IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEFFREY SHUMINER,

Respondent.
_____/

Supreme Court
Case No. 72,886

The Florida Ear Case
No. 88-70,993(11F)

INITIAL BRIEF OF TIE FLORIDA BAR

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TABLE OF CITATIONS

OTHER AUTHORITIES:

Florida Standards For Imposing Lawyer Sanctions

SYMBOLS AND REFERENCES

In this Brief the appellant, The Florida Bar, will be referred to as "The Florida Bar"; the appellee, Jeffrey Shuminer, will be referred to as "Respondent"; "RR" will denote the Report of Referee and "T" will denote the transcript of the June 16, 1989 final hearing.

STATEMENT OF THE CASE

The Florida Bar filed its Complaint and Request for Admissions on August 18, 1988. On August 31, 1988, the Honorable Steven Shutter was appointed Referee. The Respondent submitted his Answer and Affirmative Defenses to the Complaint and Request for Admissions on October 17, 1988. On December 5, 1988, The Florida Bar filed a Motion Compelling Discovery and Motion for Sanctions as a result of Respondent's failure to respond to discovery requests. On January 3, 1989, Respondent filed a Motion to Stay Proceedings. On January 17, 1989, the Referee deferred ruling on The Florida Bar's Motion for Sanctions affording Respondent the opportunity to petition the Supreme Court for an extension of time in which to conclude the proceedings. On January 17, 1989, Respondent filed a Motion for Extension of Time Within which to Conclude Referee Hearing and Filing of Referee Report. On January 26, 1989, The Florida Bar and Respondent entered into a Stipulation whereby Respondent would enter a guilty plea admitting the facts alleged in the Bar's complaint as well as the disciplinary rule violations and The Florida Bar would not oppose Respondent's Motion for Extension of Time. On January 31, 1989, the Supreme Court of Florida granted Respondent's Motion for Extension of Time to May 30, 1989. On February 23, 1989, Respondent filed an Unconditional Guilty Plea, reserving the right to present testimony and evidence relevant to discipline. On May 12, 1989, The Florida Bar filed a Motion to Set Date for Final Hearing and

Motion for Sanctions. On May 18, 1989, Respondent filed his Response to Motion for Sanctions and his response to requested discovery. On May 23, 1989, Respondent filed a Motion for Extension of Time Within which to Conclude Referee Hearing and Filing of Referee Report. On May 30, 1989, the Supreme Court of Florida granted Respondent's Motion for Extension of Time to June 30, 1989. A final hearing was held on June 16, 1989. On July 7, 1989, the Supreme Court of Florida granted the Referee's Request for Extension of Time to file Referee Report to July 17, 1989. The Referee entered his Report of Referee on July 10, 1989, finding Respondent guilty of all violations charged by The Florida Bar and to which Respondent had entered an Unconditional Plea of Guilty. The Referee recommended that Respondent be suspended from the practice of law for eighteen (18) months, followed by a probationary period of thirty (30) months and 100 hours of community service.

This cause was considered by the Board of Governor's of The Florida Bar at its meeting which ended September 23, 1989. The Florida Bar filed its Petition for Review on October 9, 1989 appealing the Referee's recommended discipline of an eighteen month suspension.

STATEMENTS OF THE FACTS

Th Florida Bar wc ld dopt the Referee's finding of facts as contained in the Report of Referee. Those findings have been included below for the Court's convenience.

This Referee finds the following facts:

A. He is, and at all times hereinafter mentioned was a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. He maintained a trust account at Continental National Bank of Miami, Miami, Florida, Account No. 6-121-2 (hereinafter referred to as "trust account").

C. An audit of his trust account was undertaken by Carlos Ruga. The Florida Bar Staff Auditor, which included all recorded trust account transactions during the period January 1, 1987 through January 31, 1988.

D. As of October 30, 1987 he should have preserved in his trust account at least TWELVE THOUSAND TWO HUNDRED SIX DOLLARS AND TWENTY CENTS ($12,206.20) representing funds received from or on behalf of clients (hereinafter referred to as "client liability").

E. His trust account bank statement reflects a balance of EIGHT HUNDRED FORTY TWO DOLLARS AND FIFTY FOUR CENTS ($842.54) as of October 30, 1987.

F. His trust account client liability exceeded trust account assets as of October 30, 1987.

G. As of October 30, 1987, there was a shortage in his trust account in the amount of ELEVEN THOUSAND THREE HUNDRED SIXTY THREE DOLLARS AND SIXTY-SIX CENTS ($11,363.66).

H. The shortage in his trust account was created by his unauthorized use of trust funds for the benefit of himself and/or persons other than the particular client for whom or from whom funds were received.

I. By reason of the foregoing, he misappropriated trust funds.

J. His misuse of trust funds constitutes a violation of 5-1.1, Rules Regulating Trust Accounts.

K. He represented Felipe Sudarsky (hereinafter referred to as "Sudarsky") in a real estate transaction.

L. Sudarsky is a principal of Percheron, Inc.

M. On or about April 3, 1987 he received from Sudarsky or on his behalf the sum of ELEVEN THOUSAND DOLLARS ($11,000.00) in connection with his representation of Sudarsky (hereinafter referred to as "Sudarsky trust funds").

N. He deposited the Sudarsky trust funds into his trust account on April 3, 1987.

O. On April 3, 1987, he issued Check No. 1007 from his trust account, made payable to himself, in the amount of $500.00 for his attorney's fees in connection with his representation of Sudarsky.

P. As of April 3, 1987 his trust account client liability in connection with his representation of Sudarsky was the

remaining balance of TEN THOUSAND FIVE HUNDRED DOLLARS ($10,500.00).

Q. He failed to preserve the remaining balance of the Sudarsky trust funds in the amount of $10,500.00 in his trust account for use in connection with the real estate transaction.

R. He utilized the remaining balance of the Sudarsky trust funds in the amount of $10,500.00 for other unauthorized purposes.

S. by reason of the foregoing, he misappropriated the Sudarsky trust funds.

T. His handling of funds he received from or on behalf of Sudarsky constitutes misappropriation of trust funds in violation of Rule 5-1.1, Rules Regulating Trust Accounts.

U. He represented Frank Alexander (hereinafter referred to as "Alexander") in connection with a personal injury matter arising from an automobile accident.

V. In conjunction with his representation of Alexander, he handled the claim for property damage to the vehicle on behalf of the owner of the vehicle, Alexander's mother (hereinafter referred to individually as "Mrs. Alexander" or in conjunction with Alexander as "Alexanders").

W. During or about June 1987, he entered into an agreement with Liberty Mutual Insurance Company to settle Alexander's claim for the sum of SIX THOUSAND DOLLARS ($6,000.00).

X. During or about June 1987, he entered into an agreement with Liberty Mutual Insurance Company to settle the

property damage claim of Mrs. Alexander for the sum of ONE THOUSAND FIVE HUNDRED EIGHTY NINE DOLLARS ($1,589.00).

Y. He entered into the settlement agreement with the insurance company without the prior knowledge and consent of the Alexanders.

Z. His actions of settling the Alexanders claims without the prior knowledge and consent of the Alexanders constitute a violation of Rule 4-1.2(a) and 4-1.4(a) & (b) of the Rules of Professional Conduct.

AA. In June 1987, he received settlement proceeds on behalf of Alexander totalling SIX THOUSAND DOLLARS ($6,000.00).

BB. Between June 1987 and January 1988 he failed to advise Alexander that he had settled his claim.

CC. between June 1987 and January 1988 he failed to advise Alexander that he received settlement proceeds on his behalf.

DD. Alexander contacted him subsequent to June 1987 to obtain information concerning the status of his claim.

EE. In response to Alexander's inquiries, he represented to Alexander that the settlement negotiations were proceeding.

FF. He represented to Alexander that the insurance company had offered THREE THOUSAND TWO HUNDRED DOLLARS ($3,200.00) in settlement.

GG. His representations to Alexander concerning settlement negotiations and an offer were false in that at the time the representations were made, he had already settled Alexander's claim and had received SIX THOUSAND DOLLARS ($6,000.00) as settlement proceeds.

HH. His failure to advise Alexander of both the settlement of his claim and receipt of settlement proceeds, as well as the misrepresentations to Alexander concerning the status of his claim constitutes a violation of Rules 4-8.4(c) and 4-1.15(b) of the Rules of Professional Conduct and Rule 3-4.3 of the Rules of Discipline.

11. Pursuant to the settlement agreement he entered into on behalf of the Alexanders, in June 1987 he received two checks from the insurance company in an aggregate amount of SEVEN THOUSAND FIVE HUNDRED EIGHTY NINE DOLLARS ($7,589.00) representing settlement proceeds (hereinafter referred to as "Alexander settlement proceeds").

JJ. The Alexander settlement proceeds funds constitute trust funds.

KK. He failed to deposit the Alexander settlement proceeds into his trust account.

LL. His failure to deposit into his trust account the settlement proceeds entrusted to him on behalf of the Alexanders constitutes a violation of Rule 4-1.15(a), Rules of Professional Conduct.

MM. He maintained an office operating account at Continental National Bank of Miami, Miami Florida, Account No. 6-12-44 (hereinafter referred to as operating account).

NN. On June 25, 1987, he deposited the Alexander settlement proceeds into the operating account.

OO. On or about June 25, 1987, he issued Check No. 1140 from the office account, made payable to Prestige Imports, in the amount of FIVE THOUSAND DOLLARS ($5,000.00).

PP. He issued check No. 1140 as a deposit for a new car.

QQ. He utilized Alexander settlement proceeds for the benefit of himself or persons other than Alexander, including payment of employees salaries and office operating expenses.

RR. By reason of the foregoing, he misappropriated the Alexander settlement proceeds.

SS. His failure to use Alexander settlement proceeds for the specific purpose for which they were entrusted to him constitutes misappropriation of trust funds in violation of Rule 5-1.1, Rules Regulating Trust Accounts.

TT. On or about November 15, 1986, he executed a Doctor's Lien to protect the fees of Lawrence Tuchinsky for medical services provided to Alexander from funds received, including settlement proceeds.

UU. Although he received settlement proceeds on behalf of Alexander in June 1987, he did not satisfy the Doctor's Lien.

VV. He utilized the Alexander settlement proceeds which were to be used to satisfy the Doctor's Lien for other unauthorized purposes.

WW. He misappropriated the portion of the Alexander settlement proceeds which were to be used to satisfy the Doctor's Lien.

XX. The failure to satisfy the Doctor's Lien from Alexander settlement proceeds and the unauthorized use of said

funds constitutes a violation of Rule 5-1.1, Rules Regulating Trust Accounts and Rule 4-1.15(b), Rules of Professional Conduct.

YY. He represented Eduardo Soto (hereinafter referred to as "Soto") in a personal injury matter arising from an automobile accident.

ZZ. On or about October 10, 1986, he executed a Doctor's Lien to protect the fees of David Tuchinsky for medical services provided to Soto from funds received, including settlement proceeds.

AAA. He negotiated a settlement on behalf of Soto with Orion Insurance Company.

BBB. Pursuant to the settlement agreement he entered into on behalf of Soto, in July 1987, he received a check from the insurance company in the amount of THREE THOUSAND TWO HUNDRED DOLLARS ($3,200.00) representing settlement proceeds (hereinafter referred to as "Soto settlement proceeds").

CCC. The Soto settlement proceeds funds constitute trust funds.

DDD. On July 20, 1987, he deposited the Soto settlement proceeds into the trust account.

EEE. He prepared a settlement statement which provided for payment to him of $500.00 for his attorney's fee, payment to David Tuchinsky of ONE THOUSAND DOLLARS ($1,000.00) to satisfy the Doctor's Lien and payment to Soto of ONE THOUSAND SEVEN HUNDRED DOLLARS ($1,700.00) which represented the net settlement

proceeds due his client, Soto (hereinafter referred to as "Soto sett1ement statement).

FFF. The Soto settlement statement was executed by Soto and reflected authorization to disburse Soto settlement proceeds.

GGG. On July 17, 1988, he issued Check No. 1017 from the trust account, made payable to himself, in the amount of $500.00 representing the attorney's fees in accordance with the Soto sett1ement statement.

HHH. On July 28, 1988, he issued Check No. 2021 from the trust account, made payable to Soto, in the amount of ONE THOUSAND SEVEN HUNDRED DOLLARS ($1,700.00) representing the net proceeds due Soto in accordance with the settlement statement.

111. He failed to issue a check from his trust account for payment to David Tuchinsky in accordance with the settlement statement and Doctor's Lien.

JJJ. He utilized funds in the amount of ONE THOUSAND DOLLARS ($1,000.00) which were entrusted to him for payment to David Tuchinsky for other unauthorized purposes.

KKK. He misappropriated the portion of the Soto settlement proceeds which were to be used to satisfy the Doctor's Lien.

LLL. The failure to disburse the Soto settlement proceeds in accordance with the settlement statement, as well as his misappropriation of funds which were to be used to satisfy the Doctor's Lien constitutes a violation of Rule 5-1.1, Rules Regulating Trust Accounts, and Rule 4-1.15(b), Rules of Professional Conduct.

MMM. He represented Nestor Garcia (hereinafter referred to as Garcia) in a personal injury arising from an automobile accident.

NNN. He negotiated a settlement on behalf of Garcia with an insurance company.

OOO. On or about November 14, 1986, he executed a Doctor's Lien to protect the fees of Lawrence Tuchinsky for medical services provided to Garcia from funds received, including settlement proceeds.

PPP. Pursuant to the settlement agreement he entered into on behalf of Garcia, in or about July 1987, he received a check from the insurance company in the amount of FOUR THOUSAND FIVE HUNDRED DOLLARS ($4,500.00) representing settlement proceeds (hereinafter referred to as "Garcia settlement proceeds").

QQQ. The Garcia settlement proceeds funds constitute trust funds.

RRR. On July 20, 1987, he deposited the Garcia settlement proceeds into the trust account.

SSS. He prepared a settlement statement dated July 17, 1987 which provided for payment of ONE THOUSAND ONE HUNDRED TWENTY FIVE DOLLARS ($1,125.00) to him for the attorney's fee and payment to Garcia of TWO THOUSAND EIGHT HUNDRED EIGHTEEN DOLLARS AND EIGHTY CENTS ($2,818.80) which represented the net settlement proceeds due his client, Garcia (hereinafter referred to as "Garcia settlement statement").

TTT. Pursuant to the Garcia settlement statement, $500.00 was retained by him for payment of Garcia's medical bills and $56.20 was retained by him for payment of 5% sales tax.

UUU. The Garcia settlement statement was executed by Garcia and reflected authorization to disburse Garcia settlement proceeds.

VVV. On July 17, 1988, he issued Check No. 1015, from the trust account, made payable to himself, in the amount of ONE THOUSAND ONE HUNDRED TWENTY FIVE DOLLARS ($1,125.00) representing the attorneys fees in accordance with the Garcia settlement statement.

WWW. On July 17, 1988 he issued Check No. 1014 from the trust account, made payable to Garcia, in the amount of TWO THOUSAND EIGHT HUNDRED EIGHTEEN DOLLARS AND EIGHTY-EIGHT CENTS ($2,818.88) representing the net proceeds due Garcia in accordance with the settlement agreement.

XXX. He failed to issue a check from his trust account for payment to Lawrence Tuchinsky in accordance with the Garcia settlement statement and Doctor's Lien.

YYY. He failed to issue a check from his trust account for payment of the sales tax in accordance with the Garcia settlement statement.

ZZZ. He utilized funds in the amount of $556.20 which was entrusted to him for payment of medical bills and sales tax for other unauthorized purposes.

AAAA. He misappropriated the portion of the Garcia settlement proceeds which were to be used to satisfy a Doctor's Lien and to pay sales tax.

BBBB. The failure to disburse the Garcia settlement proceeds in accordance with the settlement statement, as well as his misappropriation of funds which were to be used to satisfy the Doctor's Lien and to pay sales tax constitutes a violation of Rule 5-1.1, Rules Regulating Trust Accounts and Rule l.l.l5(b), Rules of Professional Conduct.

SUMMARY OF THE ARGUMENT

The Referee's recommendation that the Respondent receive an eighteen month suspension is inappropriate for misconduct involving Respondent's misappropriation of clients' funds, funds to be used to satisfy doctor's liens and taxes, settling a client's claim without their knowledge or consent and misrepresentation to a client. This type of misconduct, even if mitigating factors had been substantiated, mandates disbarment.

ARGUMENT

I. WHETHER DISBARMENT IS APPROPRIATE AND WHETHER THE REFEREE'S RECOMMENDATION OF AN EIGHTEEN MONTH SUSPENSION IS INAPPROPRIATE GIVEN THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT

While the Referee's findings of fact are presumed to be correct, it is a well established point of law in Florida that the Florida Supreme Court is not bound by the Referee's recommendation of the discipline to be imposed. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978), The Florida Bar v. Mueller, 351 So.2d 960 (Fla. 1977). In fact, the Florida Supreme Court exercises a broad scope of review in evaluating a referee's recommendation of discipline. The Florida Bar v. Patarni, 14 FLW 458 (Sept 22, 1989).

Respondent was found guilty of and admitted to the misappropriation of client's funds and funds to be used to satisfy doctor's liens and taxes. (RR 2-7). This misappropriation amounted to approximately $20,000.00 over a six (6) month period of time (RR 1-7). Furthermore, Respondent was found guilty of and admitted to settling a client's claim without their knowledge or consent, misrepresenting to the client that negotiations were still proceeding and that an offer had been made for an amount that was half of what Respondent had already settled the case for and had, in fact, received and already misappropriated (RK 2-4). This type of professional misconduct not only warrants disbarment but mandates disbarment.

As stated by this Court in The Florida Bar v. Breed, 378 So.2d 783, 785 (Fla. 1979), misuse of client's funds is one of the most serious offenses a lawyer can commit. This Court went on to warn "henceforth, we will not be reluctant to disbar an attorney for this type of offense even though no client is injured". This court reemphasized it's warning of disbarment for misuse of clients' funds even where there is restitution while holding that it is appropriate to take into consideration circumstances surrounding the incident. The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981).

In The Florida Bar v. Harris, 400 So.2d 1220, (Fla. 1981), the Florida Supreme Court rejected the Referee's recommendation of a thirty six month suspension where Respondent had a continuous and irresponsible pattern of conversion of client's trust funds to his own use, for approximately one (1) year. This Court held that "Respondent's actions demonstrate an attitude wholly inconsistent with the high professional standards of the legal profession". Respondent was disbarred. Likewise, in the case at bar, Respondent had a continuous and irresponsible pattern of conversion of client's trust fund for six (6) months and should, accordingly, be disbarred.

In The Florida Bar v. Davis, 474 So.2d 1165 (Fla. 1985), Respondent was disbarred when he used clients' trust funds to satisfy personal obligations, among other things. Likewise, in the case at Bar, Respondent used client's trust funds to pay for personal office expenses and to make a deposit on a Jaguar (T 142-143, 167) and should be disbarred.

In The Florida Bar V. Bussey, 529 So.2d 1112 (Fla. 1988), the Florida Supreme Court rejected the Referee's recommendation of a two year suspension in a situation analogized to an attorney misappropriating clients' fund. As this Court stated,

> "An attorney is held to a high standard of trust. Like the attorney who misappropriates a clients' funds, the Respondent in this case has abused his position of trust through his misconduct. It is precisely this sort of conduct that tarnishes the reputation of attorneys in Florida. The Respondent and his associates, by taking advantage of their positions of trust have engaged in the type of conduct which damages the reputation of attorneys throughout the state. His conduct "does irreparable harm to the public image of attorneys in this state. Indeed the public has been most vocal about the need for protection from dishonest lawyers. It is therefore without hesitation that we provide that protection."

Likewise, the Florida's Standards for Imposing Lawyer Sanctions mandate that Respondent be disbarred for his misconduct. Rule 4.11 provides for disbarment "when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." Rule 5.11 provides that disbarment is appropriate when "a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law." It is the Bar's position as supported by the record that Respondent intentionally and knowingly converted close to $20,000.00 of his client's property. Respondent's contention that he didn't know he was taking the funds (T 95), didn't realize what he was doing (T 96) and that he thought he could "borrow the money'' (T 96) doesn't stand up against the record. On June 22, 1987, Respondent received $7,589.00 on behalf of his client. On June 25, 1987,

Respondent deposited such funds into his operating account. On that same day, Respondent issued a check for $5,000.00 from his operating account to Prestige Imports, for a deposit on a new Jaguar (C-5). In furtherance of this intentional and knowing conversion of his clients' property, Respondent intentionally misrepresented to his client that negotiations for settlement were still proceeding with an offer of $3,200.00 by the insurance company at a time when Respondent had already settled the claim, received the funds and misappropriated the funds (C-4).

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."

There can be no doubt that Respondent's misappropriation of clients' property constitutes a violation of a duty owed as a professional. There is also no doubt that Respondent intended to obtain a benefit from such misappropriation, namely a new Jaguar, the payment of personal office expenses, etc (T 142). The injury or potential injury to a client, the public or legal system cannot be disputed. What could be more harmful to the client, public and legal system than to condone an attorney, using his position of trust and confidence to obtain funds on behalf of a client and then steal those funds. What could be more harmful to a client, public and legal system that to condone an attorney misrepresenting to his client the status of

settlement negotiations and amount being offered. As stated in The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968), "Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in manner which will cause layman, and the public generally, to have the highest respect for and confidence in the members of the legal profession". Although the case of The Florida Bar v. Calhoun, 102 So.2d 604 (Fla. 1958) dates back to 1958, it was never as applicable as it is today.

> "If the bench and bar are being subjected to general public suspicion or criticism, attorneys are charged, with even greater measure of responsibility than is usual in order to re-establish public confidence in legal profession and the administration of justice and have the duty to exercise every measure of care and caution to avoid creating any justification for such suspicion".

It is the Bar's position that the imposition of any discipline but disbarment in this case would only aggravate the existing distrust, suspicion and criticism by the public of attorneys and the legal system.

Respondent admits that he misappropriated his clients' property. Respondent admits that he misused trust funds. Respondent admits that he settled his clients' claims without their prior knowledge or consent. Respondent admits he failed to advise his client of the settlement of the claim, of receipt of settlement proceeds and his misrepresentation to his client concerning the status of his claim. Respondent admits he failed to disburse settlement proceeds in accordance with his settlement statement by not paying two doctor's lien. However, Respondent maintains that this misconduct was a result of drug

addiction, that he was so impaired that he didn't know the difference between right and wrong. (T 6). Respondent contends that his drug intake had escalated to a point where he was spending a thousand or fifteen hundred dollars a week on cocaine (T 94). It is Respondent's contention that he didn't realize that he was taking the funds (T 95), that he was so grossly impaired that he did not realize what he was doing (T 8). It is Respondent's contention that at the time of his misconduct, he was totally impaired and did not realize the gravity of his actions (T 96).

While The Florida Bar recognizes drug and alcohol addiction as a factor to be taken into consideration in determining the appropriate discipline to be imposed, this addiction should have been the underlying or direct cause of the misconduct. The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982). The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985). As further elaborated on in In re Johnson, 322 N.W. 2d 616, 618 (Minn. 1982) in addressing alcoholism as a mitigating circumstance, the Respondent must establish by clear and convincing evidence that the alcoholism caused the misconduct. The allegations of alcoholism as the cause of misconduct have become so frequent that such addiction must be shown by clear and convincing evidence to have been the cause of the misconduct. It is the Bar's position that Respondent has not shown that his drug addiction was the direct or underlying cause of his misconduct.

Respondent has abused drugs for twenty years, since he was ten years old (T 22, 42). One of Respondent's witnesses

characterized Respondent's involvement with drugs as an illness, an illness that has existed for years (T 44). During this twenty year period of time, Respondent graduated high school, graduated from college, got accepted to law school, graduated law school and passed the Bar exam (T 63). During April 1987 through October 1987, the period of time in which Respondent's misconduct occurred, Respondent represented clients and appeared in Court. Judge Pooler, one of Respondent's witnesses, testified that Respondent appeared as defense counsel on numerous occasions during the period in question, and that Respondent was one of the better young trial attorneys in traffic court, doing a very fine job for his clients (T. 70-71). Judge Pooler never suspected Respondent of being drunk or under the influence of any narcotics. Respondent never failed to show up and never neglected his clients (T 74-75). Judge Gelber, another witness for Respondent, testified that Respondent was in court every day and was an excellent attorney (T 77). Judge Gelber never suspected Respondent of being under the influence of drugs (T 86). Respondent was very competent and never failed to show up (T 81).

It is peculiar that during the period that Respondent's misconduct occurred, no one would characterize Respondent as impaired or grossly impaired. That is no one except Respondent. To the contrary, Respondent was said to be an excellent attorney, a competent attorney, one who did a good job for his clients, showed up and never neglected his clients. Respondent himself admits that he did "all right" for his clients (T 131).

Judge Gelber was the founder of a drug education program and is very familiar with drug addiction (T 78). Yet, Judge Gelber never thought Respondent appeared before him while under the influence of drugs (T 86). Respondent was a very competent attorney, one who could think and talk on his feet (T 87). There have been no complaints made by Respondent's clients. Furthermore, during this same period of time that Kespondent maintains he was *so* totally impaired that he didn't know what he was doing, Respondent kept his trust account records as required, maintaining the appropriate trust account records, ledger cards, journals and making the proper reconciliations (T 132).

There is no evidence that Respondent's misappropriation of client funds and misappropriations of funds to be used to satisfy doctor's liens and taxes was the direct result of his drug addiction, the fact that he was so impaired as to not know that misappropriating clients' funds was wrong. There is no evidence showing that Respondent's addiction was the direct or underlying cause of his settling his client's claim without their prior knowledge or consent: misrepresenting to his client that negotiations were still proceeding and that an offer had been made for an amount that was half of what Respondent had already settled the case for and had received and already misappropriated. Yes, Respondent has a drug problem but Respondent has had a drug problem for twenty years. For twenty years, Respondent has functioned exceptionally well. It was not until the Bar confronted Respondent with his misconduct and the

ramifications of such misconduct that Respondent decided he had a drug problem that affected all his reasoning, knowing right from wrong and made him misappropriate his clients' funds and lie to them about it.

Further, in aggravation of Respondent's misconduct is his dishonest or selfish motive. Section 9.22(b), Florida's Standards for Imposing Lawyer Sanctions. Respondent tries to rationalize his misconduct but maintaining that he was so impaired that he didn't know what he was doing. The facts do not support his position. Respondent misappropriated client funds. In one instance, he deposited such funds in his operating account and on the same day wrote a check for a deposit on a new Jaguar. Other client funds were used to pay personal and office expenses. Then, in an attempt to cover up the theft of these client funds, Respondent misrepresented to his client that negotiations were still proceeding with an offer of half the amount actually settled for. These are not the acts of a man so impaired by drugs that he didn't know what he was doing. To the contrary, these are the acts of a man who knew exactly what he was doing and knew how to try and cover up his misconduct until such time as he was confronted by The Florida Bar.

In further aggravation of Respondent's misconduct is that there was a pattern of misconduct and multiple offenses. Section 9.22(c) and (d), Florida's Standards For Imposing Lawyer Sanctions. Over a six (6) month period, Respondent misappropriated $10,500.00 of one client (RR - 2), $6,000.00 of

another client (RR - 3), and then $1,589.00 of another client (RR - 3). Respondent misappropriated funds to be used to satisfy doctor's liens in three separate cases (RR - 4-7).

Despite the fact that Section 4.11, Florida's Standards for Imposing Lawyer Sanctions provides for disbarment "when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury" (emphasis added), this Court has, on occasion, imposed discipline other than disbarment in theft cases where there had been cooperation on the part of the Respondent or restitution had been made. The Florida Bar v. Pinckett, 398 So.2d 802 (Fla. 1981); The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983). No such circumstance exists in this case.

Respondent provided no documentary evidence of restitution. Since October of 1988, Respondent has been asserting that a timely good faith effort of restitution was made. Since October of 1988, The Florida Bar has been requesting proof or documentation of Respondent's representation that restitution had been made (T 115). Respondent never provided such proof or documentation. Even though Respondent's contention is that he made restitution to one client by issuing a check from his operating account, Respondent has never provided a copy of that check (T 116). Respondent never applied for a subpoena from the Referee to the bank to obtain the records Respondent needed to establish that restitution was made (T 117). Respondent's contention that he made restitution to another client by way of

a cashier's check is supported by nothing but his bare assertion (T 98-99).

Most noteworthy is the fact that no agreements were reached with the doctors whose funds Respondent had misappropriated until June 5, 1989 and June 14, 1989, right before the final hearing on June 16, 1989, even though Respondent had been asserting that a timely good faith effort of restitution was made as far back as October 1988 (T 115, 123, 124-125). As commented on in Florida's Standards for Imposing Lawyer Sanction, Section 9.3, Commentary, "restitution which is made upon the lawyer's own initiative should be considered as mitigating; lawyers who make restitution prior to the initiation of disciplinary proceedings present the best case for mitigation, while lawyers who make restitution later in the proceedings present a weaker case". There is absolutely no evidence of a timely good faith effort to make restitution to his clients. Respondent himself testified that he only had a belief that he made a timely good faith effort of restitution, that it was not based on any documentation (T 118).

There is also no evidence that Respondent made full and free disclosure to the disciplinary board or had a cooperative attitude toward the proceedings. Section 9.32(e), Florida's Standards for Imposing Lawyer Sanctions. In fact, Respondent did not disclose or come forth with his unethical conduct until after he was contacted by The Florida Bar (T 134). The initiation of proceedings began in August 1988 and were contested by Respondent (T 135). The Florida Bar requested that

Respondent produce copies of his income tax records to support Respondent's contention that his substance abuse problems caused him financial problems. Respond nt never complied with such request (T 136-137). The Florida Bar requested that Respondent produce proof or documentation concerning restitution (T 115). Respondent never complied with such request. Respondent did not enter his unconditional guilty plea until February 23, 1989, contesting the proceedings up to that date (T 135).

This Court has held the misuse of client funds to be one of the most serious offenses a lawyer can commit. The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987). Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment, a presumption that can be rebutted by various acts of mitigation, such as cooperation and restitution. The Florida Bar v. Schiller, -So.2d-, 14 FLW 59 (Opinion filed Fla. Feb. 1989). In Schiller, Respondent had replaced in his trust account all the money he had misappropriated by the time of the final hearing and had undertaken to pay trust funds to medical providers who were entitled to them. This Court still held that the referee's recommended discipline of a two year suspension was insufficient to impress upon the Respondent, the rest of the profession, and the public that Respondent's misconduct was egregious and suspended Respondent for a period of three years. Likewise, an eighteen month suspension as recommended by the referee is insufficient where there is misappropriation of client funds and no evidence of restitution or cooperation.

Furthermore, Respondent admitted to and was found guilty of misrepresentation to his client. As stated by this Court in The Florida Bar v. Wilder, -So.2d-, 14 FLW 261 (Opinion filed Fla. May 25, 1989), "A lawyer has the absolute responsibility of being truthful, candid and above board with his client. A failure in this regard should result in a heavy penalty to assure that other lawyers will be deterred from similar conduct and to protect the clients of lawyers".

It is respectfully submitted that the extremely serious nature of Respondent's misconduct coupled with aggravating factors and lack of substantiated mitigating factors mandate that Respondent be disbarred. As stated in The Florida Bar v. Golub, -So.2d-, (Case No. 71,055) (Opinion filed Fla. Sept. 28, 1989), "although we may consider uch factors as alcoholism and cooperation in mitigation, we must also determine the extent and weight of such mitigating circumstances when balanced against the seriousness of the misconduct". Accordingly, this Court rejected the referee's recommendation that Respondent be suspended from the practice of law and disbarred the Respondent, in spite of Respondent's alcoholism, cooperation, voluntary self imposed suspension and absence of any prior disciplinary record. Likewise in The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986), Respondent was disbarred for misappropriation of client funds despite his defense of alcoholism. This Court held that the seriousness of Respondent's misconduct warranted disbarment while taking into account Respondent's alcoholism, that he had undergone treatment and ceased drinking, that Respondent made

prompt restitution to his clients and that he had no prior disciplinary record. Likewise, the Respondent in this case should be disbarred.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court to affirm the Referee's findings of fact and recommendation of guilt but reject the Referee's recommended discipline of an eighteen month suspension and order instead disbarment and payment of costs of these proceedings in the amount of $2,956.10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of The Florida Bar was Federal Expressed to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahasee, Florida, 32301-8167, and that a true and correct copy was mailed to Richard Baron, Attorney for Respondent, 11077 Biscayne Boulevard, Suite 307, Miami, FL 33161 this 7 day of November, 1989.

Jo Ann Braverman

JO-ANN BRAVERMAN
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEFFREY SHUMINER,

Respondent.
_____/

CONFIDENTIAL

Supreme Court Case No.

The Florida Bar Case No. 88-70,993(11F)

TO COMPLAINANT INITIAL BRIEF

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