IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

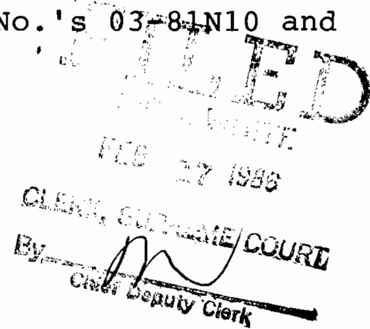
MERRILL TUNSIL,

Respondent.

______________________/

Case No. 66,743

(TFB File No.'s 03-81N10 and 03-84N22)



COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF THE CASE

On February 15, 1984, the Third Judicial Circuit Grievance Committee found probable cause against Respondent for the violation of article XI, Rule 11.02(3)(b), Rule 11.02 (4) and the Bylaws thereunder of the Integration Rule of The Florida Bar, and Disciplinary Rules 9-102(B)(3) and 9-102(B)(4) of the Code of Professional Responsibility of The Florida Bar. The Florida Bar subsequently filed a formal complaint against Respondent on March 20, 1985, charging Respondent with the above-cited Integration Rule and Disciplinary Rule violations.

The Honorable Theron A. Yawn, Jr., a judge in the Eighth Judicial Circuit Court of Florida, was appointed referee on April 1, 1985. The parties entered into a Stipulation of Facts prior to the final hearing. On October 7, 1985, a hearing was held before the referee in Gainesville, Florida. The purpose of the hearing was two-fold. First, the hearing was held to determine whether the facts as stated in the stipulation constituted violations of the Integration Rule and Disciplinary Rules charged in the formal complaint. Secondly, the hearing was held to allow the parties to make arguments as to the appropriate discipline and to provide evidence of any aggravating or mitigating circumstances. The referee filed his report on November 19, 1985, recommending that Respondent be found guilty, receive a suspension for a period of three months with automatic reinstatement, together with a period of suspension of two

years duration, and pay costs now totaling $1,169.70. (Appendix A 1-6).

On December 4, 1985, The Florida Bar filed a Motion for Clarification with the referee seeking clarification of two specific points of the Referee's Report and Recommendation. (Appendix A 7-8). This Motion was denied by the referee on December 13, 1985. (Appendix A 9).

The Board of Governors of The Florida Bar received the report at their January 1986 meeting. The Board voted to seek review of the recommended discipline, which they believe to be erroneous and unjustified, and to request a suspension of at least one year's duration with two years' probation as set forth in the Referee's Report, with proof of rehabilitation prior to reinstatement and payment of costs.

STATEMENT OF FACTS

The facts in this case are not in dispute. The parties to this cause entered into a Joint Stipulation of Facts, a copy of which is contained in the Appendix at pages A 10-12. The recitation of facts as set forth in the Joint Stipulation is as follows:

Respondent represented a minor, Stephen Lamar Smith, in a personal injury matter arising out of an automobile accident on October 26, 1982. After a settlement was negotiated, Respondent was to handle a guardianship proceeding to enable Stephen Lamar Smith's mother, Ruby Lee Smith, to administer the settlement proceeds until her son reached the age of eighteen (18). On January 27, 1982 and February 18, 1983, Respondent made two separate deposits into his trust account, totaling $16,666.67. These funds represented the settlement proceeds from Respondent's representation of Stephen Lamar Smith in the personal injury matter.

On February 18, 1983, a hearing was held to obtain a court order for Ruby Lee Smith to withdraw $2,666.66 from Respondent's trust account to pay expenses for her minor son. The order was granted, and a check was issued to Ruby Lee Smith by Respondent in the amount of $2,666.66.

On February 18, 1983, Respondent also filed a Petition for Authority to Invest Funds to allow Ruby Lee Smith to invest the

remaining $14,000.00 on behalf of her minor son. Respondent never obtained a court order authorizing investment of the funds.

Over the following six (6) month period, Respondent spent, for his personal use, approximately $10,500.00 of the remaining $14,000.00 belonging to Stephen Lamar Smith. When Stephen Lamar Smith attained the age of eighteen (18) in June of 1983, his mother discovered that the remaining guardianship funds were not being held in an escrow account at the First National Bank of Jasper. Mrs. Smith contacted Respondent in August of 1983 to inquire as to the location of the missing funds. At this time, Respondent paid Mrs. Smith $500.00 in cash. On September 16, 1983, Respondent issued a check in the amount of $4,000.00 to Mrs. Smith. On September 23, 1983, Mrs. Smith received a check in the amount of $1,000.00 pursuant to a court order by Judge Peach, Circuit Court Judge for the Third Judicial Circuit. On October 31, 1983, Mrs. Smith received from Respondent a cashier's check in the amount of $7,909.00, representing the balance of funds from the guardianship of Stephen Lamar Smith. Upon finding that all funds had been repaid, Judge Peach entered an order terminating the guardianship.

In a separate matter, Respondent subpoenaed a witness to testify in a workers' compensation case in early 1981. A check dated April 13, 1981, in the amount of $9.20 was written from Respondent's trust account to cover certain expenses incurred by the witness. When the witness attempted to negotiate the check, it was returned for insufficient funds. Respondent's check was again returned for

insufficient funds several days later when the witness attempted to renegotiate it. The witness finally received payment on the check by cashier's check from Respondent on May 27, 1981.

As a result of Respondent's misappropriation, he was charged with grand theft, violation of Section 812.014(2)(b), Fla. Stat., a third degree felony.

Respondent entered into a plea agreement whereby he plead no contest to the charges. Adjudication of guilt was withheld, and Respondent was sentenced to three (3) years probation.

At the final hearing, the parties presented evidence relating to aggravating and mitigating factors. Respondent is married and the father of two children. He is a sole practitioner in the small town of Lake City, Florida. (T. pp. 45, 46). Further, Respondent plead guilty to charges of grand theft, adjudication was withheld, and Respondent was placed on probation for two years. (Appendix A 2-3). Respondent testified at the hearing that during the time period in which the misconduct occurred, he was suffering from a serious alcohol problem. (T. pp. 54-58).

The Bar introduced as evidence of aggravating factors, Respondent's prior disciplinary record, which consists of a private reprimand for minor misconduct. (Appendix A 13-14).

SUMMARY OF ARGUMENT

THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FOR ONLY THREE (3) MONTHS, WITH AUTOMATIC REINSTATEMENT AND A PERIOD OF PROBATION, IS ERRONEOUS AND UNJUSTIFIED IN LIGHT OF THE SERIOUSNESS OF RESPONDENT'S MISCONDUCT.

The misconduct of Respondent in this case involves the conversion of funds belonging to a guardianship which were to have been temporarily placed in Respondent's client's trust account. Respondent failed to follow through in the placement of the funds into an interest bearing account. Instead, over a period of six (6) months, Respondent spent approximately $10,500.00 of the guardianship funds for his own personal use. These funds were eventually repaid to the guardianship, and a full accounting was made by Respondent.

The referee, in his recommendations as to discipline, specifically noted a number of mitigating factors which influenced the recommendation of a three (3) month suspension and probation. However, The Florida Bar believes that the recommended discipline is too lenient in light of the serious nature of Respondent's misconduct and previous disciplinary cases cited herein.

Bar Counsel had asked for disbarment at the final hearing. However, in light of the mitigating factors noted in the Referee's Report, the Bar is now seeking review of this matter and is asking for a period of suspension for a period of time of at least one year, with conditions of probation as stated in the Referee's Report.

ARGUMENT

The facts in this case are not in dispute. The issue to be resolved is whether the recommended discipline is an appropriate discipline for the Respondent's misconduct. The purpose of discipline is set forth in article XI, Rule 11.02 as follows:

> The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar.

This Court further elaborated on the purpose of discipline in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), stating that in addition to being fair to both the public and the accused attorney, "the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." Pahules at 132.

Clearly, mitigating factors must be taken into account in each case in determining a discipline that is fair and appropriate. However, these mitigating factors cannot entirely diminish the seriousness of unethical conduct.

In his report and recommendations, the referee noted that, in the instant case, the Respondent revealed the misappropriation of guardianship funds to the guardian. In fact, the Stipulation of Facts reflects that the guardian confronted Respondent when she discovered that the funds were not being held in an interest bearing account. It was at this time that Respondent confessed that he had

spent a large portion of the funds for his own personal use. He returned $500.00 to the guardian at that time. Various sums of money were returned to the guardian over the following two months, resulting in full restitution by Respondent. Respondent's admission when confronted, and eventual repayment, is not as mitigating as it might have been had Respondent approached the guardian, confessed, and immediately returned the funds.

The conversion of a client's funds by an attorney has been termed a "capital offense" of attorneys. It is one of the most serious charges that can be made against an attorney. In this case, we have an attorney who took funds from a trust account that belonged to a guardianship. The fact that these funds belonged to a guardianship makes their conversion even more serious. Respondent, as an attorney, knew full well that these funds were regulated by special laws relating to guardianships and could not be released even to the guardian without a court order.

In The Florida Bar v. Baker, 419 So.2d 1054 (Fla. 1982), this Court disbarred an attorney who took funds belonging to beneficiaries of an estate and spent the funds for his own purposes. The attorney in that case did so without either the knowledge or approval of either the court or the beneficiaries. Those funds were also repaid, but this Court agreeing with the Referee's Recommendation, disbarred the attorney.

In The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981), the attorney admitted to misappropriation of trust funds, a failure to keep adequate trust account records and issuing checks on insufficient funds. The referee in Anderson noted that Anderson had cooperated fully with the Bar investigator, had no criminal intent and had reimbursed all funds so that no client was actually deprived. Although the referee took these mitigating factors into account in recommending a two-year suspension and probation, he noted that Anderson could not be absolved of her violation. This Court upheld that part of the Referee's Report recommending that Respondent be suspended for two years and probation.

In 1979, this Court issued a stern warning to the legal profession in the State of Florida that "henceforth we will not be reluctant to disbar an attorney for this type of offense {misuse of clients' funds}, even though no client is injured." The Florida Bar v. Breed, 378 So.2d 783, 785 (Fla. 1979). This warning was reiterated in Frederick O. Leopold, 399 So.2d 978 (Fla. 1981) and The Florida Bar v.Pincket, 398 So.2d 804 (Fla. 1981). In Pincket, this Court stated:

> We emphasize that we are not in any way retreating from our statement in Breed, but we do believe that it is appropriate in determining the discipline to be imposed to take into consideration circumstances surrounding the incident, including cooperation and restitution. Pincket at 803.

The policy of the Board of Governors of The Florida Bar is that the warning issued in Breed must be taken seriously. In order to insure that such is the case, the Board routinely recommends

disbarment in cases involving conversion of clients' trust funds. However, the Board, mindful of the language in Pincket, moderated its policy in the instant case. Because Respondent herein had made full restitution and, in light of the other mitigating factors enumerated in the Referee's Report and Recommendation, the Board recommended that a review of the Referee's Report be sought and that a suspension of at least one year's duration be sought.

The Bar does not dispute the referee's findings as to mitigation in this case. As enunciated in Pincket, supra, these factors should be taken into consideration in determining the discipline to be imposed. However, even taking these factors into consideration, the referee's recommended discipline of three months is simply too lenient. Pursuant to article XI, Rule 11.10(4), a suspension of three months or less does not require proof of rehabilitation prior to reinstatement. Thus, Respondent would be automatically reinstated to the practice of law upon the expiration of the three-month suspension. The conditions of probation, while affording some protection to the public, do not afford the same protection as would a requirement of proof of rehabilitation prior to reinstatement.

In recent cases, this Court has ordered a discipline less severe than disbarment wherein the attorneys had misappropriated clients' funds but where mitigating factors, including restitution, were present. The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982) and The Florida Bar v. Roth, 471 So.2d 29 (Fla. 1985).

However, both Morris and Roth resulted in periods of suspension, two years and three years respectively, that were much greater than that recommended in the instant case. In The Florida Bar v. Sheldon, 446 So.2d 1081 (Fla. 1984), this Court approved the referee's recommended discipline of one year with proof of rehabilitation, where the misconduct involved did not rise to the level of seriousness of that in the instant case. In Sheldon, the attorney was to place money of a client's into a special bank account, but failed to open such an account or keep the money in an identifiable trust account. There was no conversion of clients' funds in Sheldon, as there is in the case now before this Court.

In light of the discipline imposed by this Court in past cases, the recommended discipline of three months is a mere slap on the wrist. Such a recommendation is erroneous and is not in keeping with the purposes of discipline enunciated in Pahules, supra. Not only would the confidence of the public in the legal profession be eroded by the imposition of such a light discipline, but there would be little deterrent effect upon other members of the legal profession who might be prone to become involved in like violations.

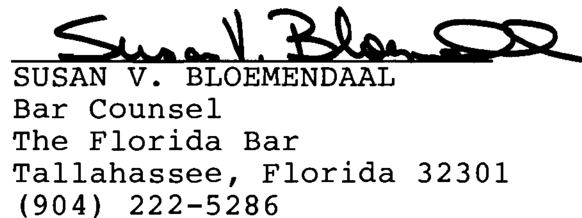
A fair and appropriate discipline in this case would be a suspension of at least one year's duration with proof of rehabilitation, a period of probation of two years following reinstatement with conditions as set forth in the Referee's Report and Recommendation, and payment of the costs of these proceedings. Such a discipline would take into account the mitigating factors

noted by the referee, while not absolving Respondent of the serious misconduct to which he readily admits his guilt.

CONCLUSION

For the foregoing reasons, the Bar respectfully requests this Honorable Court to reject that part of the Referee's Report which recommends a suspension of three (3) months' duration, and instead, impose a period of suspension of at least one (1) year's duration, with proof of rehabilitation, probation for two years upon reinstatement with conditions as set forth in the Referee's Report, and assess costs of these proceedings against 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 has been mailed by regular U.S. Mail to Merrill Tunsil, Respondent, 505 East Duval Street, Suite B, Lake City, Florida 32055, and to James T. Golden, Attorney for Respondent, 101-B West First Street, Sanford, Florida 32771, this 17th day of February 1986.

Susan V. Bloemendaal