IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RONALD S. GOLUB,

Respondent.

Supreme Court Case
No. 71,055

On Petition for Review

Initial Brief of Complainant

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NTRODUCTION

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar filed its complaint on February 3, 1987. A final hearing was conducted before the Honorable David Kirwan, Referee on December 4, 1987.

The Florida Bar would adopt the Referee's summary of facts contained in the Report of Referee as its statement of the facts. Those findings have been included below for the court's convenience.

> "**FINDING OF FACTS:** Respondent stipulated to the facts of this case in his Waiver of Finding of Probable Cause and Stipulation as to Facts dated July 9, 1987. Those facts are set forth below:
>
> > 1. That Respondent was the attorney of and personal representative for the Estate of Cecil Harlig.
> > 2. That during the period of 1984 through 1986 the Respondent removed approximately $23,608.34 from the Estate of Cecil Harlig.
> > 3. That the Respondent did not have the permission of the heirs, debtors, or the Probate Court to remove said funds.
> > 4. The the removed funds have not been replaced to date.

In addition, evidence was presented at the hearing which established the following facts:

Respondent is an attorney admitted to practice in New York in 1956 and in Florida in 1961. He had no prior disciplinary

incidents in either jurisdiction until the present complaint.

On August 19, 1987, Respondent voluntarily contacted **F.L.A.** Inc., for assistance. He had a history of heavy use of alcohol dating back many years and his alcoholism had brought him to the point of contemplating suicide. **F.L.A.** Inc., arranged for Respondent to be taken to a facility for detoxification and then to an in-patient treatment center. At the time he contacted **F.L.A.** Inc., the Bar had received a complaint from a 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. The imminence of the Bar proceeding was one of the factors which caused Respondent to seek help. His mental, physical, and financial problems were the other factors, including problems with his ex-wife and children. The Bar contacted the Respondent at the treatment center which he had committed himself and he volunteered the details concerning the removal of the funds freely and openly to Bar counsel, he had not paid Bar dues for 1986 and was suspended from practice accordingly as of October 1, 1986. The Bar recognized his "voluntary suspension" from practice in a communication demanding payment for the year 1986 and 1987 of the dues in arrears which communication is in evidence. In September 1987, on advice of counsel, Respondent remitted the arrearages and in his petition

for reinstatement set forth the reason for not paying his dues as his realization that at the time he was incapable of practicing law. Respondent has been suspended from the Bar for a period in excess of one year, from October 1, **1986** until his reinstatement on October **6, 1987.** He is not now actively engaged in the practice of law.

The Respondent removed the funds from the estate over a period of about a year in small amounts.

Following release from the treatment center, Respondent became active in Alcoholics Anonymous under the supervision of F.L.A. Inc., and has pursued with enthusiasm a program of alcoholic rehabilitation.

Ronald Golub has not engaged in the practice of law since August **19, 1986.** His present employer was informed by him of these proceedings. That employer, a research and development corporation, is convinced of his honesty and integrity and he is entrusted with company funds. Respondent has made only minimal restitution, largely due to his distressed financial circumstances. Respondent is remorseful. He has suffered substantially as a result of his alcoholism by losing his career, his family and his status in the community.

The Referee finds that the sole underlying cause of Respondent's professional misconduct was his alcoholism.

With regard to the damage caused by Respondent's misappropriations, it should be noted that Respondent removed a

substantial sum of money over a two year period. The testimony revealed that there were six beneficiaries and a creditor. Three beneficiaries were aged 50, 66 and 71. One beneficiary died prior to the final hearing. Michael Swann, the estate's administrator ad litem, appeared as a bar witness and testified that he had spoken to the wife of the deceased. She advised that her husband had been on dialysis for many years and had hoped to use his bequest from the Harlig Estate to help out. Another beneficiary was a synagogue in Canada. The Sixth bequest was another synagogue for maintenance of gravesites. The creditor was a nursing home.

In addition to the Report of Referee The Florida Bar would note that the Respondent stipulated to the fact that he removed funds from the Estate of Cecil Harlig over a period of two years, from **1984** to **1986,** and not a period of one year as the Referee notes in his report to this Honorable Court.

SUMMARY OF ARGUMENT

Disbarment and not a three year suspension is warranted for the theft of almost twenty four thousand dollars from the estate of Cecil Harlig by the Respondent, Ronald Golub.

This Honorable Court has noted that the theft of client funds is one of the most serious breaches of our Code of Professional Responsibility, that an attorney can commit. It is because of this, that this Court has warned that disbarment was the appropriate sanction for the theft of client funds.

It can also be noted that disbarring an attorney for theft of client funds is consistent with the underlying principles of lawyer discipline. This is especially true when one considers that the public trust in the legal profession is grossly violated by the theft of client funds.

Even if this Court finds that disbarment is not always warranted for the theft of client funds it is clear that the aggravation present in this case requires disbarment of the Respondent. This is clearly mandated by the Respondent's repeated thefts during a two year period from the Estate of Cecil Harlig.

Lastly, even though there were some mitigating factors present in the case sub judice, these mitigating factors are substantially outweighed by the seriousness of the Respondent's actions and the aggravating factors, found in this case.

In conclusion, then it is clear that the Respondent, Ronald S. Golub, should be disbarred.

POINT ON APPEAL

WHETHER DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION IN THIS INSTANCE?

ARGUMENT

DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION IN THIS INSTANCE

Theft of client funds by an attorney is one of the most serious breaches of the Rules of Professional Conduct that an attorney can commit. The Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla. 1986). This Honorable Court has noted that "(i)n the heirarchy of offenses for which lawyers may be disciplined stealing from a client must be among those at the very top of the list." Id.

In The Florida Bar v. Breed, 378 So.2d 783, 784 (Fla. 1979) this Court cited with approval a Report of Referee which stated that "(t)he willful misappropriation of client funds should be the Bar's equivalent of a capital offense. There should be no excuses." The major underlying reason why this should constitute a "capital offense" is that an attorney's theft of funds entrusted to him evidences a total disregard of his fiduciary duties. Tunsil at 1231.

It is important to note that this Honorable Court has on more than one occasion warned that this Court would "not be reluctant to disbar an attorney for this type of offense, even though no client is injured." Breed at 785; Tunsil at 1231. It is therefore appropriate to disbar the Respondent in the case sub judice as he has stolen approximately twenty-three thousand six

hundred eight dollars and thirty four-cents ($23,608.34) from the Estate of Cecil Harlig.

Disbarment in this instance would be consistent with this Court's decision in other theft cases. For example in The Florida Bar v. Dreyer, 493 So.2d 1025, 1026-1027 (Fla. 1986), an attorney was disbarred for five years as a direct result of the attorney's theft of client funds.

In a case similar to the one at hand an attorney was disbarred for among other things misappropriating estate assets. The Florida Bar v. Casler, 508 So.2d 721, 722-723 (Fla. 1987). The attorney in Casler was further required to give restitution as a condition precedent for readmission to the Bar. Id at 723.

Yet another example of the appropriateness of disbarment for the theft of client funds is The Florida Bar v. Nagel, 440 So.2d 1287 (Fla. 1983). In Nagel the Respondent converted his client's funds to his own use and was disbarred and was made ineligible to apply for readmission for ten years. Id at 1287.

At this juncture it is also important to note that repeatedly stealing client funds warrants disbarment. The Florida Bar v. Hunt, 441 So.2d 618, 620 (Fla. 1983).

The Florida Bar recognized that disbarment is the most severe form of discipline that can be imposed upon an attorney. The Florida Bar v. Turk, 202 So.2d 848, 849 (Fla. 1987); The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966). It is contended that one of the most serious breaches of the Code of

Professional Conduct, theft of the clients funds, warrants the most severe form of discipline, disbarment. Id.

The Florida Standards for Imposing Lawyer Sanctions mandate that the Respondent be disbarred. Rule 4.11 provides for disbarment "when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." Additionally, Rule 7.1 provides for disbarment "when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public or the legal system."

An application of the above mentioned case law and the Florida Standards for Imposing Lawyer Sanctions clearly indicates that the Respondent's repeated instances of theft from the Estate of Cecil Harlig over the period of 1984 to 1986 warrant the imposition of the ultimate disciplinary sanction, disbarment.

A. DISBARMENT FOR THE THEFT OF CLIENT FUNDS IS CONSISTENT WITH THE UNDERLYING PRINCIPLES OF LAWYER DISCIPLINE.

On prior occasions this Court has held that:

> " Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, 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. Lord, 433 So.2d 983, 986 (Fla. 1983). Also see The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970); The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979). On a prior occasion this Court has noted that: (t)he single most important concern of this Court in defining and regulating the practice of law is the protection of the public from incompetent, unethical and irresponsible representation. The Florida Bar v. Dancu, 490 So.2d 40, 41 (Fla. 1986). Thus, this Court has recognized the fact that of the three purposes for lawyer discipline the most important purpose is the protection of the public. Id.

The Court in Dancu explains that:

> "The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence." Id at 41-42.

It is contended that the only way the public will continue to trust a member of The Florida Bar is a pronouncement by this Honorable Court that when an attorney steals funds that have been entrusted to him, by a client, that attorney will be disbarred. Additionally, it is important to note that the best way to protect the public from an attorney-thief is to make sure that

the attorney-thief is no longer given an opportunity to steal from his clients by disbarring that attorney-thief.

The second concern of lawyer discipline is that the discipline should be fair to the attorney. It is contended that disbarment is not only warranted for theft of client funds but it is also fair to the attorney as an attorney-thief should expect no less for his serious breach of ethics.

It has been stated on more than one occasion that a punishment should fit the crime in such a way that the lawbreaker is not given an opportunity to commit the crime a second time. By disbarring an attorney-thief you are depriving him of the access to client funds and the opportunity to steal again.

The last concern of lawyer discipline is that the discipline handed out must be severe enough to deter others from committing these same acts. A disbarment is the severest form of discipline that this Honorable Court can impose. Turk at 849. Surely, the possibility of disbarment would give pause to anyone thinking about stealing his client's funds.

The New Jersey Supreme Court was also faced with determining what sanction to impose for the theft of client funds by an attorney. In re Wilson, 81 N.J. **451, 409** A.2d **1153 (1979).** In the case of In re Wilson, the Supreme Court of New Jersey determined that disbarment is the appropriate sanction for lawyers who misappropriate client funds. Id.

The New Jersey Supreme Court in adopting this rule stated that:

> "Like many rules governing the behavior of lawyers, this one has its roots in the confidence and trust which clients place in their attorney. Having sought his advice and relying on his expertise, the client entrusts the lawyer with the transaction - including the handling of the client's funds. Whether it be a real estate closing, the establishing of a trust, the purchase of a business, the investment of funds, the receipt of proceeds of litigation, or any one of a multitude of other situations, it is commonplace that the work of lawyers involves possession of their client's funds.. .. Whatever the need may be for the lawyer's handling of client's money, the client permits it because he trusts the lawyer... (T)here are few more egregious acts of professional misconduct of which an attorney can be guilty than the misappropriation of client's funds held in trust... recognition of the nature and gravity of the offense suggests only one result - disbarment." Id., at 81 NJ at 454-55, 409 A2d at 1154-55.

B. THE AGGRAVATING FACTORS PRESENT IN THIS CASE WARRANT THE IMPOSITION OF A DISBARMENT RATHER THAN A THREE YEAR SUSPENSION.

Rule 9.21 of the Florida Standards for Imposing Lawyer Sanctions defines aggravating circumstances as any consideration or factor "that may justify an increase in the degree of discipline to be imposed." Rule 9.22 lists several factors which may be considered in aggravation.

The first factor of Rule 9.22 that applies to the instant case is subsection (b). Rule 9.22(b) states that a dishonest or selfish motive may be taken into consideration as aggravation. Clearly the stealing of someone else's funds indicates a

dishonest, if not selfish motive. As the Respondent, during the period of 1984 through 1986, stole almost twenty four thousand dollars from the Estate of Cecil Harlig, his conduct is indicative of a dishonest motive.

The fact that the Respondent repeatedly dipped his hand into the till can also be taken into account as aggravation. The Florida Bar v. Bern, 425 So.2d 526, 528 (Fla. 1982). Rule 9.22(c) states that a pattern of misconduct may be viewed as aggravation. The Respondent admits that he repeatedly took money from the Estate of Cecil Harlig and he has therefore admitted to a pattern of misconduct,

Rule 9.22(j) indicates that indifference to making restitution can be an aggravating factor. The record in this case clearly indicates that the Respondent has made little if any attempts to return the funds that he took from the estate.

It must be pointed out that the Referee in the case sub judice declined to accept the lack of restitution as an aggravating factor. This finding by the Referee is not consistent with Rule 9.22(j) of the Florida Standards for Imposing Lawyer Sanctions.

In light of the above-mentioned aggravating factors it is clear that the Respondent should be disbarred,

C. THE MITIGATION PRESENT IN THIS CASE DOES NOT WARRANT A LESS SEVERE DISCIPLINE.

The Referee in this case at Bar found several mitigating factors to be present 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, intern rehabilitation, remorse and the fact that (Respondent) was suspended through his own act for more than one year." Report of Referee page 6.

It is the Bar's position that even if these mitigating factors are present the serious nature of the Respondent's actions, and the aggravating factors present in this case, clearly outweighs the mitigation that may be present.

The Referee noted that the Respondent lacked a prior disciplinary record. Yet it can be argued that the Respondent's suspension from the practice of law for the non-payment of dues is a prior disciplinary record. Although it must be noted that if a suspension for non-payment of dues is considered as a prior disciplinary record, it should be given less weight than a disciplinary record for violations of the Code of Professional Conduct.

The Referee also found as mitigation the fact that the Respondent willfully failed to pay his Bar dues so he would be suspended. The Respondent did not need to stop paying his dues as he could have asked to be placed on the inactive list for an incapacity not related to misconduct. See Rule 3-7.12 of the Rules of Discipline.

The Referee specifically found that the root of the Respondent's ethical violations was the Respondent's alcohol problem and therefore, the Respondent's alcohol problem was

accepted as mitigation.

The law is well settled that where alcoholism is the underlying cause of professional misconduct the alcoholism may be taken into consideration. The Florida Bar v. Headley, 475 So.2d 1213, 1214 (Fla. 1985).

However, alcoholism is not always accepted as an absolute defense for an ethical infraction. The Florida Bar v. Knowles, 500 So.2d 140, 141 (Fla. 1986).

In Knowles, an attorney converted a substantial amount of his client's trust funds and was later charged with eight counts of grand theft. Id. at 141. The attorney in Knowles pointed towards his alcoholism as a mitigating factor. Id. This Honorable Court found that the seriousness of the offense warranted disbarment notwithstanding the fact that the attorney had a serious alcohol problem. Id.

The Knowles case is not unlike the case at hand. Knowles took client funds over a period of four years. Id. at 141. Golub stole client funds over a two year period. Knowles was convicted of a felony. Id. Golub's actions can be considered felonious. Report of Referee page 5. Both attorneys had an alcohol problem. Id. Knowles did make restitution while Golub did not. Id. at 142.

As the Knowles opinion is closely analogous to the case at hand, the Respondent's alcoholism should be overlooked due to the nature of the seriousness of his ethical violations. Id. The

attorney in Knowles was disbarred for his theft of client funds even though his alcoholism was found to be the cause of his problems. Id. at 141-142. Therefore, the Respondent, Ronald Golub, should be disbarred for his theft of client funds.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed a three year suspension, and would urge this court to disbar the Respondent, Ronald S. Golub.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of Complainant on Petition for Review was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida **32399-1927** and that a true and correct copy was mailed to John A. Weiss, Attorney for Respondent, 101 North Gadsden Street, Tallahassee, Florida **32301**, this 14th day **of** April, 1988.

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