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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,  
Complainant,

Case No. 76,126

v.

FRANCES S. CHILDERS,  
Respondent.

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RESPONDENT'S ANSWER BRIEF

John A. Weiss  
Attorney Number 0185229  
P. O. Box 1167  
Tallahassee, Florida 32302-1167  
(904) 681-9010  
COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

The Appellee in these proceedings shall be referred to throughout this Brief as either Respondent or Mrs. Childers. The Appellant will be designated The Florida Bar or the Bar.

All of the exhibits entered into evidence at final hearing were those of the Respondent. They will be referred to in this Brief by the symbol EX followed by the number by which they were accepted into evidence with the exception of Exhibit 1, the deposition of J. Rogers Padgett, Circuit Judge. All references to that deposition shall be by the symbol DEPO followed by the appropriate page number.

References to the Report of Referee will be by the symbol RR followed by the appropriate page number of his report.

STATEMENT OF FACTS

Respondent accepts the statement of facts set forth by The Florida Bar in its Brief with the following additions.

Respondent returned the \$950.00 within two or three hours of her conversation with the managing partner about the \$950.00 on September 27, 1989. The funds had been maintained in her savings account the entire sixteen day period. TR 110, 111.

Mrs. Childers testified at the final hearing that she did not immediately disclose her disciplinary proceedings to her employers at HRS because she feared she may be waiving confidentiality, and thereby violating disciplinary rules by discussing her pending grievance. After discussion with counsel, she immediately told her employers about her pending grievance. TR 123-125.

### SUMMARY OF ARGUMENT

Respondent, Frances Childers, argues that the referee's recommendation that she be suspended for 90 days for her misconduct is appropriate and should be upheld by this Court.

Mrs. Childers is a 45 year old lawyer who was admitted to The Florida Bar in October, 1986. Since she graduated from high school in 1963, she has had an exemplary personal and employment record. Despite the fact that she had to quit going to college full time two years out of high school due to the birth of her first child in 1965, and that upon her divorce in 1973, she had to raise two children without support from their father, she returned to college in 1980. While working two jobs, and supporting both children, she managed to complete her college degree and obtain a law degree in 1986.

Mrs. Childers worked with the Honorable J. Rogers Padgett from 1970 until she left to go to law school in December 1983. From mid-1975 until her commencement of law school, she was Judge Padgett's secretary. During that time he entrusted her with his personal finances, and despite her being financially strapped throughout much of that period, she never breached his trust. From 1976 to 1983, Mrs. Childers was very active in Parents Without Partners. She held virtually every office in that organization, including treasurer, and there was never any hint of impropriety during the entire time that she was in the organization. One of her witnesses attested to Mrs. Childers' willingness to help others despite the fact that she was working two jobs and raising two

children without assistance.

All of Mrs. Childer's witnesses, including the managing partner of the law firm from whom she diverted the \$950.00, attested to her good character, her honesty and her integrity. Mr. Selber testified to the referee that he thought that her conduct was totally out of character. Judge Padgett and Charlene Francis, a lawyer with whom Mrs. Childers worked, both characterized her conduct as an aberration and both felt there was no danger of it being repeated.

Mrs. Childers admitted unequivocally taking \$950.00 of a check intended for her firm on September 11, 1989. She deposited that check into a savings account, and within three hours of being confronted by Mr. Selber, returned the \$950.00 to him. She cannot explain why she took the money: she did not need it and she was expecting a \$3,000.00 bonus in three months from the firm. The only possible explanation of her conduct comes from an incredible amount of stress.

The Board of Governors has taken a totally untenable position on this appeal. The Bar would have Mrs. Childers suspended for three years, a period longer than virtually all of the cases cited by The Florida Bar, for the diversion of the firm's funds. The Bar points to cases involving misappropriation of client's trust funds as support for their position. All of those cases are distinguishable. The only three cases cited by the Bar that are at all analogous to the case at Bar involved suspensions of 90 days, six months and one year respectively. Mrs. Childers' conduct

is less reprehensible than that in each of the three cases cited by the Bar and the mitigation is stronger.

Mrs. Childers is an honest individual with a sterling record. She, under incredible stress at the time, spontaneously acted improperly. Fortunately, she secured the funds that she diverted from the firm and was able to make restitution to the firm within three hours of their learning about it. While she does not deny that discipline is warranted, she urges this Court to adopt the 90 day suspension recommended by the referee.



## ARGUMENT

THE RECOMMENDATION OF THE REFEREE THAT RESPONDENT RECEIVE A NINETY DAY SUSPENSION FOR HER SIXTEEN DAY DIVERSION OF A \$950.00 CHECK BELONGING TO HER FIRM, DURING WHICH TIME THOSE FUNDS WERE HELD IN AN READILY IDENTIFIABLE ACCOUNT, AND WHICH WERE RETURNED TO HER FIRM WITHIN THREE HOURS OF THE FIRM'S INQUIRY ABOUT THE FUNDS, IS THE APPROPRIATE DISCIPLINE TO IMPOSE IN LIGHT OF RESPONDENT'S EXEMPLARY RECORD OF HONESTY AND INTEGRITY, COMMUNITY WORK AND PAST EMPLOYMENT.

Frances Childers is a 45 year old lawyer, having been admitted to The Florida Bar on October 16, 1986, who has done one bad thing in an otherwise exemplary life. On September 11, 1991, during a period of extremely high stress, she inexplicably deposited into one of her savings accounts a check for \$950.00 which, although it was made payable to her, really represented funds belonging to her firm. On November 27, 1989, Leonard Selber, the managing partner of Mrs. Childers' employer, the law firm of Selber & Selber, learned of Mrs. Childer's actions from a bookkeeper. Upon being asked about the deposit by Mr. Selber, Mrs. Childers readily acknowledged wrongdoing and returned the \$950.00 within two or three hours of her conversation with Mr. Selber. TR 111. During the entire sixteen days that she had possessed firm's funds, she had kept the \$950.00 in her savings account. TR 111.

Mrs. Childers has never denied culpability for her misconduct. TR 15, 109, 110 and 128; EX 2 and EX 3. She cannot, even today, explain why she engaged in such conduct. Her psychologist evinces the opinion that Mrs. Childers' conduct was a result of extremely high stress. TR 28. Even Mr. Selber testified to the referee that

her actions were totally out of character. TR 14, 15.

The referee in this matter, after hearing all of the evidence (The Florida Bar was alleviated of the necessity of proving up its case by a stipulation of facts between the parties which disposed of all factual issues), and after observing Mrs. Childers personally, recommended suspension for 90 days "in light of the mitigating factors and the fact that no one has been hurt except the Respondent herself". RR 8.

The Board of Governors of The Florida Bar, after the Bar recommended at final hearing a suspension "of at least 91 days" at final hearing, TR 138, is now asking for a suspension of three years duration.

A. BACKGROUND

To understand that her conduct was totally out of character, one must look at Mrs. Childers' background.

Mrs. Childers graduated from high school in 1963 and immediately started working towards a college degree at the University of South Florida (USF). As so frequently happens, one year later she was married and in July 1965 her daughter Michelle was born. In December 1969, she gave birth to her second child. In the interim, Mrs. Childers had stopped going to USF full time and, by December 1969, she had to quit going to college altogether. TR 78, 79.

Mrs. Childers was divorced in 1973. In September 1980, she began attending USF part time. At that time she was working full time as a judicial assistant for Circuit Judge Rogers Padgett.

Despite her full time job, she had to work approximately 20 hours per week at part time jobs to make ends meet while she was going to college. TR 79, 80. She finally received her B.A. from USF in 1983. TR 78.

During the time that she was going to school, Mrs. Childers received little or no child support from her ex-husband. TR 86. To support her two children and to supplement her income, Mrs. Childers did market research, standing in malls and telephoning people, and she made phone calls for appointments to sell cemetery lots. She also worked part time at J.M. Fields running a cash register. Finally, she got a part time job typing for a court reporter. TR 86.

Mrs. Childers' full time employment with Judge Padgett was a result of their working together in the State Attorney's office from 1970 until 1975. In mid-July, 1975, she transferred into the now Judge Padgett's office. TR 87. Mrs. Childers remarried in May 1986, one week after she graduated from the University of Florida Law School. TR 84. She immediately went to work for the Selber & Selber law firm. TR 77.

In 1976, Mrs. Childers became very active in Parents Without Partners. TR 82. During her time with that organization, she held virtually every local and regional office, including treasurer. TR 83. She handled funds for the organization at different times amounting to several hundreds of dollars monthly and there were never any allegations of embezzlement or improper handling of funds. TR 84.

One of Mrs. Childers' character witnesses, Cynthia Jean Price, an accounts receivable clerk in Tampa, attested to Mrs. Childers' dedication to helping others both in the Parents Without Parents organization and as a friend in need. Mrs. Price talked about her experiences with Mrs. Childers in the 1970's during a period when both were single parents struggling to make ends meet. During times of hardship, Mrs. Price would lend money to Mrs. Childers when it was needed and the loans were reciprocated when circumstances were reversed. TR 64.

When Mrs. Price had to undergo surgery, Mrs. Childers was there to keep Mrs. Price's homestead together and to make sure that Mrs. Price's daughter was cared for. TR 64.

Mrs. Price testified that, despite Mrs. Childers' having two jobs and having to take care of her two children alone Mrs. Childers would take the time to not only make costumes for her daughter for high school activities, but she would make costumes for others girls whose parents either did not know how to sew or did not have the time to do it. TR 65.

Mrs. Price further testified to Mrs. Childers' dedication to the Parents Without Partners organization. She attested to the many offices that Mrs. Childers held, including that of treasurer, and advised the referee that Mrs. Childers had an excellent reputation in that organization. TR 65, 66.

The referee's opinion of Mrs. Childers' character had to have been enhanced greatly by the testimony of the Honorable J. Rogers Padgett, Circuit Judge. Judge Padgett, who has known Mrs. Childers

since they worked together at the State Attorney's office in 1970, hired her as his secretary about six months after he assumed the bench on January 1, 1975. She was his secretary until late 1983 or early 1984 when Mrs. Childers left his employ to attend law school at the University of Florida. DEPO. 4, 5. Judge Padgett described Mrs. Childers as one of the best secretaries in the courthouse and acknowledged that she was a reliable, meticulous and a diligent worker. DEPO. 6.

Judge Padgett explicitly trusted Mrs. Childers. She would deposit his monthly pay check in the bank and bring back to him approximately \$100.00 in cash. Generally, Judge Padgett would keep between \$1,500.00 and \$2,000.00 in his desk for money to be drawn upon for traveling or similar expenses. Despite the fact that Mrs. Childers had complete access to those funds, and that she was having financial problems on numerous occasions throughout her employment with Judge Padgett, none of those funds were ever touched. DEPO. 6, 7.

Judge Padgett, who has served as a referee in grievance proceedings, DEPO. 9, and who is aware of the circumstances of Mrs. Childer's grievance, still "absolutely" trusts her and would not hesitate to entrust her with his personal finances. His high opinion of her character has not changed and he can only characterize her taking the \$950.00 that belonged to her firm as an "aberration of some sort." DEPO. 10.

Even Mr. Selber, the representative of the "victim" of Mrs. Childers' acts, spoke very highly of her. He pointed out that her

work product was excellent and that her clients were very happy with her work. He characterized her as "motivated, aggressive, straight-forward,...." and that she and Charlene Francis (an associate in the firm who also testified on Mrs. Childer's behalf) were the only two associates the firm had had that they felt very good about. TR 11.

When Mr. Selber confronted Mrs. Childers about the \$950.00 check, she immediately acknowledged wrongdoing, advised him that she felt terrible about it and further told him that from the second that she took the money "she wanted to undo it but didn't know how to undo it". TR 12. When asked if Mrs. Childers ever denied culpability for her misconduct, Mr. Selber answered:

No. Let me say, I was -- maybe this isn't responsive to the question. But I went in there fully expecting -- when I talked to her, fully expecting that she was going to have some reason, because it was just -- it was so out of character and so unexpected and so shocking, because it was just not like anything that she had done in the past. TR 14, 15.

Mr. Selber emphasized that Mrs. Childers "freely admitted it at the very beginning" when he questioned her about the \$950.00. TR 15.

Notwithstanding that Mr. Selber was a representative of a family run firm, Selber & Selber, and that he was the spokesman for the "aggrieved" party, Mr. Selber's testimony was more akin to that of a character witness than that of an aggrieved party. When asked whether Mrs. Childers should be suspended, Mr. Selber answered as follows:

My personal opinion is that she would never do it again, that she is probably wondering how she did it that time, because it was so out of character, and the embarrassment of having it -- having to go through these proceedings, I just -- I can't imagine that whatever punishment that she has already had isn't enough, in my opinion. TR 15.

Both Mr. Selber and his associate Charlene Francis, attested to Mrs. Childers' ethics in litigation. Mr. Selber characterized Mrs. Childers' ethics as being one where "there was never even the remotest suggestion" that she would take undue advantage or do something that was not straight-forward or correct. TR 18.

Charlene Francis, who first met Mrs. Childers when they started law school together in January 1984, TR 49, worked closely with her throughout their law school career and was instrumental in Mrs. Childers' going to work at the Selber & Selber law firm. In essence, Ms. Francis and Mrs. Childers were together from January 1984 until Mrs. Childers left the firm in October 1989. During that time, Ms. Francis stated that she "never had any reason to question her honesty or her integrity" and Mrs. Childers never suggested any means of cutting corners or cheating or plagiarism, TR 54, or engaging in improper activities in litigation. TR 55.

Despite the episode with the \$950.00, Ms. Francis has no doubt but that Mrs. Childers "is a very fine upstanding honest person". TR 56. As was true with Judge Padgett, Ms. Francis can only characterize Respondent's conduct in the case at Bar as an "aberration that would never happen again". TR 56.

The referee in these proceedings obviously considered Mrs. Childer's life and character as a whole when he recommended that

she receive a 90 day suspension, the longest suspension available not requiring proof of rehabilitation, for her misconduct. Rather than focusing on the sixteen day period, the referee considered the individual with an unblemished 25 year career that included raising two children as a single mother without support; who worked full time as a judge's secretary and part time in other endeavors, and who succeeded in going back to college seventeen years after she graduated from high school, while still raising two children as a single parent and working at least one full time and one part time job, to attain her college and law degrees.

The referee had to have considered Mrs. Childers' exemplary work in Parents Without Partners, and her selfless devotion to helping others, when he recommended the 90 day suspension.

Perhaps most importantly, however, the referee had to have accepted that Mrs. Childers' spontaneous action on September 11, 1989, was an aberration and was completely out of character based on the testimony before him. He must have accepted the witnesses' opinion that her misconduct would not be repeated.

Mrs. Childers was treasurer for Parents Without Partners during times of her own financial hardship and there is no hint that any money was ever mishandled. Throughout her times of financial duress, when she had to work a second job in addition to her full time job to make ends meet, Judge Padgett entrusted Mrs. Childers with his pay check and he felt secure in the knowledge that over \$1,500.00 in his desk drawers would never be tampered with despite the fact that Mrs. Childers had access to that money.



B. RESPONDENT'S MISCONDUCT: SEPTEMBER 11, 1989 TO SEPTEMBER 27, 1989.

The circumstances surrounding Mrs. Childers' misconduct are not in dispute. As discussed earlier in this brief, Mrs. Childers has never denied in any way her misconduct. When confronted on September 27th with the incident of the \$950.00 check, "she freely admitted it at the very beginning". TR 15. She admitted it to the Bar. EX 3. She admitted it to the referee. TR 108, 128.

Despite the fact that the refund check was made payable to her, Mrs. Childers never equivocated or in any way put forth the position that she "thought" that the money belonged to her. She immediately acknowledged wrongdoing.

Mrs. Childer's forthright admission of wrongdoing, when coupled with her sterling background, lends credence to her testimony that she would have returned the money "immediately if I could have figured out how to do it". TR 113. This was the position she spontaneously took when confronted about the \$950.00 by Mr. Selber in his office. He testified that "she felt terrible about it" and that "from the second that it went into her account, she wanted to undo it but didn't know how to undo it". TR 12.

The facts are simple: On September 11, 1989, the law firm of Selber & Selber received a \$950.00 refund check from the Sheriff's department. The firm (the funds did not belong to a client) had advanced \$1,000.00 to the Sheriff's office on a case involving the possible levy of an automobile. When those proceedings were terminated, the refund check was sent to the firm's offices but it

was made payable to Mrs. Childers. TR 108, 109.

Mrs. Childers deposited the \$950.00 check into her savings account. TR 109. The funds remained in that account until September 27, 1989, when Leonard Selber asked Mrs. Childers about the refund. She immediately drew a check on her savings account and reimbursed the firm within two or three hours of her meeting with Mr. Selber. TR 110, 111.

The irony of the situation was that Mrs. Childers did not need the money that she took. She and her husband were both working full time, had no large bills outstanding and were making sufficient funds to make ends meet. TR 112. She was expecting a Christmas bonus of at least \$3,000.00 in three months and, if she had needed one, she could have received an advance on that bonus. TR 113.

The only large expense on Mrs. Childers' horizon was the wedding of her daughter Michelle which was to take place in April 1990. TR 102. Even there, however, there was no pressing need for money. Mrs. Childers anticipated her daughter's wedding costing between \$4,000.00 and \$5,000.00. TR 110. However, in September, Mrs. Childers already had over \$4,000.00 set aside for that wedding. TR 109, 110. It was into her daughter's wedding account that Mrs. Childers deposited the \$950.00 check.

Although the Selber & Selber law firm and Mrs. Childers agreed that her employment at the firm would be terminated, it is obvious that the firm still had confidence in her. She stayed at the firm until late October, TR 14, and even to this day partners from the

firm call her to discuss cases. In fact, Mr. Selber intimated that, had the firm not been "down-sizing", to use the parlance that seems to be in vogue in Tallahassee these days, that she may still be working for the firm today. TR 12.

It was not until October 27, 1989, that Selber & Selber notified The Florida Bar of Mrs. Childer's actions. EX 2. Even there, the grievance might not have been filed but for the fact that Ms. Francis' research indicated that the firm was required to report Mrs. Childer's acts. TR 14, 55.

On the same day that the Selber & Selber firm reported Mrs. Childers to the Bar, she called The Florida Bar and then confirmed her conversation by letter dated October 27, 1989. EX 3. In that letter, Mrs. Childers unequivocally acknowledged her impropriety and stated, in black and white, that she knew it was "wrong from the moment I deposited that check".

C. EVENTS SUBSEQUENT TO SEPTEMBER 27, 1989.

The Bar has succeeded in setting up a "straw man" regarding Mrs. Childers' application for an acceptance of employment with the Florida Department of Health and Rehabilitative Services (HRS). The Bar would have this Court believe that Mrs. Childers is of bad moral character because, when applying for employment at HRS before she had wound down her affairs at the Selber & Selber firm, and before any grievance proceedings had commenced, she did not disclose to her interviewers the incident with the \$950.00. The Bar has ignored Mrs. Childers' quite reasonable explanation for her

failure to disclose and now urges this Court to consider that conduct as egregious as the \$950.00 incident.

The facts are once again simply stated: Ms. Childers applied for work at HRS before her employment at Selber & Selber ended and before grievance proceedings began. TR 92, EX 3. She made no misrepresentations on her application. Most significantly, however, within two weeks of her beginning employment at HRS on January 26, 1990, she disclosed to her superiors the pendency of grievance proceedings and the possibility that she would be suspended. TR 93, 94. Mrs. Childers violated no Bar rules in her dealings with HRS and, in fact, she was charged with no misconduct in this regard.

Mrs. Childer's explanation for her failure to disclose her grievance to HRS is perfectly understandable. At that time, confidentiality still attached to Bar proceedings. Mrs. Childers feared that disclosing the grievance to her employer would waive any confidentiality rights that she had. It was not until Bar counsel advised her in late January or early February, 1990 that she was facing a suspension that she sought the advice of counsel. At that time, she was advised that it would not be improper to tell her employer about her grievance and she did so the next day. TR 93, 94, 123, 124.

If HRS was offended by Mrs. Childer's actions, they still had the option of dismissing her immediately. TR 40. They did not do so.

Employees at HRS contacted the Selber & Selber law firm and all that Mrs. Childers told them was confirmed by Mr. Selber. In fact, Mrs. Childers was completely candid with HRS when she initially disclosed her pending grievance and, has been, throughout the pendency of these proceedings. TR 36, 37. Notwithstanding her pending grievances, she was appointed district counsel on an interim basis by Suzanne Casey, the District Administrator for HRS in district three (the supervisor of Mrs. Childer's supervisor). TR 39. Ms. Casey advised the referee at final hearing that Selber & Selber was "very supportive of" Mrs. Childers. TR 37.

Notwithstanding HRS' loyalty and support for Mrs. Childers, they will be forced to terminate her position as a lawyer should Mrs. Childers be suspended. TR 41.

While it can be argued that it would have been a better course of conduct for Mrs. Childers to immediately disclose to HRS the \$950.00 incident, that lack of good judgment is largely diluted by her advising her employer of her misconduct and her grievance proceedings within two weeks of employment commencing. At that point in time it would have been no burden on HRS to dismiss her and hire new counsel had they wanted to do so. The applications were still on file and Mrs. Childers could not have, in only two weeks, so solidly entrenched herself in her position that it would have been a burden to relieve her of her duties.

D. THE REFEREE'S RECOMMENDATION IS APPROPRIATE AND CONSISTENT WITH CASE LAW.

The referee, after reviewing virtually the same cases that the Bar is now citing to this Court as support for its three year suspension, rejected the Bar's recommendation of a suspension of at least 91 days and imposed a 90 day suspension. The burden is on The Florida Bar to demonstrate to this Court that the referee's recommendation "is erroneous, unlawful or unjustified." Rule 3-7.7(c)(5) of the Rules Regulating The Florida Bar.

None of the cases cited to this Court in the Bar's Brief provides sufficient justification to depart from the referee's well-reasoned recommendation. And certainly none of those cases support the Board of Governors' outlandish position that Mrs. Childers should be suspended for three years.

In its attempt to portray Mrs. Childers' actions as being tantamount to the misappropriation of client trust funds, the Bar cites to The Florida Bar v Breed, 378 So.2d 783 (Fla. 1979). In fact, no client trust funds were taken. The \$950.00 belonged to the firm and did not constitute funds advanced to that firm by a client. EX 2.

The Breed case is inappropriate however, not only because it dealt with the theft of client funds, but because Mr. Breed received but a two year suspension for continuing deficits in this trust account totaling up to \$40,000.00 and which lasted over many months. Mrs. Childers engaged in one act of misconduct, lasting sixteen days, and involving only \$950.00.

The Board of Governors would have this Court suspend Mrs. Childers for one incident of diversion of firm funds for a period one year longer than that given Mr. Breed for stealing \$40,000.00 in client funds.

The cases cited in the Bar's brief that are more closely analogous to the case at Bar are The Florida Bar v Gillen, 484 So.2d 1218 (Fla. 1986), The Florida Bar v Farver, 506 So.2d 1031 (Fla. 1987) and The Florida Bar v Stalnaker, 485 So.2d 815 (Fla. 1986). All of those cases involved diversion of firm fees. The longest suspension imposed in any of them was Mr. Farber's suspension of one year.

In Gillen, a lawyer who attempted to steal \$25,000.00 from his partners received a six month suspension. The mitigation involved in Gillen was certainly no stronger than that in the instant case. Yet, he received a suspension of but one sixth of that being sought by The Florida Bar.

The primary distinguishing factor between Gillen and the case at Bar is that Mr. Gillen engaged in a deliberate scheme, involving numerous overt acts including writing bogus checks, in an attempt to steal \$25,000.00 from his law firm to buy himself a new 1984 Porsche automobile. In the case at Bar, there was no course of conduct and the amount of money involved was but \$950.00. Certainly, Mrs. Childers' suspension should be no more than half that given to Mr. Gillen.

In The Florida Bar v Farver, supra, the accused lawyer was suspended for one year for stealing \$6,671.00 from his firm. In

that case, there was no mitigation listed except for the absence of prior discipline. In fact, Mr. Farver did not see fit to make restitution to his law firm until after he was arrested for grand theft. In the case at bar there is abundant mitigation including restitution within three hours.

In Stalnaker, the accused lawyer diverted almost \$37,000.00 from his law firm over a two year period. Once again, the misconduct involved a conspiracy with numerous overt acts of misconduct occurring over a two year period. However, Mr. Stalnaker received but a 90 day suspension.

All three of the aforementioned cases involved courses of conduct with numerous overt acts to further the conspiracy to deprive. In the case at Bar, there was but one overt act involving far less money than that taken by Messrs. Gillen, Farver or Stalnaker.

Perhaps even more significant than the fact that there was but a single incident, is the fact that Mrs. Childers kept the \$950.00 that she diverted secure in a savings account the entire sixteen days (and only sixteen days) that she held it. And, the money was restored to the firm within three hours of Mr. Selber's inquiry about the \$950.00. TR 110, 111.

It is simply preposterous for the Board of Governors of The Florida Bar to argue to this Court that Mrs. Childers should be suspended for three years when Mr. Stalnaker was suspended for only 90 days; when Mr. Gillen was suspended for but six months; and when Mr. Farver was suspended for one year.



After discussing the only three cases in Bar jurisprudence that seem to be on point, the Bar once again resorts to client trust fund theft cases to support its arguments in the case at Bar. The reference to The Florida Bar v Schiller, 537 So.2d 992 (Fla. 1989) is inappropriate. Mr. Schiller was suspended for three years for stealing client trust funds. In fact, the whole thrust of the Bar's argument that misappropriation starts at disbarment and mitigation reduces it is contained in a paragraph talking about the "misuse of client funds....". Schiller, supra, p. 993.

Mr. Schiller misappropriated client trust funds over a five year period resulting in deficits in his trust account that approached \$29,000.00. For his five year course of conduct, resulting in liability to clients in the amount of \$29,000.00, Mr. Schiller received a three year suspension. The Board of Governors urges this Court to impose this same discipline on Mrs. Childers for a single act.

Incredibly, The Florida Bar points to The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986) as support for its position that Frances Childers should be suspended for three years. Mr. Tunsil received but a one year suspension for stealing \$10,500.00 in client's funds from an estate. He was also guilty of trust account record keeping violations and bouncing operating account checks. Although there was mitigation involved, it was diluted by the fact that restitution was made only in accordance with a plea agreement in respondent's criminal case. Furthermore, Mr. Tunsil had a prior disciplinary record.

How can Board of Governors in good faith argue to this Court that Frances Childers should receive three times the discipline that Mr. Tunsil received?

There is no sound justification for the Board of Governors of The Florida Bar seeking a three year suspension in the instant case. One can only speculate that the Board is pandering to the press (enabling it to issue a press release after this Court hands down a reasonable discipline pointing out that The Florida Bar sought Draconian punishment, and, therefore, does a better job than the Department of Professional Regulation) or it is seeking a ridiculous position in the hope that this Court will compromise between the Bar's position and the referee's sound decision. Such conduct by the governing body of the Bar of this state is not only improper, it is a disgrace. The Board has an obligation not only to the public and the Supreme Court, but to the Bar to seek fair disciplines.

The Board of Governors completely ignored all precedent when it ordered its Bar counsel to abandon the reasonable position of a suspension of at least 91 days (the undersigned recognizes that three years is "at least 91 days", but submits that reason dictates that the language used meant a suspension in that neighborhood) which is consistent with Gillen, Farver and Stalnaker, and to seek, instead, a three year suspension.

The Board has completely abandoned precedent in taking its position before this Court. As the Supreme Court stated in The Florida Bar v Breed, previously cited by The Florida Bar:

to totally ignore [precedence] would allow caprice to substitute for reasoned consideration of the proper discipline. Id. p. 785.

The Florida Bar has repeatedly urged this Court to "send a message" to errant lawyers through the sanctions it imposes. Respondent, therefore, feels justified in urging this Court to send a message to the Board of Governors that it should take only reasonable positions before this Court. That message can be sent by affirming the referee's decision.

The referee in these proceedings had very good basis for his recommendation of a 90 day suspension. He specifically discussed Stalnaker, Farver and Gillen in his report of referee. He then considered those cases in light of The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1980) in which this Court set forth the three factors that need to be considered in imposing a disciplinary sanction. At page 132 of that decision, the Court stated that:

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 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.

A 90 day suspension, as reasoned by the thoughtful referee in these proceedings, will accomplish all three of the purposes. The referee specifically stated on page eight of his report that:

I believe an imposition of a 90-day suspension in the case at bar will satisfy all three factors in Pahules. Hopefully, society will notice that an attorney engaging in conduct of this nature will not be tolerated by the legal system. Despite the seriousness of Respondent's intentional act, a 90-day suspension is warranted in light of the mitigating factors and the fact that no one has been hurt except the Respondent herself.

The referee specifically cited on page five of his report that the factors and mitigation included (1) no prior disciplinary history; (2) personal or emotional problems; (3) cooperative attitude toward proceedings; (4) interim rehabilitation; and (5) remorse. All of those factors are set forth as mitigation in rule 9.32 of the Standards for Imposing Lawyer Sanctions.

Despite the Bar's attempt to characterize Mrs. Childer's conduct in this matter as a pattern of deceit and misconduct, she committed but one wrong. On September 11, 1989, she spontaneously and inexplicably took a \$950.00 check made payable to herself, but which she knew full well represented firm funds, and placed it in her savings account. Thereafter, she simply did not know how to put the money back in. The Bar speculates that had she not been caught she never would have returned the money. We speculate that the money would have been returned in the very near future.

Mrs. Childers has been up front about her conduct from the moment she was approached by Leonard Selber. He testified that she never denied culpability, TR 12, and that "she freely admitted it at the very beginning". TR 15.

Mrs. Childers also told Mr. Selber on the spot that "she felt terrible about it", that "she wished she hadn't done it," and that she wanted to "undo it but didn't know how to undo it". TR 12. Clearly, Mr. Selber, who if anybody has a right to be aggrieved, does, believed Mrs. Childers. He told the referee that his "personal opinion is that she would never do it again,....". He also testified that "I can't imagine that whatever punishment that she has already had isn't enough, in my opinion". TR 15.

The question of why Mrs. Childers, with her clean background and with absolutely no hint of any misconduct in the past whatsoever, would do this act remains unanswered. In her letter advising the Bar of her misconduct, Mrs. Childers stated "I cannot make much of an explanation for what I did because I knew it was wrong from the moment I deposited that check," EX 3. Mrs. Childers testified before the referee:

I still to this day don't know why I did it, but I never denied doing it when confronted by the partner. I immediately returned the money. TR 95.

She further testified that:

During the period of time that I had the money, I kept trying to figure out how could I solve this problem. I was afraid I would lose my job. I didn't want to lose my job. I didn't want to lose the esteem of my colleagues, and I didn't act soon enough maybe, but I didn't act, and I was looking and searching for a solution to the problem and I couldn't find it. And I was so relieved when Leonard confronted me that I could get this matter resolved. TR 95.

Clearly, Mrs. Childers is not a thief. She made a mistake and did not know how to undo it.

The only explanation that we possibly have for Mrs. Childers actions comes from the psychologist that testified at final hearing. Dr. Anastasia Wells, a clinical psychologist, after testing Mrs. Childers and finding all of the scales on her personality test were "in the normal range" and after finding that she did not have any neurosis, psychosis or personality disorder, TR 24, could only explain Mrs. Childer's conduct as a result of "unusually high levels of stress." TR 25.

In fact, Frances Childers was, throughout 1989 and culminating in late August of that year, under an incredible amount of stress. She was working 70 to 80 hours per week, TR 99, as a result of the firm gradually reducing the number of lawyers in the firm and giving her increasingly large amounts of work. TR 97. Furthermore, her experienced and efficient secretary had been promoted out from underneath Mrs. Childers in early 1989 and she had to put up with a succession of four secretaries up through September 1989. TR 101, 102. Perhaps, however, the factor that contributed the most to her attitude in August was the fact that her youngest child, her son, was leaving the soon to report for military service on September 12, 1989, TR 106, 107, and the fact that her daughter Michelle had come to Jacksonville in late August to plan for the upcoming April, 1990 wedding. TR 102.

Mrs. Childers attempted to take a week's leave to attend to her daughter's wedding during the only week they would be together.

However, despite the fact that she had given repeated notice of her upcoming leave, she had to return to her office four times to handle various matters and was on the phone virtually every day. TR 103. In fact, this was the normal course of conduct for the firm. Succinctly stated, they were grossly overworking this associate.

Frances Childers, as a result of all that she was undergoing, on September 11, 1989 inexplicably took \$950.00 in a check made payable to her and deposited it into a savings account. She did not need the money. TR 112. She simply did it. Dr. Wells opined that Mrs. Childers "was under extreme stress and just, you know, didn't even think." TR 28. Dr. Wells believes that, based on her therapy, that it is "unlikely" that Mrs. Childers will ever succumb to such stress again. TR 31.

Respondent submits to this Court that such conduct will not be repeated. She has learned how to handle stress and, while not stated specifically, this Court can rest assured that the lesson she has learned as a result of these proceedings, losing her job at Selber & Selber, facing disciplinary proceedings, a 90 day suspension, and the loss of her attorney position at HRS, are, as Mr. Selber testified, sufficient punishment for her offenses.

Frances Childers does not need to prove rehabilitation. She is no threat to the public and all three of the characteristics listed in Pahules will be fulfilled by her 90 day suspension.

CONCLUSION

The 90 day suspension recommended by the referee is appropriate for this one time incident of misconduct by Frances Childers. The Bar's request for a three year suspension should be rejected and the referee's recommendation should be adopted.

Respectfully submitted,

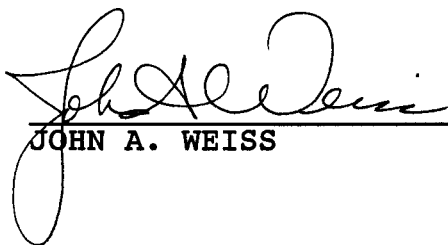


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John A. Weiss  
Attorney Number 0185229  
P. O. Box 1167  
Tallahassee, Florida 32302-1167  
(904) 681-9010  
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief was mailed to James N. Watson, Jr., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 20th day of May, 1991.



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JOHN A. WEISS