IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN J. SCHILLER,

Respondent.

_____/

CASE NO. 71,830
TFB NO. 88-10,198 (20A)

THE FLORIDA BAR'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, JOHN J. SCHILLER, will be referred to as "the respondent". "C" will denote the Complaint. "RC" will denote the Response to Complaint. "TR 1" will denote the Transcript of the final hearing on April 8, 1988. "TR 2" will denote the Transcript of the discipline hearing, held on June 1, 1988. "RA" will denote the report of The Florida Bar auditor. "RR" will denote the Report of Referee.

STATEMENT OF THE FACTS AND OF THE CASE

Following notification that a grievance had been filed against him and that a trust account audit would be sought, respondent voluntarily went to The Florida Bar Association and disclosed that there was a deficit in his trust account. He estimated the deficit to be approximately $10,000.00. Prior to meeting with The Florida Bar, respondent had deposited $9,000.00 of his personal funds toward the aforementioned deficit. (RA, p.10, L.7; RR, p.1). A subsequent audit of the respondent's trust account for the period of June 1982 through October 30, 1987 disclosed deficits throughout the period audited. In 1983 and until approximately June 6, 1986 the shortage was less than $1,000.00. From January 6, 1986 through September 21, 1987 the deficit increased steadily to a high of $29,292.23 on September 21, 1987. (RA, p.11, L.21; RR, p.1). Following a determination by The Florida Bar auditor of the exact amount of the deficit, respondent borrowed the money to cover the entire shortage. (TR 1, p.27, L.15-19; TR 1, p.26, L.15-17; RR, p.1).

Respondent was aware, from at least approximately January 1986 through the time of his $9,000.00 deposit on September 23, 1987, that he was writing checks on the trust account without authorization to do so. (TR 1, p.8, L.5-17). He admitted that over a period of time, he misappropriated substantial amounts of money to his own use. (TR 1, p.10, L.5-17). Trust money was

transferred into the respondent's operating account and used to pay office operating expenses. (TR 1, p.11, L.16-17).

Respondent misappropriated the trust money from amounts withheld from settlements to pay providers in personal injury actions. He rationalized to himself that his clients were off the hook because he had agreed to protect the bills, and therefore he was personally responsible if the providers made a claim for the funds. (TR 1, p.10, L.1-14). On occasion respondent deposited a nominal amount towards the deficit, an amount which he felt he could afford at the time of the deposit. (TR 1, p.17, L.6-16; TR 1, p.22, L.19-25 and p.23, L.1-4). Only after he was aware that The Florida Bar was going to audit did he borrow the money to cover the deficit. (TR 1, p.18, L.2-13, TR 1, p.17, L.17-25). He did not borrow the money earlier to cover the deficit although he knew he was misappropriating client funds. (TR 1, p.18, L.12-14). Respondent was clearly aware that he was misappropriating trust monies which he should have sent to physicians. (TR 1, p.16, L.23-24). Respondent knew, at least by the early part of 1986, that he was writing checks which he was not authorized by his client to write, and which his client would not have wanted him to write. (TR 1, p.17, L.2-5).

Although respondent was aware in both 1986 and 1987 that his trust accounts were not in substantial compliance with the Rules and Regulations of The Florida Bar, when he submitted his payment of Bar dues in 1986 and 1987, he certified that his

trust accounts were in substantial compliance with those rules and regulations. (TR 1, p.9, L.8-20).

In the discipline proceeding held on June 1, 1988, the referee found respondent guilty of the following violations: Rule 5-1.1 (Integration Rule 11.02(4) before January 1, 1987) (Utilization of client trust funds for purposes other than those for which they were entrusted); Rule 5-1.2(B)(5)a (Bylaws Section 11.02(4)(c)2.e.(i) before January 1, 1987 and Integration Rule 11.02(4)(c)2.c. before July 1, 1984) (failure to adequately identify all disbursements from trust accounts); Rule 5-1.2(b)(5) (Bylaws Section 11.02(4)(c)2.e. before January 1, 1987) (failure to maintain and/or produce for inspection cash receipts and disbursement journals). Rule 5-1.2(b)(6) (Bylaws Section 11.02(4)(c)2.f. before January 1, 1987 and Integration Rule 11.02(4)(c)2.d. before July 1, 1984) (failure to maintain separate ledger cards for all clients); Rule 5-1.2(c)(1), (2), and (3) (Bylaws Section 11.02(4)(c)3.a., b., and c. before January 1, 1987 and Integration Rule 11.02(4)(c)4.a. before July 1, 1984) (failure to prepare trust account reconciliations and/or produce said reconciliations for inspection); Rule 4-1.15(a) (DR 9-102(A) before January 1, 1987) (commingling); Rule 4-1.15(b) (DR 9-102(B)(4) before January 1, 1987) (failure to promptly pay or deliver to a client trust funds which the client is entitled to receive); DR 1-102(A)(3) (engaging in illegal conduct involving moral turpitude); DR 1-102(A)(6)(engaging in conduct

adversely reflecting on his fitness to practice law) (committing a criminal act reflecting on his honesty and fitness as a lawyer); Rule 4-8.4(c)(dishonesty). (RR, p.2).

The referee recommended that the respondent be disciplined as follows: That respondent be suspended from the practice of law for a period of twenty-four (24) months and thereafter until he proves rehabilitation; that prior to reinstatement, respondent retake and successfully pass the portion of The Florida Bar examination on legal ethics and, in addition, successfully complete a CLE or Bar trust accounting course; that upon readmission to the Bar he be placed on one (1) year probation, with quarterly reports of his trust account being completed by a CPA and submitted to The Florida Bar. In addition, he recommended that prior to readmission respondent should be required to account for all trust funds currently in his possession and to show that they have been disbursed to the appropriate parties. He further recommended that the respondent pay all costs incurred by The Florida Bar in these disciplinary proceedings.

The Florida Bar Board of Governors, having reviewed the Report of Referee and attached exhibits, along with portions of the transcripts of proceedings, voted to seek disbarment in this matter.

SUMMARY OF ARGUMENT

Respondent misappropriated over $29,000.00 from his trust account. (RA, p.11, L.21; RR, p.1). The money misappropriated was taken from amounts withheld from clients' settlement checks to pay physicians whom had been given letters of protection by the respondent. (TR 1, p.10, L.1-14). Although aware that he was misappropriating client monies, and that there were deficits in his trust account, respondent did not replace the monies which he had taken until after he was aware of an upcoming Florida Bar audit. (TR 1, p.18, L.2-14; TR 1, p.17, L.17-25). Further, respondent on two (2) occasions submitted certified statements to The Florida Bar Association indicating that his trust accounts were in substantial compliance with the Rules Regulating the Florida Bar even though he was aware of the deficits. (TR 1, p.9, L.8-20).

The referee's recommendation is that respondent be suspended from the practice of law for a period of twenty-four (24) months and thereafter until he proves rehabilitation; that prior to reinstatement, respondent retake and successfully pass the portion of The Florida Bar examination on legal ethics, and, in addition, successfully complete a CLE or Bar trust accounting course; that upon readmission to the Bar he be placed on one (1) year probation, with quarterly reports of his trust account being completed by a CPA and submitted to The Florida Bar. In

addition, the referee recommends that prior to readmission respondent should be required to account for all trust funds currently in his possession and to show that they have been disbursed to the appropriate parties. The referee further recommends that the respondent pay all costs incurred by The Florida Bar in these disciplinary proceedings. The recommended discipline is not an appropriate disciplinary measure for the knowing misappropriation of monies withheld from client settlement checks, particularly where the attorney has issued letters of protection to the individuals to whom those monies were due.

Respondent has paid back all misappropriated monies and did so prior to the final hearing. He cooperated with The Florida Bar after he was aware there was going to be an audit. However, the respondent's knowing and prolonged misappropriation of client monies when coupled with his breech of his fiduciary responsibility to those to whom he gave letters of protection, and with his knowing misrepresentation to The Florida Bar Association that his trust accounts were in substantial compliance with the Rules Regulating the Florida Bar, warrants disbarment.

Therefore, The Florida Bar respectfully requests that this Court disapprove the referee's recommendation of a two (2) year suspension and its associated conditions, and order the respondent disbarred from the practice of law in the State of Florida.

ARGUMENT

ISSUE: WHETHER A TWO (2) YEAR SUSPENSION, FOLLOWED BY A YEAR OF PROBATION, IS A SUFFICIENT DISCIPLINARY SANCTION FOR AN ATTORNEY WHO KNOWINGLY MISAPPROPRIATES TRUST MONIES WITHHELD FROM SETTLEMENT CHECKS, FAILING TO DISTRIBUTE THOSE MONIES TO INDIVIDUALS WHOM HAVE BEEN GIVEN LETTERS OF PROTECTION.

It is uncontested that the respondent misappropriated client trust money, (TR 1, p.10, L.5-17) and that he did so knowingly over a period that extended from at least early 1986 through approximately September 21, 1987. (TR 1, p.8, L.5-17). The deficit in the trust account reached as high as $29,292.23. It is further well established that respondent issued letters of protection to physicians in personal injury cases, and then misappropriated the monies owed to those physicians. (TR 1, p.10, L.1-14). Additionally, when respondent submitted his annual Bar dues in 1986 and 1987, he misrepresented to The Florida Bar that his trust accounts were in substantial compliance with the Rules Regulating the Florida Bar although he knew that his representations were false. (TR 1, p.9, L.8-20).

There was no evidence presented that the misappropriation was related to substance abuse, emotional difficulties experienced by the respondent, alcoholism, or financial crises. Also there is no evidence to suggest any clients were harmed by the respondent's misconduct. All trust monies which had been

misappropriated were replaced prior to the time of the final hearing, and respondent subsequently has made his best efforts to disburse the money to those entitled thereto.

The two (2) year suspension ordered by the referee in the instant case is not without precedent. In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), no client was injured due to Breed's misappropriations. In Breed, the respondent utilized his client trust account as one of his sources to cover deficits created by a check kiting scheme in a non-client account. The referee in Breed concluded that the client trust account was short approximately $7,816.00, and that Breed had converted clients' funds to his personal use. It was further found that Breed had engaged in a check kiting scheme, had failed to keep adequate records or reconcile the escrow accounts, that he commingled his funds with those of his clients, and that he misused and misappropriated his clients' funds. In recommending disbarment, the referee had stated that "while many disciplinary infractions involve situations where matters in mitigation should be considered, a violation involving misuse of clients' funds is not one of them. Recognizing restitution as a defense or in mitigation may help minimize client losses, but it should not mitigate the discipline." Id. at 785. The Supreme Court, on appeal, found that a two (2) year suspension with proper proof of rehabilitation before readmission was the appropriate discipline. The Court gave notice, however, to the legal profession that henceforth they would not be reluctant to disbar an attorney for

this type of offense even though no client is injured. Id.

In The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981), the Court indicated that while it was not in any way retreating from the statement in Breed, 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. Id. at 803. In Pincket, the attorney in a real estate transaction received approximately $37,500.00 in escrow money for the sellers, but was thereafter unable to promptly account for and deliver the full amount to the sellers upon demand on respondent's trust account. In addition, the respondent was aware that other funds for which demand was made on his trust account were not available and that a continuing violation existed of Trust Accounting Rules. The respondent voluntarily reported the additional violation to the office of staff counsel of The Florida Bar, and was desirous of making full restitution and of continuing the practice of law. The Court noted that the respondent cooperated fully with The Florida Bar by voluntarily advising the Bar of the deficiency in his trust account, stipulated to a temporary suspension and entered an unconditional plea of guilty, thereby waiving both grievance and referee proceedings. Pincket made partial restitution, but did not fully restore trust funds misappropriated from an estate. The issue before the Court in Pincket was whether or not disbarment, recommended by The Board

of Governors, was too severe under the circumstances of the case. The Court indicated that, while not retreating from its position in Breed, it believed that it is appropriate to take into consideration circumstances surrounding the incident, including cooperation and restitution. Id. at 803. Pincket was suspended for two (2) years.

The instant case is similar in many respects to Pincket. Once Respondent became aware that in all probability his trust account would be audited, he came forward and admitted the misappropriation. Additionally he began making restitution. However, unlike Pincket, by the time of the final hearing he had fully replaced all trust funds which had been converted. He was cooperative during the proceedings, waiving the grievance committee hearing and admitting to the allegations at the referee level.

In The Florida Bar v. Morris, Jr., 415 So.2d 1274 (Fla. 1982), the respondent freely admitted that he had converted trust funds to his own use, knowing fully that he was invading trust funds. The Court found that Morris' conduct was similar to Pincket's, noting that Morris had voluntarily turned over his books and records to The Florida Bar, made restitution to one client, and additionally had voluntarily withdrawn from the practice of law. The Court order that the respondent be suspended from the practice of law for a period of two (2) years and that he be readmitted only upon proof of rehabilitation. Pincket and Morris provide support for the discipline

recommended by the referee in the instant case. Nevertheless, in Breed, 378 So.2d at 785, Justices England and Sundberg, dissenting, noted that the referee found that Breed woefully disregarded his fiduciary responsibility and that his act evidenced moral turpitude. Under the circumstances, they believed that the appropriate discipline was disbarment. In Morris, 415 So.2d at 1275, Justice Alderman, dissenting, stated that disbarment is the only appropriate discipline in this type of case. He further indicated that a lawyer who steals from his trust account is worse than a common thief, and that there is no place for such person in The Florida Bar. Justice Alderman had in a similar manner characterized the behavior of Pincket as theft.

In The Florida Bar v. Harris, 400 So.2d 1220, 1222 (Fla. 1981), the Court found that a respondent who engages in a continuing and irresponsible pattern of conversion of client trust funds to his own use, failure to account for clients' trust funds and failure to maintain trust records should be disbarred. The Court noted that Harris' actions demonstrated an attitude wholly inconsistent with the high standards of the legal profession. In Harris, the respondent commingled his own funds with clients' funds during a period from November 1977 until sometime in 1979. He wrote several trust checks on the accounts when there were insufficient funds to cover those checks, and overdrew the trust account fifty-one (51) times. Id. at 1220. Additionally, respondent collected a $4,000.00 settlement for his

client, deposited the money into his trust account and then issued a post dated check which subsequently was returned for insufficient funds. After the complaint regarding the insufficient funds was lodged against respondent, his client was sent a check to cover the amount due her. In another instance, the respondent failed to pay his client $2,000.00 of the amount to which the client was entitled based on a settlement. The $2,000.00 was paid after the grievance committee hearing. In another settlement case, the respondent converted $27,427.00, representing his client portion of her father's estate. Under the circumstances of Harris, the Court ordered that the respondent be disbarred.

The instant case can certainly be differentiated from Harris. In the instant case, the respondent fully repaid all monies taken from the trust account prior to the final hearing, while in Harris full repayment was not made. However, repayment of misappropriated trust funds by a respondent when that repayment is done only after the respondent believes his misconduct will be discovered should never be considered mitigating. To give less disciplines to someone because they are able to repay suggests to the legal profession that if an attorney wishes to use client money for his own purposes, he should protect himself from the ultimate sanction by setting aside enough money, or having a good enough credit line, to make repayment if detected. Although the respondent in the instant case made a couple of deposits into the trust account prior to

the time that he knew The Florida Bar was going to audit, he deposited only what he "could afford to put in at that time". He did not at that time borrow the money to cover the full deficit even though he knew he was misappropriating client funds. (TR, p.18, L.12-13).

Because of the circumstances under which the trust accounts were eventually replenished, the replacement of monies therein should not be considered mitigating.

In the instant case, there is no indication that there was any damage to clients. Additionally, there were no complaints by individuals to whom trust monies should have been disbursed. To find these facts mitigating would be to reward the respondent for his style of misappropriation and skill in concealing his misconduct.

Respondent testified that his clients authorized him to withhold monies in settlement cases to pay various medical providers, and that he had issued letters of protection to those providers. The monies withheld became the funds that he misappropriated. He further stated that he rationalized to himself that since he was personally responsible to the providers if the providers made a claim for the funds, then he would be personally obligated to pay them. He felt the clients were off the hook since he had agreed to protect the bills. (TR, p.10, L.1-14). Hopefully the respondent would not argue to this Court that since he stole the money from physicians rather than clients, his conduct should not be considered as egregious.

The thefts are, in fact, even more reprehensible given that he had issued letters of protection to the physicians and thereby had a fiduciary responsibility to both the clients and the physicians. Respondent does testify that he honestly believed that he would be able to remedy the deficits in his trust account. Further he indicated that it was his intention that no client should ever suffer, and that the persons to whom the money was owed would not suffer. In light of the respondent's willingness to not honor letters of protection, the false statements regarding the status of his trust account which he submitted in two (2) consecutive years to The Florida Bar, and the steady increase in the amount of deficits due to misappropriations until the detection of the misconduct was imminent, the above statements by respondent should be seen as self serving at best.

The respondent testified that inspite of his knowledge that he had written a check when there were not sufficient client trust funds to cover that check, (TR, p.9, L.8-18), and although aware that he was misappropriating client trust monies (TR, p.9, L.15-17), he certified on his due statements in both 1986 and 1987 that his trust accounts were in substantial compliance with the Rules Regulating the Florida Bar. (TR, p.9, L.8-20).

The time is long past due when the attorneys in the State of Florida should be given the clear message by the Florida Supreme Court that the knowing and intentional misappropriation

of trust monies by an attorney merits the maximum sanctions under the Rules. Attorneys should not be advised through the Court's decision in this case or in any other case that they can protect themselves from disbarment by assuring that they can pay back misappropriated money if caught, that they can avoid disbarment if they give letters of protection to those from whom they steal and are willing to pay the individuals the money owed to them if caught, or that they can make blatant and knowing misrepresentations regarding the status of their trust account in dues' statements to The Florida Bar and yet remain as members of the Bar.

The two (2) year suspension with its accompanying conditions as recommended by the referee fails to achieve the purpose for which sanctions are to be utilized. Given the frequency with which cases of misappropriation come before this Court, it is increasingly clear that the deterrence created by past disciplines is insufficient. Creating a category of knowing theft which is somehow not worthy of disbarment because an attorney confesses when detection is imminent and can pay back what he misappropriated would weaken the deterrent value of discipline. It would also do little to create public confidence in the Bar's ability to police itself.

Based on the foregoing, The Florida Bar respectfully requests that this Court disapprove the referee's recommended

discipline of a suspension from the practice of law for a period of twenty-four (24) months and its accompanying conditions, and disbar respondent from the practice of law in this State.

CONCLUSION

The issue before this Court is whether or not a Two (2) Year Suspension, plus requiring that the respondent pass the Ethics portion of The Florida Bar exam prior to readmission, that he complete a course on Trust Accounting, and that he serve a one (1) year term of probation following readmission to the Bar is a sufficient discipline for an attorney who knowingly misappropriated client trust funds, but replaced the misappropriated money and cooperated with The Florida Bar after detection was imminent.

It is The Florida Bar's position that the penalty recommending by the referee is not sufficient for the respondent's misconduct in this case. The misappropriation was intentional, the monies were taken from physicians who had been given letters of protection, and the respondent submitted two certified statements to The Florida Bar indicating that his trust accounts were in compliance with trust accounting regulations even though he knew this was not true.

The only appropriate sanction for the respondent's misconduct is disbarment.

WHEREFORE, The Florida Bar respectfully requests that this Honorable Court disapprove the referee's recommended discipline and in lieu thereof disbar the respondent, JOHN J. SCHILLER, from the practice of law in this State.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FLORIDA BAR'S INITIAL BRIEF has been furnished to JOHN J. SCHILLER, Respondent, at his record Bar address of Post Office Box 2835, Ft. Myers, Florida 33902-2835, by Certified Mail, Return Receipt Requested, #P130 629 500; and to JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by Regular U.S. Mail; on this 17 day of August, 1988.

Thomas E. DeBerg

THOMAS E. DEBERG