IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DAVID M. ANDERSON,

Respondent.

_____/

CONFIDENTIAL

Case No. 67,803

TFB No. 08-87N78

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE

The Florida Bar filed its formal complaint against Respondent on October 22, 1985. It also filed its Request for Admissions on October 22, 1985. The Honorable John P. Thurman was appointed as referee on October 28, 1985. John A. Weiss filed a Notice of Appearance as attorney for Respondent on October 30, 1985. Respondent submitted his Motion to Maintain Confidentiality on October 30, 1985. On November 6, 1985, The Florida Bar filed its Response to Respondent's Motion to Maintain Confidentiality. Respondent answered The Florida Bar's Complaint on November 8, 1985.

The Honorable John P. Thurman submitted his Referee's Report on July 25, 1986. He recommended that Respondent be found guilty of violating The Florida Bar Code of Professional Responsibility Disciplinary Rules 1-102(A)(1) (violation of a disciplinary rule); 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation); 1-102(A)(6) (conduct that adversely reflects on his fitness to practice law); 5-101(A) (acceptance of employment when professional judgment may be reasonably affected by attorney's own financial or personal interest); 5-104(A) (entering into a business transaction with a client with differing interests); 7-101(A)(3) (intentional prejudice of an attorney's client during course of professional relationship); 7-102(A)(8) (conduct that is illegal or contrary to a disciplinary rule). As a disciplinary sanction, the referee recommended that Respondent be suspended from the practice of law for six months, that Respondent pass the Ethics portion of the

Florida Bar Exam, and that Respondent make full restitution to his client totaling $116,177.43 along with payment of the costs of the disciplinary proceedings.

The Board of Governors of The Florida Bar considered the Referee's findings of fact and disciplinary recommendation at their meeting held September 17-20, 1986. The Board determined that a review of the Referee's recommendation for discipline should be initiated and that the appropriate discipline to be sought should be disbarment.

STATEMENT OF THE FACTS

Respondent's initial contact with the client in question, Mr. A. E. Copeland, came about when Copeland retained him to represent him in an incompetency hearing initiated by his daughter. Copeland was afraid that his daughter was trying to obtain his assets by having him declared incompetent. Through a series of legal maneuvers, Respondent assumed control of all of Copeland's assets as trustee of a trust drafted by Respondent with Copeland as beneficiary.

In October of 1980, Respondent filed a Petition for Voluntary Guardianship on behalf of Copeland requesting that Respondent be appointed voluntary guardian for Copeland. Respondent failed to bring to the attention of the court that he was trustee of Copeland's assets. The court appointed Copeland's brother as guardian for Copeland in February of 1981. The guardian died in May of 1982 without ever filing any guardianship papers or accountings.

During September of 1983, the Copelands requested funds from Respondent as trustee of the Copeland trust. Respondent refused to disburse the requested funds.

Copeland retained a second attorney to file a petition for Appointment of a Successor Guardian in September, 1983 in order to recover his assets from Respondent. Respondent filed an objection to

the petition and a Motion to Quash. The court dismissed the petition with leave to file for a voluntary successor guardian. In November of 1983, Respondent finally filed the trust agreement of Copeland in the public records. The court appointed Copeland's wife as guardian in February of 1984. She then filed a Motion for an accounting of the trust assets. The Copelands were concerned about cash withdrawal from Copeland's bank account totaling approximately $100,000.00.

The court ordered that an accounting be filed by 5:00 p.m., April 19, 1984. Respondent did not meet the court's deadline and instead filed an incomplete Report of Trustee on April 25, 1984. The following May, Respondent filed a supplemental report as trustee showing an unsecured promissory note given by Respondent to Copeland for $90,000.00. In reality, Respondent drafted this note after the successor guardian filed for an accounting. Respondent predated the note to October 6, 1980.

Respondent failed to honor the note. The successor guardian obtained a final judgment against Respondent for $114,155.43 in favor of Copeland.

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

An additional matter to be considered is the fact that Respondent received a grievance committee level private reprimand in

March of 1982. Respondent received the reprimand for making misrepresentations to a client. In determining appropriate discipline, it is proper for the court to consider Respondent's previous discipline record. See The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982).

SUMMARY OF ARGUMENT

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

The Florida Bar believes that the nature of the offenses, misappropriation of a client's funds and predating of a promissory note, is so egregious in nature that disbarment should be the appropriate discipline.

The continuing circumstances of Respondent's conversion of funds, his abuse of his client's trust during a time when the client's mental capacity was questionable, the predating of a promissory note to mislead the court, and the lack of any mitigating factors warrants disbarment of Respondent.

ARGUMENT

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 six months, that Respondent pass the Ethics portion of the Florida Bar Exam, and that Respondent make full restitution to his client in the amount of $116,177.43. 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 misappropriation of client funds, the conversion of those funds to his personal and private use, and predating a promissory note to cover his conduct. The actions of Respondent were taken without the knowledge or consent of his client.

The facts establish that Respondent was entrusted with Copeland's assets at a time when there was a question as to Copeland's mental capacity. Respondent took advantage of his client's diminished mental state and defalcated thousands of dollars to his personal use. When the discovery of the misappropriation became inevitable, Respondent sought to cover his unethical conduct by drafting a promissory note and predating it to correspond with a

supposed loan transaction between him and his client. Respondent's client had to appeal to the court in order to recover his assets from Respondent.

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). The Breed case involved an attorney who converted clients' funds to his personal use and kept inadequate trust records. The referee concluded that Breed willfully disregarded his fiduciary duties and that such misconduct evidenced moral turpitude, supra , p. 784. As part of his report, the referee in Breed recommended disbarment and justified his recommendation based upon his description of such abuse 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.

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 considers certain acts of the accused as 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 matter at hand, the referee has submitted a report of his findings with a recommendation of a six month suspension, thereafter until Respondent passes the Ethics portion of the Florida Bar Exam, proves his rehabilitation and for an indefinite period until he pays the costs of the discipline proceedings and makes full restitution to his client in the amount of $116,177.43.

It would appear that the circumstances herein must be examined in light of Pincket, supra, and substance given to any acts or circumstances which may mitigate the Bar's recommendation of disbarment.

The facts show a complete lack of mitigating factors in the case at hand. Respondent took advantage of his client during a period of time when the client could have been suffering from a

mental deficiency. As sole trustee of his client's trust he had total control of all of his assets for several years which enabled him to misappropriate almost $100,000 without his client's approval or knowledge. Respondent aggravated the circumstances by not disclosing his trusteeship to the court and by attempting to legitimize his embezzlement by drafting an unsecured promissory note which he predated to mislead the court. His unethical conduct forced his client to retain counsel to recover his assets from Respondent. Ultimately, Copeland obtained a judgment against Respondent for his default on the promissory note. Respondent has made no attempt to reimburse his client for these funds. Respondent has not cooperated with the Bar during its investigation. Respondent's conduct was of a continuing nature beginning in late 1980 until 1985. Such conduct can only be seen as demonstrating the complete lack of concern by Respondent as to his responsibility to his clients or to his profession.

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.

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 similar 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 Florida Bar v. Kent, 484 So.2d 1230 (Fla. 1986) at 1231 (Ehrlich dissenting).

The referee's report adopted in Breed, supra, described the conduct of an attorney who has willfully disregarded his fiduciary responsibilities 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. Such an ultimate sanction in this matter would certainly act as a deterrence 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 matter at hand, the Bar would argue that there are no mitigating factors but rather only aggravating factors. Respondent took advantage of a client's diminished mental capacity and stole thousands. Upon the discovery of the theft, he attempted to cover his misdeed. The client ultimately obtained a judgment upon the promissory note which Respondent has failed to satisfy.

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 a copy of the above has been provided to David M. Anderson, respondent, at his record Bar address of 224 Southwest Second Avenue, Post Office Box 1307, Gaineville, Florida 32601 by regular U.S. Mail and by HAND DELIVERY to John A. Weiss, counsel for respondent, 101 North Gadsden Street, Tallahassee, Florida 32302 all this 6th day of October, 1986.

John A. Boggs

John A. Boggs