69,358

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs.

PETER T. ROMAN,

Respondent.

_____/

CONFIDENTIAL

CASE NO. 69,358
(TFB No. 86-16-351-06A
formerly 06A86H27)

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THE FLORIDA BAR'S OPENING BRIEF

Bonnie L. Mahon
Bar Counsel
The Florida Bar
Tampa Airport, Marriott Hotel
Suite C-49
Tampa, Florida 33607
(813) 875-9821

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar". The appellee, Peter T. Roman, will be referred to as "the respondent". "TR" will denote the transcript of the Final Hearing before the referee. "R" will refer to the record.

STATEMENT OF THE FACTS AND OF THE CASE

In the early part of January, 1978, Edna Mae Banner died intestate and without heirs.

In November, 1979, respondent became the attorney and the personal representative of the Banner estate. After becoming personal representative, respondent, with the assistance of one of his law partners, created an heir and beneficiary to the Banner estate. (TR p.82, l.19-25 and p.83, l.1-7).

On January 10, 1980, respondent filed a Petition for Determination of Beneficiaries with the Probate Court. The Petition listed Frank C. McColm as the nephew and sole surviving heir to the Banner estate. (R-Complaint, paragraph 4). Respondent also filed with the Court a false Affidavit and Waiver portraying Mr. McColm as the nephew of the decedent and bearing the forged signature of Frank C. McColm. (R-Complaint, paragraph 6). Said petition, Affidavit and other supporting documents were filed by respondent with the intent and purpose of deceiving the Probate Court. (R-Complaint, paragraph 7). At the time respondent filed the aforesaid documents, he knew that Mr. McColm was not an heir to the estate, and that the information contained in the petition and supporting documents was false.

As a result of respondent's actions, the Court entered an order, declaring Mr. McColm as the only living heir to the Banner estate. (TR p.83, l.18).

On or about February 28, 1980, respondent withdrew $7,082.71 from the Banner estate account and converted said assets to his own use. (R-Complaint, paragraph 9). Respondent gave a portion of the money from the estate to his law partner, James Anderson, and shortly thereafter submitted a false Receipt of Beneficiary to the Probate Court reflecting that the assets of the estate had been distributed to Frank C. McColm. (TR p.84, l.2-10).

From November, 1979 until approximately April, 1980, respondent was experiencing emotional instability caused by marital discord and excessive work pressures. In approximately November, 1979 respondent sought psychiatric treatment for his emotional problems. Respondent's doctor prescibed stalazine which is a psychotrophic medication. Respondent took this medication through April, 1980. (TR p.74, l.17-19 and p. 75, l.5,6). Respondent committed the misconduct herein at the time he was experiencing emotional instability. In mid-1980, respondent resolved his marital problems and thereafter his emotional attitude improved greatly. (TR p.95, l.17-20). In April, 1985 respondent was confronted by an investigator for the Pinellas County State Attorney's Office and was questioned

about his participation in the theft of the Banner estate assets. (TR p.85, l.17-25 and p.86, l.1-2).

In June, 1985, a one-count felony information was filed against respondent in the Circuit Court for Pinellas County charging respondent with Grand Theft. (R-Amended Report of Referee, paragraph V).

Respondent entered a nolo contendere plea to the charge of Grand Theft, adjudication was withheld, and respondent was placed on five-years probation with one of the conditions of probation being that he serve nine months in jail. (TR p.107, l. 2-5 and p.108, l.7-9).

The Florida Bar filed a Complaint against respondent charging him with violating The Florida Bar Code of Professional Responsibility, Disciplinary Rule 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); DR 1-102(A)(6) (engaging in conduct that adversely reflects on his fitness to practice law); DR 7-102(A)(4) (knowingly using perjured testimony or false evidence); DR 7-102(A)(5) (knowingly making a false statement of law or fact); and DR 7-102(A)(6) (participating in creation of evidence when he knows the evidence is false (R-Amended Report of Referee, paragraph III).

The respondent filed an answer in this cause to which

he admitted each and every allegation of the Bar's Complaint with the exception of paragraph 9. (TR p.4, 1.1-5). Paragraph 9 alleged that "respondent thereupon took possession of assets of the Banner estate in Mr. McColm's name and converted them to his own use. (R-Complaint paragraph 9). At the Final Hearing on July 28, 1987, respondent admitted paragraph 9 of The Florida Bar's Complaint, with the clarification that respondent received only one-half of the assets of the Banner estate, the other half going to his law partner, James Anderson. (TR p.4, 1.9-16).

The referee found respondent guilty of violating the aforementioned Rules of Discipline and recommended that respondent be suspended from the practice of law for a period of three years, be required to take and pass the Ethics portion of The Bar Exam prior to being reinstated, and required to pay all costs incurred in The Florida Bar proceedings. (R-Amended Report of Referee, paragraph IV).

The Florida Bar Board of Governors reviewed the Report of Referee and voted to seek disbarment in this matter.

SUMMARY OF ARGUMENT

In late 1979 or early 1980, respondent created a beneficiary to an estate he was representing. In addition, respondent committed a fraud upon the Probate Court by knowingly submitting a false petition and false supporting documents bearing the forged signature of the purported beneficiary. The respondent thereupon misappropriated the assets of the estate and converted them to his own use.

The referee's recommendation of a three-year suspension is not a sufficient disciplinary measure for such criminal and unethical conduct.

Emotional instability, caused by marital problems and pressures from work, should not be considered mitigating in a case of conversion of estate assets coupled with knowing and intentional submission of fraudulent documents to the Probate Court. Respondent's misconduct was an abuse of the legal system and a disgrace to the legal profession. Simply, there can be no mitigation for unethical misconduct as serious as that which was committed by respondent.

In this Petition for Review, The Florida Bar respectfully requests that this Court disapprove the referee's recommendation of a three-year suspension and enter an Order of disbarment against respondent.

ARGUMENT

ISSUE: WHETHER AN ATTORNEY SHOULD BE DISBARRED FOR CONVERTING ESTATE FUNDS AND COMMITTING FRAUD UPON THE COURT, NOTWITHSTANDING AN ASSERTION OF EMOTIONAL INSTABILITY AT THE TIME OF THE MISCONDUCT.

The issue before this Court is whether a three-year suspension is a sufficient disciplinary sanction for an attorney who devises and carries out an intricate plan to create a false beneficiary, to perpetuate a fraud upon the Probate Court, and converts estate assets. The fact that the respondent was experiencing emotional instability caused by marital disharmony, a strenuous law practice and medication prescribed by his psychiatrist is insufficient mitigation to warrant granting a suspension rather than a disbarment.

This Court has recognized that an attorney's misuse of client funds is one of the most serious offenses a lawyer can commit. The Florida Bar v. Breed, 378 So.2d. 783 (Fla.1980).

The referee in the instant case, recommended that the respondent be suspended from the practice of law for a period of three years. However, the referee reached this decision only after considering several factors which he considered to be in mitigation of respondent's misconduct.

The referee stated "the misconduct alone is certainly, if considered solely alone by itself, would be sufficient in my opinion to justify disbarment. That is without consideration of any mitigating factors, it would be sufficient, in my opinion, to justify disbarment....". (TR p.134, l.21-24 and p.135, l.1-2)

The mitigating factors considered by the referee in this case are as follows:

1. Respondent did not have a prior disciplinary history.
2. Respondent was experiencing personal and emotional instability caused by marital problems and pressures from work.
3. Respondent was receiving psychiatric care at the time of the misconduct.
4. Respondent was taking prescribed medication for depression at the time he committed the misconduct (TR p.135, l.7-20).

The complainant submits that the mitigating factors considered by the referee were not sufficient to justify reducing the sanction for respondent's misconduct from disbarment to suspension.

In The Florida Bar v. Knowles, 500 So.2d 140 (Fla.1986), the respondent converted to his own use, a total of $197,900.00 from the trust fund accounts of several of his clients. The referee recommended disbarment and the respondent appealed the recommendation. On appeal, the respondent argued that the referee's recommended discipline

was unduly harsh in light of the role that alcoholism played in causing his misconduct and given his subsequent successful efforts toward rehabilitation.

This Court held that "although we recognize that alcoholism was the underlying cause of respondent's misconduct, it cannot constitute mitigating factors sufficient to reverse the referee's recommendation to disbar under the facts of this case." Id at 142.

In the instant case, the respondent, as the attorney and personal representative of the Banner estate, misappropriated the assets of the estate consisting of $7,082.71 in cash and converted them to his own use. Respondent accomplished the same by creating a beneficiary to the estate knowing that there were no heirs, that Ms. Banner died intestate and that the assets were to escheat to the State of Florida. Respondent knowingly submitted false documents to the Probate Court which led the Court to believe that a bonafide beneficiary existed. These fraudulent documents enabled respondent to steal the estate assets.

The respondent admitted that he misappropriated the assets of the Banner estate. In addition, the respondent admitted that he knew at the time he committed said act, it was wrong to convert the estate assets to his own use.

At the Final Hearing in this cause, the following was

elicted from respondent during cross-examination:

> Q. Did you not know what you did by taking the assets of the estate and submitting false documents to the Court was wrong, was criminal, unethical?
>
> A. Now or then?
>
> Q. Then.
>
> A. Of course, I knew it was wrong at the time.
>
> Q. Yet you went ahead with it anyway?
>
> A. I went ahead with it anyway. My judgment was clouded. I was just involved in so much that affected my mental judgment, and I can only account for it by--and its not an excuse because what happened, happened--my judgment was just not right at this time. But yes, I knew what I did. (TR p.110, l.21-24 and p.111, l.1-9).

Respondent blamed his misconduct on his clouded judgment caused by emotional instability due to marital problems, pressures from work and a medically prescribed psychotrophic medication. Emotional instability should not constitute a mitigating factor sufficient to reduce the sanction for respondent's misconduct from disbarment to suspension. Furthermore, the respondent resolved his marital problems in mid-1980 and thereafter his mental attitude improved greatly. (TR p.95, l.17-20). Yet, when respondent's mental attitude improved, he did not voluntarily come forth and admit his misconduct.

A review of the record clearly shows respondent's conduct falls far below the professional standards expected

of a practicing attorney and warrants the strongest sanction available, disbarment. There can be no mitigation for respondent's theft of $7,082.71 from the Banner estate.

In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980), Breed converted client trust funds to his own use. The referee recommended disbarment and in so doing expressed the following:

> "If one looks strictly at the conduct of a lawyer's practice, the misuse of clients funds, whether it be using commingled funds or otherwise, is certainly one of the most serious offenses a lawyer can commit. Few offenses have such an adverse public impact. While many disciplinary infractions involve situations where matters in mitigation should be considered, a violation involving the misuse of clients funds is not one of them...The willful misappropriation of clients funds should be the Bar's equivalent of a capital offense. There should be no excuses." Id. at 784.

In Breed, the respondent appealed the referee's recommendation and successfully argued for a suspension based on the fact that disbarment was inconsistent with the past disciplinary opinions of The Florida Supreme Court.

Although this Court suspended Breed from practicing law for two-years since disciplinary proceedings involving similary misconduct had not resulted in disbarment, this Court stated "we give notice, however, to the legal profession of this state that henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured". Id. at 785.

Unlike Breed, the respondent in the instant case did not misuse client trust funds. However, he did convert the assets of the Banner estate to his own use. In light of Knowles and Breed, disbarment is the only appropriate sanction for respondent's misconduct.

According to Florida's Standards for Imposing Lawyer Sanction (hereinafter referred to as The Standards) approved by The Florida Bar's Board of Governors in November 1986, disbarment is the appropriate sanction for respondent's misconduct in this case.

The following sections apply to respondent's misconduct:

> Section 4.1 Failure to Preserve the Clent's Property: Under this section, disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.
>
> Section 5.1 Failure to Maintain Personal Integrity: Under this section, disbarment is appropriate when: (a) a lawyer is convicted of a felony under applicable law; and (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.
>
> Section 6.1 False Statements, Fraud, and Misrepresentation Under this section, disbarment is appropriate when a lawyer with the intent to deceive the Court, knowingly makes a false statement, or submits a false document.

Under each of the aforementioned sections, aggravating

and mitigating factors can be considered in determining the appropriate sanction for an attorney's misconduct.

Section 9.2 of The Standards sets forth aggravating factors that may justify an increase in the degree of discipline to be imposed. The only aggravating factor set forth in this section, that applies to respondent's misconduct is "dishonest or selfish motive".

Section 9.3 of The Standards sets forth mitigating factors that may justify a reduction in the degree of discipline to be imposed. The following mitigating factors set forth in this section, were present in this case: absense of prior disciplinary record; personal or emotional problems; physical or mental disability or impairment; full and free disclosure to disciplinary Board or cooperative attitude toward proceedings; character or reptutation; imposition of other penalties or sanctions; and remorse.

Although there are numerous mitigating factors which apply to this case according to The Standards, complainant contends that none of the above justify a reduction in the degree of discipline which should be imposed against the respondent. Under The Standards, respondent committed two disbarable offenses, one being respondent's theft of client

funds, the other being respondent's submission of a false document to the Probate Court with the intent to deceive the Court.

The disciplinary sanction for two disbarable offenses cannot be reduced to a three-year suspension due to the mitigating factors set forth above.

CONCLUSION

The prevailing rule of this Court is that an attorney who steals client funds should be disbarred. Respondent not only stole client funds but in addition, he intentionally submitted fraudulent documents to the Probate Court which is a disbarable offense in and of itself.

The fact that respondent was experiencing emotional instability at the time he committed the offense is not sufficient to justify a reduction of the degree of discipline which should be imposed against the respondent.

There should be no mitigation for respondent's misconduct.

WHEREFORE, The Florida Bar respectfully requests that this Honorable Court disapprove the referee's recommendation and disbar respondent, Peter T. Roman, from the practice of law.

Respectfully submitted,

BONNIE L. MAHON
Assistant 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 copy of the foregoing Opening Brief has been furnished to Joseph G. Donahey, attorney for Peter T. Roman, at his record bar address of 13584 49th Street North, Suite A, Clearwater, Florida 34622; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 600 Apalachee Parkway, Tallahassee, Florida 32301-8226, this 16th day of October, 1987.

Bonnie L. Mahon

BONNIE L. MAHON