IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

TERENCE T. O'MALLEY, SR.

Respondent-Appellee.

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TFB File No. 87-26,936 (17D)

Supreme Court Case No. 70,495

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

On January 13, 1984, respondent was entrusted with gold, silver and cash in the aggregate amount of $100,000.00 for the specific purpose of holding such items, in escrow, as collateral for certain surety bonds. He breached his trust by converting the cash portion of the escrow ($57,500.00) to cashiers checks and giving the checks to his client and by removing the precious metals from the depository where he agreed to safekeep such items. When his breaches were discovered, respondent lied under oath concerning his misconduct. The facts follow.

One Paul E. Kersten faced certain criminal charges in a case pending in Martin County, FL (State of Florida v. Kersten, Case No. 83,897-CF (Trowbridge)). In connection therewith, surety bonds in the principal amount of $1,000,000.00 were posted and certain liquid assets delivered to the surely as collateral (24, 99*; bar's complaint, paragraph 8).

Apparently concerned with its exposure, the surety company determined that it required an additional $100,000.00 of liquid assets to constitute "chase money" in the event Mr. Kersten were to skip the jurisdiction (25).

Sam Pendino, Esquire, a Tampa attorney (now a county court judge) was retained to negotiate the terms relating to the posting of the additional collateral (24). He dealt first with the bail bondsman who he refused to permit to hold the collateral and was then referred to Ted Aubuchon, a client of respondent who was an officer of Pioneer Bonding &

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*All page references are to October 19, 1987 transcript unless otherwise specifically noted.

Insurance Agency, Inc., an agent for American Druggist Insurance Company, the surety company. Mr. Pendino also refused to permit Aubuchon to act as escrow agent insisting that the collateral be held by an attorney (25, 26). Mr. Pendino had never met or heard of Aubuchon or respondent prior to this transaction nor had respondent ever heard of Mr. Pendino (27, 116).

After a few telephone conversations, Mr. Pendino and respondent worked out the terms of a simple, page and one-half escrow agreement (27-29; bar's exhibit 1 in evidence). Mr. Pendino then gathered cash, gold and silver and travelled to Fort Lauderdale meeting respondent at a bank where the two men inventoried the collateral, executed the escrow agreement and secured the cash and precious metals in a safe deposit vault (29-32).

The agreement was expressed in the simplest of terms, clearly understood by respondent (114). It provided that in the event of discharge of the surety, the $100,000.00 would be returned to Mr. Pendino; in the event of an estreature under the surety bonds, the fund would be delivered to the surety company (bar's exhibit 1 in evidence).

After Mr. Pendino left the bank, respondent removed the cash and precious metals from the safe deposit box. There is no evidence as to what he did with the precious metals, but it is conceded that he never thereafter maintained such items in accordance with the terms of the agreement (see paragraphs 5 and 7 of the bar's complaint both admitted to in respondent's answer). He took the cash portion, $57,500.00, purchased seven (7) cashiers checks payable to the order of his client, Pioneer Bonding & Insurance Agency, Inc. and delivered the checks to

Pioneer (see bar's complaint, paragraph 5 admitted by respondent's answer). In his answer to the bar's complaint charging that such conduct was in contravention to the express terms of the escrow agreement, respondent suggested that he was relieved from such terms as he had allegedly received oral instructions from Aubuchon approving the conversion (see respondent's answer, paragraph 8). He receded from such position at the final hearing where he conceded that he knew, at the time of the conversion, that his conduct was contrary to the responsibilities he assumed under the written agreement. He testified upon cross-examination, as follows:

> Q. Mr. O'Malley, did you, Sir, regard your client's direction and demand to you regarding the immediate turnover to him of the $57,500.00 as being in contravention of the express terms of the January 13, 1984 agreement? Do you understand my question?
> A. I think so.
>
> Q. All right. Can I have an answer?
> A. If she would read it back again.
> (Whereupon, the requested portion was read back by the court reporter).
>
> THE WITNESS: Yes (115, 116).

Respondent not only failed to notify Mr. Pendino of his immediate conversion of the escrow fund, he failed to make any mention of his unilateral actions when he mailed a copy of the fully executed agreement to Mr. Pendino about two weeks after the meeting at the safe deposit box (117).

In September, 1985, the surety was discharged, a certified copy of the discharge order was furnished to respondent and demand made of

respondent for the immediate return to Mr. Pendino of the collateral (see bar's complaint, paragraph 13 admitted to by respondent in paragraph 5 of his answer). Thereafter, despite numerous demands by Mr. Pendino, respondent failed and refused to return the fund, render any accounting therefor or permit Mr. Pendino access to the safe deposit box so that he could at least insure that the fund was intact (38-44). Respondent's reaction was to insist upon the institution of a civil action (43).

Upon respondent's refusal to deliver the fund or render an accounting, Mr. Pendino retained local (Broward County) counsel and an action was commenced to recover the collateral. It was not until 1987 that respondent finally turned over the collateral to Mr. Pendino's counsel (45, 46).

Having knowingly and brazenly converted the collateral entrusted to him, respondent embarked upon a course of perjury to conceal his misconduct. At depositions, given in the civil litigation, he testified:

> (November 26, 1985 deposition)
>
> Q. Where is the collateral now?
> A. The collateral is in my possession.
>
> Q. It is being held where?
> A. In my possession.
>
> Q. Did you remove any of the cash or the gold and silver from the box?
> A. Only when I closed out the account of the safety deposit box.
>
> Q. Have you turned over cash - Have you given us possession of any of the cash, or gold, or silver?
> A. I believe I have already answered that question.

Q. How about answering it one more time?
A. Collateral is in my possession.

Q. Are you -- In terms of the location of the collateral, is anybody else, other than yourself, in possession of the collateral?
A. No. It's in my care, custody and control.

Q. You said you closed your safety deposit box with NCNB bank. Do you remember when that was?
A. No.

Q. Prior to that time, did you ever remove any of the collateral from the safety deposit box?
A. No. Only briefly.

Q. What collateral - Which part of the collateral?
A. I took a gold bar, a krugerrand, and a medallion - No, and a silver bar to a local -- I took one of each kind of metal over to a local coin dealer to ask if they were real because I didn't know, and I returned them.

Q. You put it back in the safety deposit box?
A. Absolutely.

Q. Did you ever remove anything from the safety deposit box?
A. No. Well, nothing that relates to this law suit. There were other documents in that safety deposit box.

Q. Have you ever turned over any of the collateral to Mr. Aubuchon?
A. No.

Q. Excuse me?
A. No.

Q. And you are saying that you never turned it over to anybody? You have kept it yourself?
A. I think I have already answered that question.

Q. I am correct?
A. Pardon me?

Q. I am correct in that?
A. Yes. You are correct in that.

Q. How long has it not been in a bank safety deposit box?
A. Since I closed out my account with NCNB.

(March 31, 1986 deposition)

Q. Alright. In your deposition of November 26th, you told me that the cash had never been out of your care, custody up until that point in time. That was a lie in that deposition?
A. I think I said care, custody or control and in an effort to protect my client, who had told me that when he finally was forced to return it by getting a copy, he would return it back to me, and in order not to be the last link in the chain of criminal prosecution of my client, Mr. Aubuchon, I considered that his comment to me to return it when required left it within my control, even though it was not physically in my custody.

Q. In your deposition of November 16th, I asked you if you had ever changed the form of any of the collateral and you said no. That was incorrect as well?
A. Ever change the form?

Q. Yes, cash checks for one?
A. Cash the cashier checks. I guess I was incorrect technically.

The foregoing excerpts from respondent's deposition testimony were recited in paragraphs 17 and 18 of the bar's complaint and admitted to by respondent in his answer.

Respondent persisted throughout the disciplinary proceedings in suggesting that his testimony given at the depositions hereinabove referred to and quoted from was technically correct. His rationalization never diminished. Respondent claims that his client's possession of the cash permitted him to swear, under oath, that the collateral remained in respondent's possession (123); that because he delivered the cashiers checks to a corporate employee other than his client, Aubuchon, he was therefore free to deny that any collateral had ever been turned over to Mr. Aubuchon (129, 130).

Mr. Pendino, victimized by respondent's misconduct, was made to suffer the travails of protracted litigation involving trips back and forth between Tampa and Fort Lauderdale (46-49). More damaging, he was left in a completely untenable position with a client to whom he had to offer an explanation of why he could not return $100,000.00 specifically entrusted to him when all conditions for its return were satisfied (48).

The Honorable Mary E. Lupo, a judge of the Fifteenth Judicial Circuit Court of Florida was appointed referee for the Court. The case was fully tried before Judge Lupo on October 19, 1987. As a result of a post hearing proffer by bar counsel which Judge Lupo regarded as inappropriate, she declared a mistrial and requested that the proceeding be referred to another referee. The Honorable Steven D. Levine, a judge of the County Court of Dade County was then appointed referee.

Upon stipulation of the parties, the transcript and evidence adduced before Judge Lupo was presented to Judge Levine for rendition of his report based solely upon the prior record.

Although finding that respondent had, inter alia, engaged in illegal conduct involving moral turpitude, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct contrary to honesty, justice or good morals, he deemed the violations to be lacking in bad intent and neither dishonest or selfish. The referee has recommended a ninety (90) day suspension plus other conditions as appropriate discipline.

The bar regards the referee's recommended discipline as inadequate suggesting that disbarment is the appropriate sanction.

ARGUMENT

I. INTENTIONAL MISAPPLICATION OF MONEY ENTRUSTED TO AN ATTORNEY FOR A SPECIFIC PURPOSE, COUPLED WITH PERJURY BY THE ATTORNEY TO CONCEAL HIS MISCONDUCT, WARRANTS DISBARMENT.

Throughout the disciplinary proceeding, respondent maintained a steadfast posture that he was relieved of his responsibility to maintain the cash entrusted to him upon "parol information which he understood to have modified the agreement" and that he acted "in good faith upon that parol information" (see paragraph 8 of respondent's answer). Time and again respondent urged that in delivering the cash to his client's possession, respondent retained constructive possession thereof (105, 123). He excused his failure to maintain the precious metals entrusted to him in the manner expressly mandated by the written escrow agreement as "essentially immaterial" (see paragraph 9 of respondent's answer).

In fact, when respondent converted the cash entrusted to him immediately after he received it, he knew his actions to constitute a breach of the express terms of the written agreement (115, 116). It is respectfully submitted that a grade school - stakeholder, holding the side bet on the outcome of a sandlot ball game would be abhorred at the thought of favoring his team with the entrustment prior to the outcome of the game. One need not be an elder statesman at the bar to recognize, appreciate and honor the sacrosanct nature of being entrusted with money and property for a specific purpose. To urge, as respondent has throughout this proceeding, that his conversion was the product of inexperience or some misplaced notion that one may deliver an escrow

fund to a party to the escrow agreement (in good faith) belies credulity and establishes a mind-set not warranting membership in the bar.

The referee well expressed the attorney's special relationship with the public. He observed:

> In this case, the duties violated are fundamental. There are perhaps no more important responsibilities of a lawyer than to preserve property entrusted to him or her and to testify honestly and forthrightly in litigation proceedings (referee's report, page 9, second unnumbered paragraph).

What concerns the bar is the referee's conclusion that respondent did not act with bad intent "because he (respondent) mistakenly believed it was part of some oral agreement between the parties and because he thought it may have been required by law, despite the clear language of the escrow contract" (referee's report, page 9, third unnumbered paragraph). If not bad intent, respondent's actions in converting and divesting himself of the cash entrusted to him, constitutes such mindless conduct as to warrant a reevaluation by the Board of Bar Examiners. How can any individual, attorney or otherwise, cast in the role of a stakeholder, entrusted with funds by a stranger under a written agreement, immediately deviate from the express terms of such agreement without advance notice to the stranger? How can such individual thereafter furnish a copy of the very written agreement to the stranger with no notice, no hint, no advice that the terms have been breached? Mr. Pendino could have entrusted the collateral to the bail bondsman or to Ted Aubuchon, a representative of the surety company. He specifically chose not to do so, insisting that an attorney be constituted the stakeholder (26), a colossal waste of effort as it turns out.

The totality of respondent's actions are indicative of bad intent rather than ignorance. He delivered the cash with no notice to Mr. Pendino, failed to notify Mr. Pendino of the conversion two weeks later when he delivered a fully executed copy of the agreement, failed to indicate his lack of possession of the cash when demand for return of the collateral was made, and indicated outrage when, upon his refusal to return the collateral in accordance with the express terms of the agreement, Mr. Pendino requested that he at least be permitted to count the money and see the collateral (43). Would not the forthcoming individual have informed Mr. Pendino that there was no money to count; that it was no longer in the safe deposit box; that none of the collateral was present?

If ignorance of so fundamental a responsibility is somehow mitigating for an attorney's breach of trust, perjury should vitiate the mitigation. It is respectfully submitted that having found respondent to have engaged in illegal conduct involving moral turpitude, having found him to have engaged in conduct involving dishonesty, deceit, fraud or misrepresentation and having found that respondent engaged in conduct contrary to honesty, justice or good morals (referee's report, page 7, item B), the referee was unusually forgiving in his conclusion that respondent's motives were neither dishonest or selfish (referee's report, page 9, third unnumbered paragraph). There was no ambiguity in the questions posed to respondent. He was specifically asked "where is the collateral now?" His answer was singularly direct and singularly false when he stated "the collateral is in my possession." Had the question been posed but once, respondent may have convinced someone that

he failed to hear it or comprehend it. But the question was asked repeatedly. When asked "it (the collateral) is being held where?" Respondent once again swore that it was "in my possession." So that there could be no possibility of miscomprehension or misunderstanding respondent was asked as to the precise location of the collateral. The question was posed "in terms of the location of the collateral, is anybody else, other than yourself, in possession of the collateral?" His denial was clear, resounding, and false. He stated "no. It's in my care, custody and control." When queried whether or not he ever removed anything from the safety deposit box respondent answered "no. Well, nothing that relates to this law suit." When asked directly whether or not he "ever turned over any of the collateral to Mr. Aubuchon" he responded "no" and upon asked for clarification, repeated his answer.

Respondent contends and the referee obviously agrees that respondent had license to give false testimony because his motive was to protect a client. The bar most respectfully submits that while an attorney should raise every privilege and/or objection and take all appellate avenues open to him in the protection of a client, there is and can be no license, under any circumstances, for an attorney to lie under oath.

It is respectfully submitted that the referee's charitable view that respondent's breach of trust and perjury was to protect a client from his criminal misdeeds, is misdirected. The referee's view pays to heed to the victim of such chicanery. If it constitutes a disbarment offense for an attorney to apply money entrusted to him by a client to a purpose other than the one intended (see The Florida Bar v. Altman, 465 So.2d 514 (Fla. 1985)), why should such misapplication hold lesser

consequences for the attorney when the victim is a stranger entrusting funds to the lawyer as an escrow agent. It is respectfully submitted that the stranger reposes even more trust and confidence in the attorney's unique position of trust than does the client. When coupled with the perjury committed by the respondent, the sanction should be appropriately severe. In The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984) this court directed a two (2) year suspension where a respondent demonstrated less than complete candor about his unwitting involvement in a suspicious activity.

In a legal career of relatively short tenure, respondent ran afoul of his ethical responsibilities by placing himself in a position of conflict while a state legislator and is now faced with a referee's recommendation that he has violated the most serious mandates involving trust responsibilities, illegal conduct involving moral turpitude and dishonesty. A disbarment will ensure a thorough and complete evaluation of respondent's propensities for misconduct prior to his readmission to the bar.

Florida's Standards for Imposing Lawyer Sanctions indicates that a disbarment is the appropriate sanction. While Rule 4.11 speaks in terms of the intentional or knowing conversion of client's property mandating disbarment regardless of injury or potential injury, the bar respectfully urges that such rule should apply equally to the conversion of any property entrusted to an attorney. As suggested hereinabove, an entrustment by a stranger certainly is invested with the same, if not higher, expectations in an attorney than a similar entrustment by a client.

Rule 6.11 recites that disbarment is appropriate when a lawyer, with intent to deceive the court, knowingly makes a false statement or submits a false document or improperly withholds material information and causes serious or potentially serious injury to a party. Rule 5.11 calls for disbarment when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the attorney's fitness to practice.

II. FORCED RESTITUTION AND UNCORROBORATED CLAIMS OF ALCOHOLISM ARE NOT MITIGATING FACTORS WARRANTING REDUCTION OF SANCTION.

The referee found, as mitigating factors, that respondent had a serious alcohol problem and that respondent eventually paid nearly $70,000.00 as restitution. It is respectfully submitted that neither factor constitutes mitigation and should play no part in determining the appropriate sanction.

Rule 9.4 of Florida's Standards for Imposing Lawyer Sanctions provides that forced or compelled restitution should not be considered as either aggravating or mitigating. Here, respondent misapplied funds, was in conceded breach of the express terms of the escrow agreement and further breached such agreement when he failed and refused to return the cash and precious metals to Mr. Pendino upon the discharge of the surety. Respondent insisted that a litigation be instituted and then, dragged out the litigation for two years before finally complying with his responsibilities. In the bar's view, this hardly constitutes the timely good faith effort to make restitution or to rectify the consequences of his misconduct as contemplated by Rule 9.32(d).

The bar most urgently and respectfully requests that the Court address the effect of uncorroborated allegations of alcoholism offered by a respondent to mitigate misconduct. Here, respondent testified that he had "some serious problems with alcohol" (110). While the one character witness produced by respondent observed that respondent "drank too much" (141), respondent offered no testimony from any expert qualified to render an opinion regarding whether respondent was an alcoholic and to what extent, if any, respondent's drinking had on his

ability to function. If the quantity and quality of evidence vis a vis alcoholism or some other alleged addiction as was offered in the case at bar is considered as mitigating, then it is respectfully submitted that every respondent in every bar disciplinary proceeding will offer similar uncorroborated evidence that their violations were somehow the product of a besotted mind due to some addiction or another.

Even had competent evidence been adduced to establish some addiction, the serious violations involved would nonetheless mandate disbarment. In The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986), the respondent established an addiction to alcohol. Notwithstanding respondent's alcoholism, this Court directed his disbarment due to the serious nature of his violations. The bar submits that respondent's actions in willfully breaching his escrow obligations and then lying about his breaches, constitutes misbehavior every bit as serious as the defalcations in Knowles, supra.

In arriving at his recommended discipline, the referee cited The Florida Bar v. Whitley, 515 So.2d 225 (Fla. 1987) and State v. McClosky, 130 So.2nd 596 (Fla. 1961). The cases appear to be distinguishable. In Whitley, supra, respondent apparently undertook representation of a client in a rather complex corporate capitalization with little or no knowledge concerning how to achieve his client's goal. The referee noted his difficulty in ascertaining from respondent's work product whether the capitalization structure was such as to create investor loans or investor purchases. While respondent was found to have violated Fla. Bar Integr. Rule, article XI, Rule 11.02(4) there was no hint nor suggestion that respondent was, in any way, involved in illegal

conduct involving moral turpitude, dishonesty or conduct contrary to honesty, justice or good morals. It appears that respondent, due to ineptness, created a mess which in turn gave rise to the violations.

In McClosky, supra, the respondent, as in the case at bar, misapplied escrow funds entrusted to him. Unlike the case at bar, there was no attempted coverup by McClosky who admitted his foolishness in departing from the terms of the agreement. In approving the six (6) month suspension which the court characterized as "more than lenient to respondent" the court noted:

> A lawyer's professional character and integrity is measured very largely by the manner in which he withstands the blandishments and temptations of the "Elrods." In the abuse of a trust like that involved here the damage a lawyer does to his profession in the eye of the public is immeasurable. Litigants to whom he is obligated are embarrassed and inconvenienced. In fact, such professional transgressions affect so many factors, it is impossible to measure their outreach in damages either to the public or those personally affected.

If the Court, regarded the breach of escrow in McClosky, supra, as deserving of at least a six (6) month suspension which discipline it regarded as "more than lenient" then it is respectfully suggested that the addition of the elements of cover up and perjury present in the case at bar more than justify the sanction of disbarment.

CONCLUSION

The respondent has demonstrated no comprehension of the nature and extent of his violations. Charged with an absolutely indefensible breach of a written escrow agreement respondent justified his actions as being in good faith and based upon parol advice from his client. One can only imagine the chagrin if not abject fear on the part of the public at respondent's position. It is either hubris of the highest degree, or, ignorance of extraordinary magnitude that could possibly permit an attorney to believe that he has a right to violate the express terms of a trust agreement, and divest himself of substantial funds entrusted to him by a stranger, upon the urgings of a client.

The compounding of such basic abuse of trust by perjury and the rationalization that both violations were somehow permissible are indicative of an individual incapable of comprehending ethical propriety and posing a danger to the public. Respondent should be disbarred.

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief of The Florida Bar was furnished to Nicholas R. Friedman, attorney for respondent/appellee, Suite 2200, New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132 on this 8th day of June, 1988.

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