

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

V.

NEIL A. SHANZER,
Respondent.

Supreme Court Case No. 74,765

TFB CASE NOS. 89-70,544(11F)
89-70,702(11F)

ANSWER BRIEF OF THE FLORIDA BAR

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PREFACE

For purposes of this brief, the Complainant, The Florida Bar, will be referred to as "The Florida Bar" and Neil A. Shanzer will be referred to as "Respondent". The following abbreviations will be utilized:

T - Transcript of final hearing conducted on January 22, 1990, to be followed by the appropriate page.

RR - Report of Referee

Guilty Plea - Respondent's Stipulation as to Probable Cause, Unconditional Guilty Plea and Waiver of Venue.

Complaint - The Florida Bar's Complaint

STATEMENT OF THE CASE AND FACTS

The Florida Bar is compelled to submit a Statement of the Case and Facts as Respondent's is argumentative and incomplete.

On September 22, 1989, The Florida Bar's Complaint and Respondent's Stipulation as to Probable Cause, Unconditional Guilty Plea and Waiver of Venue was filed in The Supreme Court. (same are attached hereto as Appendix I and II respectively) The Honorable W. Herbert Moriarty was appointed Referee in this cause.

On January 22, 1990, a hearing was held as to the discipline to be imposed as the Respondent had submitted his Unconditional Guilty Plea.

The Florida Bar filed a seven (7) count Complaint. The first count concerned Respondent's violation of the trust account recordkeeping and procedural requirement of the rules regulating attorneys.

The second count of The Florida Bar's Complaint concerned Respondent's improper retention for himself of the interest in his trust accounts.

Counts three, four, five, six and seven of The Florida Bar's Complaint concerned misappropriation of funds and shortages in the Respondent's trust account. Respondent has admitted this serious misconduct. The Respondent has failed to

make complete restitution in this cause. (See, T., Page 3 and paragraph 7c of Guilty Plea).

On March 20, 1990, the Referee forwarded his Report of Referee wherein he found the Respondent guilty of all counts and recommended that the Respondent be disbarred for a period of five (5) years. Further, the Referee found the following aggravating factors present in this case: (1) dishonest or selfish motive, (2) a pattern of misconduct and (3) multiple offenses. Additionally, the Referee specifically found as follows:

Respondent has not made full restitution in this cause as \$3,893.76 is still owed to Mr. Melish. I find that a portion of the restitution made in this cause was only made after a Complaint was filed with The Florida Bar. (Report of Referee, Page 3)(said Report is attached hereto as Appendix III)

The Respondent testified before the Referee that he had a cash flow problem and dipped into his trust account as needed. (See T. 22-31) Respondent testified about personal difficulties at the time of his misconduct. Same were not sufficient to excuse or mitigate Respondent's serious misconduct including several acts of misappropriation. (See Complaint, Guilty Plea, Report of Referee).

SUMMARY OF ARGUMENT

THE REFEREE'S RECOMMENDATION OF
DISBARMENT FOR A PERIOD OF FIVE
(5) YEARS SHOULD BE UPHELD BY
THIS COURT.

Respondent engaged in serious misappropriation and has failed to make complete restitution. The Referee found three aggravating factors present to wit: (1) dishonest or selfish motive, (2) a pattern of misconduct and, (3) multiple offenses. The cases cited by Respondent do not contain such aggravating factors. This Court has disbarred attorneys for misappropriation notwithstanding their defenses of suffering from alcoholism at the time of the misconduct. The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986), The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989), and The Florida Bar v. Rodriguez, 489 So.2d 727 (Fla. 1986). However, the instant Respondent did not have the mitigating factor of alcoholism.

Cumulative misconduct, as present in this case, is dealt with severely. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Standard 4.11 of the Standards for Imposing Lawyer Discipline provides as follows:

Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

The Respondent knew he was using the funds of his clients and intentionally did so. (See Guilty Plea).

Therefore, for these serious violations, The Florida Bar requests that this Court uphold the Referee's recommendation of disbarment for a period of five (5) years.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF DISBARMENT
FOR A PERIOD OF FIVE (5) YEARS SHOULD BE
UPHELD BY THIS COURT

Respondent's admitted misappropriations constitute one of the most serious transgressions that an attorney can commit. Count six (6) of the Complaint and Respondent's Guilty Plea clearly demonstrates that the Respondent's trust account liabilities exceeded his trust account assets by \$27,768.97.

Between January and September, 1988, there existed constant misappropriation and shortages of funds in the Respondent's trust accounts. (See Respondent's Guilty Plea and Complaint). Respondent has admitted this serious misconduct. However, the Respondent has failed to make complete restitution. Respondent still owes \$3,643.76 to G. Hartley Melish. (T. 3 and paragraph (7c) of guilty plea). Respondent contacted The Florida Bar in this matter only after he already knew The Florida Bar was aware of Mr. Rutter's complaint. (T.9). In his testimony, the Respondent admitted that he had a cash flow problem and dipped into his trust account as needed. (See T. 22-31). Partial restitution was made by the Respondent after The Florida Bar was on notice of the trust problems. (T. 4). The misappropriation engaged in by the Respondent undermines the trust placed in him as an attorney.

Disbarment is the appropriate discipline in this cause based upon the Respondent's serious and cumulative misconduct. In The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981) the Respondent was disbarred for a continuing and irresponsible pattern of conversion. In the instant case, the Respondent misappropriated funds for a period of at least nine (9) months. (See Complaint, Guilty Plea, and Report of Referee).

In The Florida Bar v. Davis, 474 So.2d 1165 (Fla. 1985), the Respondent was disbarred for using client trust funds to satisfy personal obligations, for failure to keep adequate trust records and for other violations. Similarly, the instant Respondent also used clients' funds for personal obligations and had inadequate trust records (T. 29).

In the cases styled The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986), The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989) and The Florida Bar v. Rodriguez, 489 So.2d 727 (Fla. 1986), the Respondents were disbarred for misappropriation of funds, notwithstanding their defenses of suffering from alcoholism at the time of misconduct. Similarly, Respondent's statements regarding his personal difficulties are not sufficient to excuse his misconduct. Everyone experiences personal difficulties at some point or other. However, same does not justify the theft and use of clients' funds. It would be incredulous to believe that an attorney could dip into his

trust account whenever he was low on funds. Respondent in his testimony admitted that he had a cash flow problem and used his trust account as needed. (T. 22-31). Respondent acknowledged that he could have obtained the funds from other sources. (T. 35)

The Honorable W. Herbert Moriarty, Referee found as aggravating factors in this cause the following: (1) dishonest or selfish motive (2) a pattern of misconduct and (3) multiple offenses.

In his brief, Respondent complains that the Referee ignored his mitigating circumstances. The Referee is not obligated to accept or consider such items. See The Florida Bar v. Setien, 530 So.2d 300 (Fla. 298). The Referee certainly can make a recommendation of disbarment even if mitigating factors had been found. In Setien, this Court stated that many of the Respondent's mitigating allegations explain his conduct, but do not excuse it. In Setien, this Court stated that the mitigating factors presented by the Respondent were either rejected or not considered sufficient by the Referee compared with the conduct involved. Similarly, the instant Referee most likely rejected same or considered it not sufficient in comparison to the serious misconduct in this case.

Most importantly, as of the date of the final hearing, Respondent had failed to make restitution in the amount of

\$3,643.76 to an expert witness. (See RR, page 2 and Guilty Plea, page 2)

Respondent cites the case of The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989) wherein cooperation and restitution were found. In Schiller, the Respondent had replaced all the misappropriated money by the time of the final hearing. The instant Respondent failed to have made complete restitution as of the date of the final hearing and to date has not done so to the knowledge of Bar Counsel. (T. 3, paragraph 7c of Guilty Plea).

Since this Court's suspension in The Florida Bar v. Pinckett, 398 So.2d 802 (Fla. 1981), this court has disbarred numerous attorneys for misappropriation of funds. See Knowles, Supra, Golub, Supra, Rodriguez, Supra, The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988), The Florida Bar v. Gillis, 527 So.2d 818 (Fla. 1988), The Florida Bar v. Shuminer, 15 FLW S385 (July 13, 1990), The Florida Bar v. Nagel, 440 So.2d 1287 (Fla. 1983), The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989), The Florida Bar v. Bookman, 502 So.2d 893 (Fla. 1987) and The Florida Bar v. Ross, 417 So.2d 985 (Fla. 1982).

The Florida Bar agrees that there are three (3) purposes of attorney discipline, to wit:

First, the judgment must be fair to society, both in terms 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. The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

As to the first factor of the judgment being fair to society, The Florida Bar submits that the public would not be protected if the Respondent is not disbarred and that any lesser discipline would be viewed by the public as being too light for an attorney who intentionally misappropriated clients funds for his own use. Respondent wrote at least twenty (20) checks to himself from his trust account (See complaint and guilty plea).

The second factor in the Pahules case is the judgment being fair to the Respondent and being sufficient to punish a breach of ethics and encourage reformation. A discipline less than disbarment under the facts of this case would not be sufficient to punish the serious misconduct and acts of misappropriation present in this cause.

The third factor of the judgment being severe enough to deter others would certainly not occur if the Respondent receives any discipline less than disbarment. Under the Respondent's theory, an attorney can steal and use clients

funds, then tell of personal difficulties, and escape serious discipline. Said attempt cannot be tolerated. The instant Respondent intentionally took the money in at least twenty (20) separate checks. He was not suffering from alcohol or drug addiction, although even when attorneys have drug or alcohol problems, they have been disbarred for their serious breaches of the trust imposed in them.

The facts of The Florida Bar v. Block, 500 So.2d 529 (Fla. 1987), and The Florida Bar v. Anderson, 395 So.2d 555 (Fla. 1981) cited by Respondent are much less severe than the instant case. In Block, there were technical trust violations and one dishonored check. Respondent's instant misconduct involves cumulative acts of misconduct and the improper issuance of numerous checks to himself. In Anderson, the Respondent made complete restitution whereas same has not occurred in this cause.

The first count of The Florida Bar's complaint concerned Respondent's violation of the trust account recordkeeping and procedural requirements of the rules regulating attorneys. Such violations in and of themselves warrant, at the least, the imposition of a public reprimand. See The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980).

The second count of The Florida Bar's complaint concerned Respondent's improper retention for himself of the interest in

his trust accounts. In The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988), the Respondent's attorney was disbarred for cumulative misconduct, including the improper retention of interest. Cumulative misconduct is dealt with severely and is present in this case. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

The Board of Governors of The Florida Bar adopted Standards for Imposing Lawyer Discipline. Standard 4.11 provides:

Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

The Respondent knew that he was using the funds of others and intentionally did so. Under Standard 9.22, the Referee found that the following aggravating factors are present: (a) dishonest or selfish motive (Respondent clearly used funds of clients and others for his personal obligations), (b) a pattern of misconduct (there were several acts of misappropriation involved herein), (c) multiple offenses (Respondent engaged in numerous acts of misconduct, Counts 1 through 7).

In the cases cited by Respondent wherein mitigating factors were found, none of said cases had the findings of the Referee of the above-stated aggravating factors and said cases are readily distinguished. Additionally, in this cause, the Referee did not make any findings of mitigating factors.

Further, the Respondent to date has not made complete

restitution and part of the restitution he did make was only after The Florida Bar was on notice of a complaint against the Respondent in this cause. (T. 3-4).

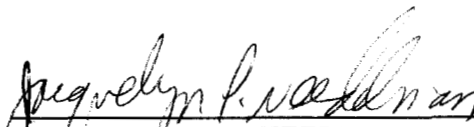
Count 6 of the Complaint clearly demonstrates that the Respondent's trust account liabilities exceeded his trust account assets by \$27,768.97. Same constitutes serious misappropriation.

Accordingly, The Florida Bar requests that this Court uphold the recommendation of the Referee and disbar the Respondent from the practice of law for a period of five (5) years.

CONCLUSION

The Florida Bar respectfully requests this Honorable Court to uphold the Referee's findings of fact, approve the discipline of disbarment for a period of five (5) years that was recommended by the Referee, and have execution issue against the Respondent in the amount of \$1,468.25 for the costs incurred in this proceeding.

Respectfully submitted,



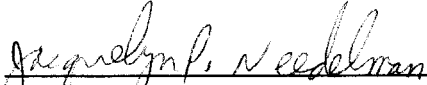
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Answer Brief of The Florida Bar was sent to Sid J. White, Clerk of The Supreme Court, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399-1927; and a true and correct copy was mailed to Neil A. Shanzer, Respondent, by certified mail P 034 323 820 return receipt requested, at his official record bar address of 8121 S.W. 162nd Street, Miami, Florida 33131; and a copy was mailed to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300 on this 3rd day of August, 1990.



JACQUELYN P. NEEDELMAN
Bar Counsel

APPENDIX

- I. COMPLAINT, DATED SEPTEMBER 21, 1989
- II. RESPONDENT'S STIPULATION, DATED SEPTEMBER 7, 1989
- III. REPORT OF REFEREE, DATED MARCH 20, 1990