

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RONALD ROBERT TORRES,

Respondent.

Supreme Court Case
No. SC02-1801

Florida Bar File: 2000-71.116(11F)

Respondent's Answer Brief

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SYMBOLS AND REFERENCES

For the purpose of this Answer Brief on Appeal, the Respondent will be referred to as Torres or Respondent. The Florida Bar will be referred to as TFB. Witnesses will be referred to by their full name initially and thereafter by surname. The Broward Trailer Park shall be referred to as the trailer park.

The transcript of the final hearing before the Referee consists of six volumes, I through VI, and are paginated consecutively. References to the transcript of the final hearing will be set forth as TR and page number.

References to the Respondent's Exhibits at final hearing will be set forth as Resp. Ex. and number. References to the exhibits of the Florida Bar will be identified as TFB Ex, and number. The Report of the referee dated January 27, 2004 will be referenced as ROR. And page number.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent adopts the statement of the case and of the facts filed by the TFB, with the following exceptions:

1. The Bar incorrectly contends that Georgina Hennessey hired Respondent subsequent to Taylor disappearing in 1994 for the purpose of representing the trailer park. (Initial Brief of The Florida Bar, dated April 20, 2004, p. 3) However, the Referee found that after Taylor disappeared and abandoned the trailer park, Hennessey asked Respondent to assist her in locating Taylor. (ROR p. 4). The Referee also determined that Respondent made diligent attempts to locate Taylor by personally visiting her former addresses and enlisting the services of a private investigator while never charging Hennessey a fee for his services. Furthermore, the Referee found that Hennessey did not retain Respondent on behalf of the trailer park until sometime in 1995 when she was specifically requested his assistance in dealing with tenant rule violations and delinquent rental payment. (ROR p. 4).

2. The Bar inaccurately states that Stoner fired Respondent and hired Regina Bushkind, Esq. and Connie Hiaasen, Esq., in December of 1997 to probate the trailer park. (Initial Brief of The Florida Bar, dated April 20, 2004, p. 5). However, the Referee found that Hiaasen was part of a devised plan spearheaded by Cohen, the developer who ultimately purchased the trailer park from the estate

of Verne Stoner, to immediately probate the estate of Verne Stoner, appoint Daniel Stoner as the Personal Representative, and conclude negotiations for the sale of the trailer park to Mr. Cohen. (ROR p. 17). The Referee went on to find that despite Hiaasen's knowledge that Respondent was representing Daniel Stoner in the trailer park in December of 1997, she agreed to secretly represent Daniel Stoner while working in concert with Cohen and Stoner to probate the estate of Verne Stoner and finalize the contract for the sale of the trailer park to Cohen. The Referee further found that neither Hiaasen, Stoner, or Cohen ever advised Respondent of Hiaasen's representation until March 24, 1998, the day Hiaasen filed a probate action for and on behalf of the estate of Verne Stoner with Daniel Stoner being appointed Personal Representative. (ROR p. 17-18). The Referee also determined that Respondent was not formally dismissed by Stoner until March 24, 1998, the date Hiaasen instituted the probate proceedings and over three months after she began secretly representing Stoner on the sale of the estate. (ROR p.18).

3. The Bar contends that the State Attorney's Office ultimately determined that Respondent misappropriated \$42,000.00 from the mobile home park/estate. (Initial Brief of The Florida Bar, dated April 20, 2004, p. 10). The Report of the Referee is absent any such conclusion. However, the Referee did determine, through the testimony of John Hanlon, a seasoned economic crime prosecutor and former FBI agent, that the State had a greater chance of losing the

case against Respondent than prevailing. (ROR p. 22). Furthermore, Hanlon testified that Hennessey, who had been collecting trailer park funds in cash for years, had some baggage. Hanlon explained that she had been sitting on the money for a number of years and a case could be made that she took it. In fact, the Referee found that Hanlon was concerned about even surviving a Judgment of Acquittal any on allegations of misappropriation if a case had been brought against Respondent. Lastly, according to Hanlon, the \$42,000.00 Respondent was to pay to the estate represented a negotiated settlement between Respondent and The State Attorney's Office in Broward County and not because the State Attorney's Office determined that Respondent misappropriated \$42,000.00 from the trailer park/estate. The Referee found that Respondent reluctantly entered into the settlement with the State Attorneys Office to avoid the expense and embarrassment of a trial for the sake of his family and reputation. (ROR p. 22).

4. Lastly, The Bar contends that Respondent initiated a civil law suit on January 12, 2000 for the exact monies he ultimately agreed to pay in criminal restitution on February 9, 2000. (Initial Brief of The Florida Bar, dated April 20, 2004, p. 7). The Referee made no such finding. However, the Referee did find that the judgment amount represented a supposed overpayment of \$23,400.00 as part of the plea agreement. The Referee found that the \$23,400.00 overpayment was arrived at by subtracting the amount Respondent borrowed from Hennessey

(\$18,600.00) from the negotiated plea amount of \$42,000.00. (ROR p. 24). In addition, the judgment obtained by Respondent against Virginia Stoner included attorney's fees and costs incurred by Respondent in the defense of the criminal charges brought against him as well as his time invested in pursuing the global litigation against the estate of Verne L. Stoner. (ROR p. 24). Along these same lines, the Bar inaccurately states that Respondent obtained a default judgment against Virginia Taylor in the civil case for \$42,000.00 which was previously paid by Respondent to the estate of Vernon L. Stoner for criminal restitution. This was not the finding of the Referee as he, clearly, based upon the evidence found that Respondent obtained a judgment for \$52,304.75 against Virginia Stoner, individually.

SUMMARY OF THE ARGUMENT

TFB contends in its Initial Brief that Respondent should be found guilty of violating two provisions of the Rules of Professional Conduct that were not pled in its Amended Complaint nor argued before the Referee. The first is that Respondent's filing of a civil complaint against Virginia Stoner constitutes conversion. The second is that Respondent's failure to maintain a trust account is conduct prejudicial to the administration of justice. As a consequence of TFB's failure to raise or plead these arguments prior to appeal, Respondent's right to due process will be violated by the denial of notice and an opportunity to defend

against such charges. TFB's request to charge Respondent with these additional violations should be stricken and not considered as any such charge has been waived.

In addition, TFB cites the deposition of Respondent in its Initial Brief which was not introduced at the evidentiary hearing before the Referee and, as such, is not part of this record. These new arguments and evidence are not properly before this Court and should not be considered but be stricken.

TFB, throughout its Initial Brief, contends that the "misappropriation" of the funds by Torres should have been deemed by the Referee to be an intentional misappropriation requiring disbarment. TFB, however, misconstrues the holding of the Referee in that the Referee did not find that Respondent misappropriated client funds unintentionally, but rather the Referee found that there was no proof that Respondent ever took or converted any client funds. This misconception is prevalent throughout the Initial Brief.

TFB claims that the Referee erred when he found that Respondent did not intentionally convert or misappropriate trailer park funds. In order to prevail TFB has the burden of proving either there is no competent evidence in the record to support the Referee's finding, or that the record evidence contradicts the conclusion reached by the Referee. The Respondent testified that he did not count the monies received from and collected by Siniscalco nor did he reconcile the

accounting Siniscalco provided to him. The record also reflects that if Siniscalco's unverified accounting, was wrong then the shortage, if any, would also be wrong. The undisputed evidence further showed that Respondent did not use any money he received for any unauthorized or personal purposes. Based upon the evidence presented the Referee correctly concluded that TFB failed to establish by clear and convincing evidence that the Respondent took or converted any funds. TFB failed to introduce any evidence that Siniscalco's accountings were accurate or that Respondent received the monies alleged. TFB further failed to introduce any evidence that Respondent converted trailer park funds or used such funds for any improper purpose.

In support of its claim that the evidence contradicts the referee's finding, TFB cites the shortfall calculated from Siniscalco's accountings and the fact that Respondent borrowed money from Hennessey to comply with the Court order when Respondent behind he had a shortfall. (TFB also claims the filing of the civil complaint evidences conversion. Not only is this not accurate but this claim was not previously argued, as discussed above, and should not be considered). The alleged shortfall in funds and the borrowing of the money from Hennessey does not constitute evidence that clearly contradicts the findings of the Referee, but are, rather, inferences argued by TFB and rightly rejected by the Referee in light of the clear and convincing evidence in the record.

TFB next contends that the Referee erred in his findings of guilt and recommendations of discipline. Once again TFB has the burden of proving that the findings of guilt are clearly erroneous in order to prevail. Based upon the facts found by the Referee and the arguments set forth above there is insufficient evidence to charge Respondent with the violations involving conversion or dishonesty.

TFB argues that Respondent should be disbarred. This argument fails to take into account the Standards for Imposing Lawyer Sanctions. The Referee found that Respondent did not take or convert client funds, but rather knew or should have known that his failure to place the funds in trust was dealing improperly with client monies. Based upon this finding the standards dictate suspension and not disbarment. The length of suspension recommended by the Referee is also appropriate based upon cases with similar violations ordering suspensions that range in duration from ninety one days to two years. The recommendation is also appropriate given the seven mitigating factors found by the Referee.

The final point argued by TFB is that the Referee abused his discretion by failing to award it costs. The Referee was critical of TFB in that it failed to prove any of the alleged violations other than those admitted by Respondent in his pleadings. The Referee further noted that he had serious doubts as to the

credibility of the witness TFB called to prove its claims. It is within the discretion of the Referee to require each party to bear its own costs when it appears that TFB has taken too broad an approach by failing to abandon questionable claims.

ARGUMENT

I. THE FLORIDA BAR HAS MADE ARGUMENTS THAT ARE INAPPROPRIATE IN THIS APPEAL AND SHOULD BE STRICKEN.

A. The Florida Bar's Argument That The Filing Of A Civil Complaint By The Respondent Is Tantamount To Conversion Should Be Stricken As It Was Not Pled Nor Argued Before The Referee.

TFB's first point on appeal is "whether the Referee erred in finding there was no competent evidence or facts to support the allegations of misappropriation/conversion contained in Count III and Count IV of The Florida Bar's Complaint." (Initial Brief of The Florida Bar, dated April 20, 2004, p. 13). The problem with this argument is that Count IV of The Florida Bar's Amended Complaint does not contain any allegations of misappropriation or conversion. Count IV of the Amended Complaint addresses Respondent's filing of a civil complaint against Virginia Taylor for restitution. Based on this conduct, TFB alleges Respondent violated Rules 4-3.1 (meritorious claims and contentions) and 4-8.4(d) (engage in conduct with the practice of law that is prejudicial to the administration of justice) of the Rules of Professional Conduct. (The violation of

Rule 4-3.1 (meritorious claims and contentions) was abandoned by TFB as it was not set forth in the Probable Cause Affidavit of The Florida Bar.) Count IV is also the only count where Respondent's filing of the civil lawsuit is addressed by TFB.

Despite the fact that TFB did not allege that Respondent's filing of a civil lawsuit was tantamount to theft or conversion, this argument is pervasive throughout its Initial Brief. Not only was this allegation not raised by TFB in its Amended Complaint, but it was also not raised or argued before the Referee. To allow this new charge of conversion, which was not raised or pled before the Referee, to be considered now, is a violation of Respondent's right to due process. *Florida Bar v. Batista*, 846 So. 2d 479 (Fla. 2003). In *Batista* this Court held that the Referee could not consider a new rule violation without adequate notice to respondent. *Id.* at 484. Based upon *Batista*, it would likewise be a violation of due process for this Court to consider a new rule violation for the first time in this appeal. This Court has held that an attorney must be given reasonable notice of the charges they face before the referee's hearing on those charges. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.ed. 2d 117 (1968); *Florida Bar v. Price*, 478 So. 2d 812 (Fla. 1985). Without notice that TFB was alleging conversion based upon the filing of the civil suit Respondent has been denied due process. He has been

rendered unprepared to refute these allegations and call witnesses on his behalf to address this issue.

Because it is impermissible for TFB to raise allegations, not previously pled or identified, for the first time on review, the allegation that Respondent's filing of the civil suit against Virginia Stoner is conversion should be stricken by this Court.

B. Florida Bar's Argument That The Respondent's Failure To Maintain A Trust Account Is Conduct Prejudicial To The Administration Of Justice Should Also Be Stricken As It Was Not Pled Nor Argued Before The Referee

The Florida Bar also argues, for the first time in this appeal, that Respondent should be found guilty of a violation of 4-8.4(d) (engage in conduct with the practice of law that is prejudicial to the administration of justice) of the Rules of Professional Conduct, based upon his conceded trust account violations. (Initial Brief of the Florida Bar, dated April 23, 2004, p. 23.) TFB contends, based on this Court's holding in *Florida Bar v. McClure*, 575 So. 2d 176 (Fla. 1991), that Respondent's admitted trust account violations require a finding of guilt on rule 4-8.4(d). Once again, these charges cannot be raised for the first time in this appeal and should not be considered by this Court.

In addition, TFB's reliance on *McClure* is misplaced. *McClure* is distinguishable from the instant case in two ways. First, the attorney in *McClure*, made distributions to herself from her trust account that the referee found to be intentional rather than inadvertent. This factual finding by the referee was not disturbed on appeal. The referee further found the lawyer wrongfully withheld funds from the estate she represented. Based on the conduct of McClure, the Court found that her actions pertained directly to fiduciary services performed on behalf of the estate and, therefore, directly related to the representation of the estate in the probate proceeding. *Id. at 178*. This nexus between the violation and the use of the Court proceeding to effectuate the violation was sufficient to find McClure guilty of conduct prejudicial to the administration of justice. *Id.*

The Referee in the instant case did not find any intent on the part of Torres to make distributions to himself from the trailer park monies. Nor has there been a finding that his misconduct, failure to establish a trust account and follow the rules pertaining to said accounts, is directly related to his representation in a court

proceeding. There is no nexus in this case connecting the two events as in *McClure*.

Second, TFB complaint against *McClure* alleged a violation of Rule 4-8.4(d) and therefore McClure presumably had notice of the charge against her. TFB in this case charges Respondent with a violation of Rule 4-8.4(d) only in Count IV of its Amended Complaint. Count IV addresses only the filing of a civil action against Virginia Taylor. TFB has never, prior to its initial brief on this appeal, alleged that Respondent's handling of the Estate/Trailer Park money, and his admission of trust account violations constitute a violation of Rule 4-8.4(d) of the Rules of Professional Conduct.

Once again, having failed to argue this issue before the Referee or even plead such violation precludes TFB from raising the issue for the first time in this appeal. *Batista*.

C.The Florida Bar Cited The Deposition Of Respondent Which Was Not Entered Into Evidence Nor Made Part Of The Record And Therefore Should not Be Considered By This Court

On two separate occasions in its Initial Brief, TFB cites the deposition of Respondent taken on May 12, 2003. (Initial Brief of the Florida Bar, dated April 23, 2004, pp. 16, 27). The deposition of Respondent was not filed in this case, nor was it entered into evidence during the hearing before the Referee. Having never been offered into evidence, the deposition of Respondent, and any reference thereto, is improper as it constitutes evidence outside the record.

II.THE FLORIDA BAR HAS FAILED TO ADEQUATELY IDENTIFY EVIDENCE IN THE RECORD THAT CLEARLY CONTRADICTS THE FINDING OF THE REFEREE THAT THE RESPONDENT DID NOT CONVERT OR MISAPPROPRIATE CLIENT'S MONEY AND THE REFEREE'S FINDING IS SUPPORTED BY COMPETENT EVIDENCE.

TFB contends that the "misappropriation" of the funds by Torres should have been deemed by the Referee to be an intentional misappropriation requiring disbarment. TFB, however, misinterprets the holding of the Referee in that the

Referee did not find that Respondent misappropriated client funds unintentionally but rather the Referee found that there was no evidence that Respondent ever took or converted client funds. This misconception is prevalent throughout TFB's Initial Brief.

TFB first challenges, what it views as, the Referee's factual finding that Respondent did not intentionally misappropriate or convert trailer park funds. Because a referee in a disciplinary proceeding is in the best position to determine the credibility of witnesses, the Court will defer to his resolution of any conflicting testimony. *Florida Bar v. Batista*, 846 So. 2d 479, 483 (Fla. 2003) citing *Florida Bar v. Fredricks*, 731 So. 2d 1249, 1251 (Fla. 1999). The Referee's findings of fact carry a presumption of correctness. *Florida Bar v. Vannier*, 498 So. 2d 896 (Fla. 1986). In order to find that an attorney acted with dishonesty, misrepresentation, fraud or deceit TFB must show the necessary element of intent. *Florida Bar v. Burke*, 578 So. 2d 1099, 1102 (Fla. 1991). To prevail, TFB is required to demonstrate that the evidence in the record clearly contradicts the Referee's conclusions or that the record is devoid of evidence to support the Referee's finding that Respondent did not misappropriate client funds. *Florida Bar v. Spann*, 682 So.2d 1070 (Fla. 1996). If the referee's findings are supported by competent evidence, this Court is precluded from reweighing the evidence and

substituting its judgment for that of the referee. *Florida Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla. 1998).

The Referee found, based upon the more persuasive evidence presented, that TFB failed to prove, by the heightened standard of clear and convincing evidence, that Torres converted or misappropriated any funds belonging to the estate of Verne Stoner. (ROR, pp.23, 28, 29) This finding is supported by competent evidence in the record, such as the unrefuted testimony of Respondent that he did not take, convert, or spend any trailer park funds. (TR. 706-707, V) (ROR, p.23). In reaching his conclusion the Referee further relied upon Respondent's testimony that his accounting, which evidences the shortfall of \$20,779.34, was based solely upon the rental receipt records provided by Siniscalco. (ROR, p.19). Respondent further testified that he never reconciled any funds received from Siniscalco with the monthly records produced by Siniscalco. (ROR, p.19). Finally, Respondent explained that he kept the funds at his house, rather than open a trust account, in anticipation of instituting a probate proceeding. (ROR, p. 11). Based upon this evidence the Referee makes the finding that TFB presented no clear and convincing evidence, given the manner in which the trailer park cash funds were maintained by Hennessey and later Siniscalco, that Respondent actually took or converted funds. (ROR p.23). This evidence overwhelmingly supports the

conclusion drawn by the Referee that Respondent did not take or convert client funds.

Because the Referee's finding is supported by evidence in the record, as set forth above, the only way TFB can prevail is to demonstrate that there is evidence in the record which clearly contradicts the finding that Respondent did not convert client's funds. TFB identifies four areas of testimony it contends clearly contradicts the Referee's finding. The first is that Respondent stipulated to a shortfall of \$20,779.34 from the monies of the trailer park. Second, that Respondent has failed to provide an adequate and proper explanation as to why he was short \$20,779.34. Third, Respondent has failed to provide an adequate or proper explanation as to why he borrowed \$20,300.00 from Georgina Hennessey to cover the shortfall. Fourth, Respondent has failed to provide an adequate explanation as to why he initiated a civil lawsuit to recoup \$42,000.00 in criminal restitution which he had agreed to pay.

Respondent's stipulation to a shortfall alone is not evidence that contradicts the Referee's finding that Respondent did not convert client funds. Respondent's explanation that the shortfall calculation is based solely upon accountings never verified by Respondent is consistent with the Referee's finding. TFB failed to introduce any evidence that the shortfall was accurate or the accountings upon which it was based were correct.

TFB cites *Florida Bar v. Simring*, 612 So. 2d 561 (Fla.1993), for the proposition that “sloppy and intentionally improper trust accounting procedures cannot be used as a shield to hide his intent to misappropriate trust account funds.” *Id at 566*. In *Simring*, this Court found that intentionally improper acts can be used to infer intent to misappropriate trust account funds. *Id.* Specifically, the record evidence in *Simring* consisted of forty four (44) trust account checks returned for insufficient funds, a trust account overdrawn for in excess of one month, depositing \$20,000.00 in loans and the proceeds from the sale of the lawyer’s home into the trust account. *Id.* In addition, the Court found *Simring* dispersed money out of the settlement proceeds of a minor prior to Court approval. These disbursements were paid to the lawyer’s family members, including his wife, bookkeeper and employee. The monies were also used to pay for his car, insurance, personal credit card payments, and repayment of a personal loan. *Simring* additionally used the settlement funds of the minor to pay office expenses. These disbursements were made without approval from the Guardian. Furthermore, the Respondent failed to use the remaining money to pay the healthcare providers of the minor child. *Simring* thereafter took the remaining settlement money and gave it to a retired lawyer in New York to place in a safe deposit box to avert the Internal Revenue Service who was investigating the attorney’s trust accounts. It was based upon this plethora of record evidence that

this Court held the lawyer intentionally misappropriated and convert his clients' funds. *Id.* In the case at bar, TFB did not introduce, and therefore cannot cite from the record, a single transaction by Torres similar to those set forth in *Simring*.

TFB next contends that Respondent's lack of an "adequate" explanation for the shortfall is sufficient evidence of Respondent's intent to convert client's money. First, The Florida Bar's characterization that Respondent failed to provide an explanation is inaccurate. As set forth in detail above, Respondent never reconciled or accounted for the money turned over by Siniscalco. The contention of TFB that Respondent's failure to provide an explanation is proof of his guilt misstates the burden of proof in these matters. TFB had the burden to affirmatively prove to the Referee, by clear and convincing evidence that Respondent converted trailer park funds. Having failed to do so TFB cannot now claim Respondent's failure to provide a better explanation provides evidence which contradicts the Referee's findings.

The Florida Bar likewise contends that Respondent's lack of an explanation for borrowing \$20,300.00 from Georgina Hennessey is evidence of conversion. Again, this is an inaccurate statement of the record by TFB. Respondent offered a plausible explanation as to why he approached Georgina Hennessey to borrow \$20,300.00. The evidence reflects that prior to Georgina Hennessey retiring from

her position as manager of the trailer park, she sold her trailer to the trailer park, which was purchased by Respondent with trailer park funds to be used as an onsite office for Stoner who was contemplating a move back to Florida to run the trailer park. Respondent paid Hennessey \$20,000.00 for the trailer. (TR. P. 550) Knowing Georgina Hennessey rarely left the house and was frugal with her money, Respondent testified he believed Georgina Hennessey would still be in possession of the \$20,000.00 from the sale of her trailer. (TR. p. 550) Respondent further testified that the Court Order provided him only 24 hours to turn over the funds in his possession. Upon realizing a shortfall based on Siniscalco's accounting, Respondent panicked and attempted to obtain the money to comply with the Court Order. Respondent contacted Hennessey and she lent him the funds. The record supports, and the Referee found, that when respondent approached Hennessey to borrow the missing funds, he believed that he was borrowing money that belonged to Georgina Hennessey personally and not funds from the Estate. (ROR pp.20-21) Although TFB claims that Respondent knew that the money technically belonged to the Estate of Verne Stoner this statement is not accurate. The Referee specifically found "The Florida Bar has failed to establish by clear and convincing evidence that the Respondent knew that the money loaned by Hennessey was from Trailer Park funds." (ROR p.20). This factual finding by the Referee has not been

challenged by The Florida Bar and therefore is conclusive that Respondent believed the money belonged to Georgina Hennessey at the time.

TFB fails to adequately explain how borrowing money from a Hennessey is evidence of conversion or misappropriation of the rental proceeds in his possession. His attempt to immediately and timely return the missing funds to the Estate is not evidence of an intent to steal but rather has been found to be a mitigating factor by this Court. *Florida Bar v. Tauler*, 775 So.2d 944 (Fla. 2000) (an attorney's attempt to replace client funds at the earliest possible opportunity by refinancing her family home would support a finding that the attorney made timely and good faith restitution to the client.)

The final evidence cited by TFB for its proposition that the record contradicts the Referee's finding that Respondent converted fund is that Respondent filed a civil lawsuit against Virginia Stoner. As set forth previously in this Brief, TFB's claim that filing a civil suit was tantamount to conversion is an impermissible argument as this was neither pled in TFB's Complaint, nor was it tried before the Referee. Even if the Court were to consider the argument that filing of such a civil suit was a conversion, it cannot stand as it misstates the findings of the Referee. The Referee found, that the funds loaned by Hennessey to Respondent appeared to be Hennessey's personal funds. (ROR pp.20-21).

These three arguments by TFB, even taken together, do not amount to evidence that clearly contradicts the finding of the Referee.

III. THE REFEREE'S RECOMMENDATION AS TO GUILT IS
APPROPRIATE AND SUPPORTED BY COMPETENT EVIDENCE IN THE
RECORD.

Next, TFB challenges the Referee's recommendation as to guilt and the discipline he applied in this case. The Referee recommended the Respondent be found guilty of violating the following Rules Regulating the Florida Bar:

- (1) 4-1.15(a)-Client's and third party funds to be held in trust.
- (2) 4-1.15(b)-Notice of Receipt of trust funds, delivery, and accounting.
- (3) 4-1.15(d)-Compliance with trust account rules.
(ROR p. 26).

The above violations were all admitted by Respondent in his Second Amended Answer and Affirmative Defenses.

TFB contends, in addition to those violations set forth above, the Referee should have recommended that Respondent be found guilty of violating Rules 4-8.4(b)(commit a crime that reflects adversely on the lawyer's honesty), 4-8.4(c)(engage in conduct involving dishonesty, fraud or deceit) and 4-8.4(d)(engage in conduct with the practice of law that is prejudicial to the administration of justice).

Just as this Court is limited in its review of the Referee's factual findings, it is likewise limited in its review of a Referee's recommendations as to guilt. *Florida Bar v. Brown*, 790 So. 2d 1081 (Fla. 2001). If the Referee's recommendation as to guilt is supported by competent, substantial evidence this Court will not reweigh the evidence and substitute its judgment for that of the referee. *See Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000).

TFB challenges the Referee's finding that TFB did not prove by clear and convincing evidence Respondent violated Rule 4-8.4(b)(commit a crime that reflects adversely on the lawyer's honesty). As set forth more completely above, the Referee was not convinced that Respondent took or converted any money that belonged to the trailer park. (ROR p. 23). The Referee relied upon the testimony describing the way in which the trailer park had been run by Siniscalco and Hennessey, including the payment of expenses with cash and accepting cash rents as well as the fact that respondent never reconciled the money received from Siniscalco. (ROR pp. 8, 19, 23). This testimony combined with the uncontroverted testimony of Respondent that he did not take or convert to his own use the money of the trailer park is competent evidence in the record that Respondent did not

committed any crime and hence could not be guilty of violating rule 4-8.4(b). In essence, TFB never proved that the accountings upon which the shortage was based were accurate or that any money was missing at all. Although Respondent concedes he should have established a trust account for these funds, failure to do so is not a crime involving dishonesty.

Likewise, since the Referee found that Respondent did not convert trailer park funds to his own use, Respondent did not commit a violation of rule 4-8.4(c)(engage in conduct involving dishonesty, fraud or deceit). The Referee did not find, and TFB cites no evidence in the record, that Respondent lied, defrauded or deceived anyone in this case. Again TFB claims the dishonesty is the conversion of the money by Respondent but this fact was not proven by TFB.

Finally, TFB contends that the Referee erred by not recommending guilt on violation of rule 4-8.4(d)(engage in conduct within the practice of law that is prejudicial to the administration of justice). TFB argues that filing the civil suit against Virginia Stoner to recoup amounts paid in restitution was conduct prejudicial to the administration of justice. Although the Referee found the lawsuit “misguided” he did not find that it rose to the level of a violation of rule 4-4.8(d).

TFB supports its request for violation of 4-4.8(d) by arguing that Respondent knew at the time he filed the complaint that the money had been “deemed money of the estate.” The Respondent and the state attorney agreed that Respondent would pay \$18,600.00 to the estate as part of the plea. (ROR p. 22) There was no legal finding by any court that the estate was actually owed \$18,600.00. This amount was simply a negotiated plea on the misdemeanor petit theft count. This plea was entered and agreed to by Respondent in order to avoid the expense of a trial and the embarrassment to himself and his family. (ROR p. 22) Respondent believed, at the time he borrowed the money from Hennessey, that the money belonged to Hennessey. He executed an IOU in favor of Hennessey and not in favor of the estate. (ROR. p.21) He was also cognizant of the fact that Hennessey could still pursue him for the IOU even if the state had “deemed” the \$18,600.00 part of the estate. As previously stated, the Referee found that TFB failed to establish that Respondent knowingly borrowed trailer park funds from Hennessey. The evidence indicated that Hennessey acted consistent with the fact that these were her personal funds by writing a note to Respondent that she had bills and her granddaughter’s wedding to pay with this money. (Resp. Ex. 48). The fact that Respondent would still be liable to Hennessey on the IOU, and ultimately would be required to pay twice, is sufficient to give Respondent grounds to bring the civil lawsuit. In addition, Respondent did not file the civil suit against the estate of Verne Stoner but against Virginia Stoner, individually. Filing a lawsuit to recoup one’s losses, even if misguided, is not the type of conduct contemplated to fall within the purview of rule 4-4.8(d). *Florida*

Bar v. Pettie, 424 So. 2d 734 (Fla. 1982). The type of conduct contemplated by this rule are acts such as hindering witnesses from appearing, assaulting process servers, influencing jurors, obstructing court orders or criminal investigations. *Id.* The term is not so broad as to include all conduct which is illegal but rather those activities, for example, more directly associated with "bribery of jurors, subornation of perjury, misrepresentations to a court or any other conduct which undermines the legitimacy of the judicial processes. *Id.* TFB has again failed to show that the record evidence is contrary to the finding of the Referee. The Referee held that the conduct of Respondent in this regard does not rise to the level of a violation of 4-4.8(d) and TFB has cited no authority to suggest that such conduct constitutes a violation of the rule.

IV. THE REFEREE'S RECOMMENDATION OF DISCIPLINE SHOULD BE UPHeld BECAUSE IT HAS A REASONABLE BASIS IN EXISTING CASELAW

TFB contends that, not only did the Referee err by not finding Respondent guilty of the additional charges, but the Referee also erred by failing to recommend disbarment. The only portion of the recommended discipline challenged by TFB is the Referee's recommendation as to suspension.

In reviewing a referee's recommended discipline, the Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the responsibility of the Supreme Court to order the appropriate sanction. *See Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989); However, the Court will not second guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Florida Bar v. Temmer*, 753 So. 2d 555 (Fla. 1999).

Based upon the three trust admitted violations the Referee recommended suspension from the practice of law for one year followed by three years of probation during which Respondent shall submit to random audits, attend a debt management course and complete 30 hours of Continuing Legal Education with an emphasis on ethics. (ROR p. 26).

Based upon the Referee's finding that the Respondent "knew, or at the very least, should have known that he was dealing improperly with funds belonging to the trailer park by failing to deposit said funds in trust and by keeping accurate records" suspension rather than disbarment is the appropriate sanction. The Referee found Respondent guilty of failing to protect his client's property as required by the Rules Regulating the Florida Bar. (ROR p.27). The Referee was guided in his recommendation of discipline by standard 4.1 of the Florida Standards for Imposing Lawyer Sanctions which addresses appropriate sanctions for failing to protect a client property. (ROR p. 27) *FL ST LWYR Sanctions 4.1.*

Standard 4.11 makes disbarment the appropriate sanction when a lawyer intentionally converts client property. *FL ST LWYR Sanctions 4.11*. Standard 4.12 mandates suspension from the practice of law when a lawyer knows or should know he or she is dealing improperly with client property. *FL ST LWYR Sanctions 4.12*.

Relying on his finding that the clear and convincing evidence presented did not suggest Respondent converted or misappropriated trailer park funds, the Referee applied Standard 4.12 and recommended the Respondent be suspended rather than disbarred. *FL ST LWYR Sanctions 4.12*. (ROR, p. 28). In light of his conclusion that Respondent did not take or convert trailer park monies the Referee found TFB's request for disbarment inappropriate. (ROR, p.28). The Referee's application of Standard 4.12 is appropriate in this case.

The Referee, in support of his recommendation for a one year suspension, cited *Florida Bar v. McFall*, 28 Fla. Law Weekly S845 (Fla. Nov. 26, 2003), *Florida Bar v. Neu*, 597 So 2d 266 (Fla. 1992) and *Florida Bar v. Weiss*, 586 So. 2d 1051 (Fla. 1991). In *McFall* the lawyer intentionally paid himself fees from trust funds, over the client's objection, on three different occasions. When contacted by TFB, McFall lied to the client and the bar about his conduct. Despite this conduct McFall was given a three year suspension. Because the conduct in *McFall* was found to be intentional and dishonest, it warranted a three year suspension. Consequently, Respondent's violations, which were unintentional and not dishonest, warrant a suspension less severe. Therefore, the Referee's recommendation of one year is consistent with *McFall*.

In *Florida Bar v. Weaver*, 279 So. 2d 298 (Fla. 1973), this Court held that commingling of trust funds with the personal funds of the attorney and converting the funds to the attorney's own use was not done with the intent to deprive the client of said funds but rather was brought about by inadequate accounting procedures. *Id.* This warranted a public reprimand. *Id. at 300*.

In *Florida Bar v. Mason*, 826 So. 2d 985 (Fla. 2002), the referee found intentional misconduct that resulted in over 82 inappropriate transfers from her trust account and submitting a false statement to TFB indicating that she had certain funds in her trust account that she did not. *Id.* Distinguishing the case from other more egregious misappropriation cases, this Court imposed a suspension of two years. This Court also declined to disbar Mason, holding that the extreme sanction of disbarment is designed to be imposed in cases where rehabilitation is highly improbable and the conduct is egregious. *Id.* citing *Florida Bar v. Kassier*, 711 So. 2d 515, 517 (Fla. 1998). The Referee in this case found that Torres is unlikely to commit any similar acts in the future as his law practice has flourished without incident for the past five years during these proceedings. (ROR p.32).

The Referee's recommendation that Torres be suspended for one year is further supported by *Florida Bar v. Adler*, 589 So. 2d 899 (Fla. 1991). In *Adler* the respondent was found guilty of commingling trust and business monies, failure to produce required trust account records, failing to protect client's funds and utilizing trust funds for purposes other than those designated. *Id.* The violations in *Adler* are nearly identical to those found by the Referee in this case. The Court in *Adler* affirmed an 18 month suspension based upon the fact that Adler had previously been disciplined for fraudulently backdating tax documents and prior misuse of trust funds. *Id.* At 900. The Court indicated it would deal more severely with cumulative misconduct and prior discipline. *Id.* The Referee in the instant case found Torres to have no prior history of discipline and therefore the appropriate suspension, based on *Adler*, should be less than 18 months. (ROR p. 32) The Court in *Adler* also considered that *Adler* had substantial experience in the practice of law. *Adler* at 900. The referee found Torres was largely inexperienced, only three years out of law school when he began representation of Hennessey. (ROR p. 29). In fact, Respondent never worked under the tuteledge of other lawyers, but had been engaged as a sole practitioner for the three years before meeting Hennessey. (TR. 596-597, IV). This fact also supports the Referee's recommendation of a one year suspension.

This Court has repeatedly recommended suspensions of short duration for trust account violations as found herein. *Florida Bar v. Burke*, 578 So. 2d 1099 (Fla. 1991)(ninety one day suspension for trust account violations and engaging in conduct prejudicial to the administration of justice and conduct adversely reflecting on fitness to practice law). *See also Florida Bar v. Penn*, 421 So. 2d 497 (Fla.1982); *Florida Bar v. Fredrick*, 756 So. 2d 79 (Fla. 2000)(ninety one day suspension for trust account violations and failure to use trust money entrusted to him for the intended purpose and conduct prejudicial to the administration of justice).

In the above referenced cases the Court considered mitigating factors, or lack thereof, as an element to the determination of the length of suspension. The Referee found that Torres had the following mitigating factors:

- (1) Respondent was inexperienced in the practice of law
 - (2) Respondent was a self starter
 - (3) Respondent had an impeccable reputation
 - (4) Respondent was unlikely to commit similar mistakes in the future
 - (5) Respondent exhibited no selfish or dishonest motive
 - (6) Respondent was remorseful
 - (7) Respondent was cooperative with TFB
- (ROR pp.22-33)

TFB has not challenged any of the factual findings of mitigating factors made by the Referee.

This Court has repeatedly considered mitigating factors in its disciplinary determinations. *McFall at 308*. TFB, by requesting the maximum suspension allowed under the rule, has failed to take the mitigating factors found by the referee into account which is inconsistent with this line of cases. The seven identified mitigating factors lend further support to the fact that the Referee's recommendation of a one year suspension has a reasonable basis in existing case law.

TFB's position that this case requires disbarment appears to be based repeatedly on TFB's characterization of Respondent's conduct as a misappropriation/conversion. The cases cited by TFB are cases involving findings of intent, misappropriation, and conversion. The Referee did not find intent, misappropriation, or conversion and therefore the application of the cited cases to these facts is inappropriate.

For instance, TFB compares this case to *Florida Bar v. Tillman, 682 So.2d 542 (Fla. 1996)*. In *Tillman*, the Court found ample evidence in the record to support the finding of the Referee which included *Tillman* paying personal expenses from client's money, drawing excessive fees, withdrawing premature fees, failing to pay client's medical bills from the monies held in trust for that purpose. The Court upheld the Referee's recommendation that *Tillman* had misappropriated client's funds by relying on *Tillman*'s own admissions, the testimony of her bookkeeper, as well as the evidence of improper payments made from her trust account. In arguing that Torres should be suspended TFB attempts to compare the conduct of Torres to that found in cases such as *Tillman* where the record is replete with evidence of conversion, misappropriation and even fraud by the Respondent.

The reason that these cases are not appropriate precedent is that TFB did not present a single document or witness who could verify any improper use of the monies held in trust. The Referee found that the TFB did not prove by clear and convincing evidence that Torres took or converted anything. Therefore TFB's reliance on these cases for disbarment is misplaced. (ROR p. 23)

The recommendation of suspension for one year should be affirmed as the Referee's recommendation is based upon the Florida Standards for Imposing Lawyer Sanctions as well as existing precedent.

V. THE REFEREE DID NOT ABUSE HIS DISCRETION BY FAILING TO AWARD COSTS TO THE FLORIDA BAR.

The Referee refused the TFB's request to tax costs of \$11,388.24 in this proceeding. Rule 3-7.6(o)(2) of the Rules of Discipline provide that the referee shall have the discretion to award costs and absent an abuse of discretion the

Referee's award shall not be reversed. TFB argues that because the costs were found to be reasonable and necessary that the Referee abused his discretion in refusing to award same. The Referee actually states in his Report that the costs were reasonable and necessary "in order to properly present this matter to the Referee and ultimately to the Florida Supreme Court." (ROR p. 33). Although the Referee agrees the costs were necessarily incurred to litigate the case through the three day evidentiary hearing, the Referee suggests that it was unnecessary for TFB to do. The Referee found that the only violations proven by TFB were those admitted by Respondent in his Second Amended Answer. (ROR p. 33). The Referee further found Respondent's testimony to be consistent with those admissions. (ROR p. 33). Finally, the Referee suggests that TFB was pursuing these ultimately unproven charges against Respondent based solely on the testimony of questionable individuals about which the Referee had "serious concerns..." Id.

TFB continued to pursue many claims against Respondent, many of which were based upon questionable witnesses. These claims could have been abandoned early on in the proceeding by TFB. TFB proved nothing other than what was previously admitted by Respondent. Based upon TFB taking this broad approach, the Referee did not abuse his discretion in requiring both parties to bear their own costs. Florida Bar v. McCain, 361 S. 2d 700 (Fla. 1978)(Court found it inequitable to impose the costs of proceedings against Respondent where the bar took a broad approach and failed to abandon questionable claims, each party would bear their own costs.) Clearly, requiring each party to bear their own costs is within the discretion of the Referee and therefore should be upheld. *Id.*

CONCLUSION

In conclusion, TFB has the burden of proving that the Referee erred in either his findings of fact, his recommendations of guilt, or recommendations as to discipline. TFB has failed to present adequate evidence in the record that supports such a conclusion and, as such, the Referee's Report and Recommendations should be affirmed.

The Referee also acted within his discretion to require each side to bear their own costs as a result of the failure of TFB to prove any charges other than those admitted by Respondent, and as a result of the questionable nature of the testimony offer to prove the remaining, ultimately unsuccessful, charges. Having acted within his discretion, the Referee's denial of costs should stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of Respondent's Answer Brief was forwarded via Federal Express, airbill no. 846710063855, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Arlene Kalish Sankel, Attorney for The Florida Bar, at 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and to John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this _____ day of June, 2004.

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I HEREBY CERTIFY that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by OfficeScan Real-Time Monitor for Windows.

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