IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

NEIL A. SHANZER,

Respondent.

_____/

Supreme Court Case
No.74,765

The Florida Bar
Case Nos. 89-70,544)11F)
89-70,702(11F)

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

In addition to the symbols used in Respondent's Initial Brief, the symbol "AB." will be used for references to the Answer Brief of The Florida Bar filed herein , and the symbol "IB." will be used for references to Respondent's Initial Brief.

ARGUMENT IN REPLY

At no point in its brief does the Bar take issue with the existence of any of the numerous mitigating factors present sub judice - neither Respobent's full cooperation, his substantial restitution nor any of the other mitigating factors present are disputed. Rather, the Bar argues, that the referee properly rejected same or considered them insufficient when compared with the conduct involved. In support of its position, the Bar focuses on (i) Respondent's failure to make complete restitution, (ii) the fact that a portion of the restitution made by Respondent occurred after the subject grievance was filed with the Bar, (iii) the three "aggravating factors" found to be present by the referee, (iii) and the fact that this court has disbared attorneys in misappropriation cases notwithstanding the presence of such mitigating factors as alcoholism or drug addiction, neither of which are present here. (AB 3.)

Although Respondent's has not made complete restitution, he has made **substantial** restitution and most of that was made months before the subject grievance was filed with the Bar. (IB 6-7.) Does the Bar seriously contend that nothing less than full restitution can be considered as a mitigating factor? Rule 9.32(d), Florida Standards for Imposing Lawyer Sanctions, indicates otherwise for good reason. The policy of this court and the Bar should be to encourage as much voluntary restitution as possible. To hold otherwise would send the wrong

message, i.e if you are unable to borrow enough money to make full restitution, don't bother to borrow and repay any money because it will not have any weight as a mitigating factor. Surely, substantial restitution with a sincere intention of completing same, as is present here, should be considered as a mitigating factor.

Along these same lines the Bar highlights the referee's finding that a portion of the restitution was made after the subject grievance was filed with the Bar. (AB 2.) Later in its brief, the Bar attempts to distinguish The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), where the respondent's cooperation and restitution resulted in sanctions less severe than disbarment, on the basis that full restitution was made in that case. (AB 8.) However, as pointed out in Respondent's Initial Brief (IB. 16), the misappropriated funds were replaced by Mr. Schiller only **after** he was notified of the grievance and the exact deficit in his trust account was determined. A dishonest or selfish motive, a pattern of misconduct, and multiple offenses were also present. Mr. Schiller admitted, inter alia, that he had knowingly misused and misappropriated in excess of $29,000 in trust funds over a five (5) year period for his own purposes. Notwithstanding, this court found that the presumption of disbarment as the appropriate punishment had been rebutted and suspended Mr. Schiller for three (3) years.

The Bar incorrectly states that none of the three aggravating factors found by the referee were present in the numerous cases cited in Respondent's Initial Brief. This simply is not true. Although the referees in those cases may not have made specific findings as to their presence, a review of the facts in almost all of the cases previously cited by Respondent in his Initial Brief demonstrates that such factors were very much present. See e. g., Schiller, supra.

The Bar correctly points out that this court has disbared attorneys in misappropriation cases notwithstanding the presence of alcoholism or drug addiction. (AB 3.) By the same token, this court has refrained from imposing disbarment in many cases (cited in Respondent's Initial Brief) where neither of these mitigating factors were present, although other mitigating factors, also present here, did exist. See e. g., Schiller, supra.

In short, each case must be decided on its own facts. The facts in the cases cited by the Bar make them clearly distinguishable.

In The Florida Bar v. Harris, 400 So.2d 1220 (Fla.1981) (AB. 6), the respondent misappropriated in excess of $42,000 in trust funds from four clients, wrote 51 bad checks on one of his trust accounts, and lied on his bar dues statement for 1978. Of the $42,000 misappropriated, Respondent had only repaid approximately $6,000. Substantial restitution was not present.

In The Florida Bar v. Davis, 474 So.2d 1165 (Fla.1985) (AB. 6), the referee found respondent guilty a host of Integration and Disciplinary Rules resulting from, inter alia, his misappropriating trust funds; borrowing approximately $100,000 from several clients without advising them that their interests could differ and to seek independent counsel; defaulting on these loans; and, neglecting certain legal matters causing harm to a client. No mitigating circumstances were present and no petition for review was filed. Thus, the referee's recommendation of disbarment was approved.

The respondent in The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986) (AB. 3,6,8) misappropriated $197,900 in trust funds between August 1979 and May 1983. Shortly after these misappropriations were brought to the

attention of the Bar, Respondent was suspended from the practice of law effective September 14, 1983. Thereafter, he was charged with eight counts of grand theft to which he plead no contest. Adjudication of guilt was withheld and Respondent was sentenced to two years probation, three hundred hours of community service, and fined $14,000. Respondent had received treatment for alcoholism and was continuing his rehabilitation through "AA" and private therapy. He had not consumed alcohol for several years. Noting that these misappropriations occurred continuously over a period of approximately four (4) years during which respondent continued to work regularly without suffering a discernable diminution of income, the Florida Supreme Court approved the referee's recommendation of disbarment for three (3) years. However, noting that Respondent had promptly made restitution and had no disciplinary record prior to this complaint, disbarment was ordered to run concurrently, nunc pro tunc, with respondent's suspension, effective September 1983. Thus, by the time this Court rendered its opinion in December 1986, Respondent's period of disbarment had expired.

Similarly, in The Florida Bar v. Shuminer, 15 FLW S325 (Fla., July 18, 1990), this court noted that notwithstanding the presence of various mitigating factors, Respondent's violations were aggravated by the fact that during the period in question Respondent continued to work regularly and efficiently, suffered no discernable diminution in income, and used a significant portion of the misappropriated funds to purchase a luxury automobile (a Jaguar).

Unlike the two cases just cited, in the instant case the respondent was experiencing, among other things, severe financial difficulties, was depressed and unable to work effectively during the period in question. (T. 24-26.)

The respondent in The Florida Bar v. Golub, 550 So.2d 455 (Fla.1989) (AB. 6), failed to make any restitution of the approximately $24,000 he misappropriated.

Citing The Florida Bar v. Setien, 530 So.2d 300 (Fla. 1988) (AB. 7), the Bar argues that the referee sub judice was not obligated to "accept or consider" the unrebutted evidence regarding mitigating circumstances. Understandably, under the facts of that case, the referee may not have considered Mr. Setien drug and alcohol addiction to have been sufficient. Mr. Setien had neglected numerous legal matters, bounced a number of checks even though he was able to purchase a $25,000 Porsche automobile at the same time, closed his practice and went into hiding. The Bar's investigator, a former F.B.I. agent, spent 100 hours over the course of a little more than a year unsuccessfully trying to find Mr. Setien.

The Florida Bar v. Newhouse, 520 So.2d 25 (Fla.1988) (AB. 11), involved an attorney that was found to have intentionally lied to the Florida Supreme Court in connection with a previous disciplinary matter; intentionally and purposefully violated a court order regarding the disbursement of certain settlement proceeds; counseled and assisted others to violate court orders; failed to follow proper trust accounting procedures and maintain proper trust accounting records; failed to comply with interest bearing trust account rules; converted a client's property; and, failed to produce records in response to a grievance committee subpoena. The referee found that there were no mitigating factors present and that the situation was aggravated by Respondent's previous record (he had previously received a public reprimand, The Florida Bar v. Newhouse, 489 So.2d 935 (Fla.1986)), dishonest motive, pattern of misconduct,

noncooperation, deceptive practices, failure to acknowledge wrongdoing, and length of experience.[1]

In The Florida Bar v. Gillis, 527 So.2d 818 (Fla. 1988) (AB. 8), the Respondent failed to respond to Bar inquiries, did not attend the grievance committee hearing, failed to respond to the Bar's formal complaint, did not attend the hearing before the referee, and made no appearance before this court.

Other than the fact that a seventeen (17) count complaint was filed by the Bar in The Florida Bar v. Nagel, 440 So.2d 1287 (Fla. 1983) (AB. 8), involving, inter alia, numerous instances of misappropriations and a guilty plea to related criminal charges, few facts are disclosed by this court's opinion. No mitigating circumstances, such as cooperation or restitution, are mentioned.

In The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989); (AB. 8), the Respondent's violations and misappropriations were apparently motivated by greed. He swindled his client/partner in a real estate transaction involving several hundred thousand dollars. Additionally, he was uncooperative and concealed his misconduct for a significant period of time causing substantial delay in his prosecution. It also appears that he made little or no restitution.

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[1] Mr. Newhouse was involved in additional disciplinary actions. The Florida Bar v. Newhouse, 539 So.2d 473 (Fla.1989). This time, after a hearing at which he was neither present nor represented, he was found to have misappropriated thousands of dollars belonging to a number of clients, overcharged eight clients a total of $15,505.43 in unvalidated costs, failed to maintain minimum trust account procedures, failed to pay entrusted funds promptly upon request, and, commingled his funds with clients' funds in his interest-bearing trust account. The referee ordered Mr. Newhouse to make restitution of a total of $38,235.28 to the 23 clients involved and recommended that he be be disbared for 20 years. This court approved and entered judgment for costs of $12,448.32 incurred by the Florida Bar.

In The Florida Bar v. Bookman, 502 So.2d 893 (Fla. 1987) (AB. 8), the Respondent absconded with approximately $68,000 of his client's money, abandoned his law practice and could not be located. He made no appearance before this court. There was no evidence of any mitigating factors.

In The Florida Bar v. Ross, 417 So.2d 985 (Fla. 1982), the Respondent misappropriated approximately $84,000. He failed to appear in person at his hearing before the referee and did not appeal the referee's recommendation of disbarment. There was no evidence of any restitution or any other mitigating factors.

Clearly, the facts sub judice are most closely analogous to those in Schiller, supra., where the presumption of disbarment was found to have been overcome by evidence of the respondent's cooperation and restitution. Schiller, supra., should control the outcome of the instant case.

CONCLUSION

It is respectfully submitted that the referee erred in failing to give any consideration to the mitigating factors present including, inter alia, Respondent's full cooperation, substantial restitution and sincere intention to repay all funds remaining due, personal and emotional problems at the time, and lack of any prior disciplinary actions - none of which are even disputed by the Bar. After giving due consideration to all the facts adduced, it is respectfully submitted that the "extreme sanction of disbarment" is too harsh and would not serve the various purposes applicable to lawyer discipline in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 30th day of August l990 to Jacquelyn P. Needelman, Esq., Bar Counsel, The Florida Bar, Miami Office, Suite M-100, Rivergate Plaza, 444 Brickell Ave., Miami, FL. 33131.

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