IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 71,830
TFB NO. 88-10198 (20A)

v.

JOHN J. SCHILLER,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the appellant, The Florida Bar, will be referred to as "The Bar". The appellee, JOHN J. SCHILLER, will be referred to as "the respondent". "C" will refer to the Complaint. "TR 1" will refer to the transcript of the final hearing on April 8, 1988. "TR 2" will refer to the transcript of the discipline hearing held on June 1, 1988. "RR" will refer to the report of the referee entered on June 28, 1988.

STATEMENT OF THE CASE AND OF THE FACTS

The respondent accepts The Bar's statement of the case and of the facts with the following exceptions:

The report of the auditor indicates that he determined the maximum shortage in the respondent's trust account to be $28,155.83 as of June 30, 1988. Thereafter, the amount of the deficiency decreased prior to the time The Bar requested an audit of the respondent's trust account. Following the audit, the respondent discovered that certain sums due him as fees had not been credited him. After making the appropriate adjustments, the maximum shortage in the account $26,752.64. The respondent made personal deposits into the account which balanced this shortage. (RR, p.1)

The Bar does not accurately state the Referee's determination that the respondent violated DR 1-102(A) (6). The Referee did not find that the respondent had "committed a criminal act reflecting on his honesty and fitness as a lawyer". (RR, p.2)

SUMMARY OF ARGUMENT

The referee in this case recommended that the respondent be suspended from the Florida Bar for a period of two years, followed by one years probation, successful completion of the Florida Bar Ethics examination, completion of a trust accounting course and quarterly reports of his trust account following any eventual reinstatement for the probationary year together with the payment of the costs of the disciplinary proceedings.

This recommended discipline is consistent with that given to other attorneys for similar violations and even exceeds the sanctions imposed in other recent cases.

The respondent requests that the Court adopt the disciplinary recommendations of the referee and believes the record supports the referee's recommendations.

ARGUMENT

ISSUE: SHOULD THE REFEREE'S RECOMMENDATION OF A SUSPENSION OF TWO (2) YEARS AND THEREAFTER UNTIL PROOF OF REHABILITATION; SUCCESSFUL COMPLETION OF THE FLORIDA BAR EXAMINATION ON LEGAL ETHICS; COMPLETION OF A TRUST ACCOUNTING COURSE; ONE (1) YEAR PROBATION WITH QUARTERLY REPORTS OF TRUST ACCOUNTS SUBMITTED TO THE BAR; ACCOUNTING FOR ALL TRUST FUNDS CURRENTLY IN THE RESPONDENT'S POSSESSION AND PAYMENT OF ALL COSTS INCURRED BY THE BAR IN THE PROCEEDINGS BE ACCEPTED BY THE COURT AS APPROPRIATE DISCIPLINE IN THIS MATTER.

In the report of the referee issued on June 28, 1988, the referee made certain findings of fact and upon those findings made recommendations as to guilt and discipline pertaining to the allegations made in the Bar's Complaint against the respondent. The referee recommended that the respondent be found guilty of violations of nine (9) Rules of discipline. However, the referee made no findings of fact in the Report which supported the allegations that the respondent committed the technical violations of Rule 5-1.2(b) (5)a. (Bylaws Section 11.02 (4) (c) 2.e.(i) before January 1, 1987); Rule 5-1.2 (b) (5) Bylaws Section 11.02 (4) (c) 2.e. before January 1, 1987); Rule 5-1.2 (b) (6) (Bylaws Section 11.02 (4) (c) 2.f. before January 1, 1987); and Rule 5-1.2 (c) (1) (2) and (3) (Bylaws Section 11.02 (4) (c) 3.a. b. and c. before January 1, 1987).

The respondent conceded at the final hearing that he had violated the Rules as alleged in the Complaint. In fact, as the Bar concedes and the referee acknowledges in his report, the respondent requested

a meeting with counsel for the Bar and the Bar auditor for the purpose of disclosing his trust account problems and violations. (TR 1 p.24-26) The Bar concedes in it's brief that none of the respondent's clients have been harmed as a result of the respondent's admitted misconduct. The referee, in making his recommendation as to discipline in this case found that no clients had been directly damaged by the respondent's misappropriation and that no client had even complained of the respondent's conduct with regard to his funds or of any other matter related to the respondent's handling of his affairs.

The Bar also concedes that all money owed to clients or their medical providers had been properly repaid prior to the final hearing and the respondent has made his best efforts to properly disburse the money to those entitled to the receipt of the funds.

The referee found nine factors to be mitigating based on the evidence presented:

1. The respondent has no prior history of discipline.
2. Once aware of a requested audit, he immediately disclosed the amount he believed to be the misappropiation.
3. Prior to meeting with the Bar, he undertook to replace the estimated deficit.
4. By the time of the final hearing, he had replaced all the money misappropriated.
5. The respondent seemed genuinely remorseful.
6. The respondent appears to be a good candidate for rehabilitation.
7. No clients were directly damaged.
8. No complaints were filed against the respondent as a result of his conduct.
9. Once the deficit was made up, the respondent paid the trust funds to the providers entitled to them.

The discipline recommended by the referee in this matter is entirely consistent with that imposed by the Court in similar cases. In The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981) the Court

rejected a petition by the Board of Governors that the respondent be disbarred. Instead, the Court imposed a two-year suspension despite the respondent's failing to make restitution to one client in the amount of $21,000.00 and misappropriation of an additional $37,500.00 from another client. The Court, in rejecting the demand for disbarment stated that it "believed that it is appropriate in determining the discipline to be imposed to take into consideration circumstances surrounding the incident, including cooperation and restitution. [Emphasis supplied] Id. at 803.

Cited in the Pincket case was the earlier case of The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). Breed was involved in a check-kiting scheme involving in excess of $70,000.00. The Court rejected the recommendation of the referee for disbarment and rejected as well the referee's contention that restitution "should not mitigate the discipline". Id. at 784. The Court recognized that

> "each case must be assessed individually and in deter mining the punishment we should consider the punishment imposed on other attorneys for similar misconduct. To totally ignore these prior actions would allow caprice to substitute for reasoned consideration of the proper discipline." Id. at 785.

In The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982) the Court cited Breed and Pincket and rejected the referee's suggested six month suspension. The Court followed Breed and Pincket in imposing a two-year suspension despite Morris' failure to make complete restitution of an unknown sum to his clients, his parents.

In the last case cited by the Bar in its brief, The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981) the attorney overdrew his trust account 51 times and committed numerous other violations. He was

charged in six separate complaints and failed to make restitution to his clients who lost over $33,800.00. For this the Court disbarred Harris. In its brief, the Bar acknowledges that Harris can be differentiated from the present case. But the Bar seems to rely on Harris for the proposition that an attorney's restitution should not be considered a mitigating factor in determining the appropriate discipline. The Bar's position seems to require automatic disbarment in cases of misappropriation of funds. Followed to its logical conclusion, this position would provide very little incentive for an attorney to attempt to make restitution in these cases even if he was genuinely remorseful and he would instead probably continue to enjoy the ill-gotten funds or place them out of the reach of his clients. In fact, the Court continues to accept restitution as a factor in mitigation and should continue to do so.

In more recent cases, the Court may be perceived to have relaxed the standards expressed in Breed and Pincket. In The Florida Bar v. Padgett, 501 So.2d 593 (Fla. 1987) the attorney pled nolo contendere to two counts resulting in the referee recommending a finding of guilt for violating twelve Rules including Integration Rule 11.02(3)(a) (conduct contrary to honesty, justice or good morals); Rule 11.02(4) (mishandling trust funds); Rules 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); 1-102(A)(6) (misconduct reflecting adversely on fitness to practice law); 2-106(E) (failure to prepare and execute written settlement statements); 9-102(B)(3) (inadequate trust records); 9-102(B)(4) (failing to promptly disburse funds after settlement); and 6-101(A)(3) (neglecting client's case). The referee recommended suspension for three months and one day, two years probation, audit of trust accounts and restitution. The Court approved the

recommendation and added it on to an existing six month suspension that Padgett was serving. Other attorneys have received similar sanctions for similar infractions: a six month suspension for violation of Rules 1-102(A)(4) (engaging in conduct involving fraud, misrepresentation, dishonesty and deceit); 1-102(A)(6) (conduct reflecting adversely on fitness to practice law, two counts); abandoning the law practice; neglecting a client's case and others. The Florida Bar v. Shannon, 506 So.2d 1036 (Fla. 1987); numerous "technical and substantive trust accounting improprieties" resulting in a client's loss of $20,000.00 and non compliance with trust accounting procedures resulting in a public reprimand and three years probation. The Florida Bar v. Block, 500 So.2d 529 (Fla. 1987); lengthy and continuous failure to comply with trust account record-keeping requirements despite previous private reprimand, coupled with intermingling of personal and trust account funds warranted public reprimand, two years probation and quarterly reports. The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986); commingling funds, failing to keep adequate trust account records and failing to reduce contingency fee agreements to writing warranted a public reprimand and one years probation with quarterly review of records. The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986). In the case of The Florida Bar v. Hosner, 513 So.2d 1057 (Fla. 1987) the Court cited the Mitchell and Aaron cases as well as the case of The Florida Bar v. Staley, 457 So.2d 489 (Fla. 1984) and remarked that these were more serious cases where such misconduct has been combined with other additional violations and in second-offense cases but still resulted in only public reprimand and probation.

Despite this line of cases and those of Breed and Pincket, the Bar would have the Court throw out its well considered position in cases of

this nature, remove the salutary effect of recognizing restitution as a factor in mitigation and impose the severest sanction possible under the Rules for the purpose of sending, as the Bar puts it in its brief, a "clear message" to others who may be otherwise willing to come forward and admit their misappropriations, cooperate with the Bar in its investigation and make the effort to make their clients whole again.

The referee's recommended discipline is consistent with the Court's previous decisions in similar cases and should be adopted by the Court.

CONCLUSION

The issue before the Court is whether to accept the referee's recommended disciplinary sanctions in this case. The recommended sanctions track nearly exactly the sanctions given other attorneys in similar or even more egregious situations. The recommended sanctions were carefully considered by the referee who heard the testimony and the evidence, are fully supported by the record and should not be rejected by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to THOMAS E. DEBERG, Esq. The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607 this 2nd day of November, 1988.

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