliberately engaged in misappropriation conduct or, in any way, intended to misappropriate client money. The referee was correct to recognize a distinction between trust violations rooted in negligence, as opposed to intentional conduct. The referee was correct to not impute dishonest intent to Johnson when there was no clear and convincing evidence that he that he knowingly or deliberately engaged in negligent bookkeeping. Lastly, the referee was correct to refrain from using the perfectly ethical act of delegating trust account responsibilities to a trusted employee as if the act of delegation would alone satisfy the "knowing" or "deliberate" intent requirement of Rule 4-8.4(c).

In Point II, the Respondent maintains the referee committed no error associated with failing to find, as aggravators, that he acted with a dishonest or selfish motive and bad-faith obstruction of the disciplinary proceeding; and committed no error associated with finding the flip-side mitigating factors of absence of dishonest or selfish motive and full, free disclosure to

the disciplinary board or cooperative attitude toward proceedings. There is evidence to support the referee's presumptively correct finding that Johnson endeavored in good faith to cooperate with The Bar during the course of an investigation that posed formidable obstacles for all involved because of the need to reconstruct missing trust account records before they could be produced; and because of how Johnson's law firm was intertwined with his debt-management business and its thousands of debt-clients.

In Point III, Johnson maintains the referee's recommended discipline is entirely appropriate; and supported by the applicable Sanction Std. and existing case law applicable to an instance of negligent misappropriation and failure to supervise a trusted employee who mishandled his trust account(s), embezzled from him, and managed to conceal her actions for approximately 2 years. As soon as Johnson learned of his trust account problems, he acted quickly to reconstruct his records, identify missing funds, correct the bookkeeping mistakes, terminate the employment of his treacherous and incompetent employee, and protect his clients from being harmed.

ARGUMENT

POINT I

THE REFEREE DID NOT ERR IN FINDING RESPONDENT NOT GUILTY OF VIOLATING RULE 4-8.4(c) WHEN THE BAR'S EVIDENCE DID NOT ESTABLISH HE DELIBERATELY OR KNOWINGLY PARTICPATED IN THE MIS-HANDLING OF TRUST MONIES.

Pursuant to Rule 3-7.7(c)(5), it is The Bar's burden in this review proceeding "to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified." At page 12 of its Initial Brief, The Bar correctly cites to Florida Bar v. Barrett, 897 So.2d 1269, 1275 (Fla. 2005) for the proposition that a referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The referee's finding that Mr. Johnson's misconduct was not deliberate or knowing is a factual finding which must be upheld if it is supported by competent, substantial evidence. See, Florida Bar v. Watson, 2011 WL 6090078 (Fla. December 8, 2011); Florida Bar v. Nicnick, 963 So.2d 219 (Fla. 2007).

It is undisputed that during the relevant audit period [January 1, 2009 through November 2010], Respondent Johnson failed to maintain adequate records, failed to follow trust accounting procedures, and failed to properly

supervise his trust account(s). While there was conflicting evidence as to the amount of actual shortages in the TA-1 account, the account did incur shortages that were fully rectified by Mr. Johnson by December of 2010. (T 117-118, 131, 144, 182, 432-434). It is also equally undisputed that during the very same time frame, Johnson himself was victimized by a trusted bookkeeper/office manager who used her position of trust and financial access to incompetently manage his law firm trust account, steal from his operating account, and then conceal her incompetence and treachery for two (2) years or more by transferring money around and hiding financial information. (T 259-273). Once trust account reconstruction efforts enabled Johnson to identify missing fund amounts, he promptly replaced those missing funds. No client of Johnson's has complained or suffered injury.

Following the disciplinary hearing, the referee determined Mr. Johnson's professional misconduct regarding his TA-1 account, was rooted in negligence as opposed to intentional and knowing conduct. (ROR-29, 41-47). In fact, the referee specifically found Johnson did *not* know Ms. Cintron was mishandling the TA-1 account, concealing trust account records, not complying with trust accounting rules and procedures, and thwarting accounting reconciliation efforts until such time as the true nature and extent of her misconduct became revealed by account reconstruction

efforts commenced subsequent to The Bar's initiation of an investigation into 2 bounced checks. (ROR-28, 29). The referee further found The Bar's evidence had failed to prove, by clear and convincing evidence, that he had deliberately or knowingly engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation; or that he had any intent to misappropriate trust funds. (ROR-28, 29). The referee noted the total absence of evidence that Johnson had intentionally or knowingly participated in Ms. Cintron's dishonest, fraudulent or deceitful conduct. (ROR-29).

For its part, The Bar maintains that to prove a violation of Rule 4-8.4(c), in the context of trust account shortages,—all it was required to show was that, as the proverbial "captain of the ship", Mr. Johnson negligently supervised his bookkeeper and thereby "…allowed [improper] transfers to occur into and out of his trust account for which he, not his employee, was fully responsible." (Initial Brief, pg. 14). According to The Bar, it was the referee's duty to conclude Johnson intentionally and dishonestly misappropriated client funds—and to, therefore, recommend he be disciplined just as if he had deliberately and knowingly stolen from his clients. Contrary to The Bar's position, however, it was not error for the referee to draw a distinction between trust violations rooted in negligence, as opposed to intentional conduct. Therefore, the referee did not err in failing

to find that Johnson had the requisite intent to misappropriate trust funds when there was no clear and convincing proof he was deliberately or knowingly engaged in misappropriation conduct; and no clear and convincing proof he knew Ms. Cintron was mishandling the TA-1 account and making all sorts of improper transfers in and out of the account.

At the hearing level, The Bar's proof burden for alleged disciplinary violations is the rigorous clear-and-convincing standard. See, Florida Bar v. Burke, 578 So.2d 1009, 1102 (Fla. 1991). It is the function of the assigned referee to weigh the evidence and determine its sufficiency. Florida Bar v. Weiss, 586 So.2d 1051, 1053 (Fla. 1991). In a case involving allegations of trust account shortages, the question of appropriate disciplinary punishment doesn't begin and end solely with the matter of whether The Bar can demonstrate that shortages occurred. Rather, the question of appropriate disciplinary punishment necessarily focuses on determining the circumstances of any misappropriation. See, Florida Bar v. Barley, 831 So.2d 163, 171 (Fla. 2003). After weighing the evidence and determining its sufficiency—the referee determined The Bar had failed to clearly and convincingly prove that Johnson intentionally or knowingly made improper and untimely disbursements from his trust account, or in any way intended to misappropriate client money. While The Bar undoubtedly disagrees with

the referee's fact-finding on intent, nowhere in its Initial Brief has it cited this Court to any record basis whereby it clearly and convincingly proved Johnson intentionally or knowingly made improper disbursements from his trust account; intentionally or knowingly diverted client monies to his own uses; intentionally or knowingly participated in Ms. Cintron's misconduct; deliberately or knowingly engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation; or had any contemporaneous knowledge Ms. Cintron was mishandling the TA-1 account, concealing trust account records, concealing bank statements, and not complying with trust accounting rules and procedures. Instead, The Bar has cobbled together an argument which erodes any meaningful distinction between negligent conduct and deliberate conduct by employing a legal fiction which imputes dishonest intent to Johnson purely because he negligently supervised his embezzling, poor-performing bookkeeper.

At pages 13-16 of the Initial Brief, The Bar cites to Florida Bar v. Riggs, 944 So.2d 167, 171 (Fla. 2006); Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999); and Florida Bar v. Watson, supra, to support its claim that it clearly and convincingly proved Johnson to be guilty of intentionally misappropriating client funds notwithstanding the absence of any evidence he had knowledge of Cintron's mishandling of his TA-1 account and her

failure to comply with trust accounting rules and procedures. While Riggs, supra, contains some language which initially appears to support The Bar's argument [for equating negligent trust account supervision with dishonest intent]—a closer reading reveals it to be materially distinguishable from Johnson's disciplinary case. Similar to the case, sub judice, The Bar filed a Complaint alleging Riggs had engaged in misconduct involving client funds, committed acts of dishonesty and misrepresentation, and violated trust account requirements. And, when The Bar's investigation of Riggs' trust account revealed a substantial shortage, coupled with negligent supervision of his paralegal and sloppy bookkeeping, he likewise claimed he had been the victim of a dishonest former employee who had stolen money. It is at this point, however, that the similarities between Riggs and the case sub judice come to an end. At the disciplinary hearing, Riggs claimed most of the shortage was due to the criminal conduct of his former paralegal, Tammy Campbell. There was additional evidence that over a period of about 4 months, Riggs had multiple trust checks returned for insufficient funds. There was further evidence he was commingling funds; placing client escrow funds into his operating and savings accounts; and making numerous unexplained online transfers of funds between accounts. Despite the wide spectrum of trust account mismanagement, the only misconduct he appears

to have directly attributed to Ms. Campbell was her action of supposedly absconding with client money. In the wake of determining that some $118,000 of one client's funds was missing, Riggs made only a token effort to make the injured client whole. After weighing the evidence and determining its sufficiency, the referee found Riggs *had* engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation because he had deliberately or knowingly engaged in negligent bookkeeping. However, quite unlike the case sub judice, the referee did *not* find Riggs to be the blind-sided victim of a long-time trusted employee who violated that trust, turned his accounts into a quasi-Ponzi scheme, and left his bookkeeping system in shambles as she sought to conceal her derelict bookkeeping performance and outright thefts. On review, Riggs disputed the referee's presumptively-correct finding that he had violated Rule 4-8.4(c) by acting with dishonest intent—claiming his failure to supervise Campbell was unintentional conduct on his part in stark contrast to her proven theft conduct. This Court found Riggs' argument flawed—noting: (1) the referee had never made the fact-finding that Campbell was the one who had taken the missing client funds despite Riggs' ongoing assertions of that as "fact"; and (2) the record evidence did not otherwise establish Riggs had even been the victim of an embezzling employee. Riggs, supra at 171. Further

support for the referee's finding that Riggs had deliberately or knowingly engaged in negligent bookkeeping was furnished by his failure to alert The Bar to the NSF checks he was writing over a period of about 4 months; his act of having set up his real estate trust account with prohibited overdraft protection; and his failure to have directed his bank to notify The Bar in the event of a dishonored trust account check, as required. Riggs, supra at 169.

Even apart from the significant factual and case-posture differences described above, it is erroneous to view Riggs as standing for the sweeping proposition that any time an attorney has negligently supervised a bookkeeper or accountant carrying out trust account responsibilities the attorney will necessarily be guilty of engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, in the event that trust violations, including shortages, occur. Under Riggs, supra at 171, sloppy or negligent bookkeeping amounts to dishonest intent under Rule 4-8.4(c) *only when the attorney has deliberately or knowingly engaged in sloppy or negligent bookkeeping*. When affirming the referee's finding that Riggs had acted with the requisite dishonest intent, this Court specifically cited to Florida Bar v. Smith, 866 So.2d 41, 46 (Fla. 2004),--thus indicating it was continuing to adhere to the long-established principle that requires any finding of dishonest or fraudulent intent under Rule 4-8.4(c) to be tied to

deliberate or knowing violation conduct by the attorney. See also, Florida Bar v. Fredericks, supra; Florida Bar v. Watson, supra. Stated differently, Riggs wasn't found to have acted with dishonest intent just because he had failed to properly supervise his paralegal's trust account activities. Rather, he was found to have deliberately and knowingly engaged in the violation conduct in question, i.e., negligent bookkeeping. Riggs, supra at 171. In contrast, the referee below made the well-supported fact-findings that Mr. Johnson lacked any contemporaneous knowledge that his TA-1 account was being mismanaged in violation of Chapter 5; and he had not knowingly or deliberately participated in Ms. Cintron's misconduct. Consequently, Mr. Johnson, unlike Riggs, did not knowingly or deliberately engage in negligent bookkeeping. The referee below was also correct to acknowledge that "[d]elegation is a necessary evil for most lawyers", and to reject The Bar's push to treat the perfectly ethical act of delegating trust account responsibilities to a trusted employee as if it was a form of violation activity that would alone satisfy the "knowing" or "deliberate" intent requirement of Rule 4-8.4(c) should negligent bookkeeping issues ever subsequently arise involving that employee. (ROR-27).

Having considered the conflicting testimony and evidence, and having fundamentally determined Johnson to be "guilty of negligence but no more",

in his multiple trust violations (including the *negligent* misappropriation of client funds), the referee rejected The Bar's argument that Johnson's professional misconduct warranted presumptive disbarment, per Sanction Std. 4.11. (ROR-29-31). Due to the lack of convincing evidence he had the intent to misappropriate or had violated Rule 4-8.4(c), the referee concluded his misconduct more fittingly came within Sanction Std. 4.12. (ROR-29-31). In addressing how he came to ultimately recommend a 6-month suspension coupled with probation, the referee noted that suspending Johnson would be generally consistent with the "grossly negligent" trust violation cases of Florida Bar v. Neu, 597 So.2d 266 (Fla. 1996), (6-month suspension for negligently commingling personal and client funds); Florida Bar v. Weiss, 586 So.2d 1051 (Fla. 1991), (6-month suspension for failing to properly supervise accountant's handling of firm trust accounts); Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991), (91-day suspension coupled with re-taking the ethics exam for negligent handling of client funds unaccompanied by any dishonest intent); Florida Bar v. Mason, 828 So.2d 985 (Fla. 2002), (2-year suspension imposed for *intentional* misappropriation over an extended time period, albeit without any intent to steal); and the unreported disciplinary case of Florida Bar v. August J. Stanton, Jr., Case No. SC06-408, (private admonishment for misconduct arising from the negligent

failure to properly supervise a trusted employee who used her delegated authority to mismanage the trust account and embezzle money over a period of roughly 6 years).

Given the referee's extensive discussion of Stanton, Id., it is apparent he believed Stanton highly pertinent to Johnson's disciplinary case. (ROR-32-33). In Stanton, the trusted comptroller/employee of a Central Florida law firm embezzled firm and client monies totaling some $1.2 million over an extended, multi-year period. When the theft conduct was fortuitously discovered, the firm proceeded to reconstruct missing financial records—including required trust account records. Over a period of several months, the firm internally analyzed the damage wrought by its employee and went about the task of replacing any client funds it determined to be missing. Only then did the firm self-report the trust account irregularities and misappropriations. In the ensuing Bar audit, numerous trust violations were found—including missing records, inaccurate records, and trust account shortages. The Bar's position, before the referee, was to assert the case law and the Sanction Stds. required Stanton receive a disciplinary recommendation of nothing less than suspension because client funds had clearly been misappropriated. The referee decided, however, to recommend a public reprimand. On review, this Court issued a July 17, 2007 order

approving the referee's fact findings and legal conclusions, but disapproving the recommended sanction of a public reprimand. Instead, Attorney Stanton received an *admonishment* for professional misconduct arising from his negligent failure to properly supervise a trusted employee and his trust account. Stanton, Id. not only shares very similar case facts with Johnson's disciplinary case [a rogue, embezzling employee who manages to create bookkeeping havoc and trust account shortages, in part, because of negligent supervision]—it also shares similar strong mitigation factors. Like Attorney Stanton, Mr. Johnson has no prior disciplinary record; there is an absence of any dishonest or selfish motive; he has sought on his end to cooperate with The Bar under challenging circumstances; he made a timely, good-faith effort to rectify the accounting irregularities, re-construct his trust records, and protect his clients from suffering any harm or disadvantage; has genuine remorse for his negligent supervision conduct; and has demonstrated himself to be a person of good character and reputation. It was well within the prerogative of the referee below to rely on Stanton, Id.; Neu, supra; Weiss, supra; and Burke, supra to support his disciplinary recommendation of a 6-month suspension period *nunc pro tunc* to April 11, 2011, followed by a year of probation involving trust account monitoring.

At page 14 of its Brief, The Bar draws attention to the referee's "ponzi

scheme" description of Ms. Cintron's trust account manipulation and transfer activity in order to contend its evidence of account manipulation should have led the referee to conclude Johnson was intentionally misappropriating trust funds. The fallacy of TFB's argument is that the referee reasonably found, based on the evidence, that Johnson was the unknowing victim of the so-called "ponzi scheme"; rather than the person who perpetrated the account mismanagement and concealment activity. This is a significant distinction that, apparently, is lost on The Bar.

At pages 20-22 of its Answer Brief, The Bar sets forth a rendition of how its audit evidence supposedly proved Mr. Johnson was intentionally stealing from his clients. At page 21, it states "Mr. Pearson specifically testified that theft of $50,000 by Ms. Cintron from [the firm operating account], by using a ATM card, would not account for all the shortages in the TA-1 account." Well, Johnson has never maintained his trust account shortages were a direct dollar-for dollar result of Ms. Cintron stealing from his operating account. The problem is not that The Bar has somehow mischaracterized Mr. Pearson's testimony. The problem is that the monstrous damage Ms. Cintron inflicted on Johnson's TA-1 account [by, inter alia, not physically depositing settlement checks before cutting trust checks and electronically transferring earned fee monies out of trust coupled with all the transfer

activity designed to either cover the premature trust disbursements with earned fee monies drawn from the debt-management operating accounts, or to “pay back” the operating accounts, or to conceal her outright thefts] went far beyond her use of the ATM card tied to the firm’s operating account.

At pages 21-22 of its Brief, The Bar essentially argues that because Mr. Pearson was the only person to have conducted a full compliance audit of the TA-1 account, the referee should have unqualifiedly accepted his opinions pertaining to shortage amounts, the number of shortages, and whether Johnson was intentionally stealing client funds. After considering and weighing Pearson’s testimony, in conjunction with other testimony and evidence, the referee ultimately decided Pearson’s testimony tended to overstate the number of improper transfers and the amount of actual shortages. First, the referee noted Pearson’s testimony about there being 31 improper transfers from TA-1 to Johnson’s operating account was heavily based on the accuracy and reliability of a Wire Transfer Activity Report [B-Ex.15] which was prepared by Ms. Cintron before anyone knew about all the her theft and concealment activity. (ROR-8). Second, the referee noted neither Pearson’s audit nor his testimony drew any distinction whatsoever between an attorney’s receipt of a fee prematurely paid, but otherwise owing; versus the circumstance where the attorney is directly stealing from

a client. (ROR-9, 10).

To further illustrate how The Bar's improper-transfer and shortage amount figures tended to be over-inclusive, the referee cited the examples of account activity connected with Johnson's legal representation of Sakina Ramadan, Jenkins Alvarez, Shamara Ortiz, and Chambers. (ROR-8-11). In Ramadan's instance, her personal injury settlement check was deposited late and premature disbursements of settlement proceeds from trust were made to the client, the law firm, and medical providers. To cover the anticipated shortfall from those premature disbursements, Cintron had electronically transferred $10,000 from a debt-management operating account into the TA-1 account. Thereafter, she transferred the $10,000 back from TA-1 to "repay" the debt-management operating account. While Pearson had viewed and treated the $10,000 transfer from trust to operating as Johnson taking an excess fee—the referee declined to do so, recognizing that the net result of all the irregular transfer activity had been that the client was paid the correct amount, the firm was paid the correct fee, and the medical providers had been paid the correct amount. The irregularity arose from the fact that due to the tardy physical deposit of the insurance settlement check—all the disbursements had been paid before the settlement check ever was deposited. While not condoning this representative example of technical

misappropriation, the referee did choose to recognize there is a distinction between fee and client disbursements being made prematurely versus an attorney who is deliberately stealing from his clients. (ROR-8, 9) In his Report, the referee similarly examined the irregular transfer activity involving clients Jenkins Alvarez, Shamara Ortiz, and Chambers that, likewise, was considered by The Bar to be instances of intentional misappropriation. In doing so, the referee pointed out improper transfers going in and out of the TA-1 account that he found to be entirely consistent with Ms. Cintron's admitted conduct of trying to conceal her ongoing thefts from the operating account, as well as her premature disbursements of trust monies made in advance of physically depositing the settlement draft. (ROR-10, 11). The referee also noted there was not a shred of evidence that Johnson knew of or participated in the tardy-deposit practices, the premature-disbursement practices, or the improper transfer activity involving the TA-1 account that made it possible for Ms. Cintron to conceal her shoddy bookkeeping work and her ongoing theft conduct. (ROR-9-11).

In closing, The Bar has failed to demonstrate the Report of the Referee under review is erroneous, unlawful, or unjustified. Mr. Johnson urges this Court to uphold the referee's fact-findings and legal conclusions.

POINT II

IN LIGHT OF THE RECORD, THE REFEREE APPROPRIATELY REFUSED TO FIND THE EXISTENCE OF DISHONEST OR SELFISH MOTIVE AND BAD-FAITH OBSTRUCTION OF THE DISCIPLINARY PROCEEDING; LEADING THE REFEREE TO CORRECTLY FIND IN MITIGATION THE ABSENCE OF A DISHONEST OR SELFISH MOTIVE, AND GOOD-FAITH DISCLOSURE OF INFORMATION TO THE BAR AND A COOPERATIVE ATTITUDE TOWARD DISCIPLINARY PROCEEDINGS.

Pertaining to aggravating factors, the referee made the finding that Johnson had engaged in a pattern of misconduct [Rule 9.22(c)] as it concerned his decision to not immediately notify three (3) processing companies of this Court's emergency suspension order. (ROR-36). While acknowledging Respondent's testimony regarding his motivation in seeking to keep his debt-clients from being financially harmed by the ripple-effects of the emergency suspension—the referee nonetheless viewed Johnson's non-compliance as a significant aggravator. (ROR-36-37). The referee also found the multiple-offense aggravator applicable noting the myriad of trust violations that could and should have been reasonably discovered upon proper diligence. (ROR-37). However, the referee declined to find that Johnson had a selfish or dishonest motive [Rule 9.22(b)] or that he had

engaged in bad faith obstruction of the disciplinary proceeding [Rule 9.22(e)].

On review, The Bar asserts the referee erred by not finding dishonest or selfish motive and bad faith obstruction. (Initial Brief, pg. 26). And, by virtue of that error, The Bar asserts the referee further erred in finding the mitigating factors of absence of a dishonest or selfish motive [Rule 9.32(b)], and full and free disclosure to disciplinary board or cooperative attitude toward proceedings [Rule 9.32(e)]. As it must, The Bar acknowledges a referee's fact-findings of mitigation and aggravation are presumptively correct and will be upheld unless clearly erroneous or without record support. See, Florida Bar v. Herman, 8 So.3d 1100, 1106 (Fla. 2009).

The aggravation evidence before the referee did indeed establish there were disbursements from the debt trust accounts [not TA-1] subsequent to the freezing-date, i.e., May 11, 2011, established by this Court's emergency suspension order. (T 157-158, 207-208). Johnson candidly acknowledged this. (T 588, 605). The Bar even uses the phrase "[respondent] was withdrawing funds from the trust account *to himself…*" so as to imply Johnson was putting money into his own pocket. However, what The Bar has neglected to mention is that *every penny* withdrawn from trust after May 11, 2011, and disbursed to either the processors or to Johnson Law Group,

has gone to make the creditor payments owed by Johnson's roughly 13,000 debt-clients. (T 463-464, 468, 473, 588, 614-615). Stated differently, not a single penny has been intentionally disbursed to Johnson from any trust or operating account subsequent to May 11, 2011 in light of this Court's emergency suspension order. (T 463, 556-557, 572-573, 603, 615-617). Even The Bar's auditor, Mr. Pearson, acknowledged Johnson had taken no fees. (T 649-650).

At pages 27-31 of its Initial Brief, The Bar claims its evidence clearly proved Johnson's "ongoing lack of cooperation", "selfish or dishonest motive", and "little regard for this Court and the disciplinary rules" by referencing such matters as his August 1, 2011 suspension-notification of his debt-clients; his transfer of debt-clients to another firm; his failure to initially disclose all his debt-management trust accounts to The Bar; his slowness at providing trust account records; his supposed evasive and incorrect deposition testimony; and his disbursement of trust money contrary to the emergency suspension order.

At its core, what The Bar is asking of this Court is for it to improperly "second guess" the weighing-evidence and credibility determinations made by the referee in the face of highly conflicting evidence. The referee found that Johnson did not know of the embezzlement or the mismanagement of

his TA-1 account until after he was being actively investigated by The Bar. (ROR-38). Thus, when The Bar was making its initial demands for account information—Johnson was unable to readily and fully comply because he was in the beginning stages of retaining experts and reconstructing account records. (ROR-38). In Stanton, supra, the discussed facts reflect it took Stanton and his partners *several months* to reconstruct sufficient firm records to be in a position to assess and rectify the damage and chaos inflicted by the embezzling employee. In the case at bar, the task of account reconstruction, and the complexity of that task, was substantially magnified by the existence of Johnson's debt-management business with its thousands of clients; and the number of financial accounts serving that business. While the referee sharply criticized Johnson for not initially identifying all his debt-related trust accounts when specifically requested by The Bar (ROR-12),--the referee was convinced by the overall weight and credibility of the evidence that once the extent of his trust account problems was brought to Johnson's attention, he responded appropriately and quickly to correct the problems and make the necessary deposits to assure each client received every penny of their funds. The referee was further convinced Johnson had endeavored in good faith to cooperate with The Bar during the course of a lengthy investigation that posed great difficulties for all involved.

The Report of the Referee plainly reflects Johnson was found to be a credible witness. Acting within his prerogative, the referee gave credence to Johnson's testimonial account outlining the practical, real-life logistics he faced as he endeavored to cooperate with The Bar's investigation and comply with the emergency suspension order. He gave unrefuted testimony that he had not been practicing during the suspension. (T 583). He testified his overriding concern had been to protect his debt-clients from being seriously damaged by the emergency suspension's freezing of the debt-management accounts. (T 552-553). In contravention of the emergency suspension order (and his attorney's advice), he allowed the disbursement of client money after May 11, 2011, so that his debt-clients would not be legally harmed by the breach of their contractual obligations to make timely periodic payments to their creditors. (T 552-553, 571, 605). He testified he had retained Rodger Moss, Esq., to help him form and execute a viable plan to logistically pull off an ethically-appropriate transfer of some 12,000 debt-clients to a reputable debt-management business that met the criteria of being licensed in all 50 states. (T 553-554, 568). He testified that with the freezing of his accounts per the emergency suspension order, he's been without fee income for 6 months and, therefore, lacked the ability to pay even the quoted retainer fee, much less the projected overall cost of

hiring a receiver to manage the debt-settlement business during the suspension. (T 574, 577-578, 605). It was only in connection with negotiating the transfer of the 12,000-plus debt-clients that Johnson came up with a way to meet the costs for providing suspension-notification to all his debt-clients. (T 575-576). He testified the mailing cost alone was about $48,000; and the total expenditure for giving notice to the debt-clients ran between $65,000 and $68,000. (T 577-578). Johnson acknowledged The Bar's investigation had been appropriately commenced because of mistakes he'd made in supervising his TA-1 account; while continuing to assert he'd neither hurt his clients nor intended to hurt them. (T 597-598). He acknowledged The Bar was "just doing its job" when it came to the disciplinary case initiated against him. (T 598).

POINT THREE

THE SIX-MONTH SUSPENSION AND PROBATIONARY SANCTIONS RECOMMENDED BY THE REFEREE ARE APPROPRIATE AND AUTHORIZED UNDER THE FLORIDA SANCTION STANDARDS AND REASONABLY SUPPORTED BY EXISTING CASE LAW.

As this Court noted in Florida Bar v. Breed, 378 So.2d 783, 785 (Fla. 1979), each attorney disciplinary case must be assessed individually, with due consideration given to the punishment imposed on other attorneys so that caprice is not substituted for reasoned consideration. Though this Court exercises a somewhat broader scope of review when it comes to a referee's recommended discipline, the disciplinary recommendation of the referee is generally upheld and not second-guessed as long as the discipline is authorized under the Sanction Stds. and is reasonably based in existing case law. See, Florida Bar v. Spear, 887 So.2d 1242, 1246 (Fla. 2004).

The referee below, after considering all the evidence concerning the circumstances of the misappropriation—including substantial mitigation evidence—came to the reasoned conclusion that disbarment was not an appropriate sanction to impose on Johnson when there was no evidence he had intentionally misappropriated client funds; and plenty of evidence

indicating his trust violations were largely the handiwork of a trusted, unsupervised employee who betrayed his trust by making significant bookkeeping errors in the trust account, stole from him, and then proceeded to transfer funds in and out of his TA-1 account so that her incompetence and thefts would remain undetected. Moreover, the referee specifically found in mitigation the absence of a prior disciplinary record; the absence of a dishonest or selfish motive; the lack of any intent to mishandle client monies; timely, good-faith effort to make restitution or to rectify the consequences of his misconduct; full and free disclosure to the disciplinary board or a cooperative attitude toward proceedings; inexperience in the field of debt-management which contributed to his accounting procedures becoming overwhelmed and negligent management; outstanding moral character and reputation in his community; interim rehabilitation based on correcting the deficiencies in his trust accounting practices; his having already suffered significant financial and regulatory penalties in connection with his debt-management business; and genuine remorse for his conduct. (ROR-37-41). In fact, the referee alternatively noted that even if the law somehow required dishonest intent to be attributed to Johnson due to his negligent supervision conduct—the rogue-employee circumstances of the misappropriation and the strength of the mitigation evidence militated

against disbarment being an appropriate sanction. (ROR-45).

Throughout this disciplinary proceeding, Mr. Johnson has duly recognized his failure to properly manage his trust account(s) and supervise his bookkeeper/office manager is a serious matter that properly makes him subject to professional discipline. He recognizes this to be the case even though his violation conduct was rooted in negligence. But, contrary to The Bar's core position, neither the Sanction Stds. nor the case law require a referee to treat negligent conduct the same as intentional conduct when making a recommendation as to discipline. Having appropriately determined, factually, that Johnson was "guilty of negligence but no more" [ROR-45] it was reasonable and appropriate for the referee to conclude the most applicable Std. was 4.12 (rather than the presumptive disbarment called for in Sanction Std. 4.11) since Johnson was not proven to have intentionally or knowingly converted client property. Sanction Std. 4.12 states that suspension is the presumptive discipline when the lawyer knows or should know he's dealing improperly with client money and causes injury or potential injury. (ROR-30-31).

Similarly, the disciplinary case law draws a distinction between intentional misappropriation versus negligent misappropriation. In the former instance, disbarment is the presumptive sanction. In the latter

instance, suspensions are often imposed. To guide and inform the disciplinary recommendation, the referee below very explicitly relied on the pertinent "negligent misappropriation/negligent supervision" cases of Florida Bar v. Neu, supra, (6-month suspension); Florida Bar v. Weiss, supra, (6-month suspension); Florida Bar v. Burke, supra, (91-day suspension); Florida Bar v. Mason, supra, (2-year suspension for intentional misappropriation but without any intent to steal); and Florida Bar v. Stanton, supra, (private admonishment). Mr. Johnson has already discussed the foregoing cases at 28-30 of this Brief, and he incorporates that discussion into this Point. Similarly, he has already extensively discussed and distinguished Florida Bar v. Riggs, supra, at pages 23-27 of this Brief. He likewise incorporates that analysis into this Point.

The Bar's effort to discredit the referee's reliance on the foregoing cases boils down to asserting Neu, Weiss, and Burke are too outdated to serve as precedent since they issued in 1996, 1991, and 1991, respectively; and that the July 2007 disciplinary order in Stanton is not factually applicable to Johnson's case because Attorney Stanton self-reported the trust violations, and the embezzling employee was criminally prosecuted. The matter of whether the embezzling employee is or isn't reported or criminally prosecuted is not a matter of particular significance. The fact that Attorney

Stanton self-reported was certainly a valid mitigating factor to his credit. However, Stanton's self-reporting was not a fact of such importance that the absence of self-reporting in Johnson's instance renders the Stanton case materially distinguishable. It must be remembered Johnson did not have any knowledge of Ms. Cintron's bookkeeping shortcomings, trust account mismanagement, and treachery, prior to The Bar initiating its investigation into the 2 bounced checks. He had no opportunity to self-report under the circumstances. It follows also that, unlike Attorney Stanton, Johnson did not have the luxury of being able to reconstruct his missing account records and "make good" on missing client funds before The Bar began demanding the production of trust records he didn't have—thanks to being victimized by a trusted employee. The primary reasons Stanton *does* have great application to Johnson are that, just like Attorney Stanton, when the accounting problems and shortages became known, Johnson did everything he could reasonably do to correct the problems and protect his clients from being harmed by the treachery of his embezzling employee. The Bar argues Stanton is inapplicable for the simple reason that the admonishment sanction accorded to Attorney Stanton in 2007 for his negligent-supervision conduct unquestionably demonstrates that the comparatively short suspension periods seen in Neu, Weiss, and Burke continue to be entirely appropriate

sanctions in cases involving negligent misappropriation. The referee considered Stanton to be legally and factually applicable to Johnson's case—as evidenced by the referee devoting 2 pages of his Report to discussing Stanton's facts and disciplinary analysis. Clearly, the referee concluded the recommendation of any punishment less than suspension was not suitable in Johnson's instance because of the aggravation findings stemming from his allowing of disbursements from the debt-trust accounts subsequent to May 11, 2011; and his failure to initially disclose all his debt-trust accounts to The Bar. Just as clearly, the referee concluded that a 6-month suspension combined with probation was sufficient punishment to meet the balancing test of being fair to society, fair to Mr. Johnson, and severe enough to deter others from engaging in like violation conduct. See generally, Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983).

In conclusion, neither The Bar's argument nor its cited legal authorities, demonstrate the recommended discipline reached by the referee below falls outside the applicable Sanction Stds or pertinent existing case law.

CONCLUSION

Based on the foregoing argument and authorities, Respondent Johnson urges this Court to accept the well-reasoned Report of the Referee, including its fact-findings, its legal conclusions, and its recommended discipline.

Respectfully submitted,

____

DAVID A. HENSON, of
DAVID A. HENSON, P.A.
4 West Main Street, Suite 9
Brevard, NC 28712
Telephone: (828) 877-6334
Facsimile: (828) 877-6374
E-mail: dhenson@citcom.net
Florida Bar No. 330620

CHANDLER R. MULLER, of
LAW OFFICES OF
MULLER & SOMMERVILLE, P.A.
1150 Louisiana Ave., Suite 2
Post Office Box 2128
Winter Park, FL 32790-2128
Telephone: (407) 647-8200
Facsimile: (407) 645-3000
E-mail: chan@cmullerlaw.com
Florida Bar No. 112381

Attorneys for Respondent Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished by U.S. Mail to: Bar Counsel, Patricia Ann Toro Savitz, The Florida Bar, 1000 Legion Place, Suite 1625, Orlando, FL 32801-1050: Staff Counsel, Kenneth Lawrence Marvin, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; and to Executive Director, John F. Harkness, Jr., The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300 on this ___ day of January, 2012.

____
CHANDLER R. MULLER
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this Answer Brief is submitted in 14-point proportionately spaced Times New Roman font, and that the Brief has been filed by e-mail in accord with the Court's order of October 1, 2004. I further certify the electronically filed version of this Brief has been scanned and found to be free of viruses.

____
CHANDLER R. MULLER
Attorney