IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

MICHAEL H. FARVER,

Respondent.

_____/

CONFIDENTIAL
CASE NO. 66,462
TFB No. 06A85H21

THE FLORIDA BAR'S OPENING BRIEF

STEVE RUSHING
Branch Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport
Marriott Hotel
Tampa, Florida 33607
(813) 875-9821

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STATEMENT OF THE CASE

In this disciplinary proceeding, The Florida Bar filed a complaint against respondent on or about January 24, 1985.

On September 4, 1985, respondent entered a Conditional Guilty Plea before the referee for a sixty (60) day suspension, payment of restitution and payment of costs. In its Order of February 27, 1986, this Honorable Court disapproved the Conditional Guilty Plea and remanded the cause to the referee for further disciplinary proceedings on the merits.

After a hearing on the merits on September 5, 1986, the referee found respondent guilty and recommended the respondent be suspended from the practice of law for a period of one (1) year, with proof of rehabilitation prior to any subsequent reinstatement, and that he pay costs of $1,618.67.

This disciplinary proceeding is before this Court upon complainant's Petition for Review only as to the recommended disciplinary sanction of a one (1) year suspension from the practice of law, proof of rehabilitation prior to any subsequent reinstatement, and payment of costs. Complainant does not seek review of the referee's findings of fact or recommendation of guilt.

The petitioner in the Petition for Review is The Florida Bar and the respondent is Michael H. Farver. In the Opening Brief, each party will be referred to as they appeared before the referee.

STATEMENT OF FACTS

The following are the findings of fact in the Report of Referee:

1. Respondent is and at all times material herein was a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. On or about November, 1980, respondent became associated with the law firm of Pope & Henninger for the purpose of representing clients seeking legal services at the downtown legal clinic of that firm. The arrangement was not reduced to writing, but rested on parole, with respondent being entitled to receive a salary and a commission based upon production of legal fees at that office. According to the evidence, the handling of funds coming into the clinic, consisting of fees and costs, was intitially undertaken by the office secretary. She then turned over the funds to the firm's bookkeeper who deposited them in the firm's bank account or accounts.

3. Between November, 1980, and November, 1981, respondent knowingly obtained or used funds received from clientele of the clinic in the instances hereinafter described, which funds rightfully belonged to the law firm which employed respondent, and which were diverted to his own use with the intent to deprive the said law firm of the funds or benefit therefrom. Respondent's association with said law firm was terminated after

such diversion became known.

4. An independent audit by a C.P.A., whose services were paid for by respondent, was undertaken to reconcile the amount shown as fees received on client ledger cards and the amounts actually remitted by the client. In the following instances, respondent was shown to have personally received funds from persons represented by him during his tenure with Pope & Henninger which funds were in excess of those amounts reflected by the firm's fee records. Respondent either denied knowledge of the source of such unreflected fees or asserted that the fees received were earned by him separately and independently from his obligation to Pope & Henninger:

(a) In response to the audit questionaire, a client, Antonia Kliore, confirmed payment of legal fees to respondent in the amount of $250.00. The ledger card for her in the clinic reflected she had paid a total of $100.00.

(b) On or about November 13, 1981, a client, Philip R. Liedlich, paid $1,000.00 to respondent on account of services to be rendered the client's son. None of that fee was credited to the firm's account, but the entire fee was deposited in the respondent's bank account.

(c) During August, 1981, a client, Marjorie Lutkenhouse, paid $900.00 in legal fees to respondent and subsequently paid an additional $1,000.00 as the balance of respondent's legal fees for services connected with the administration of an estate. The Lutkenhouse ledger card indicated only a payment of $90.00 into

the trust account of the law firm.

(d) On or about August 3, 1981, a client, Florence Phillips, paid respondent $136.00 in legal fees. The Phillips' ledger card revealed credits in the amount of $44.00.

(e) On or about November 30, 1981, a client, Barbara J. Freeley, f/k/a Swartout, paid respondent legal fees of $100.00, but there was no record in the firm which revealed a deposit which could be credited to that client.

5. On or about January 25, 1983, respondent was arrested and subsequently charged with grand theft. In July, 1983, respondent entered into a pre-trial intervention agreement whereby he agreed to and did make restitution to Pope & Henninger in the amount of $6,671.00.

SUMMARY OF ARGUMENT

Since this Court has the inherent authority to increase or decrease in the disciplinary sanctions recommended by a referee, The Florida Bar requests that this Court increase the recommended disciplinary sanction of a one (1) year suspension to a suspension of at least two (2) years, along with proof of rehabilitation and payment of costs.

It is the Bar's position that based upon the continuing course of respondent's embezzlement, the amount of monies mishandled and caselaw, a suspension of at least two (2) years, or in the alternative, disbarment, is warranted.

ARGUMENT

THE REFEREE ERRED IN NOT SUSPENDING RESPONDENT FOR AT LEAST TWO YEARS.

Although the referee correctly found that between November, 1980, and November, 1981, respondent knowingly obtained or used funds received from clientele of a legal clinic, "..... which rightfully belonged to the law firm which employed respondent, and which were diverted to his own use with the intent to deprive the said law firm of the funds or benefit therefrom", the referee only recommended a one (1) year suspension, proof of rehabilitation and payment of costs.

At the sanctioning portion of the disciplinary proceeding, Bar Counsel requested at least a two (2) year suspension. Upon review of the referee's recommendation, The Board of Governors of The Florida Bar voted to seek the instant review of the one (1) year suspension and request a two (2) year suspension with proof of rehabilitation and payment of costs.

In The Florida Bar v. Baum, 369 So. 2d 585 (Fla. 1979), this Court approved a Conditional Guilty Plea for a two (2) year suspension, proof of rehabilitation and payment of costs, where the attorney had misused funds from his firm. Although the opinion does not reveal the amount involved, the Order of Temporary Suspension in The Florida Bar v. Baum, 305 So.2d 429 (Fla. 1978), indicates the total defalcation from the law firm's trust accounts, general accounts, and directly from clients, was $21,000.00. Although both respondent Baum and respondent Farver

misappropriated funds directly from clients, Mr. Baum received a two (2) year suspension and Mr. Farver received a recommendation of one (1) year suspension. Mitigating factors in Mr. Baum's case not present in the instant case are as follows:

(a) Mr. Baum was a partner while Mr. Farver was an employee.

(b) Mr. Baum's partners covered all known shortages in the firm's trust account prior to the hearing. Respondent repaid to the insurance company $6,671.00 for the shortages pursuant to a pre-trial intervention program.

(c) Mr. Baum submited his consent to a temporary suspension pending the investigation, while respondent continued to practice law while the investigation was pending.

(d) Mr. Baum's two (2) year suspension was pursuant to a Conditional Guilty Plea Agreement, while respondent's suspension was the result of a referee hearing.

In The Florida Bar v. Ryan, 394 So.2d 997 (Fla. 1981), this honorable Court ordered disbarment for the wrongful taking of $20,000.00 belonging to the law firm by the employee attorney and his subsequent disappearance and failure to appear in court after indictment on felony charges. Although there is no aggravation due to a "failure to appear" in the instant cause, the following factors are similar:

(a) Both Mr. Ryan and respondent were employee attorneys who wrongfully took monies for their own use which belong to their employer law firm.

(b) Both Mr. Ryan and respondent admitted their guilt to felony grand theft and entered into pre-trial for intervention agreements.

In The Florida Bar v. Bunch, 195 So.2d 558 (Fla. 1967), this honorable Court held that conversion by the Clerk of the Circuit Court of Broward County of $55,000.00 in public funds, which were subsequently restored, and conversion of $4,500.00, which was not restored to the Broward County Bar Association, warranted disbarment. Although instant case involves employee theft from a private law firm, there are similarities between Mr. Bunch and respondent:

(a) Both attorneys embezzled monies from their employers.

(b) Both attorneys made significant restitution prior to receiving their sanctions.

(c) Both attorneys entered pleas in their criminal cases, and were not adjudicated guilty of the charges.

Thus, it is clear that embezzling client fees from an employer law firm, as in the instant cause, is a serious offense and can warrant disbarment or a lengthy suspension. See also The Florida Bar v. Schemwell 361 So.2d 421 (Fla. 1978) (where the employee attorney was disbarred for numerous violations, including failing to deposit $13,795.94 of client fees to the law firm's account) and The Florida Bar v. Greenberg, 247 So.2d 322 (Fla. 1971) (where the attorney was disbarred for a deliberate course of embezzlement and mishandling of client funds and forgery of client names to checks.

The Board of Governors of The Florida Bar's position in requesting this review is that although the referee considered several enumerated mitigating factors in his report (no previous disciplinary history, respondent's date of birth of June 6, 1952, and admission to The Florida Bar in 1977), the respondent's conduct when viewed in light of caselaw and the embezzlement of $6,671.00 clearly warrants at least a two (2) year suspension.

This Court has the inherent power to increase or decrease the sanctions recommended by the referee. The Florida Bar requests this Court to increase the recommended sanction of a one (1) year suspension to at least a two (2) year suspension, proof of rehabilitation, and payment of costs.

CONCLUSION

The issue before this Court is whether an ongoing course of continuous embezzlement of legal fees by an employee attorney of a law firm from the employer law firm of $6,671.00 warrants a more severe sanction than a one (1) year suspension from the practice of law, proof of rehabilitation prior to reinstatement and payment of costs.

Based upon the continuing course of the embezzlement, the amount of monies mishandled and the above cited cases, The Florida Bar respectfully requests this Court to affirm the referee's findings of fact and guilt and to modify the referee's recommendation to disciplinary measures from a one (1) year suspension to a period of suspension of at least two (2) years or, in the alternative, disbarment.

Respectfully submitted,

STEVE RUSHING
Branch Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Bar's Opening Brief has been furnished by regular U.S. mail to James R. Niesset, attorney for respondent, 5253 Central Avenue, St. Petersburg, Florida, 33707, Michael Farver, 5253 Central Avenue, St. Petersburg, Florida, 33710, and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 26th day of November, 1986.

STEVE RUSHING