

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,  
Complainant,

CONFIDENTIAL

Case No. 66,743

vs.

MERRILL TUNSIL,  
Respondent.

FILE

FILED  
By

REPORT OF REFEREE

Final Hearing was held before the undersigned Referee on October 7, 1985, upon the Complaint of THE FLORIDA BAR against MERRILL TUNSIL alleging professional misconduct and violation of specifically designated Disciplinary Rules relating to the conversion of trust funds to Respondent's personal use and the issuance of a check upon his trust account containing insufficient funds for its payment. At final hearing the parties filed a joint stipulation of facts upon which the charges of misconduct are based. Respondent presented evidence and argument in mitigation of the penalty. The Bar retreated from its prior tentative promise to recommend suspension for ninety days followed by probation and demanded disbarment.

Ms. Susan Bloemendaal appeared for The Florida Bar and Mr. James T. Golden appeared for Respondent.

The referee, accepting as true the facts stated in the joint stipulation (Joint Exhibit 1), and considering other matters of record, finds

As to Count 1: Respondent deposited into his trust account \$16,666.67 representing the net recovery in a personal injury case in which he represented the claimant, a

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minor. He also represented the child's mother in collateral guardianship proceedings in which she served as guardian of her son's property.

Respondent timely and properly paid to the guardian \$2,666.66 from the moneys held by him in trust for the guardianship, leaving him with \$14,000 on hand. He petitioned the Court to authorize the guardian to invest the remaining funds but never obtained a ruling upon the petition.

Over the next six months respondent converted to his personal use approximately \$10,500.00 of the money remaining in his hands. The ward attained his majority in June of 1983. The guardian then contacted respondent to inquire about the funds and he told her what he had done. Within three months all moneys were repaid and the guardianship was closed. The following month respondent was informed against by the State Attorney for grand theft to which he pled nolo contendere. Adjudication of guilt was withheld and he was placed on probation for three years.

As to Count II: Respondent subpoenaed a witness to testify in a Workmen's Compensation case, issuing a check on his trust account in the amount of \$9.20 to cover the witness's fees. The check was dishonored for insufficient funds. Respondent redeemed the check about 45 days later.

I make the following recommendations as to guilt or innocence:

I recommend that Respondent be found guilty of violating Article XI of the Integration Rule, specifically Sections 11.02(4)--Misappropriation of Trust Funds, 11.02(4)(c)--Failure to Comply with Trust Accounting Pro-

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cedures; Disciplinary Rules 9-102(b)(3)--Failure to Maintain Complete Records of Client's Property; and 9-102(b)(4)--- Failure to Promptly Deliver to Client Property he is entitled to receive.

Recommendations : I recommend that respondent be suspended from the practice of law for a period of three months and that the suspension be followed by a period of probation for two years subject to the conditions that:

1. Respondent immediately submit to evaluation for alcohol abuse and to treatment therefor if indicated by the evaluation. Both the evaluation and treatment programs shall be approved by The Florida Bar.

2. Respondent's office and trust accounts be supervised and periodically audited by The Florida Bar.

3. Respondent demonstrate his understanding of and compliance with office and trust accounting procedures for members of The Florida Bar.

4. Respondent be required to pass the professional ethics portion of The Florida Bar examination.

The circumstances attendant upon this case present a burden of conscience in fashioning appropriate disciplinary measures. On the one hand I share the opinion expressed by our Supreme Court in The Florida Bar v. Breed, 378 So.2d 783 (Fla 1979); the dessents in The FLorida Bar v. Pinkett, 398 So.2d 802 (Fla 1981); and The Florida Bar v. Morris, 415 So.2nd 1274 (Fla 1982) and 452 So.2d 545 (Fla 1984); and The

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Florida Bar v. Whitlock , 426 So.2d 955 (1982) that an attorney who misappropriates money entrusted to him is guilty of embezzlement and should be disbarred. On the other hand, the Court has held, through a long line of cases, that each case must be decided on its individual facts. This referee has attempted to bring these two concepts into balance with each other and tailor the disciplinary measures recommended to the facts in this case. I believe that the result is sufficient to protect the public while maintaining its confidence in our legal institutions, punish the respondent and effect his reformation.

The respondent's conduct may be neither denigrated nor condoned. However, the Bar's recommendation of disbarment seems, under a fair evaluation of relevant facts and circumstances, to be excessively and unreasonably severe. The following circumstances mitigate against that extreme penalty:

1. The respondent has never attempted to conceal, excuse, or justify his disciplinary infractions. On the contrary, he freely admitted to them both in these and the collateral criminal proceedings to which he pled nolo contendere to the grand theft for which he is already serving a three year term of supervised probation. In fact, his conversion of funds was not discovered until he personally revealed it to his client when she demanded the money.

2. The respondent, while seeking to mitigate the penalties, has accepted responsibility for his conduct and has not sought to avoid or evade its consequences.

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3. The respondent made complete restitution of the converted funds prior to the filing of the criminal information and to the Bar's involvement in the criminal case. No one has suffered monetary loss because of Respondent's breach of discipline.

4. Respondent cooperated with the Bar and the State Attorney in this and the criminal proceeding.

5. Throughout "plea bargaining" discussions in this and in the criminal case, the Bar tentatively agreed to a proposal for a short (90 day) period of suspension to be followed by probation. Before final hearing the Bar abandoned this position in favor of the half-hearted recommendation of disbarment articulated by it at final hearing.

6. Alcoholism is the underlying cause of respondent's professional misconduct. He claims that the problem is under control. However, it is the referee's opinion that his rehabilitation depends upon future treatment.

7. Respondent is a young, and perhaps immature, man with the courage to attempt the establishment of a one man law practice in a rural community of North Florida where he is reasonably well respected. He is married to a school teacher and is the father of two children. He is contrite, penitent and remorseful with a thorough appreciation of the gravity of his misconduct and its potential consequences including disbarment.

8. These recommendations do not ignore a May 23, 1985 "Grievance Committee Report Recommending an Order of Private Reprimand for Minor Misconduct". The report has been considered and allowance made for it in the disciplinary

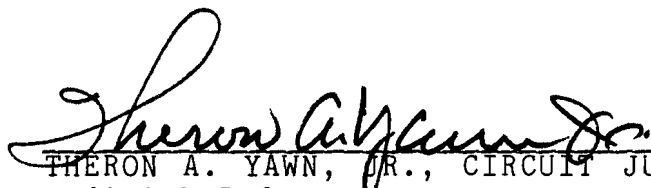
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measures recommended in this report.

I recommend that the following costs accruing in these proceedings to date be taxed against respondent.

Grievance Committee Level	
Administrative Cost pursuant to Integration Rule 11.06(9)	\$ 150.00
Court Reporter	357.20
Service of Subpoenaes	60.00
Bar Counsel Travel	23.50
Subtotal	<u>\$ 590.70</u>
Referee Level	
Administrative Costs pursuant to Integration Rule 11.06(9)	\$ 150.00
Certified Copies of Guardian- ship, Case No. 83-03	70.00
Court Reporter	256.00
Bar Counsel Travel	103.00
Subtotal	<u>\$ 579.00</u>
TOTAL	\$1,169.70

Respectfully submitted this *19th* day of November,  
A.D. 1985.

  
THERON A. YAWN, JR., CIRCUIT JUDGE  
Judicial Referee

Copies to:

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