5-27

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

V.

PATRICIA G. WILLIAMS,

Respondent.
_____/

Case No. 75,906

FILED
SID J. WHITE
MAY 3 1991
CLERK, SUPREME COURT
By: Chief Deputy Clerk

INITIAL BRIEF OF THE FLORIDA BAR

JACQUELYN P. NEEDELMAN
Bar Counsel
Attorney No. 262846
The Florida Bar
444 Brickell Avenue
Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN T. BERRY
Staff Counsel
Attorney No. 217395
The Florida Bar
650 Apalachee Parkway
Tallahassee, Fl 32399-2300
(904) 561-5600

JOHN F. HARKNESS, JR.
Executive Director
Attorney No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PREFACE

In this brief, the Complainant, The Florida Bar, will be referred to as The Florida Bar. Patricia Williams, Respondent, will be referred to as "the Respondent". The following abbreviations will be utilized:

T - Transcript of final hearing held on December 13 and 14, 1990, followed by the appropriate page number.

RR - Report of Referee, dated February 8, 1991.

STATEMENT OF CASE AND FACTS

The Florida Bar filed its eight-count complaint against Respondent on April 25, 1990. On June 26, 1990, the Honorable Dale Ross was appointed Referee in this cause. On July 6, 1990, the Supreme Court terminated Judge Dale Ross as Referee since Judge Ross recused himself. The Honorable Geoffrey D. Cohen was appointed Referee on July 6, 1990. On August 21, 1990, The Florida Bar submitted its request for admissions. Respondent's motions for continuance were granted on October 10, 1990 and October 23, 1990. The final hearing in this cause was held on December 13 and 14, 1990.

On February 6, 1991, the Referee filed his report recommending that the Respondent be found guilty of all charges and that the Respondent be suspended from the practice of law for a period of ninety (90) days.

On February 8, 1991, The Florida Bar moved to amend the report of referee. The report of referee was amended by an Order dated February 11, 1991, regarding prior discipline of the Respondent.

The Florida Bar filed its Petition for Review on April 5, 1991.

At the final hearing in this cause, bar counsel advised the Referee that bar counsel and the designated reviewer were seeking a discipline of at least suspension for a period of one (1) year and that the Board of Governors of The Florida Bar would not

receive the matter for its determination until after the Referee's Report was issued (T. 263).

The Referee found Respondent guilty of violations as to all eight counts of The Florida Bar's Complaint. (See Report of Referee).

The Referee's findings of fact concerning Count I are as follows:

> 1. On November 26, 1986, Melvin Cochran retained Respondent to represent him in a domestic relations matter. Cochran, on November 26, 1986, signed a retainer agreement and on said date and thereafter paid monies toward attorney fees.
>
> 2. Between December 1986 and January 20, 1987, Cochran attempted unsuccessfully on numerous occasions to contact Respondent and left many telephone messages for her concerning the status of his case and visited her office in attempts to discuss the case with her.
>
> 3. Respondent failed to return Cochran's telephone calls or contact Cochran as to the status of his case.
>
> 4. On January 20, 1987, Cochran sent a letter to Respondent requesting a refund of the monies paid for attorney fees and all personal papers since it did not appear that Respondent wished to represent him in the matter.
>
> 5. On January 30, 1987, Respondent filed a notice of appearance on behalf of Cochran.
>
> 6. Respondent was notified of a hearing scheduled for February 5, 1987 and advised Cochran that she would have the matter continued.
>
> 7. Respondent failed to move to continue the hearing, failed to attend the hearing or have other counsel appear for Cochran. Cochran, believing the hearing had been continued, was not present.
>
> 8. A final judgment of dissolution of marriage was entered on February 5, 1987.

The Referee found the Respondent guilty of Count I and specifically that she be found guilty of the following violations:

Disciplinary Rules 6-101(A)(3) [neglect of a legal matter], 7-101(A)(1) [a lawyer shall not intentionally fail to seek lawful objectives of client], 7-101(A)(2) [failure to carry out contract of employment entered into with client] of the Code of Professional Responsibility and Rule 4-1.3 [a lawyer shall act with reasonable diligence and promptness in representing a client], of the Rules of Professional Conduct.

The Referee's findings of fact as to Count II are as follows:

> 1. Respondent was retained to represent one Melvin Judge in a criminal case in Dade County, Florida. On August 23, 1985, Respondent received a quit claim deed on property described as Lot 22, Block 12, of Royal Palms Park, Section Three, as security for her fee in the representation of Judge.
>
> 2. On August 29, 1985, Respondent recorded the quit claim deed and in January 1988, applied with United Mortgage Company for a mortgage loan in the amount of $25,000.00 on the property. On March 23, 1988, United Mortgage Company approved Respondent's application and provided funding for said mortgage.
>
> 3. On or about April 20, 1988, Respondent appeared before the Eleventh Judicial Circuit Grievance Committee "J" in reference to the quit claim deed and the property described above. Respondent stated at the proceeding, "I have no money from that property and no mortgage on it, that I'm aware of." (Transcript, page 185).
>
> 4. At the time of Respondent's April 20, 1988 appearance before the Eleventh Judicial Circuit Grievance Committee "J", Respondent had, in fact, received money from the property and had a mortgage issued, funded and recorded regarding said property. This referee finds Respondent's explanations for said statement not credible.

The Referee found the Respondent guilty of Count II and specifically that she be found guilty of the following violations: Rules 4-8.4(c), [conduct involving dishonesty, fraud, deceit or

misrepresentation], 4-8.4(d) [conduct prejudicial to the administration of justice] of the Rules of Professional Conduct and Rule 3-4.3 [commission of any act unlawful or contrary to honesty and justice] of the Rules of Discipline.

The Referee's findings of fact as to count III are as follows:

> 1. On January 8, 1988, Respondent executed a promissory note for $25,000.00 and mortgage securing payment of such promissory note with United Mortgage Company.
>
> 2. On March 22, 1988, R.R. Darwin became holder of such note and mortgage by virtue of an assignment of mortgage.
>
> 3. A payment of $403.34 was due from Respondent to Darwin and on or about May 31, 1988, Respondent issued check number 133 for $403.34 to Darwin.
>
> 4. On or about June 10, 1989, Respondent's check number 133 for $403.34 was presented to Respondent's bank for payment. There were insufficient funds to cover the check and said check was not negotiated. Respondent issued check number 133 when she knew or should have known that she did not have sufficient funds to pay said check. On or about June 17, 1988, Respondent was notified by the mortgage holder that her check was returned.
>
> 5. On or about July 18, 1988, Respondent issued check number 172 for $418.34 to Darwin and, on or about July 25, 1988, was advised that only cash or a money order would be accepted to replace a check returned for non-sufficient funds. Respondent failed to tender cash, a cashier's check or a money order for monies due for the months of May, June and July, 1988.
>
> 6. A Notice of Lis Pendens was filed on August 23, 1988.
>
> 7. Respondent failed to make good the payments due until after a civil complaint for foreclosure of the mortgage was filed and a complaint made to The Florida Bar.

The Referee found Respondent guilty of Count III and specifically that she be found guilty of the following violations: Rule 3-4.3 [commission of any act which is unlawful or contrary to honesty and justice] of the Rules of Discipline, and Rule 4-8.4(b) [criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as a lawyer in other respects] and 4-8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

The Referee's findings of fact as to Count IV are as follows:

> 1. Respondent, during the period of December 19, 1983 through October 26, 1986, maintained a trust account as Atlantic Bank, account number 15200285526. Respondent maintained two (2) operating accounts, one at Landmark First National Bank, account number 13-168758-0-10 and another operating account at First Union Bank, account number 15200137360.
>
> 2. Carlos J. Ruga, Branch Staff Auditor for The Florida Bar conducted an audit of Respondent's trust account and trust funds for the period of December 19, 1983 through October 26, 1986. The audit revealed the following trust accounting violations:
>
> (a) Respondent failed to maintain the required minimum trust account records;
> (b) Respondent failed to follow the required minimum trust accounting procedures;
> (c) Respondent deposited client trust funds in Respondent's operating account;
> (d) Respondent deposited checks from her operating account into her trust account; and
> (e) Respondent commingled funds, depositing fees and client funds in her trust account although prohibited by the Rules governing trust accounts;

The Referee found Respondent guilty of Count IV and specifically that she be found guilty of the following violations: Florida Bar Integration Rule, Article XI, Rule 11.02(4) [trust

funds and records], Disciplinary Rule 9-102(A) [preserving identity of funds and property of client] of the Code of Professional Responsibility, Rule 4-1.15(a) [safekeeping property] of the Rules of Professional Conduct and Rules 5-1.1 and 5-1.2 of the Rules Regulating Trust Accounts. [Trust Accounting and Trust Records and Procedures].

The Referee's findings of fact as to Count V are as follows:

> 1. Respondent, on March 22, 1984, had a balance of $1,693.45 in trust account number 15200285526 maintained at Atlantic Bank. That as of March 22, 1984, Respondent had client liabilities totaling $2,389.09, reflecting a shortage of $695.64.
>
> 2. On April 22, 1984, Respondent had a balance of $1,225.37 in trust account number 15200285526 maintained at Atlantic Bank. As of April 22, 1984, Respondent had client liabilities totaling $2,181.31, reflecting a shortage of $995.94.
>
> 3. As of December 24, 1984, Respondent had client liabilities totaling $4,500.00, reflecting a shortage of $1,749.56.
>
> 4. On or about April 11, 1986, Respondent had a balance of $47.46 in trust account 15200285526 maintained at Atlantic Bank. As of April 11, 1986, Respondent had client liabilities totaling $1,105.00, reflecting a shortage of $1,057.54 in said account.
>
> 5. That although no client suffered any actual loss and Respondent repaid all shortages, Respondent admitted to the intentional use of trust account funds to "keep her office open" and her knowledge of the wrongfulness of such practices.

The Referee found the Respondent guilty of Count V and specifically that she be found guilty of the following violations: Florida Bar Integration Rule, Article XI, and Rule 5-1.1 of the Rules Regulating Trust Accounts, by using client funds for

purposes other than the specific purpose for which they were entrusted to her.

The Referee's findings of fact as to Count VI are as follows:

> 1. Respondent's trust account number 15200285526 maintained at Atlantic Bank was an interest bearing trust account.
>
> 2. Between December 19, 1983 and October 26, 1986, a total of $566.75 was earned in interest on account number 15200285526.
>
> 3. Respondent profited from the interest earned from said trust account in violation of Florida Bar Integration Rule, Article XI, Rule 11.02(4)(d).

The Referee found the Respondent guilty as to Count VI and specifically that she be found guilty of the following violation: Florida Bar Integration Rule, Article XI, Rule 11.02(4)(d) by failing to comply with the provisions of said rule concerning interest earned on trust accounts.

The Referee made the following findings of fact as to Count VII:

> 1. On October 9, 1985, one Annie Ingraham retained Respondent to represent her and her minor son, Timothy Dean, in an action against the Dade County School Board. Respondent had Ingraham and her son sign a retainer agreement on October 9, 1985, by which they contracted to pay Respondent a fee of 40% of any award or settlement.
>
> 2. Pursuant to Section 768.28 Florida Statutes, attorney fees in such cases are limited to twenty-five percent of recovery.
>
> 3. That from October 1985 through November 1987, Respondent neither informed Ingraham or Dean of this statutory limitation nor informed Ingraham or Dean that the 40% fee would be reduced to 25%.

The Referee found the Respondent guilty as to Count VI and specifically that she be found guilty of the following violation:

Disciplinary Rule 2-106(A) [a lawyer shall not enter into an agreement, charge, or collect an illegal or clearly excessive fee] of the Code of Professional Responsibility.

The Referee made the following findings of fact as to Count VIII:

> 1. On October 9, 1985, Annie Ingraham retained Respondent to represent her and her minor son, Timothy Dean, in an action against the Dade County School Board.
>
> 2. In October, 1985, Respondent filed a complaint on behalf of Dean and Ingraham in Timothy Dean and Annie Ingraham as Guardian Ad Litem v. Dade County School Board, Case No. 85-42383(07), Circuit Court, Dade County, Florida.
>
> 3. On February 5, 1986, the complaint was dismissed for lack of prosecution and neither Ingraham nor Dean was ever informed that said complaint was dismissed,
>
> 4. Respondent filed amended complaints, some of which were dismissed.
>
> 5. On July 9, 1987, Respondent took voluntary dismissals against two of the defendants, and neither Ingraham nor Dean was consulted, advised about or agreed to such voluntary dismissals.
>
> 6. On August 26, 1987, Respondent filed a notice of voluntary dismissal dismissing Ingraham and neither Ingraham nor Dean was consulted, advised about or agreed to such dismissal or Ingraham as party plaintiff.
>
> 7. Respondent failed to properly pursue this action on behalf of Dean and Ingraham; failed to keep her clients, Dean and Ingraham, reasonably informed about the status of the matter and failed to comply with her clients' requests for information; and failed to explain the matter to the extent reasonably necessary to permit her clients to make informed decisions regarding the representation.

The Referee found the Respondent guilty of Count VIII and specifically that she be found guilty of the following violations:

Disciplinary Rule 6-101(A)(3) [neglect of a legal matter] of the Code of Professional Responsibility and Rule 4-1.4(a) and (b) [keeping a client reasonably informed, providing information, and explaining matters for client to make informed decisions] of the Rules of Professional Conduct.

During the final hearing, the Respondent admitted that she filed a notice of appearance on behalf of Melvin Cochran (Count I) and that she was advised by Mr. Cochran on February 2, 1987 that a hearing concerning his divorce action was scheduled for February 5, 1987 (T. 201, 206). Despite the fact that Respondent knew she would be out of town on February 5, 1987, she did not file a motion for continuance (T. 204). Respondent made efforts to contact opposing counsel but was unsuccessful (T. 202).

Respondent admitted that she violated trust accounting rules when she improperly used monies in her trust account for office expenses (Count V). Despite her knowledge of the wrongfulness of such actions, Respondent used monies from her trust account for personal expenses (T. 208).

Respondent agreed to represent Annie Ingraham on behalf of her minor son in a negligence action against the Dade County School Board. The retainer agreement entered into by Respondent and Ms. Ingraham provided for a fee of 40% of any recovery (T. 211). Under Florida Statute § 768.28, attorneys fees in a personal injury action are limited to 25% of any recovery (Count VII). Respondent stated that at the time she entered into the fee agreement she was unaware that attorney's fee in such cases were limited by law (T. 211). After learning of the existence of

Florida Statute § 768.28, Respondent admitted that she failed to inform her clients that the fee would be 25% instead of 40%, as required by law (T. 211).

In addition to the above violation, Respondent was found to have neglected the legal matter entrusted to her by Ms. Ingraham on behalf of her minor son (Count VIII) (RR p. 7). Respondent admitted at the final hearing that she did not take any depositions or conduct any interviews in the preparation of the case (T. 212). Respondent further admitted that she did not speak with my witnesses, (T. 213) or file any formal discovery (T. 215). In investigating the matter, Respondent only made a verbal request for information to the insurance company which handled the claim on behalf of her clients (T. 214). Respondent was unable to answer why it took a year for the School Board to be served from the time the complaint was filed (T. 215). In addition to neglecting this matter on behalf of her clients, Respondent admitted that she failed to or does not recall advising or consulting with her clients prior to dismissing two defendants from the action and prior to dismissing Ms. Ingraham as party plaintiff (T. 216). As to the misrepresentation as charged in Count II, Respondent admitted receiving a quit claim from Ms. Mann as security for payment of Respondent's fee and subsequently applying for a mortgage at Metropolitan Mortgage Company (T. 218). After Respondent's application was rejected from Metropolitan because Ms. Mann placed a lis pendens on the property, Respondent admitted she dissolved the lis pendens and then applied for a mortgage with United Mortgage Company (T. 219). Respondent

received monies from United Mortgage just one month prior to her appearance before the Eleventh Judicial Circuit Grievance Committee "J", at which time she made a false statement as to whether she had received any money or mortgage on the property in question (RR p. 6). Respondent stated: "I have no money from that property and no mortgage on it, that I'm aware of." (T. 185).

The Referee recommended that Respondent receive a public reprimand, be suspended from the practice of law for a period of three (3) months with automatic reinstatement at the end of the period of suspension as provided in Rule 3-5.1(e), Rules of Discipline, and that Respondent be placed on probation for a period of two (2) years. The Referee recommended the following terms of probation:

> 1. Quarterly audits of Respondent's trust and operating accounts by auditors of The Florida Bar. The cost of said audits shall be born by Respondent and the reports shall be forwarded to The Florida Bar.
>
> 2. Attendance at continuing education programs in the following subjects: legal ethics, civil procedure, and law office management.

The Referee taxed the costs incurred against the Respondent. The Referee's Report was amended by an order dated February 11, 1991 to include Respondent's past disciplinary record wherein Respondent received a private reprimand for minor misconduct, The Florida Bar File No. 87-25,024(11J).

At its March 1991 meeting, The Board of Governors of The Florida Bar voted to seek disbarment in this cause.

SUMMARY OF ARGUMENT

THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE DISBARMENT FOR A PERIOD OF FIVE YEARS.

Based upon the serious and cumulative nature of Respondent's misconduct in this cause, disbarment is warranted. The Respondent has used clients trust funds for her own purposes, lied to a grievance committee and her explanation for same has been found by the Referee to be not credible. Further, the Respondent has not complied with the trust accounting record keeping and procedural requirements as well as having neglected and mishandled two clients matters and to have improperly earned interest on her trust account. In addition, the Respondent charged excessive fees and knowingly issued worthless checks. In The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983), this Court held that cumulative demonstrations of misconduct warrants disbarment. Similarly, disbarment is required in this cause.

ARGUMENT

THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE DISBARMENT FOR A PERIOD OF FIVE YEARS

The Referee's recommended discipline of ninety day suspension is an insufficient level of discipline given the Respondent's prior disciplinary history and the cumulative and serious nature of Respondent's misconduct. The Referee's findings of fact are presumed correct unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Seldin, 526 So.2d 41, 43 (Fla. 1988). The Referee found that The Florida Bar established every allegation contained in its complaint by clear and convincing evidence. The eight separate acts engaged in by Respondent consisting of two cases of neglect, lying to a grievance committee, issuing checks while knowing of insufficient funds to cover same, numerous trust account violations including using clients funds for her own purposes earning interest thereon, and charging an excessive fee constitute cumulative misconduct which is dealt with more severely by this Court as opposed to isolated instances of misconduct. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

The Florida Bar submits that the course of conduct engaged in by Respondent requires the severest sanction available in attorney disciplinary cases, that being disbarment as the Respondent was found guilty of eight Counts of violating the pertinent rules. This Court has held that where separate

instances of misconduct standing alone would not require disbarment, that the cumulative effect of eight violations warrants disbarment. The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983). Similarly, in the instant case consideration must be given to the cumulative nature of Respondent's serious misconduct in reviewing the appropriateness of the disciplinary recommendation. In considering the appropriate penalty in a disciplinary matter the Supreme Court considers prior misconduct and the cumulative misconduct as relevant factors. The Florida Bar v. Greenspahn, 398 So.2d 523 (Fla. 1980).

In Count II of the Complaint the Respondent was found to have made a false statement to the Eleventh Judicial Circuit Grievance Committee "J" (RR p. 16). The Referee found the Respondent's explanation for the statement not credible (RR p 2, 6). Respondent stated she had not received any monies from property held by her as security for her fee in representing Melvin Judge when, at the time of her statement Respondent had, in fact, mortgaged the property and received monies just one month prior to her appearance before the grievance committee (T. 238).

False statements made by an attorney is a most serious offense. Even where an attorney was unaware of the untruthfulness of his testimony before a grievance committee and there was no intentional misrepresentation, this Court has imposed a ten day suspension. The Florida Bar v. Lund, 410 So.2d 922 (Fla. 1982). Clearly, the instant respondent engaged in an intentional misrepresentation before the grievance committee as the Respondent knew she had recently received the monies and mortgage. As such,

a more severe sanction is appropriate due to the intentional nature of Respondent's conduct. In The Florida Bar v. Manspeaker, 428 So.2d 241 (Fla. 1983), the court held that disbarment was an appropriate sanction where an attorney perpetrated a fraud on his client and gave false testimony under oath to a bar grievance committee concerning the fraud. Additionally, where an attorney was found guilty of self dealing and lying under oath before a grievance committee the court ordered a ninety day suspension. The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979).

In his findings of fact, the Referee could not find any credibility in the explanations offered by Ms. Williams in defense of the charge (RR p. 2). It was the Respondent's position during the final hearing that she had no obligation to disclose the mortgage she obtained to the grievance committee (T. 233, lines 7-11).

Standard 6.11 of The Standards for Imposing Lawyer Sanctions provides: Disbarment is appropriate when a lawyer (a) with intent to deceive the court, knowingly makes a false statement or submits a false document; or (b) improperly withholds material, and causes serious of potentially serious injury to a party, or causes a significant or potentially significant adverse effect on a legal proceeding. This Court, in The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990), quoted the preamble to chapter 4 of the Rules Regulating The Florida Bar that states: "Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities." Id at 1124. The Court stated further that an attorney taking the oath of

admission to the bar must swear to "never seek to mislead the Judge or Jury by any artifice or false statement of fact or law." Id. Respondent was disbarred as a result of his misconduct.

This Court has held that disbarment should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960). This Court further stated:

> "No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial processes. When it is done it deserves the harshest penalty." Id. at 19.

In The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981), this Court stated that it had not changed its attitude since Dodd. Since the discipline in Dodd and Agar was disbarment for the use of "false testimony," the same discipline is clearly warranted for a false statement made before a Grievance Committee and the other cumulative misconduct in this cause. The Referee found the Respondent guilty of two instances of neglect as charged in Counts I and VIII of the Complaint (RR p. 5, 7). In the first case of neglect, Respondent was hired by Melvin Cochran to represent him in a domestic relations matter (RR p. 1). After not hearing from Respondent for approximately one year, despite many attempts by Cochran, Cochran requested a refund of monies he paid Respondent for attorney's fees (RR p. 1). Respondent then filed a notice of appearance on behalf of Cochran ten days later. Further, Respondent advised Cochran that she would have the matter

continued when he advised her that it was scheduled for a hearing (RR p. 2). However, Respondent failed to request a continuance or obtain a continuance of the noticed hearing. Subsequently, a final judgement of dissolution of marriage entered against Cochran (RR p. 2).

In the second count of neglect by Respondent, Respondent was retained by Annie Ingraham to represent her and her minor son in an action against the Dade County School Board (RR p. 5). Respondent filed a complaint on behalf of her clients and same was dismissed for lack of prosecution approximately five months later (RR p. 5). In addition, Respondent failed to inform her clients that said complaint was even dismissed (RR p. 5). Without consulting or advising Mrs. Ingraham, the Respondent took voluntary dismissals against two of the defendants and also filed a notice of voluntary dismissal of Mrs. Ingraham as the party Plaintiff. The law is well settled that once an attorney becomes the attorney of record, that attorney owes his client and the Court a duty to diligently prosecute the case, regardless of financial arrangements. Ganey v. State, 101 So.2d 827 (Fla. 1958). In a case involving similar misconduct where an attorney was found guilty of failing to carry out a contract of employment, neglecting a legal matter, failing to promptly pay funds to a client and making false representations to a client, this Court ordered disbarment. The Florida Bar v. Segal, 462 So.2d 1091 (Fla. 1985). In Segal the court noted its consideration of the nature and number of offenses charged and the respondent's past disciplinary convictions in determining an appropriate sanction.

Such considerations should similarly be implemented by the Court in the instant case. In a case involving only a finding of one instance of neglect this Court has ordered a two year suspension. The Florida Bar v. Wentworth, 453 So.2d 406 (Fla. 1984). However, the respondent in Wentworth was already under an indefinite suspension for a felony conviction. In addition, where an attorney neglected a client's interest and failed to adequately keep the client advised, the court ordered a sixty day suspension. The Florida Bar v. Neale, 432 So.2d 50 (Fla. 1983). This Court held that a one year suspension was warranted where an attorney failed to file a response on behalf of his client which resulted in a default being entered against his client. The Florida Bar v. Netzer, 462 So.2d 1103 (Fla. 1985). In a case factually similar to the instant one, this Court held disbarment was warranted where the attorney was found guilty of numerous disciplinary violations, some of which included neglect of a legal matter, failing to seek the lawful objectives of a client, failing to carry out a contract of employment, misapplication of trust funds, and engaging in conduct which adversely reflects on one's fitness to practice law. The Florida Bar v. Kinner, 469 So.2d 131 (Fla. 1985).

In Count V of the Complaint, the Referee found that the Respondent had numerous trust account shortages from 1984 through 1986 and that Respondent intentionally used trust account funds to keep her office open, despite her knowledge of the wrongfulness of such practices (RR p. 4). Misuse of client's funds is one of the most serious offenses a lawyer can commit. In the hierarchy

of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list. The Florida Bar v. Tunsil, 503 So.2d 123 (Fla. 1986). On three separate occasions in 1984 and again in 1986 the Referee found shortages in Respondent's trust account. The Respondent was found guilty of using client funds for purposes other than the specific purpose for which they were entrusted to her. (RR p. 6). Respondent failed to offer any reason or explanation underlying the theft of client funds except the following:

> Q. Can you explain why there were shortages in your trust account?
>
> A. Can I explain why there were shortages? Yes. I violated the rule, I've already admitted to that, and borrowed monies to keep my office open (T. 208).

In mitigation, Respondent offered "I always put them back the minute I got the money in." (T. 209). Financial difficulties do not justify the Respondent's behavior. Even where an attorney argued that he suffered from extreme alcoholism this Court held that stealing substantial sums from a client's estate warrants disbarment. The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989).

In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), this Court ordered a two year suspension with proper proof of rehabilitation where the respondent misused and misappropriated client's funds in addition to engaging in a check-kiting scheme, failed to keep adequate records and commingled client funds. More importantly, the court in Breed gave notice that in the future it would not be reluctant to disbar an attorney for this type of

offense even though no client is injured. Later, this Court held that where an attorney was found guilty of professional misconduct arising from the attorney's misappropriation of client funds and failure to maintain adequate trust accounting records disbarment without leave to reapply for twenty years was warranted. The Florida Bar v. Newhouse, 539 So.2d 473 (Fla. 1989).

In addition to the use of client funds, the Referee in this cause found that the Respondent committed numerous trust account violations consisting of failure to maintain the required minimum trust account records, failure to follow minimum trust accounting procedures, improper depositing of client trust funds into an operating account, improper depositing of checks from the operating account into her trust account, and commingling of fees and client funds in her trust account (RR p. 5, 6). In Count IV of the Complaint, the Referee found that the Respondent earned interest on her trust account for a period of approximately three years in violation of the Rules of Professional Conduct (RR p. 6).

In Count III of the Complaint, the Referee found that the Respondent knowingly issued a check with insufficient funds on two occasions and failed to make good the payments owed until after a civil complaint was filed against Respondent and a complaint was filed with The Florida Bar (RR p. 3). This court has held that irregularities in trust accounts and a failure to abide by the required trust accounting procedures is sufficient in itself to warrant disbarment. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). This Court clearly views numerous trust account

violations as warranting harsher sanctions than an isolated instance of misconduct. The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987). In Newman, as in the instant case, there were findings of dishonored checks, trust account liabilities in excess of assets and improper utilization of the trust account. The cumulative nature of the misconduct in Newman was recognized by this Court, and the respondent was disbarred despite the respondent's contention that his misconduct resulted from poor judgement and poor record keeping. In another case, this Court disbarred an attorney for using client funds to satisfy personal obligations and for failing to keep adequate trust account records and other violations similar to the one at bar. The Florida Bar v. Davis, 474 So. 2d 1165 (Fla. 1985). In The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991), this Court stated, "[C]learly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems". Id, at 1384. In Shanzer, this Court stated that the Respondent's cooperation and restitution efforts should be considered upon any reapplication for membership in The Florida Bar. In The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991), the Respondent was suspended for a period of three years for misappropriation of funds wherein he repaid same before The Florida Bar was aware of the misuse. Other mitigating factors were also found in McShirley. In the instant cause, Respondent also replaced the misappropriated funds before The Florida Bar was aware of same. However, in the instant case, the Respondent also engaged in other serious and cumulative misconduct which in totality warrants no

less than a disbarment. In The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991), this Court most recently ordered disbarment even though restitution was made, wherein the Respondent had mismanaged the funds of two estates and violated the trust account procedures and record keeping requirements.

The Florida Standards for imposing Lawyer Sanctions provide:

> 4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.
>
> 4.12 Suspension is appropriate when a lawyer knows or, should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Respondent's misconduct alone regarding her trust account warrants disbarment. Her prior misconduct and the cumulative nature of the instant misconduct further warrant the imposition of the ultimate lawyer sanction. Again, the totality of Respondent's conduct regarding the trust account violations must be a major consideration by this court in reviewing the Referee's recommendation. The Florida Bar v. Harper, 518 So.2d 626 (Fla. 1988). In Harper, the Court held that where an attorney knowingly and willfully overdrew his trust account on several occasions, failed to adequately keep trust account records and used trust account funds for improper purposes, a six month suspension followed by two years probation was a more appropriate discipline that the Referee's recommendation of a three month suspension, given the totality of Respondent's conduct.

The Referee found that the instant Respondent was retained by Annie Ingrahan, on behalf of her minor son, Timothy Dean, to

institute a civil action against the Dade County School Board (RR p. 4). The retainer agreement provided for a fee of 40% of any award or settlement in violation of Florida Statute § 768.28 which limits attorney's fees in such cases to 25 % of recovery (RR p.4). The record reflects that Respondent failed to amend the fee agreement even after she discovered the impropriety of such a fee agreement.

> Q. Okay. After you learned of Florida Statute 768.28, did you send any correspondence to the client to advise them that the fee would be 25 percent instead of 40 percent?
>
> A. No. (T. 211).

The discipline imposed in an excessive fee case where the respondent failed to communicate and arrange the terms of the representation was public reprimand and two years supervised probation. The Florida Bar v. Johnson, 530 So.2d 306 (Fla. 1988). A public reprimand has been imposed where an attorney charged a client $24,000.00 in fees for representing him in a $3,000.00 mechanics lien action. The Florida Bar v. Mirabole, 498 So.2d 428 (Fla. 1987).

The Complaint against the instant Respondent was comprised of eight counts of which the Referee found the Respondent guilty of all charges. As an isolated event, each instance may have merited a lesser discipline. However, the misconduct charged constitute serious cumulative misconduct which clearly reflects a complete and gross disregard for the very rules which the Respondent took an oath to uphold.

The discipline imposed for such serious and cumulative misconduct engaged in by Respondent not only must operate to punish the Respondent fairly and effectively, but to deter others from similar misconduct and to protect the integrity of the law and its processes and the legal profession. The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970). Accordingly, the proper discipline to be imposed in this cause should be disbarment.

CONCLUSION

WHEREFORE, for the above stated reasons, The Florida Bar respectfully requests this Honorable Court to uphold the Referee's recommendations of guilt and findings of fact, impose a discipline of disbarment for a period of five (5) years, and tax the costs of these proceedings against the Respondent in the amount of $7,655.73.

Respectfully submitted,

JACQUELYN P. NEEDELMAN
Bar Counsel
Attorney No. 262846
The Florida Bar
444 Brickell Avenue
Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN T. BERRY
Staff Counsel
Attorney No. 217395
The Florida Bar
650 Apalachee Parkway
Tallahassee, Fl 32399-2300
(904) 561-5600

JOHN F. HARKNESS, JR.
Executive Director
Attorney No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of The Florida Bar was furnished to Alcee Hastings, Attorney for Respondent, 1055 N.W. 183rd Street, Miami, Florida 33169 by Certified Mail #P 110 986 845, return receipt requested, and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 21st day of May, 1991.

Jacquelyn P. Needelman

JACQUELYN P. NEEDELMAN

INDEX TO APPENDIX