IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, Supreme Court Case No.: SC11-1136

Complainant, [TFB No. 2010-31,479(09B)]

v.

CLINT JOHNSON,

Respondent.
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REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

A. On June 10, 2011, The Florida Bar ("TFB") filed its Complaint against Respondent in these disciplinary proceedings. According to the Rules Regulating The Florida Bar, hearings were held on September 1, 2011, September 2, 2011, September 7, 2011 and September 13, 2011. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties.

For The Florida Bar - Patricia Ann Toro Savitz and Keshara Darcel Davis
For The Respondent - Chandler R. Muller

B. The above-captioned case is factually related to these cases: SC11-622 and SC11-1578.

II. PROCEDURAL REQUIREMENTS PERTAINING TO BURDEN OF PROOF, PROOF STANDARD, AND ROLE OF REFEREE:

TFB carries the burden of proving by clear and convincing evidence that the Respondent is guilty of the specific rule violations alleged in the Complaint. Florida Bar v. Burke, 578 So.2d 1099, 1102 (Fla. 1991). It is the task of the referee to weigh the evidence and determine its sufficiency. Florida Bar v. Weiss, 586 So.2d 1051, 1053 (Fla. 1991).

III. FINDINGS OF FACT

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Findings of Fact as to Each Item of Misconduct of Which the Respondent Is Charged: After considering all the pleadings and evidence, pertinent portions of which are commented on below and supported by the record evidence, this referee finds the following by the standard of clear and convincing evidence:

The referee considered the testimony of the witnesses that testified at the hearing held on April 28, 2011. In addition, the referee heard testimony from the following witnesses who attended the final hearing in this matter: Walter Tuller, Staff Investigator for The Florida Bar; Deanna Cintron; Vince Millen; and the Respondent. The referee also heard expert testimony from Clark V. Pearson, Certified Public Accountant and Chief Auditor for The Florida Bar; Certified Public Accountant and retired Florida Bar Auditor, Pedro Pizarro; Certified Public Accountant, Steven Koenig; and Donald Smith, Certified Public Accountant, licensed in Indiana only.

In addition to the testimony, The Florida Bar submitted Exhibits 1-47 into evidence and the Respondent submitted Exhibits 1-44 into evidence without objection.

This case arises in a very unusual and complicated context and presents correspondingly unique and difficult problems to manage. The Respondent is the principal of the Johnson Law Group ("JLG"), a law firm in Orlando and also the principal of several debt management companies, including Debt Wave, Consumer Business Debt Counseling and Enhanced Servicing Solutions. The latter companies, called "processors," assist debtors in negotiating and settling consumer debts. Debtors send money to the processors and the processors deposit this money into Trust Accounts maintained by Respondent and unquestionably subject

to TFB's regulation. The processors negotiate with creditors, like credit card companies, to reduce the debtor's principal balances in exchange for the promise of a lump sum or consistent periodic payments. Under these arrangements, the debtor/client deposits money into the trust account and the processors disburse lump sum or periodic payments to the creditor to satisfy the debt and to the law firm for fees and costs. Each of the three debt management companies have at least one trust account[1] subject to the provisions set forth in Chapter 5 of The Rules Regulating the Florida Bar ("Rule 5" accounts) and an operating account.

The debt management money is often sent by the client with special instructions or conditions related to a deal negotiated by the credit management company with the creditor. For instance, a client may enter into an agreement with a credit card company to pay off a $1,000.00 debt by paying $50/month on the first of each month for 10 consecutive months. If they do, the credit card company agrees to waive the balance of the debt and the interest. If they don't, the deal is rescinded. These agreements are totally dependent on the timely payment of an agreed amount. Any payment of a lesser amount or any late payment, even just a day late, can result in the loss of the benefit of the negotiated deal and the forfeiture of any payments already made.

[1] Ironically, Respondent's instincts in establishing a Rule 5 Trust Account in which to receive and disburse his clients' money were good ones. What better, more secure way to hold and protect a client's funds? No evidence was presented showing that such a protected account was required by or customary in the debt management business.

The Respondent also maintains a more traditional trust account (Account ending in #4380) and operating account (Bank of America account #3608) for his law firm. This trust account is the primary focus of The Florida Bar's allegations. The genesis of the Bar's investigation can be traced directly to a Bank of America Overdraft Report, dated May 4, 2010 for the trust account (#4380) (TFB's Exhibit #7). The bank's report reflected that the personal injury settlement checks issued by the firm to two clients, Brianna Gardner and Jasmine Carr, were returned for insufficient funds, thus temporarily depriving these clients of their funds. This was the only such notice sent by the bank and the only occasion prior to the Respondent's suspension when any clients were even temporarily deprived of their rightful funds. Here, both clients were made whole the next day when the checks were re-presented. (see, TFB Exhibit #14, Attachment 5-3).

TFB put on evidence showing that in May, 2010 it began its investigation of Respondent's accounts and requested documents from which to conduct an audit of Respondent's trust accounts for the period of January 1, 2009 through June, 2010. Eventually, the audit period was extended through November 30, 2010. TFB's Chief Auditor, Clark V. Pearson, testified that his audit of Respondent's #4380 trust account showed irregularities during this period, including account shortages, negative balances, improper transfers into and out of the account and a lack of required documentation showing regular trust account reconciliations and

comparisons. Mr. Pearson was the only expert to complete a full compliance audit of account #4380, referred to in the Complaint as "TA-1". He further testified that Respondent had misappropriated client funds by taking fees before the corresponding deposit and taking an earned fee more than once from the same client. Mr. Pearson also testified that the Respondent was slow in responding to trust document requests and the responses were often incomplete.

Mr. Pearson's job was made more difficult because Respondent did not regularly maintain and retain all of the documents required for trust accounts. For instance, Rule 5-1.2 requires that the lawyer keep copies of the front and back of all trust checks. Although Respondent kept proper copies for #4380 and #5245, he did not for all trust accounts. Similarly, he was required to keep monthly account comparisons of reconciliations and ledger cards. Such records were not regularly kept and were not provided to Mr. Pearson for all trust accounts. As a result, Mr. Pearson was only able to audit #4380 and only able to express opinions regarding the deposits, withdrawals and transfers concerning that account.

Mr. Pearson acknowledged that transfers back into the operating account (and then spent on personal items) from trust to reimburse the operating account for personal funds temporarily advanced to cover trust shortages would not constitute misappropriations. He also agreed that withdrawal of earned legal fees from trust would also not constitute misappropriation. Mr. Pearson acknowledged

that Respondent's trust account was balanced and in compliance with Rule 5 as of December of 2010.

Mr. Pearson testified that client harm resulted from the misappropriations even though there were no complaints filed by any client with The Florida Bar and all clients were paid when due. Mr. Pearson testified that the insufficient funds notices from the Respondent's TA-1 account issued by the bank also represented client harm.

The testimony concerning actual misappropriations is conflicting and confusing. Mr. Pearson charted monthly shortages in the trust account and prepared a Summary Comparison. (TFB's Exhibit 13 and 15) Monthly comparisons are based on the reconciled bank balance, not the ending balance as reflected on the bank statement. The Respondent also prepared monthly comparisons with the assistance of Pedro Pizarro, Certified Public Accountant and former auditor for The Florida Bar. There is a dispute in their testimony about the number of shortages, with Mr. Pizarro finding fewer actual shortages. Mr. Pearson testified that as a result of the shortages in the trust account, there were insufficient funds to satisfy the Respondent's obligations to his clients. (See, the Florida Bar's Exhibits 13 and 22), yet both parties agree that only two checks were ever returned NSF, both on the same date and both were promptly re-deposited and paid.

In order to understand this account activity, it is necessary to review the actual financial documents supporting the calculations. The Respondent provided a Wire Transfer Activity Report regarding the transfers to and from the #4380 trust to Mr. Pearson. TFB Exhibit 15. This report was prepared by Ms. Cintron before anyone knew she had been stealing from the accounts. Mr. Pearson relied in part on the accuracy of this record when viewing the Respondent's other trust records, including the client ledger cards. Mr. Pearson concluded from the wire transfer activity that there were 37 total transfers from the #4380 account to the Respondent's operating account and 31 of the 37 were improper and unauthorized. Mr. Pearson testified that Respondent used these transfers to misappropriate trust funds for his own personal use. See, the Florida Bar's Exhibits 15, 17 and 18.

Mr. Pearson identified numerous transfers between the 4380 trust account and other accounts, including the law firm's operating account that appeared improper or where not properly documented. Due to the timing of some transfers, Mr. Pearson found that not all of the trust deposits were available at all times to pay all clients their funds.

For instance, in the account of client Sakina Ramadan, her personal injury case was settled for $5,500.00. (TFB Exhibit 22, attachment 8-19 at the top) Checks were cut to the client and medical providers on October 19, 2009 in the proper amount but the settlement check from the insurance company was not

deposited until November 6, 2009. This is consistent with the testimony of Respondent and his bookkeeper, Ms. Cintron, that it was later discovered that she made a few deposits late and prematurely disbursed settlement proceeds to the client, the firm and medical providers. Apparently realizing her mistake and without telling the Respondent, Ms. Cintron electronically transferred $10,000.00 of earned fee income in debt management operating account #5216 to trust account #4380 on October 13, 2009, a few days before making disbursements to the client and firm. (TFB Exhibit 15, page 4) On October 19, 2009 (the same day she issued checks to the client, the firm for fees and the providers) she transferred the $10,000.00 back from #4380 to #5216. The net result was that the checks were temporarily covered, the client was paid the correct amount, the firm was paid the correct fee, and the medical providers were paid the correct amount, but all were paid before the actual settlement draft was deposited. The $10,000.00 should never have been transferred to this account and was properly withdrawn. In isolation, the transfer of $10,000.00 from trust to operating looked to Mr. Pearson like a misappropriation of an excess fee. In reality, the $10,000.00 transfer was entirely appropriate but the actual fee and client disbursements were paid prematurely. This means that the Respondent didn't steal the money. He didn't get any more than he was entitled to receive. But he did get the fee earlier than he should, constituting a technical misappropriation by timing. Of course, there is no

testimony that the Respondent knew of or participating in the timing problem or the premature nature of the disbursement. Mr. Pearson testified that he did not recognize any distinction in his audit (or his testimony) between money prematurely paid but otherwise owing, as in the example, from a circumstance where the money is actually stolen directly by the attorney.

Similarly, for client Jenkins Alvarez, a transfer from the firm operating account was made to trust (#4380) of $5,000.00 on October 26, 2009. (TFB Exhibit 15, page 4). Mr. Alvarez settled his case for $10,000.00 and his settlement check was deposited in trust (#4380) on October 15, 2009. On October 19 and 20, disbursements were properly made of the settlement proceeds, including the payment of the contingency fee. (TFB Exhibit 22, attachment 8-9) On the same date, $5,000.00 was transferred from trust to operating (#3608). (TFB Exhibit 15, page 4) This improper transfer was corrected by the corresponding deposit of the identical sum from the operating account on October 26. The testimony was that such electronic transfers were handled by Ms. Cintron and FTB failed to show by clear and convincing evidence that Respondent knew of such transactions or intended to benefit or misappropriate such funds. It is clear from reviewing the financial transactions as a whole that this transaction was one more example of Ms. Cintron's attempt to conceal her ongoing theft from the operating account by improperly transferring funds into and out of that account.

Another example concerns the account of client Shamary Ortiz. On November 6, 2009 a transfer was made from operating (#5232) to trust (#4380) of $6,000.00. On that same date, Ortiz's settlement check of $10,000.00 was deposited in trust and the following week, her money was properly disbursed. (TFB Exhibit 22, attachment 8-20) On November 9, 2009, a transfer was made from trust (#4380) back to operating (#5232) of $10,000.00 (including $6,000.00 to Ortiz and $4,000.00 to another client named Chambers). In isolation, this appears to be another excess fee transfer from trust of $6,000.00 but when viewed as a whole, reveals an improper transfer to trust followed by a proper transfer back out. Looking even closer to the related transfer involving Chambers, reveals that the Chambers' settlement check was deposited 10 days late, after proper but premature disbursement to the client and the firm. (TFB Exhibit 22, attachment 8-11). So, again we see an improper transfer of fee income from an operating account into trust to cover a premature payment, followed by a corresponding transfer back from trust.

Respondent has testified he was unaware of the shortages and irregularities in his trust account until July 5, 2010, when his trusted bookkeeper, Deanna Cintron, first informed him of the Bank of America's Overdraft Report dated May 4, 2010. The Respondent's testimony in this regard has been corroborated by that of Ms. Cintron. Ms. Cintron acknowledged that she delayed informing the

Respondent regarding the returned checks, the bank's Overdraft Report, or The Bar's investigation until July 5, 2010, when she came to the courthouse during a mid-day break in a trial proceeding to tell him what had gone on and first showed him The Bar's subpoena duces tecum requiring him to appear for a July 15, 2010 deposition. TFB offered no conflicting evidence and I accept the Respondent's testimony.

However, the Respondent did fail to identify all his trust accounts when specifically requested by TFB despite his obligation to do so. The Respondent produced bank statements and monthly reconciliations and client ledger cards for the firm trust account and some account statements and other financial records regarding the debt management accounts. We now know that some of the records and procedures required of trust accounts were never done and those reconciliations, ledger cards and comparisons that were done were tainted by Ms. Cintron's concealment and inaccuracies. According to Mr. Pearson, the limited records provided by the Respondent failed to satisfy the requirements of Chapter 5 regarding trust records. As a result he was unable to complete a full compliance audit of the debt management trust accounts.

Mr. Pearson executed an affidavit, with attachments as part of the emergency suspension petition filed with the Supreme Court of Florida regarding the Respondent's trust accounts. Mr. Pearson testified that the information and

documentation contained in the affidavit supported his opinion that the Respondent misappropriated trust funds from trust and that the trust accounts were not in substantial compliance with the provisions of The Rules Regulating The Florida Bar governing trust accounts. See The Florida Bar's Exhibit 22.

Walter Tuller, Staff Investigator for The Florida Bar testified in the case in chief as well as part of the sanction hearing. Mr. Tuller is the investigator assigned to the Respondent's case. Mr. Tuller personally served the Respondent on July 6, 2010 with the grievance subpoena duces tecum which required the Respondent to produce all his trust records as set forth in Chapter 5 of The Rules Regulating The Florida Bar.

In addition, Mr. Tuller spoke with the Attorney General's Offices in Florida, Georgia, South Carolina, and Colorado regarding the debt management practices of The Johnson Law Group. Mr. Tuller received copies of court documents from each of these states indicating that the Respondent's firm was not in compliance with the state registration requirements regarding debt management services. As a consequence, the Respondent was required to refund some consumers in South Carolina, Georgia, and Florida and was the subject of a law suit in Colorado regarding these same issues. See The Florida Bar's Exhibits 3-6.

The Florida Bar relied on the Respondent's deposition testimony taken in this case and in a bankruptcy proceeding in Nevada, wherein he specifically made

admissions regarding his failure to regularly review his trust account records and trust account procedures during the audit period of January 1, 2009 through November 30, 2010. These admissions included the Respondent's lack of knowledge of negative daily balances and account shortages in the #4380 account. At this point in the hearing, TFB rested.

In perhaps the most dramatic moments of the hearing, the Respondent's trusted and longstanding employee and Bookkeeper, Deanna Cintron, testified that she had stolen $50,000.00 from Respondent's operating account (#3608) using an ATM card. Ms. Cintron testified that she had access and authorization to transfer funds in and out of all of the Respondent's accounts and she regularly did so. Ms. Cintron also testified that she did not inform the Respondent of the transfers. She acknowledged that due to becoming totally overwhelmed by a number of personal problems— she began stealing from the Respondent's operating account in 2009 and 2010 in customary increments of $500.00. She acknowledged concealing financial information and records from him so he would not learn of her theft and poor performance as his bookkeeper. She testified to making numerous transfers in and out of the #4380 trust account. When she saw that money needed to be put into the trust account, she would transfer earned-fee funds from various operating accounts associated either with the law firm or Respondent's debt management operating accounts. When sufficient funds were available in the trust account, she

would then transfer the money back out to the operating account to "repay" the money she'd previously transferred. It was clear from her testimony that Ms. Cintron and the Respondent had a close working relationship at one time and that the Respondent put great trust and confidence in Ms. Cintron to handle his financial affairs. She was intimately familiar with his many accounts, salary, monthly income, and his sources of income and even paid his personal and business expenses from the firm's operating account. Her brazen theft of significant sums from the Respondent was the type of betrayal and disloyalty most often reserved for fiction.

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., testified in both the April 28, 2011 Motion to Dissolve Emergency Suspension Order hearing and the adversary hearing on September 1, 2011. He specializes in the accounting and auditing required of debt management businesses. He estimated that those accounts involved 13,230 debt management clients. At the time of the adversary hearing, Koenig's accounting firm had examined the bank accounts maintained by the Debt Management Division of The Johnson Law Group for the years 2008, 2009, and part of 2010 using a national audit standard known as "Generally Accepted Auditing Standard" ["GAAS"]. Based on its substantially-completed audit, it was the conclusion of S.A. Koenig and Associates that all bank accounts

of the Debt Management Division appeared to be in compliance with Rule 5, and were being maintained in a permissible electronic format capable of being printed out. However, Mr. Koenig's firm did not do a formal Rule 5 compliance audit. The GAAS audit that was just completed uncovered no evidence of misappropriation or commingling of funds. Mr. Koenig could find no evidence to suggest Respondent's debt-clients were being placed at risk by Respondent's conduct in handling their funds.

Mr. Koenig testified he had carefully scrutinized the disbursement-activity that went on in debt management accounts subsequent to the effective date of the emergency suspension order, i.e., May 11, 2011. He determined that sums had been disbursed but that *all* disbursed funds went for the benefit of client debt payments, and *no* disbursements were made to Mr. Johnson. The audit revealed that the monthly debt obligations of Mr. Johnson's credit-counseling clients had been properly paid even subsequent to May 11, 2011, and that was the extent of the account activity. Although Mr. Johnson had earned fees, those earned fees were accruing in the accounts and had not been touched by Mr. Johnson during the emergency suspension period.

Mr. Koenig did not perform a Rule 5 compliance audit. He found no evidence of fraud or misappropriation for the debt management trust accounts. Mr. Koenig's opinion was based on the industry standard for debt management

practices in conjunction with his review of the Respondent's account information. Mr. Koenig did not prepare the monthly reconciliations and ledger cards for these accounts. See Respondent's Exhibits 3 and 4.

Finally, it was the unrefuted testimony of Mr. Koenig that but for the fact that Mr. Johnson's numerous debt-clients have continued to have their monthly debt obligations paid to their creditors after the emergency suspension order, it is extremely likely these clients would have suffered significant financial harm.

Vince Millen testified that starting in October 2009, he performed bookkeeping duties for the Respondent's debt management trust accounts. Mr. Millen resided in Kentucky and would go to the Respondent's office in Orlando approximately every 6-8 weeks to review the records for these accounts. In 2010, the Respondent hired Mr. Millen as an employee of the office to oversee all of the firm's accounts and proper recording and disbursement of client funds and fees. He worked with Ms. Cintron and Certified Public Accountant and retired Florida Bar Auditor, Pedro Pizarro, in order to record, reconcile and correct the trust and operating accounts. Mr. Millen took much of the account information from Ms. Cintron's computer not knowing it was inaccurate. However, Mr. Millen was able to reconcile the trust account and conduct required account balance comparisons, with the help of new accounting software.

Former Bar auditor, Pedro J. Pizarro, CPA, testified extensively at the April

28, 2011 Motion to Dissolve Emergency Suspension Order hearing, as well as again at the adversary trial on September 2, 2011. Mr. Pizarro testified that most of the apparent negative balances in the trust account were the result of bookkeeper error in the form of incorrect duplicative charges for fees, compounded by Ms. Cintron's failure in some instances to deposit personal injury settlement checks at the bank before issuing checks for fees and client disbursements. Mr. Pizarro also found some instances of duplicative checks or transfers and some instances where otherwise proper disbursements were made against a settlement check that would, for whatever reason, be initially kicked back or rejected by a bank and be required to go through a reissuance process. These various contributing causes of the apparent deficits were discovered during the process of re-creating the #4380 trust account records from the inaccurate and deceptive, partial records left by Ms. Cintron.

Once discovered, the duplicate charges were duly voided and the amounts were credited back to clients. Mr. Pizarro testified that the account has been balanced and is in full, continuous compliance with Rule 5 since December of 2010. More importantly, Mr. Pizarro saw no indication that any client had been harmed as a result of the bookkeeping irregularities that had plagued the account. Mr. Pizarro testified that the disciplinary rules permit, perhaps require, that a law firm correct a negative trust account balance by the infusion of personal funds.

Then, once the cause of the negative trust account balance is resolved—for instance, by the deposit of a replacement or reissued settlement check associated with a client's personal injury representation—then the attorney can (and must) promptly withdraw his or her personal funds. Finally, Mr. Pizarro testified that once the lawyer's personal funds have been appropriately transferred from the law firm's trust account to the operating account, those transferred or withdrawn funds can be spent on personal matters without violating the prohibition against misappropriating or comingling client monies.

Mr. Pizarro made changes to the Respondent's trust procedures, supervised the reconciliation and balance of the Respondent's accounts and was able to achieve Rule 5 compliance starting in December, 2010. See Respondent's Exhibit 6. Mr. Pizarro acknowledged in his testimony that there were shortages in the #4380 trust account during the audit period before his involvement, but only 7 and all caused by deposits not made on time. Mr. Pizarro echoed that all clients were paid and all checks were honored. It was Mr. Pizarro's opinion that most problems with the account were based on accounting and recording errors. Mr. Pizarro testified that he also assisted Mr. Millen in adopting and using the Quick Books program to enable Rule 5 compliance in the future. See Respondent's Exhibits 6 and 40.

Donald Smith, Certified Public Accountant licensed in Indiana, testified that

he was hired by the Respondent to handle his personal and professional taxes. Mr. Smith stated that he had extreme difficulties contacting the Respondent as well as obtaining trust and operating records from Ms. Cintron. This situation occurred in or around 2010, over a period of approximately one year. During this time, Mr. Smith did not have any direct contact with the Respondent regarding his trust and operating records. Mr. Smith testified that his repeated requests to Ms. Cintron for the records went unanswered. He was growing concerned with Ms. Cintron's inaccurate and sometimes evasive responses to his questions. He attempted to alert Respondent by email but received no response. Only later did he learn that Ms. Cintron was intercepting his email and Respondent never learned of his concerns.

In or around January 2011, Mr. Smith received the records and was ultimately able to reach the Respondent. At that time, he alerted the Respondent to the questionable transfers made to and from the trust. Mr. Smith testified that based on his training to identify fraud, that Ms. Cintron's behavior was consistent with her much later admissions of theft and active concealment.

Mr. Smith identified discrepancies between the balances reflected in Monthly Summary Comparison Chart prepared by Mr. Pearson and the corresponding bank balances for the same period of time. He believed that some of Mr. Pearson's balance calculations were based on deliberately deceptive and inaccurate financial information supplied by Ms. Cintron. Mr. Smith disregarded

this information and relied instead solely on the accuracy of the bank records. However, Mr. Smith acknowledged that he was not licensed as a CPA in Florida and did not conduct a Rule 5 compliance audit.

Finally, Respondent testified both in the emergency suspension and discipline hearings and in the violation and penalty phases of each. Mr. Johnson was the "captain of the ship" for his law firm and acknowledged his responsibility for the proper operation and management of his trust accounts. He also recognized his failure to maintain all of the proper records and procedures and his failure to continually and directly supervise the management of his trust account.

He testified that he had a long and close business relationship with his employee/bookkeeper, Ms. Cintron. She was the niece of a close friend and he originally hired her as a receptionist. She stayed with him when he changed firms and when, in September 2006, he opened his own firm. Not surprisingly, he placed her in a position of trust in supervising other employees and eventually handling the finances of the firm, including the trust accounts. This confidence and trust proved undeserved.

Respondent testified that he provided training the Ms. Cintron and allowed her to meet regularly with the firm's "personal banker" to make sure that the accounts were set up and handled properly. Initially, the firm had its accounts at SunTrust and handled deposits, disbursements and transfers the conventional way.

Mr. Johnson testified that he supervised Ms. Cintron closely.

Circumstances apparently changed in 2008 when two things happened. First, the firm started accepting debt management clients and, second, the firm's accounts, including trust accounts, were transferred to Bank of America. Ms. Cintron started working directly with the bank and was granted electronic access to and transfer authority over the firm's trust and operating accounts. Over time, Mr. Johnson allowed his employee to handle the trust accounts with very little supervision and with complete autonomy. Moreover, she was able to instantly and electronically transfer funds to and from trust with no paper trail. Even had Mr. Johnson being extra-vigilant, which he was not, Ms. Cintron's unfettered electronic access to trust permitted her almost complete control over client balances and gave Mr. Johnson very little real opportunity to detect and prevent improper transfers and, ultimately, theft. It is clear from the evidence that this electronic access, recommended by the bank, presented significant dangers not fully appreciated by Respondent.

Respondent explained that in 2009 and 2010 he was "constantly" asking Ms. Cintron if everything was being handled properly and she would always assure him that it was. She always had an answer for his questions and appeared to be doing everything that was required. During this crucial time period, he didn't have any complaints from any clients, everyone was being paid timely, deposits were being

made and the firm was profitable. He had no reason to believe things were amiss. Little did he know, Ms Cintron was not making all the deposits timely, was getting further behind in managing the trust, and she was squirreling away bank statements, insurance checks and correspondence in a Wal-Mart bag behind her desk to conceal her thefts.

Respondent testified that he didn't know anything about shortages in his trust account until he was notified by Ms. Cintron that TFB was investigating him and wanted to take his deposition a week or so later. At that point, he still didn't know that she had stolen significant sums from him or that she was actively concealing her theft by withholding records and financial information from him and, later from his consultants and TFB.

From July through November, 2010, Respondent assembled his financial records and tried, as best he could, to recreate accurate records of the many transactions in his many accounts. By December 2010 and with the help of two CPA's, a new bookkeeper and a former auditor with TFB, he had properly balanced and reconciled his trust and only then started to understand the magnitude and manner of the theft. In January, 2011 Respondent terminated Ms. Cintron and attempted to deal with the consequences of the theft.

In April, 2011 Respondent was suspended from the practice of law. His accounts were frozen. Although he ceased practicing law at that time, he has

continued to pay his employees from savings and family loans to assist in the transfer of client files and answer questions. He is now without sufficient sums to keep his office open and continue paying his employees. He established a post-suspension trust account to receive deposits. He estimates that he has approximately $280,000.00 in fees frozen in one debt management operating account and $101,427.00 in fees in another. He also presently has $2,590,406.00 in the ESS trust account, $884,506.34 in account #8589 and $27, 236.00 in account #4380.

Respondent, with the assistance of Roger D. Moss, Esq. of Zimmerman, Kiser, Sutcliff in Orlando, Florida, has been trying to further protect his 13,000 + debt-clients by transferring those clients to Consumer Alliance Processing Corporation ("CAPC") and Consumer Attorney Services ("CAS") because of their ability to handle clients in the specialized debt management plans and negotiated debt settlements, and their licensure status in all 50 states.

Throughout the efforts to transfer the debt-clients, Respondent duly advised CAPC and CAS he was suspended from the practice of law. He also advised them he had no financial means to supply notice to the thousands of clients as required by Bar Rule 4-1.7. As a result, CAPC and CAS agreed to cover the nearly $60,000.00 cost of mailing notice to the clients via certified mail.

Respondent acknowledged that he is the subject of several out of state

investigations for failing to obtain authorization in those states for debt management services. He is contesting some, stipulating to others and facing penalties and fines. He has stopped accepting debt management clients in early 2010 and was attempting to work through his inventory of clients to close their files.

Regarding his motivation, Respondent testified that he accepted representation in debt management cases, sometimes without a fee, "to help people and do the right thing." He said that he tried to comply with Florida law in all his cases and with TFB's regulations regarding trust accounts. When he discovered the problems, he claims he addressed them promptly and tried to cooperate with the bar at all times and not avoid the problem. In concluding, he testified that "I acknowledge making mistakes. I haven't harmed any of my clients and I tried to right any wrongs."

IV. RECOMMENDATION AS TO GUILT

I recommend that Respondent be found guilty of violating the following Rules Regulating the Florida Bar, Rule 4-1.15 (Compliance with Trust Accounting Rules); Rule 5-1.1(a)(1) (Trust Account Required, Comingling Prohibited); Rule 5-1.1 (b) (Application of Trust Funds or Property to Specific Purpose) and Rules 5-1.2(a), (b),(c) and (d) (Trust Accounting Records and Procedures); and Rule 4-5.3(b)(2) (Responsibility Regarding Non-Lawyer Assistants);

Rule 4-1.15 requires a lawyer to comply with the rules regulating trust accounts. Rules 5-1.1(a) requires a lawyer to hold a client's funds or property in trust, separate from the lawyer's own property and subsection (b) requires that such client funds or property entrusted for a specific purpose must be "applied only to that purpose." Here, the evidence shows that funds were transferred into and out of trust. These relatively few transfers were done by an employee bent on stealing and covering her tracks. However, the transfers occurred on the Respondent's watch, while he was captain of the ship. He is unquestionably responsible. If a trust account does not have a sufficient balance to pay all clients all of their money, even for a short time and even in an isolated instance, the offending lawyer must rely on deposits from other clients to cover shortages caused by premature disbursements. The sanctity of trust accounts cannot rely on this type of "ponzi scheme" funding. The lawyer's trust account must always have a sufficient balance to pay all clients all sums they are due. Respondent's trust account #4380 did not and despite his lack of knowledge or participation in this deficiency, he violated this rule by allowing his trust account to fall below the required balance.

Rule 5-1.2(a), (b), (c) and (d) detail the trust account records and procedures an attorney must maintain and follow. For instance, Rule 5-1.2(b)(6) requires that a lawyer keep a separate trust ledger card for each client showing all funds received, disbursed or transferred to or from trust for that client. In addition, Rule

5-1.2(c)(1) requires all lawyers to “cause to be made monthly” (a) a reconciliation of all trust accounts and (b) a comparison of the reconciliation balances and the trust ledger cards.

Despite the Respondent’s efforts at training of his staff, the clear evidence offered by TFB establishes that the Respondent’s trust records and procedures were woefully inadequate. Moreover, such inadequate records and procedures combined with the Respondent’s failure to regularly and directly supervise his trust accounts and his failure to require strict compliance by his staff with the specific requirement of Rule 5, allowed an errant employee to steal money and manage trust account balances completely at will. I am mindful of the realities of a busy law practice. Delegation is a necessary evil for most lawyers. However, as the Respondent freely acknowledged, he is the “captain of the ship” and although he may delegate authority to a trusted employee to balance and manage his trust accounts, as many ethical lawyers routinely do, he cannot delegate the responsibility. The responsibility for full compliance with Rule 5 lies with the lawyer and only the lawyer. The evidence shows that Respondent violated Rule 5-1.2(a)-(d) by failing to maintain and retain the trust records and procedures specifically required by the rules regulating trust accounts.

Rule 4-5.3(b)(2) requires a lawyer to make “*reasonable efforts*” to ensure that the firm has in effect measures giving reasonable assurance that the person’s

conduct is compatible with the professional obligations of the lawyer. The evidence here establishes that the Respondent failed to supervise Ms. Cintron, a very trusted employee, and failed to reasonably assure that the trust account was maintained in accordance with Florida Bar regulations. Although the Respondent arranged for meetings and direct contact by and between Ms. Cintron and the bank and even with the firm's accountant, he improperly delegated almost exclusive responsibility for such tasks to this trusted employee. Unquestionably, Respondent did not know that this trusted employee was stealing from him, at least $50,000.00 based on the employee's own admissions. Nor did Respondent know that the employee was not maintaining the trust account in accordance with Bar standards. All of this came as a stunning revelation when the theft was revealed, Ms. Cintron's attempts to conceal the theft were made known and Respondent attempted to reconstruct his accounts. Only then did he learn of his noncompliance with trust accounting rules and procedures. By that point, the Bar was already on notice of a problem and actively investigating. As surprising and disappointing as Ms. Cintron's dishonesty and intentional noncompliance must have been, Respondent's own lack of direct supervision certainly contributed to the problem.

I recommend that Respondent be found not guilty of violating the following Rules Regulating the Florida Bar, Rules 4-8.4(c) and (d) (Misconduct). Rule 4-8.4(c) prohibits a lawyer from engaging in conduct "involving dishonesty, fraud,

deceit, or misrepresentation." Intent is a major and necessary element in a finding of guilt for a violation of this provision. *The Florida Bar v. Burke*, 578 So.2d 1099 (Fla. 1991). After carefully weighing the conflicting testimony and evidence, I find that TFB has failed to prove by clear and convincing evidence that the Respondent had the intent to misappropriate trust funds or has violated Rule 4-8.4(c). To the contrary, the evidence shows that the Respondent was as shocked as anyone to discover that his trusted employee had been stealing significant sums of money and trying to cover her tracks by transferring money in and out of trust. The problem was further compounded when she tried to cover improper trust activity by concealing the trust account records and thwarting efforts by the firm accountant to reconcile the account. At no time did the Respondent intentionally or knowingly participate in such dishonest, fraudulent or deceitful conduct.

Rule 4-8.4(d) prohibits a lawyer from engaging in conduct "that is prejudicial to the administration of justice, including to knowingly . . . disparage, humiliate or discriminate against litigants, jurors, witnesses, . . ." I find TFB has failed to prove by clear and convincing evidence that the Respondent has violated Rule 4-8.4(d). To the contrary, the Respondent testified that all he wanted to do was "help people". When he discovered the misappropriations, he was quick to seek help to get to the bottom of the problem and make appropriate deposits to assure each client received every penny of their funds. The fact that no client has

ever complained of the Respondent’s conduct or management of client funds is likely related to the swiftness of Respondent in addressing the problem, once the extent of the problem was brought to his attention. Violations of this rule usually involve inappropriate reference or conduct relating to race, gender, ethnicity, religion, sexual orientation and the like, directed at a participant in legal proceedings. I find a complete absence of such conduct in this case.

V. STANDARDS FOR IMPOSING LAYWER SANCTIONS

I considered the following standards prior to recommending discipline:

3.0 GENERALLY

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;

(b) the lawyer's mental state;

(c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors.

4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY.

Absent aggravating or mitigating circumstances, and upon application

of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.12 Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 Public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

7.3 Public reprimand is appropriate when a lawyer negligently 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.

7.4 Admonishment is appropriate when a lawyer is negligent in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

VI. CASE LAW

I considered the following case law prior to recommending discipline:

It is well settled that the misuse of funds held in trust is one the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate sanction. *Florida Bar v. Travis,* 765 So.2d 689, 691 (Fla.2000); *see*

also Florida Bar v. Tillman, 682 So.2d 542 (Fla.1996). However, there are other cases involving attorney misconduct relating to client funds in which the attorneys were disciplined by a six-month suspension instead of disbarment. In such cases, the attorney's misconduct was due to gross negligence rather than an intentional act to misappropriate funds. *See Florida Bar v. Neu,* 597 So.2d 266 (Fla.1992) (suspending attorney for six months for negligently commingling personal and trust fund accounts); *Florida Bar v. Weiss,* 586 So.2d 1051 (Fla.1991) (suspending attorney for six months for gross negligence in failing to properly supervise accountant's work in handling trust accounts).

I have closely reviewed *Florida Bar v. Mason*, 828 So.2d 985 (Fla. 2002); *Florida Bar v. Burke*, 578 So.2d 1099 (Fla. 1991) and *Florida Bar v. Neely*, 488 So.2d 535 (Fla. 1986) approving suspension in cases involving the negligent misappropriation of trust funds and holding that intent is a major and necessary element in finding of guilt for dishonesty, fraud, deceit or misrepresentation necessary to support disbarment.

I have also taken into account the unpublished disciplinary case of Florida Bar v. August J. Stanton, Jr., Case No. SC06-408. In Stanton, Id., a trusted comptroller-employee of a Central Florida law firm embezzled firm and client monies totaling some $1.2 million over a period of roughly 6 years. When the theft finally came to light, the firm proceeded to reconstruct financial records that

were discovered to be missing—including trust account records. Over a period of several months, the firm internally analyzed the damage done and went about replacing any client funds it determined to be missing. It then self-reported the trust account regularities to TFB. In the subsequent Bar audit, numerous trust account violations were found, including missing records, inaccurate records, and trust account shortages. In Mr. Johnson's case, the attorney did not have the option of self reporting because of conduct by the embezzling employee. Ms. Cintron had hidden the fact of the trust account irregularities from Clint Johnson. Mr. Johnson only learned of the issue after the Bar scheduled him for deposition and Deanna Cintron finally was backed into a corner and had to advise him of the Bar investigation.

Following a sanction hearing, the referee recommended Stanton be publicly reprimanded. The Bar, however, contended that a suspension was mandatory, under the case law and Lawyer Sanction Stds., because client funds had been misappropriated. On July 17, 2007, the Florida Supreme Court issued an order approving the referee’s fact findings and legal conclusions, but disapproving the recommended sanction of a public reprimand. Instead, Attorney Stanton was sanctioned by the receipt of an *admonishment* for professional misconduct arising from his negligent failure to properly supervise a trusted employee.

In *The Florida Bar v. Valentine-Miller*, 974 So.2d 333 (Fla. 2008), an attorney was suspended on an emergency basis for ***intentional*** misappropriation of trust funds, complete abandonment of her law practice and clients, and other related rule violations.

In *The Florida Bar v. Simring,* 612 So.2d 561 (Fla. 1993), an attorney was disbarred for engaging in intentionally sloppy recordkeeping and ***intentional*** misappropriation of client funds from his trust account. The account had persistent shortages, despite his deposit of personal funds. He admitted he paid personal obligations directly from his trust account and his improper trust accounting procedures made it difficult, if not impossible, to determine the extent of the misconduct.

In *The Florida Bar v. Tillman*, 682 So.2d 542 (Fla. 1996), an attorney ***intentionally*** withdrew excessive and premature fees from her trust account. This, coupled with paying her personal expenses directly from the trust account, resulted in persistent and growing shortages in the account. She failed to pay restitution to her clients, her clients were financially harmed and she admitted she routinely commingled personal funds in her trust account. The Court determined that disbarment was warranted because the mitigation was insufficient to support a less harsh sanction.

In *The Florida Bar v. Barley*, 831 So.2d 163 (Fla. 2002), following an emergency suspension, an attorney was disbarred for ***intentionally*** misappropriating client funds totaling approximately $76,000.00. The Court rejected the referee's recommendation of a 3-year suspension, stating that disbarment is presumed to be the appropriate punishment for misuse of client funds held in trust. Barley had previously received a 60-day suspension for engaging in multiple acts of misconduct.

In *The Florida Bar v. Diaz-Silveira*, 557 So.2d 570 (Fla. 1990), an attorney was disbarred for misuse of client funds, including bouncing trust fund checks, commingling funds, and check kiting. The Court found that evidence of over 300 bounced trust checks, comingling of funds and check kiting proved that the attorney's actions were ***intentional***. Diaz-Silveira had previously received a public reprimand for similar misconduct relating to trust account irregularities.

I have also considered the cases of *The Florida Bar v. Brownstein*, 953 So.2d 502 (Fla. 2007); *The Florida Bar v. Shanzer*, 572 So. 2d 1382 (Fla. 1991); and *The Florida Bar v. Herman*, 8 So. 3d 1100, 1108 (Fla. 2009), finding them inapplicable to our case because these cases deal with intentional misappropriation and theft. I also considered the cases of *Florida Bar v. Korones*, 752 So.2d 586 (Fla. 2000) and *Florida Bar Travis*, 765 So.2d 689 (Fla. 2000) and find those cases

distinguishable because they dealt with intentional and repetitive theft by the lawyer from the trust account.

VII. AGGRAVATING AND MITIGATING FACTORS

I considered the following aggravating and mitigating factors prior to recommending discipline:

AGGRAVATION.

9.22(c) Pattern of Misconduct.

The Respondent testified to his having made the conscious decision to *not* immediately notify the three (3) processing companies [including Debt Wave, Consumer Business Debt Counseling, and Enhanced Servicing Solutions] of the emergency suspension order issued by the Florida Supreme Court. It was his testimony that he omitted doing so in order to protect his thousands of debt-clients from being financially harmed by the freezing-account requirement of the emergency suspension order. He testified he believed himself morally obligated to protect his debt-clients from becoming the "collateral damage" victims of the emergency suspension order. This was the first indication that Respondent had not fully complied with the letter and spirit of the Emergency Suspension Order.

I consider this non-compliance a significant aggravating factor. Although this Referee recommended modification of the Emergency Suspension to permit the careful and compliant disbursement of client funds to minimize harm to these

clients (see, Report of Referee in Case No. SC11-622, dated May 5, 2011), that recommendation has not yet been acted upon. But, that recommendation and the recommendations contained in this Report are based in part on an expectation of the Respondent's full and timely compliance with the Supreme Court's conclusions and decisions and those of this Referee.

9.22 (d) Multiple Offenses.

The inadequate recordkeeping and several improper account deficits, multiple payments and mistaken duplicate entries should have and could have been reasonably discovered upon proper diligence.

MITIGATION:

9.32(a) Absence of a prior disciplinary record.

Respondent has no prior disciplinary record.

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

The Respondent had no intent to misappropriate trust funds or misdirect fee or cost payments.

9.32(d) Timely good faith effort to make restitution or to rectify consequences of misconduct.

Respondent made complete restitution to the only two effected clients within one day when they were paid in full by

resubmitted their trust checks the next day. In addition, Respondent deposited sufficient funds in his trust account to properly balance the account within a short time of knowing that the account was deficient and how much.

9.32(e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

The evidence shows that the Respondent's financial and trust records were insufficient and inaccurate, perhaps deliberately made inaccurate by an embezzling employee. The Respondent did not know of the embezzlement or the improper management of his trust account until investigated by TFB. His responses to the TFB were understandably incomplete, particularly in the initial stages of the investigation, while the Respondent tried to reconstruct his own account information with the help of retained experts. It appears that Respondent was cooperative and forthcoming with his testimony and financial information, as that information was assembled. Moreover, Respondent timely directed his attention and that of his team of experts to those areas identified by TFB as most critical.

9.32(f) Inexperience in the practice of law.

Respondent was not an inexperienced lawyer, having practiced law for approximately 6-7 years at the time. However, much of the present problem relates to Respondent's debt management business and incorporation of that business into his more traditional legal representations. Respondent was inexperienced in the field of debt management, having actively practiced in that area for only 1-2 years at the time of these incidents and having seen a rapid, somewhat overwhelming growth of his client base. Compounding his already inadequate trust account procedures, Respondent used Rule 5 trust accounts to essentially "escrow" debt payment funds. Through that decision, Respondent assured his clients of the highest level of protection and safety for their money but also imposed on himself significantly more stringent accounting and reporting requirements than found on standard "escrow" accounts or otherwise found in that industry. Respondent's inexperience no doubt played a significant role in that well intended but ill-fated decision and his resulting inability to properly manage the significantly larger client volume associated with this new line of practice.

9.32(g) Character or reputation.

I find from the uncontested evidence offered during 4 days of hearing that the Respondent is of the highest moral character and reputation in his community.

9.32(j) Interim rehabilitation.

As detailed in this report, the Respondent has fired an embezzling employee, hired a more experienced, full time bookkeeper, retained qualified expert consultants to oversee his firm and business accounts and stopped accepting new debt management clients. As a result of these actions, his trust account is in complete compliance with Rule 5 and has been since December, 2010. These changes should lead to complete and continuous compliance with all trust account rules in the future. Although his rehabilitation is not complete, it is well under way.

9.32(k) Imposition of other penalties or sanctions.

Respondent has been the subject of significant investigation and enforcement efforts for his failure to be authorized to conduct debt management services in those states. As a result, he has

already suffered significant financial penalty and will likely incur liability for additional regulatory penalties and prohibitions. He is currently insolvent and his debt management clients have been transferred to other providers.

9.32(l) Remorse.

I find the Respondent genuinely remorseful for his actions in not properly supervising and managing his trust account and allowing others to jeopardize his reputation and his financial affairs.

VIII. <u>RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED</u>

I recognize that disbarment is usually the appropriate sanction for an attorney's intentional misappropriation of funds. Section 4.11, *Florida Standard for Imposing Lawyer Sanctions*. However, such sanction would not be proper here because the Respondent did not intentionally or knowingly misappropriate client funds. Section 4.12, *id*. Respondent did not know and never would have guessed that a trusted and longtime employee was stealing from him. He also didn't know that the employee was concealing financial transactions, trust account transfers and bank statements. Nor did he realize that the same employee was withholding financial information, changing email accounts and generally manipulating firm

procedures to hide her larceny from Respondent and from the accountant hired to oversee her work.

The employee's unexpected and improper conduct, however, does not excuse the Respondent's negligence in failing to directly and consistently supervise this employee. But, in fairness to the Respondent, he immediately tried to rectify the situation when the theft of the bookkeeper and the mishandling of the trust account were made clear to him. Clearly, the early and aggressive intervention by TFB brought to light serious trust account issues and unquestionably kept matters from getting worse. Without the timely intervention of TFB, the impact of this incident on the public and on Respondent's clients could have been much greater.

Respondent cooperated as best he could in the Bar's efforts by gathering available records, reconstructing inaccurate records and retaining professional help to determine the degree of compromise to the trust account, adopting procedures to properly account for trust balances, and making restitution and deposits to the trust account to ensure sufficient and proper balances in the account. Although Respondent made serious mistakes in failing to adequately supervise the bookkeeper and management of the trust account, he did everything within his control to immediately and fully address the problems once he was made aware of them. See, *Florida Bar v. Mason*, 826 So.2d 985 (Fla. 2002).

Respondent's actions were negligent, not intentional. The circumstances of this case do not demonstrate the level of egregious intentional misconduct and misappropriation that would justify disbarment. Moreover, disbarment is the type of extreme sanction designed to be imposed where rehabilitation is highly improbable and the conduct egregious. Here, rehabilitation is not only likely but significantly underway. The uncontested evidence shows that Respondent fired the criminal bookkeeper, stopped taking debt management clients, made full and timely restitution, retained a new bookkeeper and new accounting program to comply with all trust account requirements, hired a former Florida Bar auditor to audit his account and provide future guidance on trust issues, and hired an accountant from New York specializing in debt management accounts to review and correct those accounts and procedures.

The experts agree, even TFB's chief auditor agrees that the trust account ending in #4380 has been in compliance with Rule 5 and without a negative balance since December, 2010. New and proper procedures have been implemented to permit the proper operation and monitoring of that account.

In addition, the Respondent testified that he stopped taking debt management matters in October, 2010- so no new clients are paying in to the trust accounts and the debt management funds will be paid out over time until the trust balances are exhausted. So the debt payment dilemma is self-limiting. In short,

Respondent has taken significant steps to remedy the prior trust issues with account #4380 and make sure such issues never re-occur. He is genuinely remorseful for his actions and it should also be noted that no money, not one penny, was stolen from a client. Not a single client complained or felt harmed by Respondent's actions.

For all of these reasons plus those articulated in the mitigation portion of this Report, the appropriate discipline is a suspension of Respondent from the practice of law for six months. Suspension protects the public from unethical conduct, and, at the same time, does not deny the public the services of an otherwise qualified and compassionate lawyer. Suspension combined with probation also encourages rehabilitation of a relatively young lawyer with many years of client and public service in his future. *See, Florida Bar v. Kassier,* 711 So.2d 515, 517 (Fla.1998) ("[T]he extreme sanction of disbarment is to be imposed only 'in those rare cases where rehabilitation is highly improbable'."); *Florida Bar v. Schiller,* 537 So.2d 992 (Fla.1989) (misusing client funds warranted three year suspension where clients were not injured and attorney was "genuinely remorseful" and a good candidate for rehabilitation); and *Florida Bar v. Hartman,* 519 So.2d 606, 608 (Fla.1988).

TFB contends that Respondent's misappropriations were intentional and constituted outright theft, requiring that Respondent be disbarred. The evidence, however, does not support such a contention.

Here, the evidence shows that the Respondent was guilty of negligence but no more. Negligence by putting his trust and confidence in someone who deserved neither. Negligence by not exercising sufficient and direct supervision of his trust account. But TFB failed to present clear and convincing evidence that Respondent intentionally or knowingly made improper or untimely disbursements from his trust account or in any way intended to divert his client's money to his own uses.

Even if the Respondent's misappropriations were intentional and knowing, however, disbarment would not be warranted in this matter. In determining whether disbarment is the appropriate punishment in a case involving misappropriation, the focus must be on the circumstances of the misappropriation. *Florida Bar v. Barley*, 831 So.2d 163 (Fla. 2003). Here, the evidence shows a relatively isolated number of misappropriations perpetrated by a rouge employee. In cases involving isolated incidents of misappropriation, our Supreme Court has found that the presumption of disbarment can be rebutted when there is mitigation such as cooperation, restitution, and the absence of past disciplinary record. See, *Florida Bar v. Thomas*, 698 So.2d 530 (Fla. 1997). All three such factors are present in this case and mitigate against disbarment and toward suspension as the

appropriate discipline. Clearly, suspension with supervised probation would be the most appropriate way to ensure the proper and timely disbursement of client funds from the trust account, assure strict compliance with recognized trust account procedures and protect the confidence of the public generally in the sanctity of trust account for members of the bar.

The best interests of the clients and the public generally however would not be served by a prolonged suspension. Disbursements must be made from the various trust accounts and someone has to oversee the disbursements and, more importantly, be accountable for the proper management and handling of such disbursements. Clearly, Respondent is in the best position to do this under proper supervision. Accordingly, I find and recommend that the six month suspension be retroactive to April 11, 2011 and be combined with the following additional conditions of reinstatement:

A. Respondent shall be placed on probation for one year as a condition of reinstatement and subject to continued and regular audits by TFB. This probation would be contingent on Respondent's full cooperation in such audits and require Respondent to promptly provide all records or documents required by TFB to assess Respondent's complete and continued compliance with The Rules Regulating The Florida Bar concerning trust accounts.

B. Pedro J. Pizarro, CPA, former Bar auditor would, at Respondent's sole cost, periodically audit and report to TFB concerning the status of the Johnson Law Group trust account (4380), the post-April 11, 2011, trust account (8965), the status of the Johnson Law Group operating account (3608); as well as any new trust accounts opened by Respondent during the probationary period.

C. The Respondent, Mr. Johnson would be required to successfully complete a law office management program offered by the Florida Bar, through LOMAS.

D. The Respondent, Mr. Johnson would be required to successfully attend and complete a trust accounting course acceptable to The Florida Bar.

E. The Respondent, Mr. Johnson would be required to successfully attend and complete an ethics course approved by The Florida Bar.

F. Additionally, as a special condition of probation, The Respondent, Mr. Johnson, would practice under the supervision of a mentor. The mentor would be responsible for providing periodic reports on a quarterly basis to The Bar during the period of probation.

IX. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1), I considered the Respondent's Bar history containing no other violations or disciplinary proceedings, except Case No. SC11-622, Emergency Suspension for matters

relating to this disciplinary incident. (see, Report of Referee from the undersigned dated May 5, 2011).

X. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Costs	$ 1,250.00
Investigative Costs	$ 5,477.86
Court Reporters' Fees	$ 2,788.95
Copy Costs	$ 154.35
Bar Counsel Costs	$ 531.02
Auditor's Costs	$26,344.47
TOTAL ITEMIZED COSTS:	**$36,546.65**

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 19th day of September, 2011.

/s/ Terence R. Perkins
Honorable Terence R. Perkins, Referee
Circuit Court Judge
Volusia County Courthouse
101 N Alabama Ave
Deland, FL 32724-4316

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that copies were mailed by regular U.S. Mail to Chandler R. Muller, Counsel for Respondent, Muller & Sommerville, P.A., Post Office Box 2128, Winter Park, Florida 32790-2128; Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and Patricia Ann Toro Savitz, Esquire, Bar Counsel, The Florida Bar, 1000 Legion Place, Suite 1625, Orlando, FL 32801-5200, on this 19th day of September, 2011.

/s/ Terence R. Perkins
Honorable Terence R. Perkins, Referee