

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC06-1432

v.

TFB File No. 2005-00,029(2B)

ROBERT J. PAPE JR.,

Respondent.

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REPORT OF THE 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:

On July 20, 2006, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. On March 5, 2007, a final hearing was held in this matter. All items properly filed including pleadings, recorded testimony, exhibits in evidence and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

## II. 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. Narrative Summary Of Case. This is a reciprocal discipline case. Robert J. Pape, Jr. was disbarred in the State of New York for professional misconduct by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; conduct prejudicial to the administration of justice; conduct adversely reflecting on his fitness as a lawyer; and failure to maintain adequate financial records.

As a result of the disbarment in New York, the Florida Bar has charged Mr. Pape with violation of Rules Regulating the Florida Bar 4-8.4(b) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) and 4-8.4(c) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects). A hearing was held March 5, 2007, at which Mr. Pape admitted that he violated Rule 4-8.4(c); it is identical to one of the violations for which he was disbarred in New York. Although counsel for Mr. Pape argued at the hearing that Mr. Pape's actions do not rise to the level of a criminal act and therefore he cannot be found guilty of violating Rule 4.8.4(b), case law shows that stealing from a client has been held to be grand theft. *Florida Bar v. Arcia*, 848 So. 2d 296, 299 (Fla. 2003). As found by the New York referee and hearing panel and adopted by the First Department Supreme Court Appellate Division of New York in Mr. Pape's

New York disbarment proceedings, Mr. Pape appropriated over \$180,000 of client and firm funds for his own personal use over a five-year period by submitting false expense vouchers for reimbursement and by "double dipping" legitimate expense reimbursements. The Referee finds Mr. Pape guilty of violating both Rule 4-8.4(b) and 4-8.4(c).

The Florida Standards for Imposing Lawyer Sanctions provide the following factors to consider in recommending sanctions: duties violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating circumstances. Pursuant to Standard 5.11(b), disbarment is an appropriate sanction for Mr. Pape's violations because he engaged in "serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation or theft." Similarly, pursuant to Standard 5.11(f), disbarment is an appropriate sanction because Mr. Pape engaged in "intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on [his] fitness to practice."

Theft of firm funds creates a presumption of disbarment. *Arcia*, 848 So. 2d at 300. Disbarment in another state also creates a presumption of disbarment. *Florida Bar v. Sanders*, 580 So. 2d 594 (Fla. 1991) ("We should not allow the practice of law in Florida of one disbarred in his home state.") Further, when a lawyer misappropriates client funds, disbarment is presumed absent substantial mitigating circumstances. *Florida Bar v. Brownstein*, 32 Fla. L. Weekly S119 (Fla. Mar. 29, 2007) ("As we have

repeatedly stated, disbarment is the presumed sanction for the misappropriation of client funds, and the presumption will be overcome only in unique circumstances."); *Florida Bar v. Martinez-Genova*, 31 Fla. L. Weekly S868 (Fla. Dec. 14, 2006) ("[T]he Court finds mitigating factors to overcome the presumption of disbarment for misappropriation only in exceptional and unusual circumstances. . . .")

The Referee finds that certain aggravating factors justify the imposition of disbarment, including Mr. Pape's dishonest or selfish motive. As his counsel admitted at the hearing, the money Mr. Pape obtained was solely for his own benefit. There is no indication in the record that the money was stolen for any reason other than his personal use, no evidence of financial hardship, a drug habit, or medical expenses. The Referee also finds as aggravating factors Mr. Pape's pattern of misconduct and the fact that he committed multiple offenses over an extended period of time. This was no isolated incident, nor was it the result of carelessness. Beginning in 1997 and ending in 2002 when his conduct was discovered by his firm, Mr. Pape deliberately and repeatedly falsified expense vouchers and submitted them for reimbursement for a total amount in excess of \$180,000.

The Florida Bar argued at the hearing that an additional aggravating factor is the vulnerability of the victims, and the Referee agrees. Mr. Pape betrayed the trust of the members of his law firm, where he had worked for over 20 years. *Arcia*, 848 So. 2d at 300 ("Theft of firm funds breaches the trust that law firms must place in their attorneys as professionals to act as representatives of the firm.") More importantly, Mr. Pape stole

from his clients, one of the most serious offenses for which lawyers may be disciplined. *Florida Bar v. Shuminer*, 567 So. 2d 430, 432-33 (Fla. 1990). The Referee finds that Mr. Pape's substantial experience in the practice of law, over 20 years, is also an aggravating factor.

The Referee agrees with the Bar's contention that Mr. Pape's restitution should not be considered as either aggravating or mitigating pursuant to Standard for Imposing Lawyer Sanctions 9.4(a) because it was forced or compelled restitution. According to Mr. Pape's own testimony at the hearing, his firm unilaterally decided to hold his capital deposit with the firm as partial restitution of approximately \$60,000. The firm also retained additional income Mr. Pape was entitled to prior to his termination of approximately \$20,000, although he freely relinquished his rights to this money. According to the report of the New York referee, Mr. Pape still owes the firm \$88,000 plus legal and accounting fees, although Mr. Pape stated at the hearing that he disputes this amount.

Counsel for Mr. Pape argued as mitigation that Mr. Pape made a timely good-faith effort to make restitution or rectify the consequences because Mr. Pape reported himself to the New York Bar and notified the Florida Bar that the New York disbarment was occurring. The Referee does not find self-reporting to the Bar after his firm caught him stealing to be an attempt to rectify the consequences of his misconduct, and for the reasons stated above, the Referee does not find that Mr. Pape made a voluntary effort to make restitution.

The Referee finds as mitigating factors absence of a prior disciplinary record, character or reputation (as shown in evidence submitted during Mr. Pape's New York disbarment), imposition of other penalties and sanctions (his New York disbarment), and remorse. As shown in the Affidavit submitted to the Referee and his testimony at the hearing, Mr. Pape clearly regrets his actions and experiences remorse for what he did.

Finally, counsel for Mr. Pape argues as a mitigating factor Mr. Pape's mental impairment at the time of the offenses. He alleges Mr. Pape was suffering from a deep-seated depression which was a factor in the commission of the acts that led to his disbarment. Mr. Pape testified at the hearing that he was diagnosed with clinical depression when he sought psychiatric treatment after his firm discovered his misconduct, and as the result of the therapy he began at that time he realized this depression has been a lifelong condition. He testified that the depression contributed, along with other work stressors, to the administrative irresponsibility that led to his disbarment. Barbara Falanga, a licensed clinical social worker in New York, testified at the hearing that she has been treating Mr. Pape for depression for the past four and a half years. She testified his therapy revealed that he had a pervasive, underlying depression that may have been a contributing factor to the acts he committed

The Referee rejects Mr. Pape's contention that his depression is a mitigating factor sufficient to overcome the presumption of disbarment because the severity of his emotional problems does not outweigh the seriousness of his misconduct. Like the attorneys in similar cases, Mr. Pape was not so impaired that he could not continue to

work as a successful lawyer during the period in question. *Brownstein*, 32 Fla. L. Weekly S119; *Martinez-Genova*, 31 Fla. L. Weekly S868; *Shuminer*, 567 So. 2d at 432. It is also significant that he did not seek psychological treatment until after his misconduct was discovered. *Brownstein*, 32 Fla. L. Weekly S119.

Even when several mitigating factors are present, including mental impairment and drug addiction, the Florida Supreme Court has repeatedly disbarred attorneys who misappropriated client funds for their own use. *Brownstein*, 32 Fla. L. Weekly S119 (attorney suffering from clinical depression); *Martinez-Genova*, 31 Fla. L. Weekly S868 (attorney suffering from clinical depression and drug addiction, including arrests for drug possession); *Shuminer*, 567 So. 2d at 432 (court found nine mitigating factors, including personal and emotional problems and mental impairment due to alcohol and cocaine addiction); *Florida Bar v. Clement*, 662 So. 2d 690 (Fla. 1995) (attorney diagnosed with bipolar disorder); *Florida Bar v. Shanzer*, 572 So. 2d 1382 (Fla. 1991) (affirming referee's finding that attorney's depression was insufficient to warrant a discipline less than disbarment).

The Court meted out suspension rather than disbarment in a case involving misappropriation of client funds, but in doing so specifically cited "unique mitigating circumstances" as the distinguishing factor. *Florida Bar v. Tauler*, 775 So. 2d 944, 947-48 (Fla. 2000) (referee found attorney was "less culpable" due to personal and emotional difficulties where husband's operations caused loss of his medical practice, bankruptcy, and loss of family home, and husband was "prime mover" behind attorney's isolated

instances of misconduct). In arguing for suspension rather than disbarment, counsel for Mr. Pape cited the *Arcia* case, in which the attorney was merely suspended for theft of firm funds. *Arcia*, 848 So. 2d at 300. However, as pointed out by counsel for the Bar, in that case the Court deferred to the referee's recommendation of suspension because the Bar had not cross-appealed and requested disbarment. *Id.* The Court then went on to emphasize that "future cases involving theft of firm funds will carry a presumption of disbarment." *Id.*

As in *Brownstein*, there is a strong presumption of disbarment to be overcome in this case, and just as in *Brownstein*, the Referee finds that the mitigating factors are not sufficient to overcome the presumption of disbarment. *Brownstein*, 32 Fla. L. Weekly S119.

### III. RECOMMENDATIONS AS TO GUILT.

I recommend that Mr. Pape be found guilty of violating 4-8.4(b) and 4-8.4(c), of The Rules Regulating The Florida Bar.

### IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Mr. Pape be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. Disbarment effective nunc pro tunc to June 17, 2004, the date of Mr. Pape's interim suspension in New York.

B. Payment of The Florida Bar's costs in these proceedings.

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1), I considered the following:

A. Personal History of Respondent:

Age: 51 years old

Date admitted to the Bar: February 24, 1981

B. Aggravating Factors:

- 9.22(b) dishonest or selfish motive;
- 9.22(c) a pattern of misconduct;
- 9.22(d) multiple offenses;
- 9.22(h) vulnerability of victim; and
- 9.22(i) substantial experience in the practice of law.

C. Mitigating Factors:

- 9.32(a) absence of a prior disciplinary record;
- 9.32(g) character or reputation;
- 9.32(k) imposition of other penalties or sanctions; and
- 9.32(l) remorse.

VI. 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
Court Reporter's Fees	411.40
Investigative Costs	<u>64.80</u>
TOTAL	\$ 1,726.20

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 26th day of April, 2007.

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Kathleen F. Dekker, Referee  
Leon County Courthouse  
301 South Monroe Street, Room 327B  
Tallahassee, FL 32301-1861

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 KENNETH LAWRENCE MARVIN, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; ARNE CARL VANSTRUM, Bar Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and RICHARD A. GREENBERG, Respondent's Counsel at Rumberger, Kirk and Caldwell, 215 S. Monroe Street, Suite 130, Tallahassee, Florida 32301, on this 26th day of April, 2007.

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Kathleen F. Dekker, Referee