IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

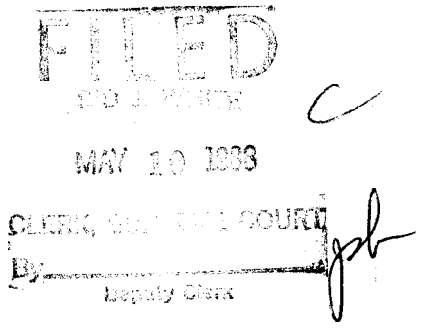
v. Supreme Court Case No.

71,055

RONALD S. GOLUB,

Respondent.

_____/



PETITION FOR REVIEW OF REPORT OF REFEREE

Respondent's Answering Brief

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NOTE

The reference "(rr.-3)" refers to the Report of Referee dated February 29, 1988 filed herein. The reference "(tr.-41)" refers to the transcript of testimony of the referee's evidentiary hearing held on December 4, 1987 and the reference "(compl. br. -7)" refers to complainant's initial brief to which this answering brief is addressed.

INTRODUCTION

The respondent would show this Court, that although the petition for review of the complainant and that of the respondent did not actually "cross in the mails", circumstances have led to that result. Complainant's petition for review, although first filed, was misaddressed when mailed to respondent's then attorney, viz. 703 N.E. 22nd St., North Miami, Florida., and complainant's initial brief, although first filed, was misaddressed to the wrong attorney, viz. one John Weiss, etc.

As a result of the ensuing delays of service of the petition and of the brief, and as a result of a lack of communication between respondent and his then attorney, respondent's timely filed initial brief did not fully meet the requirements of Rule 3-7.6 (c)(3) of the RULES REGULATING THE FLORIDA BAR in that it was written as an "initial brief" and not as

> ....(an) answering brief which shall also support any cross-petition for review.

It is submitted, however, that since the point of which both parties seek review is identical, the appropriateness of the recommended discipline, no prejudice has resulted.

This answering brief will be limited to a point-by-point rebuttal of the arguments advanced in complainant's initial brief.

RE UTTAL ARGUMENT

THE ULTIMATE SANCTION OF DISBARMENT IS NOT APPROPRIATE IN THE INSTANT CASE

The referee concluded that

> In view of the fact that the Respondent has demonstrated eight of the mitigating factors as set forth in-the Florida Standards for Imposing Lawyer Sanctions, namely: absence of a prior disciplinary record, personal or emotional problems, free and full cooperation with the proceedings, previous good character, the impairment of extreme alcoholism, interim rehabilitation, remorse and the fact that he was suspended through his own act for more than one, year, the Referee does not recommend disbarment (rr.-6).

In light of the referee's above-cited conclusion reached from his findings facts which were in turn drawn from his assessment of the testimony and the exhibits at the evidentiary hearing, it seems that the complainant's conclusion that disbarment is the appropriate discipline, is unsupported by either the record or precedent established in factually similiar cases.

The complainant's briefed sub-points, consistency of disbarment with principles of lawyer discipline, factors in aggravation and factors in mitigation will be discussed in order.

A. DISBARMENT HAS NOT BEEN THE AUTOMATICALLY IMPOSED PENALTY FOR MISAPPROPRIATION OF CLIENT FUNDS

Although the Court has imposed disbarment as the discipline in the misappropriation cases cited by complainant in it's brief, the Court has, in misappropriation cases where mitigating factors have been present, imposed a far lesser penalty.

In The Florida Bar v. Greenfield, 517 So. 2d 16 (Fla. 1987), in an opinion dated less than two weeks after the date of the evidentiary hearing held in this case, in an almost identical factual situation, the Court imposed a one year suspension.

The misappropriated funds in Greenfield by a personal representative of an estate amounted to $28,000, while here the amount was $24,000. There was a long unblemished professional record in both cases. No restitution had been made as of the time of the Florida Bar investigation, although full restitution had been made in Greenfield by the date of the opinion, while only partial restitution has been made in the instant case as of date. No alcoholism was involved in Greenfield while alcoholism was

> ....the sole underlying cause of Respondent's professional misconduct...(rr.-3)

in the case sub judice. The factors in mitigation in Greenfield surrounded an I.R.S. levy on the family home under stressful conditions, while a number of factors in addition to alcoholism, i.e. severe problems with an ex-wife (tr.-100), are present in the instant case.

A one-year suspension was deemed the appropriate discipline.

Although a smaller sum of money was involved in The Flor-

ida Bar v. Seidel, 510 So. 2d 120 (Fla. 1986), the Court imposed the discipline of certification by F.L.A. Inc. that the respondent's alcoholism was under control and practice of law under conditions of probation and the making of restitution while in practice.

A one year suspension and two year probation were deemed to be the appropriate discipline in The Florida Bar v. Tunsil, 513 So. 2d 120 (Fla. 1986), also cited by complainant (compl. br.-7). The misconduct involved the misappropriation of $10,500 from a guardianship estate.

Two year suspensions were deemed appropriate in two misappropriation cases, The Florida Bar v. Morris, 415 So. 2d 1274 (Fla. 1982) and in The Florida Bar v. Anderson, 395 So. 2d 551 (Fla. 1981).

In conclusion, it appears that this Court has looked to the circumstances in each case, weighing the aggravating and mitigating circumstances in each, in determining the appropriate discipline. it has not automatically imposed the ultimate disciplinary measure of disbarment in cases of misappropriation of client's funds.

B. THERE ARE NO MATTERS IN AGGRAVATION TO BE CONSIDERED IN THE INSTANT CASE

The complainant argues that three aggravating factors are present that warrant disbarment, "dishonest or selfish motive" (compl. br.-12), "a pattern of misconduct" (compl. br.-13) and "indifference to making restitution"(compl. br.-13). This argument is made notwithstanding that the referee considered matters in aggravation since he specifically rejected respondent's inability to make restitution as an aggravating factor (rr.-6) and found no others to be present.

It is submitted that the factor of "dishonest or selfish motive" is only addressed in this record where respondent is examined as to his state of mind at the time of the defalcation. It is to be noted at this point, that the record is absent any evidence whatsoever of respondent using falsehoods, misrepresentations or fraudulent artifices in order to effectuate his defalcation or to conceal or cover it up. No misrepresentations were made to the heirs, the creditor or the probate court.

Beginning on page 99 of the transcript, the respondent related the story of the progression of his alcoholism from his beginning to drink at college to the traumatic depths he reached some 36 years after (tr.-103).

With respect to his state of mind during the period when the funds were taken, between 1984 and 1986, he testified:

> A. My practice was practically non-existent at the time.
>
> Q. Why did you take the money? Did you know that that you were doing it? (tr.-104)
>
> A. I didn't really know exactly. I knew that I needed the money. I took some money, which I thought there

was nothing wrong with....I was going to put it back.

* * * * * *

I know that it was taken it bits and pieces over a period of about a year. I know that my practice was almost non-existent, because of my appearance--well--1 just reeked of alcohol almost all the time (tr.-105).

* * * * * *

Q. What was the stage of alcoholism that you were in when you removed the funds fromthe estate? Where were you? (tr.-110).

A. I don't know where I was. All I can do is describe my daily routine.

I know that I had very few (clients). I only had a secretary part time in that whole era, now and then.

There were several girls. They wouldn't stay with me very long. I really didn't have the money to pay then. I would try to get up in the morning and try to be very clever like all alcoholics are. So I would only take a couple of glasses of wine at about 8:00 or 8:30 in the morning to; sort of,get me to the office.

I took some breath mints and gargled and so forth, so no one would know.

At about 10:30 I would be looking at my watch to see what time I could go to lunch- to go to a bar across the street from the office.

Sometimes I would get back to the office after a three martini lunch. Sometimes, I would call and say, " I won't be coming back this afternoon. I am in a meeting. Tell anyone who calls."

I was losing the clients. (tr.-111)

* * * * * *

Q. You had no other income? The only other source of funds was the estate, is that what I am led to believe at that point ? (tr.-113)

A. Close to it. That was (a) period of time of over a year and it was twenty-two, twenty-three thousand dollars.

Respondent was cross-examined as to what'he did with the mon-

ey by bar counsel:

> Q.....Why did you need $24,000 to pay for alcohol?
>
> A. I'm sure that it wasn't all alcohol. I'm sure that some probably went for rent, some went for automobile expenses, some probably went to pay for a secretary (tr.-127).
>
> I think I was probably living on the money.
>
> That isn't a whole lot of money when you are running an office and a home and paying child support (tr.-128).

The foregoing testimony, when considered together with the expert testimony of Dr. Jules Trop, fully provides an insight into the state of mind of the respondent during the period of time when he was misappropriating the estate funds.

> The Referee: Would you explain to me what there is about alcoholism, especially as it relates to this case, that would tie in with the act here, which is going into this particular estate and taking this money out ? (tr.-45)
>
> * * * * * *
>
> The Witness: Drug addicts and alcoholics that come into treatment, typically have been stealing from their family, stealing from their clients if they happen to be professionals, and have been using the worst kind of impaired judgment, coupled with a moral deficiency, where they do not look at the consequences of their act.
>
> Indeed, the compulsion to drink or the compulsion to use a drug, spreads out into the compulsion to act in a totally egocentric way, with no eye, no thought to the consequences. They can't see beyond what they are doing right now.
>
> We see that over and over again.
>
> The interesting thing about it is in recovery, these people-and we follow them for years- are no more inclined to do these illegal or immoral things than anybody else would be.

It is submitted that in view of the totality of the testimony concerning the state of mind of the respondent at the time,

the referee did not, and could not, find that "a dishonest or selfish motive", in the sense meant in Rule 9.22 (b) of the Florida Standards for Imposing Lawyer Sanctions, was present as an aggravating factor.

The complainant next argues in that:

> ....(T)he Respondent repeatedly dipped his hand into the till, (this) can also be taken into account as aggravation,

since same constitutes a "pattern of misconduct". The complainant here, presumably, has reference to the testimony of the respondent at page 104 of the transcript, where he states,

> I was taking little bits and pieces. It must have been two or $300, the first monies that I took out of there.

It is submitted that the taking of the money in "bits and pieces" does not constitute a "pattern of misconduct" as contemplated by Rule 9.22(c) of the Florida Standards for Imposing Lawyer Sanctions. This is emphasized by the fact that the referee did find that there had been no prior disciplinary incidents in almost 30 years of practice (rr.-2).

The final aggravating factor that is cited by complainant is that:

> the Respondent has made little if any attempts to return the funds that he took from the estate (compl. br.-13).

The complainant did not take this position at the hearing before the referee. It *took* the **position** that the partial restitution made by respondent was ill-motivated in that payments were co-incident only with the fact that the hearing date had been set by the referee (tr.-9).

This was completely rebutted by the evidence. The record shows that the hearing was set for December 4, 1987 by order

dated November 16, 1987 (Appendix). Restitution began when respondent received a raise in pay from $250 to $350 a week and he could afford to make restitution at the rate of $50 a week, on or about September 30, 1987 (tr.-109).

The referee did not have to reach this point in his decision since he found that

> Respondent has made only minimal restitution, largely due to his distressed financial circumstances (rr.-3),

and concluded 'chat:

> Because of Respondent's clear inability to make restitution to date, it would be manifestly unjust to consider his failure to do so an aggravating factor in this proceeding (rr.-6).

In conclusion, it is clear that the record discloses no aggravating factors to be considered that could add to the seriousness of the misconduct, and complainant's point is not well taken.

C. THE MITIGATING FACTORS PRESENT IN THIS CASE ARE SUBSTANTIAL AND SIGNIFICANT AND THEY WARRANT A LESS SEVERE PENALTY THAN THAT RECOMMENDED BY THE REFEREE.

The complainant understandably seeks to minimize the findings of the referee as to the mitigating factors present in the instant case. The bar points out that "alcoholism is not always acceptea as an absolute defense for an ethical infraction" (compl. br. 15).

Respondent takes the position that alcoholism should never be accepted as an absolute defense for an ethical infraction, nor should diabetes, epilepsy or insanity. It is a factor that may be considered in mitigation of the seriousness of the offense, breach of a duty to society.

The respondent asks this Court to consider the misconduct of this respondent as opposed to the misconduct of the respondent in The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986), upon which the complainant so heavily relies.

The referee considered the Knowles case, and quoted therefrom:

> Although we recognize that alcoholism was the underlying cause of respondent's misconduct, it cannot constitute a mitigating factor sufficient to reverse the referee's recommendation to disbar under the facts in this case. The misappropriations occurred continuously over a period of approximately ~~four~~ years. During this time, respondent continued ~~work~~ regularly. His income did not diminish discernably as a result of his alcoholism. We note further that the clients from whom he stole were elderly individuals who trusted ~~him and for whom he held~~ powers of attorney. Under these circumstances, we believe respondent should be disbarred regardless of his alcoholism (emphasis supplied). Knowles at 142.

The referee found that the sole underlying cause of respondent's misconduct was his alcoholism (rr.-3). Research has not disclosed any factual situastion in where the presence of alcoholism as a factor in causation is so strongly stated.

In Knowles the misconduct continued over a period of four years during which his income did not diminish as a result of his infirmity. In the instant case, the misconduct continued over a period of a year with the respondent's practice and income almost disappearing as a result of his alcoholism.

The clients from whom Knowles stole were elderly and they trusted him. He had a face-to-face relationship with them evidently, since Knowlcs held powers of attorney.

Here, the respondent's client was a decedent's estate and he never knew the beneficiaries. He had met one of them a couple of times while the decedent was still alive (tr.-106).

The voluntariness of this respondent's actions in seeking help for himself is overlooked by the complainant. The opinion in Knowles does not shed light upon whether or not the respondent voluntarily sought help or when he sought help. It is submitted that at the time the respondent here voluntarily sought the assistance'of F.L.A. Inc.,the bar proceeding could have been avoided by the respondent.

> At the time he contacted F.L.A. Inc., the Ear had received a complaint from an heir of the estate to the effect that she had been unable to contact the Respondent with respect to his handling of the estate, however no formal proceedings had been instituted other than a letter from the Bar to the Respondent which may or may not have actually been read by the Respondent (rr.-2).

The estate had six beneficiaries (tr.-25). The total amount of the estate was $25,608.34, and after deducting the claim of the one creditor, some $15,000 less costs and legal fees would be available for distribution (tr.-27). After dividing the balance six ways, each of the beneficiaries would only have been entitled to receive one or two thousand dollars. How dishonestly simple it would have been for respondent to simply write the complaining beneficiary an apologetic letter and enclose a small "advance" to her on her bequest.

This dishonest act was not performed because the respondent was not dishonest. He was sick, physically and mentally, because of his alcoholism.

The respondent voluntarily called F.L.A. Inc. for help, he followed its recommendations to the letter, he submitted himself to a nine-day detoxification procedure (tr.-128), a three month in-patient treatment center confinement (tr.-133), a one-year F.L.A. Inc. monitoring program (tr.-79-80) and became active in Alcoholics Anonymous under the supervision of F.L.A. Inc. and

> ....has pursued with enthusiasm a program of alcoholic rehabilitation. (rr.-3).

He volunteered the facts of his defalcation to the bar (rr.-2) and has undergone the rigors of this proceeding.

How dishonestly simple it would have been to just write one lying letter and avoid all of the pain, torment and anguish the respondent has undergone.

It is submitted that the analogy the complainant seeks to draw between the case sub judice and the circumstances in Knowles is not well taken.

The mitigating circumstances present in the instant case do not warrant the discipline recommended by the referee, a three year suspension, much less disbarment.

CONCLUSION

It is submitted that the conclusion argued by the bar, the respondent's misconduct should be addressed by imposing the sanction of disbarment is not well taken as not being warranted from this record nor from precedent.

Neither disbarment nor a suspension exceeding the suspension voluntarily served by the respondent is warranted under these facts and the goals of attorney discipline will be well met by iniposition of supervised probation, both as to his conduct and as to his sobriety. Permitting the respondent to resume his practice will enable dollar and cents justice, restitution, to be quickly accomplished as well as permit this attorney to continue upon his path of restoring his own self-worth and serving the profession he has faithfully served for 28 years prior to his alcoholic misconduct.

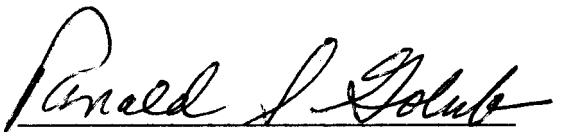
Respectfully submitted,

Ronald S. Golub

Ronald S. Golub, In proper person

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Respondent's Answering Brief on Retition for Review of Referee's Report were mailed to Honorable SID J. WHITE, Clerk, Supreme Court of Florida, Supreme Court Bui1ding, Tallahassee, Florida 32399-1927 and that true and correst copies were mailed to Kevin Tynan, Bar counsel, Suite 211, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 and to John T. Berry, Esq. Staff Counsel, The Florida Bar,Tallahassee, Florida 32301, on this 9th day of May, 1988.



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