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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Petitioner,

CASE No. 74,086
TFB No. 87-25,512 (12B)

v.

DONALD K. MCSHIRLEY,
Respondent.

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THE FLORIDA BAR'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Petitioner, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The respondent, Donald K. McShirley, will be referred to as the "respondent". "TR" will denote the transcript of the Final Hearing held on September 19, 1989. "RR" will denote the Report of Referee. "R" will denote the Record of the Final Hearing.

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to an investigation concerning respondent's failure to provide a Title Insurance Policy, The Florida Bar discovered that respondent had filed for Bankruptcy.

In January 1987, based upon respondent's filing for Bankruptcy, The Florida Bar initiated an audit of respondent's trust account records. In August 1988, a limited audit was completed by The Florida Bar.

The following was discovered during the audit, and admitted to by the respondent. (TR. p.4, line 6-21).

1. Several personal real estate transactions were handled through respondent's trust account.
2. Several dates reflect that the disbursements made to or on behalf of the respondent exceeded the amount of his personal funds commingled by him in the trust account, creating a deficit or negative balance.
3. In some instances, disbursements made to or on behalf of certain clients exceeded funds deposited into the trust account for such clients, creating negative balances for those clients.
4. The reconciliations reconstructed by The Florida Bar's Staff Auditor reflected shortages in May 1980 of \$1,066.87, which increased to \$10,634.63 by May 1982.
5. No records were available to reconstruct reconciliations for the period from June 1982 through July 1984.
6. Estimated reconciliations prepared for August 1984 through January 1986 reflect that shortages reached approximately \$27,000.00 for that same period.

During the course of The Florida Bar's investigation, and again at the Final Hearing, respondent admitted to converting approximately \$27,000.00 of his trust account funds for his own personal use, to help finance his law office, and to sponsor little league sports. (TR. p.4, line 23 and p.11, line 23-25, and p.12, line 1-4).

In approximately February 1986, respondent obtained a loan to reimburse the shortages in his trust account.

In addition to the admissions made by the respondent, the Referee found that based upon the testimony at the Final Hearing:

"That while respondent asserts that his trust account records were properly maintained or preserved until lost by a mover sometime between October 1986 to May 1987 that it is inconsistent with the fact that respondent deliberately misappropriated funds in a piecemeal fashion over a period of time from early 1984 through June 1986."

(RR, p.2, Paragraph 2).

The Referee found respondent guilty of the following violations:

Rule 5-1.1(b) (Rule 11.02(4) (b) before January 1, 1987) (failure to maintain the records or to produce them); Rule 5-1.2(b) (2) (Bylaws Section 11.02(4) (c) 2.b. before January 1, 1987) (deposit slips required); Rule 5-1.2(b) (4) (Bylaws Section 11.02(4) (c) 2.c. before January 1, 1987) (cancelled checks required); Rule 5-1.2(b) (5) (Bylaws Section 11.02(4) (c) 2.e. before January 1, 1987) (cash receipts and

disbursements journal required); Rule 5-1.2(b) (6) (Bylaws Section 11.02(4) (c) 2.f. before January 1, 1987) (ledger cards required); Rule 5-1.2(b) (7) (Bylaws Section 11.02(4) (c) 2.g. before January 1, 1987) (bank statements required); Rule 5-1.2(c) (1), (2), and (3) (Bylaws Section 11.02(4) (c) 3.a., b., and c. before January 1, 1987) (reconciliations, comparisons, and listings required); Rule 5-1.2(c) (4) (Bylaws Section 11.02(4) (c) 3.d. before January 1, 1987) (evidence of compliance which requires the lawyer to authorize and request the bank to notify The Florida Bar in the event any trust check is returned due to insufficient or uncollected funds, absent bank error); Rule 4-1.15 (Disciplinary Rule 9-102(A) before January 1, 1987) (commingling lawyer's funds with client's trust funds); DR 1-102(A) (3) (engaging in illegal conduct involving moral turpitude); DR 1-102(A) (4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and DR 1-102(A) (6) (engaging in any other conduct that adversely reflects on his fitness to practice law) (RR p.2, Paragraph III).

The Referee recommended that respondent be disciplined by a three (3) year suspension from the practice of law, passage of the Ethics portion of The Florida Bar examination and payment of the costs of these disciplinary proceedings.

The Florida Bar Board of Governors, having reviewed the Report of Referee, voted to seek disbarment in this matter.

SUMMARY OF ARGUMENT

Respondent intentionally misappropriated approximately \$27,000.00 from his trust account. (Tr. p.11, line 22-25, p.12, line 1-4). Although respondent was intentionally misappropriating trust account monies and knew that there were deficits in his trust account, respondent submitted certified statements to The Florida Bar indicating that his trust account records were in substantial compliance with the Rules Regulating The Florida Bar for the reporting years 1983, 1984, and 1985. (R-Bar Exhibit One (1), Tr. p.14).

Respondent converted approximately five (5) to six (6) thousand dollars which was used to sponsor a little league program. The balance of the misappropriated funds, approximately \$20,000.00, were used for personal or business purposes. (Tr. p.14, line 20-25).

Further, this was not a case of faulty bookkeeping. This was an intentional misappropriation of trust account funds.

This was likewise not an isolated instance of dipping into the trust account. Respondent took the funds over a long period of time in a piecemeal fashion. (Tr. p.20, line 3).

The Referee recommends that respondent be disciplined by a three (3) year suspension from the practice of law,

passage of the Ethics portion of The Florida Bar examination and payment of the costs of these disciplinary proceedings.

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.

Therefore, The Florida Bar requests that this Court disapprove the Referee's recommendation of a three (3) year suspension and its associated conditions, and enter an order disbarring the respondent from the practice of law in the State of Florida.

ARGUMENT

ISSUE: 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.

Respondent admitted that he intentionally misappropriated trust account monies, (Tr. p.11, line 22-25, p.12, line 1-4), and that he did so knowingly over a period of time that extended from 1983 through approximately February of 1986. (Tr. p.11, line 17-22). The deficit in the trust account reached as high as \$27,000.00. Additionally, when respondent submitted his annual Florida Bar Dues statement in 1983, 1984, and 1985, he misrepresented to The Florida Bar that his trust account records were in substantial compliance with the Rules Regulating The Florida Bar, although he knew that his representations were false. (Tr. p.14, line 11-17).

There was no evidence to suggest any clients were harmed by respondent's misconduct. All trust monies which had been misappropriated were replaced prior to the time of the initiation of The Florida Bar audit.

Likewise, in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), no client was injured by Breed's misappropriations. Breed used his trust account as one source to cover deficits created by a check kiting scheme in a non-client account. In recommending disbarment, the

Referee found that Breed had engaged in a check kiting scheme, had failed to keep adequate records or reconcile the escrow accounts, that he had commingled his funds with those of his clients, and that he had misused and misappropriated his clients' funds. The Supreme Court of Florida, on review, found that a two (2) year suspension with proper proof of rehabilitation before readmission was the appropriate discipline. This Court, however, gave notice to the legal profession that henceforth it would not be reluctant to disbar an attorney for this type of offense even where no client is injured. Id.

In The Florida Bar v. Baker, 419 So.2d 1054 (Fla. 1982), this Court disbarred Baker from the practice of law. Baker had misappropriated approximately \$35,000.00 from an estate account to himself or his law firm. Baker reimbursed all of the client's monies that he had misappropriated. Disciplinary proceedings were also taken in New York against Baker. The State of New York suspended Baker for a period of two (2) years. However, this Court found that he should be disbarred for his misconduct.

Again, in The Florida Bar v. Nagel, 440 So.2d 1287 (Fla. 1983), this Court disbarred an attorney who converted client funds to his own personal use. Nagel, unlike the respondent herein, was also charged and pled guilty to criminal offenses. This Court again warned lawyers of the consequences of converting client funds to their own

personal use, stating: "Let every lawyer be ever alert not to succumb to the temptation that respondent did". Id.

In The Florida Bar v. Rodriguez, 489 So.2d 726 (Fla. 1986), this Court disbarred Rodriguez despite his voluntary admission of using clients' money for personal uses.

Rodriguez's testimony was as follows:

I have used money previously, clients' money previously for living expenses. I have commingled their funds with mine, but I have paid these other people back. Record, page 21.

* * * * *

When I was short I would take money from a client for my own use, and then when I would make some money I would pay them.

Id. at 727.

The testimony of Rodriguez was strikingly similar to that of the respondent in the instant case.

Question by Staff Counsel: During that period did you ever have an occasion to take money from your trust account for other purposes?

Answer by Respondent: Yes, I did.

Q: Okay. And specifically, did you ever take money to fund your law office practice?

A: Yes. And for personal expenses.

Q: Okay. And did you take funds to finance a little league team?

A: I took funds to support a little league program that I started in Sarasota County.

(Tr. p.11, line 22-25, and line 1-4).

And when asked about the extent of the misappropriations:

Question by Respondent's Counsel:
Were they large expenditures or -- or
was it piecemeal?

Answer: It was really piecemeal. At --
at the end of a month, if I didn't have
enough to pay the bills and I knew it
was there, then I would go write a check
from trust to my general account and
pay the bills. Sometimes I would just
pay a bill directly from the trust account.

(Tr. p.20, line 1-7).

Respondent had converted approximately five (5) to six
(6) thousand dollars from the trust account to fund little
league, and approximately \$20,000.00 was converted for his
personal or business use. (Tr. p.14, line 20-25).

While respondent was candid in admitting the
misappropriation of trust monies to his own personal uses,
the Referee found him to be less than credible on the issue
of his trust account records being in substantial compliance
with the Rules Regulating The Florida Bar. (Tr. p.25, line
11-14).

The Referee found against the respondent and stated:

In addition, based upon the testimony
presented at the Final Hearing the
Referee finds that while respondent
asserts that his trust account records
were properly maintained or preserved
until lost by a mover sometime between
October 1986 to May 1987 it is incon-
sistent with the fact that respondent
deliberately misappropriated funds in
a piecemeal fashion over a period of
time from early 1984 through January
1986. Respondent admitted at the
Final Hearing that if he did not have
enough money to pay the bills, that he

would write a check from his trust account to his general account and pay the bills. Respondent further testified that he would sometimes pay bills directly from the trust account. (Tr. Final Hearing p. 20, line 3-7). Therefore, respondent's assertion of maintaining accurate records, ie, maintaining reconciliations, is inconsistent with these misappropriations.

(RR, p.2).

The Referee recommended a three (3) year suspension, passage of the Ethics portion of The Florida Bar examination and payment of the costs of this disciplinary proceedings. However, the recommended discipline falls short of the appropriate sanction of disbarment. Section 4.11, Florida Standards For Imposing Lawyer Sanctions states:

"Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury". Aggravating and mitigating factors are generally appropriate in determining the sanction in a disciplinary case. However, in this case, respondent's conduct in knowingly and intentionally misappropriating trust account monies over a prolonged period of time in a piecemeal fashion warrants nothing less than disbarment. This is not the case of an errant lawyer who in an isolated instance misappropriated \$27,000.00. Respondent funded his law office, a little league program, and converted monies for his own personal use in a piecemeal fashion. Such

conduct cannot be mitigated to reduce this offense from disbarment.

In The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988), Roman had misappropriated client funds and then committed fraud upon the courts to effectuate the theft. This Court in Roman reiterated Breed and stated:

That theft of client funds is one of the most serious offenses an attorney can commit. We warned the legal profession that henceforth we would not be reluctant to disbar an attorney for such misconduct. This case involves not only theft, but fraud on the court which strikes at the very heart of a lawyer's ethical responsibility. Either offense is sufficiently grave to justify disbarment. The mitigating factors in this case are insufficient to lessen the enormity of Roman's misconduct.

Id. at 62.

As in Roman, the mitigating factors in the instant case are insufficient to lessen the enormity of respondent's misconduct.

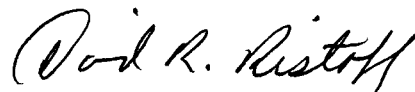
Accordingly, it is respectfully requested that the Referee's recommendation of a three (3) year suspension be disapproved, and that this Court enter an order of disbarment in this case.

CONCLUSION

The respondent knowingly and intentionally misappropriated trust account monies over a prolonged period of time in a piecemeal fashion. Respondent converted these funds to a little league program, and to his personal and business use. The respondent also misrepresented to The Florida Bar, when filing his Annual Dues Statements, that his trust account records were in substantial compliance with the minimum trust accounting regulations.

Respondents conduct is so egregious that it cannot be mitigated from disbarment. It is respectfully requested that the Referee's recommendation of a three (3) year suspension be disapproved, and that this Court enter an order disbarring respondent from the practice of law.

Respectfully submitted,



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