4-16

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

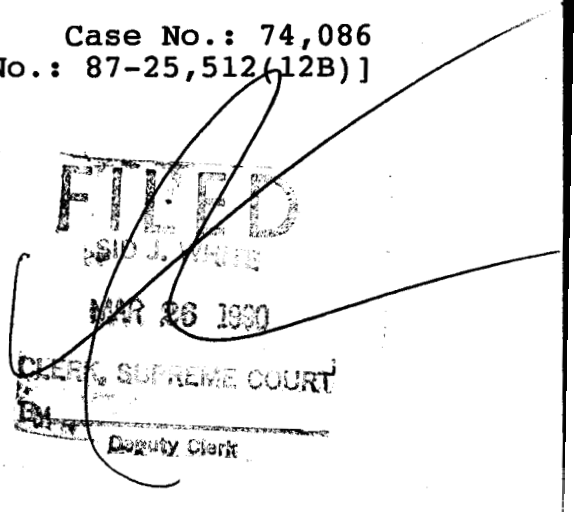
v.

DONALD K. McSHIRLEY,

Respondent.

_____/

Case No.: 74,086
[TFB Case No.: 87-25,512(12B)]



RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RESPONDENT'S ADDITIONAL STATEMENT OF FACTS AND THE CASE

There are no issues as to the facts in this case. The Referee heard the evidence and made extensive Findings of Fact and The Bar has not questioned any of said Findings, and the Respondent will not do so. Thus, the facts as found by the Referee are the facts of this case.

The Bar has omitted from its Statement of the Facts and the Case many of the facts which are relevant on this appeal and has deemphasized others. Respondent adopts the Statement of Facts and the Case as stated by Bar Counsel in the Bar's Brief to which the following should be added:

Respondent timely filed his Cross-Petition For Review on the basis that the sanctions recommended by the Referee were too harsh and punitive.

In February, 1986, Respondent, recognizing that he had over a period of several years misappropriated approximately $27,000.00 of clients' moneys from his Trust account, borrowed sufficient moneys to replace the funds so misappropriated and deposited the same into his Trust account. This action was taken prior to the time that The Bar initiated an investigation of Respondent's Trust account records in January of 1987 after Respondent filed his Petition in Bankruptcy.

After hearing all the evidence and observing the demeanor of the Respondent on the witness stand, and in the courtroom, the

Referee found, among other things, the following facts:

> "Mitigating Factors: Absence of a prior disciplinary record; good character or reputation; remorse; timely good faith effort to make restitution, even prior to initiation of disciplinary proceedings, along with the fact that no client was ever damaged or harmed; and a cooperative attitude toward disciplinary proceedings."

SUMMARY OF ARGUMENT

In this case, the Referee found that the Respondent had no prior disciplinary record, was of good character or reputation, was remorseful for his conduct, timely made a good faith effort to make restitution prior to the initiation of the disciplinary proceedings, no client was damaged by his conduct, and Respondent had a cooperative attitude toward the disciplinary proceedings. The Respondent misappropriated $27,000.00 of his clients' money and, in other ways, violated the Rules Regulating Trust Accounting. The Referee, after considering the mitigating factors set out, recommended that Respondent be suspended for three years and thereafter duly demonstrate his rehabilitation. It is the position of The Florida Bar that said sanction was not adequate. It is the position of the Respondent that the sanctions recommended are unduly harsh and punitive.

The purposes of disciplining lawyers for conduct violative of the Rules regulating them are to protect the Bench, The Bar, and the public, and to deter the guilty lawyer and all other lawyers from engaging in like misconduct. Sanctions are imposed not for the purpose of retribution or punishment, but solely for the purpose of carrying out the ultimate objectives of disciplining lawyers.

The Respondent, by his conduct and his attitude as found by the Referee as mitigating circumstances, has demonstrated that he is well on the road to rehabilitation, if he has not already arrived. The sanction of one-year's suspension would certainly

deter the Respondent and all other lawyers from engaging in like misconduct. Disbarment, as sought by The Bar, and a three years suspension as recommended by the Referee are not necessarily to carry out the purposes of disciplining lawyers, and both are unduly harsh and punitive and are unfair to the Respondent.

FIRST POINT INVOLVED

IS THREE YEARS SUSPENSION AN APPROPRIATE SANCTION FOR A LAWYER WHO OVER A PERIOD OF SEVERAL YEARS MISAPPROPRIATED APPROXIMATELY $27,000.00 OF HIS CLIENTS' MONEY FROM HIS TRUST ACCOUNT AND OTHERWISE VIOLATED THE RULES REGULATING TRUST ACCOUNTING PROCEDURES AND WHERE PRIOR TO ANY INVESTIGATION BY THE BAR THE LAWYER HAD RESTORED SAID FUNDS TO HIS TRUST ACCOUNT, NO CLIENT WAS EVER DAMAGED OR HARMED BY THE MISAPPROPRIATION, THE LAWYER HAD NO PRIOR DISCIPLINARY RECORD, ENJOYED A GOOD REPUTATION, WAS REMORSEFUL AND COOPERATED WITH THE BAR IN THE DISCIPLINARY PROCEEDING?

ARGUMENT

Both The Bar and the Respondent contend that the sanctions recommended are not appropriate. The Bar contends that disbarment is the only appropriate sanction, while Respondent contends that suspension for a period of one year is adequate to carry out the purposes of the disciplinary procedures.

It has always been the philosophy of this Court that the purposes of disciplinary proceedings are to protect the Bench, The Bar and the public from the conduct of lawyers violating the Rules Regulating The Florida Bar. Sanctions are not imposed by the Court on lawyers for the purpose of punishment, but said sanctions should be harsh enough to deter the guilty lawyer and all other lawyers from engaging in similar misconduct.

One of the leading cases demonstrating this philosophy of the Court is The Florida Bar v. Pahules, 233 So.2d 130 (Fla.1970). In Pahules, the Referee recommended disbarment for, among other

things, commingling and using over $14,000.00 of his clients' money by failing to properly account for the same or depositing it in a Trust account but instead commingled said money with his own and used it for his own purposes. In its Opinion, the Court stated:

> "In the present case, commingling of funds and embezzlement of client funds is a very serious offense. Its seriousness is not lessened by the fact that the lawyer involved made restitution before disciplinary action was initiated. Such restitution, along with other factors reflecting on respondent's character, properly may be examined for value in mitigation of the severity of penalty, but cannot erase the stain of unethical conduct."

The Court then went on to state:

> "In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in term 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."

In Pahules, the Court reversed the Referee and suspended Pahules from the practice of law for a period of six months. (The Florida Bar v. Pahules, 233 So.2d 130 (Fla.1970).

The same long-standing philosophy of the Court was well recognized by the drafters of the Florida Standards for Imposing Lawyer Sanctions. Section 3.0 of the Standards provides:

"Generally in imposing a sanction after a finding of lawyer misconduct, the Court should consider the following factors:

(a) The duty violated;

(b) The lawyer's mental state;

(c) The potential or actual injury caused by the lawyer's misconduct; and

(d) The existence of aggravating or mitigating circumstances.

Each section of the Standards setting forth particular sanctions to be imposed because of commission of specific acts of misconduct start out with the words "absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases...." Florida Standards for Imposing Lawyer Sanctions, Section 5.1, 5.2, 6.1, 6.2, 6.3, 7.0, 8.0.

Section 9.31 of said Standards provides:

> "Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed."

9.32 of the Standards provides:

> "9.32 Factors which may be considered in mitigation. Mitigating factors include:
>
> (a) absence of a prior disciplinary record;
>
> (b) absence of a dishonest or selfish motive;
>
> (c) personal or emotional problems;
>
> (d) Timely good faith effort to make restitution or to rectify consequences of misconduct."

Recently, in The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1989), this Court again considered the role of mitigating circumstances in imposing sanctions. In that case, The Florida Bar took the position before this Court:

> "that mitigating evidence is not relevant in a disciplinary proceeding, asserting that it should be considered only when an attorney applies for reinstatement."

In Eisenberg, this Court reasserted the policy which it had long followed and reasserted the policy set out in The Florida Standards

For Imposing Lawyer Sanctions in the following language:

> "We agree with Eisenberg's position that consideration of mitigating evidence is appropriate at the sanction stage of a disciplinary proceeding and that consideration of this evidence is clearly in accordance with the Florida Standards for Imposing Lawyer Sanctions."

The Opinion in Eisenberg was rendered on December 21, 1990 and rehearing was denied on February 14, 1990. It will be noted that The Bar's Brief in this case was served on February 23, 1990, subsequent to the denial of rehearing in Eisenberg. (The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla.1990).

The position of The Bar in this case is well stated in its Summary of Argument on page 5 of its Brief as follows:

> "Respondent has paid back the misappropriated funds and did so prior to The Florida Bar Audit. He cooperated with The Florida Bar after he became aware there was going to be an audit. However, the respondent's knowing, intentional and prolonged misappropriation of trust account funds, coupled with his knowing misrepresentation to The Florida Bar that his trust account records were in substantial compliance with the Rules Regulating The

Florida Bar, warrants disbarment."

The Bar's statement of the Issue involved likewise well sets out its position in this case as follows:

> "Whether a three (3) year suspension is a sufficient disciplinary sanction for an attorney who intentionally and knowingly misappropriates trust account monies over a prolonged period of time."

The purpose of the Statement of Facts in an appellate brief is to acquaint the Appellate Court with all facts that are in any way relevant to the issue or issues before the Court on the appeal. It is incumbent upon counsel in so stating the facts to state all of them that are material, whether they are detrimental or beneficial to the position of the client. The Bar, in its Statement of the Facts, has largely ignored all of the facts found by the Referee which the Referee believed should be considered in mitigation of the offense in imposing sanctions on the lawyer, and has omitted any discussion thereof in the issue involved and in its Argument. The attempted effect of these omissions is to present this case before this Court without consideration of most of the mitigating factors and thereby to completely distort this case and the Referee's Report. In brief, The Bar has presented this case to this Court just as though there were practically no mitigating factors.

So there will be no misunderstanding, Respondent's counsel is not charging that The Bar is in any way attempting to mislead this

Court. Such an attempt would be futile because the Court will find the mitigating factors in the Referee's Report and Bar counsel knew full well that the undersigned would carefully point them out to this Court. However, the omission of these mitigating factors is an attempt by Bar counsel to induce this Court to change its philosophy relative to sanctions by not considering mitigating factors in imposing sanctions but to consider them only when the lawyer seeks reinstatement, just as The Bar attempted to do in Eisenberg, Supra.

The main thrust of Respondent's Brief is to point out to this Court the mitigating factors as found by the Referee and to point out the basic purpose of lawyer discipline, so that the Court will give due consideration to the mitigating factors as found by the Referee.

As a result of the foregoing, the Brief written by Bar counsel is totally unrelated to the basic issue involved in this case which, simply stated, is whether in light of the nature of the offense and the mitigating circumstances the recommendation of the Referee should be affirmed or reversed.

The Bar cites The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). In said case, this Court gave notice to the legal profession that henceforth it would not be reluctant to disbar an attorney for misappropriating trust account funds, even where no client is injured. However, neither in Breed, nor in any case following Breed, has this Court held that in imposing sanctions for said offense the Referee and, ultimately this Court, should not

consider mitigating circumstances.

Shortly after Breed, the Court decided the case of The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). In this case, Welty, over a period of time, commingled his funds with his clients' trust accounts and used $24,848.11 of said funds for his own purposes and he closed a real estate transaction in 1978 receiving $15,000.00 in funds in trust for a client which he failed to promptly disburse because he used a portion thereof for personal expenses and to make up deficits in his trust account. Welty, like the Respondent here, restored the misappropriated money to his trust account, cooperating with The Bar in making its audit. The Referee recommended that Welty be suspended for a period of six months and until he proved his rehabilitation and that he be placed on probation for a period of two years. The Florida Bar sought review of the Referee's Report on the basis that the sanctions recommended were inadequate. In its Opinion, this Court, after reviewing numerous cases, concluded that under the particular circumstances of that case the recommendations of the Referee should be approved.

In 1987, this Court considered The Florida Bar v. Lumley, 517 So.2d 13 (Fla.1987). In that case, Lumley deposited personal funds in the same account with funds held in trust for clients and used funds held in trust for clients for purposes other than those intended by the clients and the commingling of said funds resulted in deficits to the clients' funds. In its Opinion, the Court stated:

"The Referee found that there was no intent on the part of respondent to defraud or deprive his clients of their property. The evidence showed that, although at times there were deficits in the accounts of money held in trust, respondent in every case restored the balance in the account in time to meet his obligations to his clients. No client suffered any loss or delay in the disbursement of funds.

Although the Referee found no intent to deprive the clients of their money,the existence of the account "deficits" shown by the evidence established that respondent did use, albeit temporarily, trust funds for personal purposes. <u>There is nothing in the evidence or in the referee's report to refute the inference that such improper personal use of trust funds was committed knowingly. We therefore find that the evidence and the referee's findings implicitly show that respondent knowingly used entrusted funds for his own purposes.</u> (Emphasis supplied)

The Referee recommended that Lumley receive a private reprimand. This Court held that a private reprimand was not appropriate and, instead, the Court gave Lumley a public reprimand.

In The Florida Bar v. Moxley, 462 So.2d 814 (Fla.1985), this Court again considered the appropriate discipline for misappropriating clients' funds. Moxley, while practicing law, engaged in a private business not connected therewith. He used a single checking account for both his client trust fund and the separate business venture, and on occasion he advanced funds from this account to other accounts both for the business and for his law practice before receiving deposits for these expenditures. In its Opinion, the Court, among other things, stated:

> "Rule 11.02(4) commences: 'Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose.' We take a grim view of attorneys who fail to keep sacrosanct and inviolate their trust funds as required under this rule. Recognizing this, The Florida Bar suggests that the minimum penalty should be a six-month suspension with proof of the rehabilitation. The referee, on the other hand, recommended a public reprimand plus a three-year probation with certain conditions. Moxley agrees with the Referee."

The Court then went on to state:

> "We give a great deal of weight to the referee in cases such as this. Here, the

> Referee is an experienced, considerate, and thoughtful judge. To us, however, this case more appropriately falls somewhere above the situation which existed in Horner, but somewhere below that in Welty. In disciplinary cases it is important to look at the offense and the circumstances surrounding it. But it also is important to consider the effect of the dereliction of duty on others as well as the character of the wrongdoer and the likelihood of further disciplinary violations. We therefore believe some suspension is appropriate. We do this not so much in retribution against Moxley as to clearly admonish the bar regarding the necessity to follow faithfully rule 11.02(4) and disciplinary rule 1-102."

After considering all of the factors above quoted, the Court determined that Moxley should be suspended for sixty days and placed on probation for three years.

The policy of this Court in giving consideration to mitigating factors in imposing sanctions is based on two different concepts. A lawyer who makes restitution without any coercive pressure from The Florida Bar or law enforcement officials, has had no prior disciplinary record, has enjoyed a good reputation, is remorseful over his conduct and cooperates with The Bar in the disciplinary

proceeding, has, by his conduct, demonstrated several things. He has recognized that he is guilty of an act of misconduct, has taken appropriate steps to rectify any injuries caused thereby, regrets his derelictions, and is ready and willing to accept his deserved sanctions. All of these positive actions taken by the lawyer demonstrate that he is well on the road to rehabilitation, and may be that he has obtained this goal. The fact that he has no prior disciplinary record and enjoys a good reputation in his community, is an indication that there is a likelihood that he has been rehabilitated or that his rehabilitation will successfully continue. These mitigating circumstances, when coupled with an adequate sanction for the misconduct, leads to the belief that the lawyer will become rehabilitated, if he hasn't already done so.

The Court should encourage lawyers to recognize the error of their ways, correct the same, and rehabilitate themselves voluntarily. This can be accomplished partially by reducing the sanctions imposed upon lawyers doing so. Stated another way, in seeking the ultimate sanction of disbarment demanded by The Bar in this case, can only discourage lawyers from so attempting to rehabilitate themselves.

Respondent submits that if the purpose of discipline is as heretofore stated by the Court and is not to punish but to deter, a suspension of one year, coupled with the attitude of the Respondent as reflected in the Referee's Report, will serve all of the purposes of discipline adequately. Any more severe discipline not only will not carry out the purposes of the disciplinary rules,

but to some degree, might help defeat them.

CONCLUSION

Under the particular circumstances of this case where the Referee found all of the mitigating factors set out in the Referee's Report, a suspension of not more than one year will carry out all of the purposes of the disciplinary rules in that it will fully protect the Bench, The Bar, and the public. It will be fair to the Respondent, and last, it certainly should deter Respondent and all other lawyers from engaging in similar misconduct and it might well encourage lawyers who are guilty of derelictions to rectify their conduct and comply with the Rules Regulating The Florida Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 23rd day of March, 1990, to DAVID R. RISTOFF, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607, and JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300.

Richard T. Earle, Jr., Esq.