IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

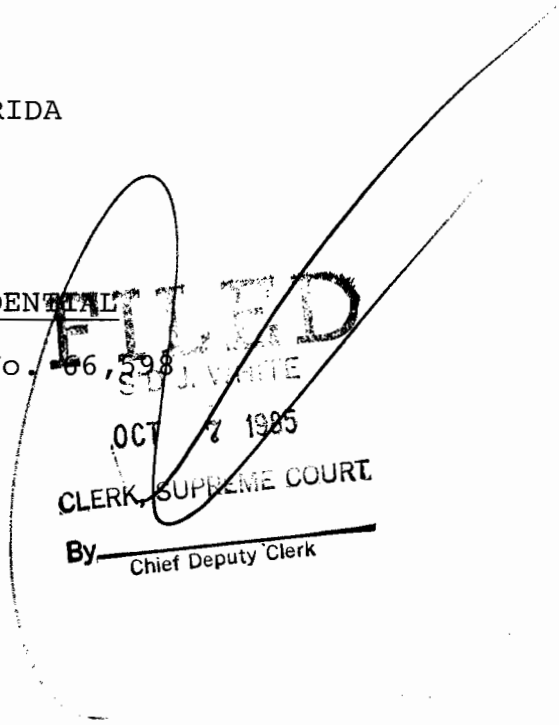
GEORGE W. KENT,

Respondent.

_____/

CONFIDENTIAL

Case No. 66,598



INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE

The Florida Bar filed its Petition for Temporary Suspension on June 4, 1984. On June 11, 1984, Robert P. Smith, Jr., submitted his Notice of Appearance as attorney for Respondent in this action. Respondent filed Respondent's Response to Petition for Temporary Suspension on June 14, 1984. In this response, Respondent waived his rights to a grievance committee hearing to determine probable cause. The Supreme Court of Florida denied The Florida Bar's Petition for Temporary Suspension on June 26, 1984. On December 3, 1984, Respondent reaffirmed his waiver of probable cause determination.

On February 25, 1985, The Florida Bar filed a formal complaint. Respondent filed his Answer to Complaint and forwarded his Motion to Maintain Confidential Status on March 15, 1985. The Honorable Osee R. Fagan was appointed referee on March 19, 1985.

The Florida Bar filed its Respondent to Motion to Maintain Confidentiality on April 15, 1985.

On April 8, 1985, the Honorable Osee R. Fagan set this cause for final hearing on June 12, 1985. On June 12, 1985, Respondent submitted a guilty plea. On June 13, 1985, the Referee requested an extension of time for filing the Referee's Report until July 25, 1985.

The Referee has recommended that Respondent be found guilty of violating Florida Bar Code of Professional

Responsibility Disciplinary Rules 1-102(A)(1) (violation of a disciplinary rule); 1-102(A)(4) (conduct involving moral turpitude); 1-102(A)(6) (conduct adversely reflecting on fitness to practice law); 6-101(A)(3) (neglect of a legal matter); 7-101(A)(1) (failure to seek lawful objectives of his client); 7-101(A)(2) (failure to carry out a contract of employment); 7-101(A)(3) (prejudice to a client); and 9-102(A)(b)(3) (failure to maintain proper records). The Referee recommended, as a disciplinary sanction, that Respondent be suspended from the practice of law for three (3) years and as conditions for his reinstatement, Respondent be required to pass ethics portion of the Florida bar examination, demonstrate his understanding of and compliance with office and trust accounting procedures and be placed on probation for three (3) years after reinstatement.

The Board of Governors of The Florida Bar considered the Referee's findings of fact and disciplinary recommendation at their meeting held September 16-20, 1985. The Board determined that a review of the Referee's recommendations should be initiated and that the appropriate disciplinary sanction to be sought should be disbarment.

POINT INVOLVED ON APPEAL

THE REFEREE ERRED IN RECOMMENDING A THREE-YEAR SUSPENSION, PROBATION AND PROOF OF REHABILITATION AS THE CONDUCT OF RESPONDENT DESERVES AND DEMANDS DISBARMENT.

A. RESPONDENT'S WILLFUL CONVERSION OF OVER $33,000.00 OF HIS CLIENT'S FUNDS DEMANDS DISBARMENT.

STATEMENT OF THE FACTS

The Referee's findings of fact are as follows:

1. Respondent, a member of The Florida Bar, on or about July 2, 1982, while representing the seller of property in Clay County, Florida, received a check for $57,264.00 representing the balance due on closing of the sale. Respondent was responsible for satisfying various outstanding obligations, among which was a mortgage that he did not satisfy. Rather, he placed these funds in his trust account and then made monthly payments on said mortgage as they became due until his funds were exhausted in November 1983, at which time said mortgage became in default. Apparently because such default brought these matters to light, the attorney for the buyers demanded in November 1983 that Respondent immediately satisfy such mortgage. The Florida Bar began an investigation following which Respondent on or about April 9, 1984 satisfied the outstanding mortgage in the amount of $33,198.02, using funds borrowed from his family.

2. The trust funds referred to in the preceding paragraph were used by Respondent for his own personal and other business purposes and were completely exhausted in November 1983.

3. Respondent failed to maintain records as to his trust account and failed to reconcile his trust account all as required by the Integration Rule.

4. Respondent has pleaded guilty as charged, and it is recommended that he be found guilty of the violations recited in the Complaint, namely DR 1-102(A)(1), (4) and (6); DR 6-101(A)(3); DR 7-101(A)(1), (2), and (3); and DR 9-102(A)(b)(3).

5. Respondent has now made full restitution.

6. Respondent has cooperated with the Bar throughout these proceedings.

7. Respondent admits his guilt and wrongdoing and does not seek to diminish the gravity of his wrongs, although he urges leniency in punishment.

8. Respondent has taken some steps to keep proper records and has virtually withdrawn from the active practice of law.

9. Respondent is apparently reasonably well thought of in his community, having served on the city council since his election in 1981, including being selected as Mayor in 1983.

10. This matter is and has remained in confidential status at Respondent's request.

11. During the final hearing, it was disclosed that separate charges against Respondent had been made involving funds of another party (Gibson) and that The Florida Bar had either filed a Complaint or was in the process of doing so. The charges related to the commingling and appropriation of such other funds during the same period of time as that involving the subject of the instant Complaint. Respondent's counsel wanted these additional charges considered and included by the Referee with the report in this Complaint, but emphasized that

Respondent admitted the charge of "commingling" these other (Gibson) trust funds, but denied charges of misappropriation of such funds. Feeling that the Supreme Court, in determining its ultimate penalty, would prefer to have all known and pending matters involving Respondent before it at the same time, the Referee agreed to try and accommodate this purpose if it could be properly done with the agreement of all concerned and the proper assignment by the Supreme Court. There is actually no assignment by the Supreme Court, and the Referee is of the opinion that no separate jurisdiction is bestowed to consider and dispose of such additional charges, but knowledge of such facts and circumstances is proper to be considered in recommending punishment for the charges as stated in the Complaint. See The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981). Based upon the communication to the Referee dated July 18, 1985 and the various discussions in the record (Transcript pps. 15-17, 30-35, 46-48, 95-101, 112-113, 112-123, 125-128, 132), I find that Respondent has commingled these additional funds (Gibson) with his own and that this matter should be considered in such penalty as here imposed.

12. Respondent was admitted to The Florida in 1977 and has had no other disciplinary charges.

* * *

Respondent, in his testimony, did not attempt to excuse his violations of professional trust and responsibility, but

he did offer the testimony of a clinical psychologist which was intended in some way to suggest that Respondent should be excused from his misconduct because of psychological trauma expressed and described in different ways. With all due deference to such profession, the credibility of such evidence is highly suspect because of its frequent abuse. It has been my experience that a psychologist of some kind can be found somewhere that is willing to explain away and excuse almost any conduct using terms and expressions found in various journals designed to attribute professional competence by their use. If the psychological state of Respondent is or was such that it excusably caused him to steal large sums from another and violate his various professional responsibilities, there is little, if any, assurance that such may not recur for the same excusable reasons. I do not believe Respondent, or any other member of the Bar, should be given the impression that The Florida Bar and its members will tolerate the conduct exhibited here under any circumstances, and the message should be made clear by the Supreme Court of Florida that it will act to protect the public from such misconduct and the image of the many thousands of fine lawyers of this state.

The conduct involved here did not occur only one or twice on the spur of the moment or in a single period of extreme pressure or difficulty. The conduct charged continued from July 1982 and on various and repeated occasions thereafter as he made his various withdrawals and also made the monthly mortgage payments for each month until November 1983. Even

after the demand by the attorney for the buyer in November 1983, it was not until the Bar's investigation and absolute confrontation with the reality of disciplinary proceedings that restitution was made in April 1984. (Referee's Report, pp. 1-6).

SUMMARY OF ARGUMENT

The Florida Bar argues that the Referee erred in recommending a three-year suspension as appropriate discipline and asks that upon review the Court disbar Respondent.

The Florida Bar believes that the nature of the offense, misappropriation of clients' funds, is so egregious in nature that disbarment should be the appropriate discipline.

The continuing circumstances of Respondent's conversion of funds, his complete disregard for any trust accounting procedures, his initial denial and lack of any mitigating excuse are enough to overcome the mitigating factors of restitution and cooperation.

ARGUMENT

I. THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE DISBARMENT.

The Referee recommended that Respondent be suspended for a period of three (3) years with a like number of years of probation after reinstatement. This Court has stated that it is not bound by the Referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). Accordingly, the Court has imposed greater discipline than recommended to it by referees when deemed appropriate. The Florida Bar v. Wilson, 425 So.2d (Fla. 1983); The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982); and The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981).

The Court has set forth certain criteria for determining the proper disciplinary sanction to be imposed against attorneys in actions brought pursuant to Florida Bar Integration Rule, article XI. The Court has mandated that:

> (F)irst, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation.

> Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970), Accord The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982), and The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979).

Mindful of the foregoing criteria, the Board of Governors of The Florida Bar has directed that Bar Counsel seek Respondent's disbarment.

While imposition of the disciplinary sanction of disbarment is the severest sanction available to the Court, the nature of Respondent's misconduct dictates that the sanction of disbarment be imposed in this instance.

As set forth in the facts, the Referee's Report and the record Respondent was accused of and admitted to the misappropriation of client funds and the conversion of those funds to his personal and private use. The actions of Respondent were taken without the knowledge or consent of his clients.

The facts establish that Respondent was entrusted with the proceeds of a real estate transaction on behalf of the sellers. As part of Respondent's representation agreement, he was to pay off certain liens upon the sellers' property, which included a first mortgage in excess of $33,000.00.

Respondent converted the mortgage funds to his own private use and continued to make the sellers' monthly mortgage payments after failing to notify the mortgage holder of the sale and change of ownership.

Respondent's actions continued on a monthly basis from July 1982 until April 1984 when the escrow funds were completely exhausted. The only reason Respondent's scheme was disclosed was due to his making a mortgage payment in late 1983 with an insufficient funds check to the mortgage holder. As a result, the sellers were notified of the delinquency and contacted Respondent.

In November 1983, the buyers notified Respondent and demanded immediate satisfaction of the mortgage. On December 6, 1983, Respondent wrote the buyers advising he was in the process of paying off the mortgage and merely apologized for the delay. (Exhibit 2, Petition for Temporary Suspension.)

It was not until April 9, 1984 that Respondent satisfied the outstanding mortgage. As part of the complaint process in this instance, a subpoena was served on Respondent in May 1984, at which time he admitted to converting the real estate escrow funds to his own personal use.

A review of the decisions concerning the nature of the misconduct involved in the instant matter reveal a diversity of sanctions invoked by the Court.

In 1979, the Court addressed the question of proper discipline where an attorney has misused the funds of a client in the matter of The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979).

In Breed, the attorney had converted clients' funds to his personal use and had kept inadequate trust records.

The referee concluded that Breed had willfully disregarded his fiduciary duties and that such misconduct evinced moral turpitude, supra p. 784.

As part of his report, the referee in Breed recommended disbarment and justified his recommendation based upon his describing the misuse of a client's funds as one of the most serious offenses a lawyer can commit.

On review, Breed argued that the recommended discipline was unnecessarily harsh when compared with past discipline in similar cases.

While rejecting the referee's recommendation of disbarment and suspending Breed for two years, the Court agreed with the referee that misuse of clients' funds is one of the most serious offenses a lawyer can commit. The Court also took into consideration the fact that Breed had made full restitution but specifically gave notice to the legal profession of Florida that "henceforth we will not be reluctant to disbar an attorney for this type of offense, even though no client is injured." Supra, p. 785.

Subsequent to Breed, the Court revisited the area of discipline in cases of attorneys misusing clients' funds in the case of The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981). In Pincket, the attorney misappropriated certain trust account funds from a real estate transaction and a probate estate.

During the processing of the complaint, Pincket cooperated fully with the Bar by voluntarily advising the Bar of deficiencies in his trust account, stipulating to a temporary suspension, pleading guilty and making restitution to one client.

While reiterating the Court's concern as to the seriousness of this type of conduct and the warning in Breed, the Court held that in determining the discipline to be imposed, consideration must be given to circumstances surrounding the incident, including cooperation and restitution.

In Pincket, supra, the Court rejected the Board of Governors' recommendation for the disbarment of Pincket and cited his cooperation with the Bar as mitigation. While suspending Pincket for two years, the Court emphasized that it was not in any way retreating from its statement in Breed.

Subsequent to Pincket, the Court has continued to examine each case of similar misconduct on an individual basis in determining the ultimate sanction to be imposed upon the attorneys. A review of these cases reveals that the Court has been considering certain acts of the accused in mitigation; namely, cooperation with the Bar in its investigation, restitution, the lack of prior discipline and circumstances surrounding the occasion of misconduct.

In the case of The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981), the Bar requested disbarment. In ultimately suspending Anderson for two years, the Court affirmed the referee's report which set forth mitigating circumstances of restitution, lack of prior discipline, cooperation and personal circumstances.

In the matter of The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982), the attorney committed trust account violations of which the referee recommended he be found guilty. Upon review, the Court rejected the referee's recommendation of disbarment and suspended Whitlock for three years citing prompt reimbursement of shortages, lack of economic loss to others and full cooperation with the Bar.

In the matter of The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982), the attorney therein was found guilty of trust violations for misappropriating clients' funds to his own personal use. While rejecting a referee's recommendation of a six-month suspension as too lenient, the Court held that disbarment was too severe, ultimately suspending Morris for two years. In mitigation, the Court cited the attorney's admission of misuse, volunteering his records to the Bar, and restitution.

More recently, the Court had the opportunity to visit this subject matter in the case of The Florida Bar v. Roth, 471 So.2d 29 (Fla. 1985). In Roth, the attorney commingled funds, converted clients' funds to his own use and failed to keep required bank records.

The referee recommended disbarment, even in light of mitigating circumstances, saying that such circumstances did not offset the misappropriation of funds and deceptive conduct. In rejecting the referee's disciplinary recommendation, the Court cited the fact of Roth's age, his prior contributions to the profession and restitution as mitigating circumstances

and suspended him for three years with proof of rehabilitation. Supra, p. 30.

In the instant matter, the referee has submitted a report of his findings with a recommendation of a three-year suspension with proof of rehabilitation. Since the Respondent entered a plea of guilty, admitting the appropriateness of the charges, the single question to be resolved by the referee was what should be the appropriate penalty.

The referee's initial impression was that he agreed with those in the previously cited cases that an attorney who steals or misappropriates money entrusted to him should be disbarred. The Florida Bar feels that this initial impression of the referee was the correct measure of discipline, and disbarment is appropriate in the instant matter.

Out of apparent necessity, it would appear that the circumstances herein must be looked at in light of Pincket, supra, and substance given to any acts or circumstances which may mitigate the Bar's recommendation of disbarment.

A review of the facts show that Respondent has made restitution by satisfying the original mortgage of the sellers. While the clients of the Respondent have suffered no ultimate harm, the property purchasers were forced to retain separate counsel, and there has been no showing of restitution of their expenses.

Respondent's ultimate restitution was completed only after his conversion scheme collapsed and demand for compliance was made by the purchaser's attorney. Even after

his conversion was disclosed, Respondent did not make restitution for another five months, from November 10, 1983 to April 9, 1984.

Respondent has argued cooperation with the Bar, and the referee has cited such cooperation in his report. A review of the record herein will show that it was not until after the investigation of the complaint had begun and a subpoena issued for Respondent's records that an admission of misconduct was forthcoming. Such a fact should lessen the impact of an argument of cooperation as might be had from The Florida Bar v. Morris and The Florida Bar v. Pincket, supra.

The referee has also cited the case of The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981) as binding him to make a recommendation of suspension rather than disbarment. In comparing Anderson to the instant matter, the only additional area of mitigation, other than cooperation or restitution, was personal or family circumstances. The referee herein reported that while the Respondent did not attempt to excuse his misconduct, he did attempt through testimony of a clinical psychologist to suggest that he might be excused of such misconduct because of psychological trauma.

The referee fully addressed such theory in his report and found no basis for such being considered as mitigation in this matter. In light of this, any reliance upon Anderson, supra, outside of restitution and cooperation as mitigation must be discounted.

As pointed out by the referee, Respondent's misconduct was of a continuing nature. Each time Respondent wrote a monthly mortgage payment on behalf of his clients, it was a recurring reminder to him of his misconduct. Echoing the referee, "The conduct involved here did not occur only once or twice on the spur of the moment or in a single period of extreme pressure or difficulty." Such conduct can only be seen as demonstrating the complete lack of concern by Respondent as to his responsibility to his clients and his profession.

The referee's report also details that any cooperation by Respondent in the resolution of the violations came only after the final realization of the Respondent being confronted with disciplinary proceedings. This fact is reinforced by the initial denial of Respondent of any wrongdoing in response to the buyers' demand letter and merely apologizing for being late in satisfying the mortgage.

As also set forth in the referee's report, Respondent's commingling was not just limited to this one particular case. In Respondent's admissions to the Bar's investigator (Exhibit 6, Petition for Temporary Suspension), his total disregard for the requirements of trust accounting procedures was shown. Again, not until the specter of discipline raised its hand did Respondent feel compelled to seek advice to rectify the haphazard accounting system that endangered anyone who entrusted Respondent with trust funds.

The misappropriation of clients' funds has always been viewed as a serious breach of discipline and has been the basis of disbarment where the Court has felt the facts have dictated such punishment.

In The Florida Bar v. Matthews, 389 So.2d 1004 (Fla. 1980), the Court disbarred the attorney for misappropriation. While this case included client injury, the Court also pointed out that an aggravating factor to be considered was a retention of funds after demand. This same factor is present in the instant matter. Respondent initially pleaded only delay, not that the funds were not available.

In The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981), the Court disbarred an attorney for misappropriation of clients' funds. The attorney in this case had converted funds with the intent to replace them at a later date. In Stillman the Court felt the record should give confidence that an attorney would live up to his fiduciary responsibilities if placed in the same conditions that led to prior misconduct. In the instant matter, the referee found that no such assurance was presented.

In The Florida Bar v. Goldhaber, 257 So.2d 13 (Fla. 1971), the attorney was disbarred for the misappropriation of clients' funds. This case is distinguishable to the instant matter in that there was no restitution or cooperation.

The Bar would urge the Court to look at the totality of the circumstances in the instant matter, the underlying characterization of the misconduct and the aggravating factors of Respondent's violation.

The misconduct undertaken by the Respondent can only be characterized as theft--he took something that did not belong to him. Not only did it not belong to him, he had been entrusted to protect such funds on no other guarantee other than he was an attorney who individually held himself out as a member of a profession built upon a cornerstone of trust.

The Court has also held that the specific intent necessary for theft is the intent to steal, not the intent to permanently deprive an owner of his property. State v. Dunman, 427 So.2d 166 (Fla. 1983). Florida's theft statute, Florida Statutes 812.014 (2)(a), makes the appropriation of another's property a first-degree felony where the value of such property exceeds $20,000. Under such statutory construction, Respondent and every attorney who misappropriates a client's funds can be seen as having engaged in felonious conduct.

The referee's report adopted in Breed, supra, described the conduct of an attorney who has willfully disregarded his fiduciary responsbilities as evincing moral turpitude. Breed, p. 784. This finding that such misconduct evinces moral turpitude was reinforced by the Court in Anderson. Supra, p. 552.

Under the Court's criteria, the Bar would urge that disbarment is the appropriate discipline. Respondent's conduct was reprehensible and flew in the face of the public's trust in the legal profession. Aside from Respondent's nonlegal political actions, there was no showing of any special legal qualifications, i.e., pro bono contributions the public community would lose. Such an ultimate sanction

in this matter would certainly act as a deterence to any lawyer tempted to commit a similar violation.

Throughout the cited authorities that propound either suspension or disbarment, the misappropriation of clients' funds has consistently been labeled as one of the most serious offenses an attorney can commit.

In the instant case, the Bar would argue that restitution may be present but that such mitigation should not offset the aggravating factors of Respondent's misconduct and the impact it has on public confidence in the legal profession.

In conclusion, the Bar would urge that the appropriate discipline in the instant matter be disbarment.

The Bar would present no objections to the facts and recommendations of guilt set forth in the Referee's Report.

CONCLUSION

For the foregoing reasons, the Bar respectfully requests this Honorable Court to uphold the Referee's recommendation of guilt and recommendation as to disciplinary violations and to enter an order that the Respondent be disbarred from the practice of law and assess the costs of these proceedings against the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Initial Brief of The Florida Bar have been hand delivered to the Supreme Court of Florida and that a copy each has been mailed by regular U.S. Mail to George Kent, Respondent, 1712 Kingsley Avenue, Suite 1, Orange Park, Florida 32073, and to Robert P. Smith, Jr., Attorney for Respondent, Post Office Box 6526, Tallahassee, Florida 32314, this 7th day of October 1985.

James N. Watson, Jr.