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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
complainant,
v.
ARTHUR B. STARK,
Respondent.

Case Nos. 76,406 and
76,819

INITIAL BRIEF OF THE FLORIDA BAR

JACQUELYN P. NEEDELMAN
Bar Counsel
Attorney No. 262846
The Florida Bar
444 Brickell Avenue
Suite M-Z00
Miami, Florida 33131
(305) 377-4445

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

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

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PREFACE

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

T - Transcript of final hearing held on April 22 and 23, 1991 followed by the appropriate page number.

RR - Report of Referee, dated September 27, 1991.

EX - Exhibit followed by the appropriate exhibit number.

STATEMENT OF CASE

CASE NO. 76,406

The Florida Bar filed a three (3) count complaint and its Request for Admissions in this cause on July 31, 1990. On September 20, 1990, The Honorable William P. Dimitrouleas was appointed Referee. On September 13, 1990, Respondent answered The Florida Bar's Request for Admissions. On October 1, 1990, The Florida Bar mailed its Request for Production of Documents and its First Set of Interrogatories to Respondent. The Respondent filed objections to same and a hearing was held regarding said objections on November 14, 1991 and on the suggestion of recusal of the Referee. The cause was scheduled for final hearing on January 11, 1991 and was continued to February 22, 1991 at the Respondent's request.

At the Respondent's request, Judge Dimitrouleas signed an order on February 21, 1991 recusing himself as Referee. The Supreme Court then appointed the Honorable George A. Shahood as Referee.

CASE NO. 76,819

The Florida Bar filed its Rule to Show Cause on October 24, 1990. On November 15, 1990, this Court issued its Order to Show Cause. On December 4, 1990, Respondent filed his response to the Rule to Show Cause and on December 7, 1990, The Florida Bar filed its Reply to same.

The Honorable William F. Dimitrouleas was appointed Referee on January 10, 1991. On February 21, 1991 Judge Dimitrouleas was recused and The Honorable George A. Shahood was appointed Referee.

CASE NUMBERS 76,406 AND 76,819

The Final Hearing in these causes was held on April 22 and 23, 1991. On September 27, 1991, Judge Shahood submitted his Report of Referee recommending that the Respondent be found guilty of all charges in Case No. 76,400 and that the Respondent be found in contempt of this court's Order dated April 25, 1991 in Case No. 75,828. The parties appeared before the Referee on September 19, 1991 regarding the contents of the Referee Report. At the direction of the Board of Governors of The Florida Bar, a Petition for Review was filed by The Florida Bar on November 25, 1991. The Florida Bar filed a Request for an Extension of Time to file its Initial Brief and this court allowed The Florida Bar until January 6, 1992 to serve its brief.

STATEMENT OF FACTS

The Referee's findings of fact concerning Count I of Case No. 76,406 are **as** follows:

2. Bert Friedman, a court reporter, retained the Respondent to handle the collection of court reporting fees owed to him and his firm, Friedman, Lombardi, Gendron and Brumm.

3. Respondent represented Mr. Friedman in numerous collection matters from 1985 through approximately **October** 1988. The Respondent has known and represented Mr. Friedman for over thirty years.

4. The agreement between Mr. Friedman and the Respondent was that the Respondent would receive 1/3 of the collected funds as his fee and the remaining 2/3 of monies would be forwarded to Mr. Friedman.

5. In his representation of Mr. Friedman, the Respondent collected monies owed to Mr. Friedman and failed to remit **\$8,466.29** of said funds to Mr. Friedman. This **\$8,466.29** constituted the 2/3 of monies collected that was owed to Mr. Friedman.

6. Respondent used Mr. Friedman's funds for his own purposes.

7. In October, 1988 and subsequent thereto, Mr. Friedman and his new counsel demanded receipt from **the** Respondent of the monies **owed** to Mr. Friedman and the Respondent failed to remit said funds.

8. Mr. Friedman received **\$8,466.29** from the Clients Security Fund of The Florida Bar (See Report of Referee, Pages 1-3).

The Referee found **the** Respondent guilty of Count I of Case Number **76,406** and specifically that **he** be found guilty of **the** following violations:

Florida Bar Integration Rule, article XI, Rules **11.02(3)(a)** (commission of any act contrary to honesty, justice or good morals): **11.02(3)(b)** (commission of a crime); **11.02(4)** (using funds entrusted for a specific purpose **or** for a purpose other than that for which it was entrusted) and **Rules** 3-4.3 and **3-4.4** (commission of act unlawful or contrary to honesty and justice and commission of a crime) of the Rules of Discipline, and Rule 4-8.4(b) (commission of a criminal act reflecting on lawyer's honesty, trustworthiness or fitness as a lawyer) of the Rules of Professional Conduct, and Rule **5-1.1** (money entrusted **for** a specific purpose must be used only for that purpose) of the Rules Regulating Trust Accounts.

The Referee's findings of fact as to Count II of Case No. **76,406** are as follows:

9. An audit was conducted by The Florida Bar of the Respondent's trust accounts by Carlos J. Ruga, Branch Staff Auditor, for The Florida Bar.

10. During the period of May 13, **1985** to June 30, 1989, Respondent maintained a trust account at Florida National Bank, Miami, Florida, account **#0003150218** (hereinafter referred to as "F.N.B. trust account").

11. During **the** period of May 5, 1989 to **on** or about February **28**, 1990, Respondent maintained a trust account at United National Bank, Miami, **Florida**, Account **#3-112831-7** (hereinafter referred to as "U.N.B. trust account").

12. Mr. Ruga's audit of Respondent's U.N.B. trust account covered the period of May 5, 1989 to February 28, 1990.

13. Respondent knowingly used clients' funds for purposes other than those for which the funds were **entrusted**.

14. Respondent **knowingly** used clients monies for his own use and to satisfy unrelated liabilities.

15. Respondent's **trust** account liabilities exceeded the funds available.

16. During January 1990, Respondent had checks dishonored on his trust account due to insufficient funds.

17. **As** of November 14, 1989, Respondent had a shortage in his trust account of at least \$17,066.29.

18. During the **period** of May 5, 1989 to February 28, 1990, Respondent incurred sixteen (16) overdrafts in his trust account at United National Bank. The Respondent testified that he had an arrangement with United National Bank to cover said overdrafts which the bank apparently did until January 1990. In January 1990, four (4) checks were dishonored and not covered by the bank.

19. **On October 2, 1989**, Thomas Smith and his wife, buyers, gave a check in trust to the Respondent, attorney for the seller, in the amount of \$7000.00 as a deposit to purchase real property. **As** of October 14, 1989, the Smiths' funds were used by the Respondent. Subsequently, at the time of the closing Respondent used funds from **other** sources to complete the closing.

20. Respondent used the funds of Mr. and **Mrs.** Smith without the knowledge **or** authorization of Mr. and Mrs. Smith. (See Report of Referee, Pages 2-3).

The Referee found **the** Respondent guilty of Count **II** of Case Number 76,406 and specifically that he be found guilty of the following violations:

Rules **3-4.3** and **3-4.4** (commission of any act unlawful or contrary to honesty and justice and commission of a crime) of the Rules of Discipline and Rule **4-3.4(b)** (commission of a criminal **act** reflecting on lawyer's honesty, trustworthiness or fitness as a lawyer) of the Rules of Professional Conduct, **and** Rule **5-1.1** (money entrusted for a specific purpose must be **used** only for that purpose) of the Rules Regulating Trust Accounts.

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

21. The audit of Respondent's trust accounts evidenced that Respondent failed to maintain the minimum required trust accounting records.

22. Respondent **failed** to maintain original or duplicate deposit slips and, in the case of currency or coin, an additional cash receipts book, clearly identifying the date and name of all trust funds received and the client **or** matter for which the funds were received.

23. Respondent failed to maintain documentary support for all disbursements and transfers from the trust account.

24. Respondent failed to maintain a separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers and the account balance and containing **at least: the** identification of **the** client **or** matter **for** which the funds were received, disbursed or transferred; the date on which all trust funds were received, disbursed **or** transferred;

the check number for all disbursements; and the reason for which all trust funds were received, disbursed or transferred.

25. Respondent failed to maintain a separate file or ledger with an individual card or page for each client or matter showing all individual receipts, disbursements or transfers and any unexpended balance, and containing the identification of the client or matter for which trust funds were received, disbursed or transferred; the date on which all trust funds were received, disbursed or transferred; the check number for all disbursements; and the reason for which all trust funds were received, disbursed or transferred. (See Report of Referee, Pages 4-5).

The Referee found the Respondent guilty of Count III of Case Number 76,406 and specifically that he be found guilty of the following violations: Rules 5-1.1(C) (trust accounts as official records) and 5-1.2 (trust accounting records and procedures) of the Rules Regulating Trust Accounts.

The Referee's findings of fact as to The Florida Bar's Rule to Show Cause in Case Number 76,819 are as follows:

26. On April 25, 1990, in case number 75,828, Respondent was temporarily suspended from the practice of law in the State of Florida, effective May 25, 1990.

27. From May 25, 1990 to date, Respondent remains suspended pursuant to the April 25, 1990 Order in case number 75,828.

28. Subsequent to the effective date of his suspension in case number 75,828, Respondent continued to have office signs stating Law Offices of Arthur B. Stark and continued to be listed in the building directory as an attorney.

29. Subsequent to the effective date of his suspension in case number 75,828, Respondent continued to have his attorney business cards displayed on his desk and allowed a Florida Bar investigator to take one such card without advising him that the Respondent was suspended from the practice of law.

30. Subsequent to the effective date of his suspension, the Respondent continued to practice law by appearing in court and arguing on behalf of a client on two occasions and by filing pleadings and motions in the cause styled Metropolitan Dade County, a political subdivision of the State of Florida, Plaintiff/Counter-Defendants, Bertram Craven, Defendant/Counter-Plaintiff, in the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, Case Number 85-49205 CA 02.

31. Regarding the Craven matter, Respondent did not advise the Court he appeared before that he was suspended.

32. Respondent has advised that he did not receive funds from his client Bertram Craven during the time he was suspended and that he was assisting the client as the client could not afford other counsel.

33. This Referee finds that it was improper and a violation of the Supreme Court's Order dated April 25, 1990 for Respondent to continue representing a client while suspended from the practice of law.

34. This Referee finds that it was improper and a violation of the Supreme Court Order dated April 25, 1990 for the Respondent to continue to display attorney business cards and to have office signs stating "Attorney at Law" and to be listed as an attorney in the building directory.

35. This Referee finds that the Respondent further violated the Supreme Court's April 25, 1991 Order by failing to timely notify his clients in writing of his suspension and failed to provide The Florida Bar with an affidavit listing all clients informed of the suspension order and that Respondent failed to do so until after The Florida Bar had failed its Rule to Show Cause in this matter.

36. This Referee finds that the Respondent failed to timely notify all banks in which he maintains accounts of the provisions of his suspension, failed to provide the banks with a copy of the Supreme Court's Order and failed to timely provide The Florida Bar with a copy of the notice Respondent was required to send to each bank.

37. This Referee finds that the Respondent failed to timely provide The Florida Bar with an affidavit stating the names, addresses, amounts and location of all funds or property belonging to clients which were being held in trust.

38. Respondent's actions listed above in paragraph twenty-six (26) through thirty-seven (37) constitute contempt of the Supreme Court's April 25, 1990 Order in Case Number **75,828**.

(See Report of Referee, Pages 5-8).

The Referee recommended that the Respondent be found in contempt of the Supreme Court of Florida's Order dated April 25, 1991 in Case Number **75,828**.

Bert Friedman testified regarding the allegations in Count I of Case Number **76,406** regarding misappropriation of the funds of Mr. Friedman's Court reporting firm. (T. 14-29)

A. J. Barranco, Esq. testified regarding the fact that he represented Ms. Friedman in his efforts to obtain the monies taken by the Respondent. In said representation, the Respondent admitted that he took the monies (T. 29-42).

Mr. Thomas Smith was called by The Florida Bar and he testified regarding funds he entrusted to the Respondent. (T. 42-52).

Carlos Ruga, Staff Auditor for The Florida Bar, testified regarding his audit of Respondent's trust accounts. (T. 55-83).

Bertram Craven testified regarding the Respondent's representation of him. (T. 133-144).

James B. Crowley, Staff Investigator for The Florida Bar, testified regarding his visits to Respondent's office and the pictures he took evidencing law office signs subsequent to the effective date of Respondent's Temporary Suspension (T. 144-153).

Joni Armstrong Coffey, Esq. testified regarding Respondent's practice of law subsequent to the effective date of his temporary suspension (T. 120-132).

Respondent testified that he used Mr. Friedman's firm's funds and that he did not file any pleadings objecting to The Florida Bar's subpoena prior to the due date of the subpoena (T. 88-91, 93-97). Respondent admitted representing Mr. Craven in court proceedings while he was temporarily suspended (T. 99-102). The Respondent claimed that he continued representing Mr. Craven to assist him (T. 99).

Respondent testified that he had an arrangement with his bank that they would honor all checks on his trust account and that they would cover overdrafts (T. 114-115).

Respondent called twenty-two character witnesses to testify on his behalf.

The Referee's disciplinary recommendation was as follows:

That the Respondent make restitution to the Clients Security Fund of The Florida Bar in the amount of **\$8,466.29** within a period of ninety (**90**) days. If that condition is met, I then recommend that the Respondent be suspended for a period of two (2) years nunc pro tunc to May 25, 1990, the effective date of his temporary suspension in case number **75,828**. Thereafter, Respondent would be subject to **readmission** upon approval **of** rehabilitation and **appropriate** supervision as deemed appropriate by the **Florida** Bar.

The Referee found the following mitigating and aggravating factors to be present pursuant to sections 9.2 and 9.3 of Florida's Standards for Imposing Lawyer Sanctions.

Mitigating Factors:

(a) Absence of prior disciplinary record and Respondent has practiced law in the State of Florida since June 1951.

(b). Personal or emotional problems as Respondent **was** caring for his mother.

(c). Attempt to rectify consequences of misconduct.

(d). Full and free disclosure to the disciplinary board and cooperative attitude toward proceedings. I reject **The** Florida Bar's argument that Respondent failed to cooperate with The Florida Bar because he failed to comply with a subpoena **duces tecum** issued by the **Grievance** Committee until he was **suspended** by the Supreme Court of Florida for said failure. I find that the Respondent has the constitutional

right to question a subpoena. I find that the Respondent cooperated after he was compelled by the Supreme Court of Florida to turn over his trust account records.

(e). Character or Reputation.

Eleven attorneys, six Circuit Court Judges, two Judges of the Third District Court of Florida, one Federal Judge, one retired County Court Judge and one General Master testified as character witnesses for the Respondent.

(f). Remorse.

Aggravating Factors:

(a). Dishonest or selfish motive.

(b). Substantial experience in the practice of law.

(c). Lack of good faith effort to make restitution and failure to make restitution.

(See Report of Referee, Pages 9-11). The Report of Referee is attached hereto as Appendix I.

SUMMARY OF ARGUMENT

I. THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE DISBARMENT

Disbarment is warranted in this cause based upon the serious and cumulative misconduct. Respondent has engaged in misappropriation of funds and practicing law subsequent to the effective date of his temporary suspension. Further, the Referee found as aggravating factors, dishonesty or selfish motive, substantial experience in the practice of law, and lack of good faith effort to make restitution and failure to make restitution.

The Referee found that the Respondent used Mr. Friedman's firm's money for his own purposes and knowingly used client monies for his own use and to satisfy unrelated liabilities, that trust account liabilities exceeded the funds available, that checks were dishonored on Respondent's trust account due to insufficient funds, and as of November 14, 1989, Respondent had a shortage in his trust account of at least \$17,066.29, as well as sixteen (16) overdrafts in a nine month period (Report of Referee, Pages 3-4).

Respondent used the funds of Mr. and Mrs. Thomas Smith without their knowledge or authorization. Said funds were entrusted regarding a real estate closing. (Report of Referee, Page 4).

Disbarment has been imposed for misappropriation of funds notwithstanding restitution being made, financial difficulties or suffering from alcoholism. The Florida Bar v. Tunsil, 503 So.2d 123 (Fla. 1986), The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989), The Florida Bar v. Davis, 474 So2d 1165 (Fla. 1985), The

Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991), The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991).

The referee found that the Respondent knowingly misused funds in this cause (Report of Referee, Pages 3-4). Standard 4.11 of the Florida Standards for Imposing Lawyer Sanctions provides for disbarment when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

Attorneys have further **been** disbarred for the unauthorized practice of law while suspended. e Florida Bar v. Bauman, 558 So.2d 994 (Fla. 1990) and The Florida Bar v. Jones, 571 So.2d 426 (Fla. 1990).

The mitigating factors found by the Referee are not sufficient to prevent disbarment in this cause wherein the Respondent engaged in misappropriation of funds, practicing law while suspended and violating a Court Order. Further, Judge Shahood, Referee, conditioned his recommendation of a two year suspension on the condition that restitution of \$8,466.29 be paid within ninety days. ~~Said condition has not been complied with~~ (See Appendix 11). *Stricken 4-13-92*

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II. THE REFEREE ERRED IN FINDING AS A MITIGATING FACTOR THAT THE RESPONDENT GAVE FULL AND FREE DISCLOSURE TO THE DISCIPLINARY BOARD AND HAD A COOPERATIVE ATTITUDE TOWARD THE PROCEEDINGS.

Respondent failed to comply with the subpoena duces tecum issued by a Grievance Committee until he **was** suspended by this Court for said failure to comply. Respondent failed to file for a protective order **and** did not otherwise challenge The Florida Bar's subpoena until he **was** ordered to file an answer to The Florida Bar's Rule to Show Cause. (See Appendix III-V).

Respondent only fully complied with the subpoena after being suspended by this Court.

Accordingly, The Florida Bar believes the Referee erred in finding as a mitigating factor that the Respondent gave full and free disclosure and had a cooperative attitude toward the proceedings when he refused to comply with the Grievance Committee's subpoena duces tecum until he was suspended by this Court for his failure to comply. (T. 96-97)

ARGUMENT

I. THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE DISBARMENT

The Referee's recommended discipline of a two year suspension if restitution was made within ninety days is an insufficient level of discipline given the 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 and Rule to Show Cause by clear and convincing evidence.

The Florida Bar submits that the misconduct engaged in by Respondent requires the severest sanction available in attorney disciplinary cases, that being disbarment. In Case Number **76,406**, the Respondent was found guilty of the three (3) counts of the complaint for misconduct including **two** counts of commission of an act contrary to honesty, justice or good morals, two counts of commission of a crime, two counts of using funds entrusted for purposes other than that for which it was entrusted, two counts of commission of a criminal act reflecting on a lawyer's honesty, trustworthiness or fitness as a lawyer, as well as trust recordkeeping violations. Further, in Case Number 76,819, the Respondent **was** found to be in contempt of this Court's April 25, 1991 Order temporarily suspending him as the Respondent continued to practice law **and** held himself out to be an attorney in good standing while temporarily suspended. Cumulative misconduct results in more serious discipline. The Florida Bar v.

Greenspahn, 398 So.2d 523 (Fla. 1980), and The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Bert Friedman **was** a friend of the Respondent for over thirty (30) years. Respondent represented Mr. Friedman's court reporting firm in numerous collection of monies owed to the firm Friedman, Lombardi, Gerdon and Brumm. The agreement between the Respondent and Mr. Friedman was that the Respondent would retain one-third of the monies collected as retainer **fees** and the remainder would be forwarded to Mr. Friedman's firm. Respondent failed to forward monies **owed** and the Clients' Security Fund of The Florida Bar paid Mr. Friedman **\$8,466.29** regarding said claim. (T. 14-29). Respondent raised as a defense that he had a special relationship with Mr. Friedman **and** that Mr. Friedman had authorized the **Respondent** to take the monies as a loan. (T. 107-108). Mr. **Friedman** denied this contention and testified that he would not allow monies to be taken from business funds wherein he has partners, but if he had been asked by the Respondent, he would have given a personal loan from his own monies, but he was never asked. (T. 18-19, 24-25, 28-29).

The Referee found that the Respondent used Mr. Friedman's firm's monies for his **own** purposes (Report of Referee, Page 2)

Further, the Referee in his findings of fact found that the Respondent knowingly used client monies for his own **use** and to satisfy unrelated liabilities, that his trust account liabilities **exceeded** the funds available, that checks were dishonored on Respondent's trust account due to insufficient funds, and as of November 14, 1989, Respondent had a shortage in his trust account of at least \$17,066.29. (Report of Referee, Page 3).

Additionally, during the period of May 5, 1989 to February 28, 1990 the Respondent incurred sixteen (16) overdrafts in his trust account (Report of Referee, Page 4).

Moreover, on October 2, 1989, one Thomas Smith and his wife, buyers, gave a check in trust to the Respondent, attorney for the seller, in the amount of \$7,000.00 as a deposit to purchase real property. As of October 14, 1989, twelve days later, the Smith's funds were used by the Respondent. Subsequently, at the time of the closing, Respondent used funds from other sources to complete the closings. Mr. and Mrs. Smith's funds were used by the Respondent without their knowledge or authorization (See Report of Referee, Page 4).

The Referee found that the Respondent had trust account shortages and knowingly used trust account funds for his own purposes (Report of Referee, Pages 3-4). 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).

Respondent testified that he had financial difficulties. (T. 91) 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 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).

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, 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. The instant case differs from McShirley as not only did the Respondent not repay any funds before The Florida Bar was aware of the misappropriation, but to date, Respondent has failed to make restitution.

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.

In The Florida Bar v. Gillis, 527 So.2d 812 (Fla. 1988), the Respondent was disbarred for misappropriation of funds in the amount of \$350.00.

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.

The Referee found that the Respondent knowingly used funds for his own use and not for the specific purposes entrusted (Report of Referee, Pages 3-4). The Referee found the Respondent guilty of serious violations including commission of a crime and commission of a criminal act reflecting on a lawyer's honesty, trustworthiness or fitness as a lawyer (Report of Referee, Pages 8-9).

Cumulative misconduct is present in this cause. Besides the three counts of misconduct in case number 76,406, the Respondent has been found in contempt of this court for continuing to practice law, holding himself out as an attorney subsequent to his temporary suspension and not complying with this Court's Order in Case Number 75,828. (See Report of Referee, Pages 5-8).

After misappropriating his clients funds, Respondent then evidenced his disregard for the rules and rulings of this Court by continuing to practice law while under a temporary suspension

order and failing to comply with the provisions of this Court's April 25, 1990 Order **in Case Number 75,828.**

In The Florida Bar v. Bauman, 558 So.2d **994** (Fla. 1990) and The Florida Bar v. Jones, 571 So.2d **426** (Fla. 1990), the Respondents were disbarred for the unauthorized practice of law while suspended and failure to comply with the suspension Order of this Court.

Practicing law while suspended and violating this Court's April 25, 1990 Order is misconduct cumulative to Respondent's serious misappropriation of funds. This Court deals more severely with cumulative misconduct than with isolated misconduct. The Florida Bar v. Vernell, **374** So.2d 473 (Fla. 1979).

The Referee in his report found the following as aggravating factors:

- (a) dishonesty or selfish motive
- (b) Substantial experience in the practice of law, and
- (c) Lack of good faith effort to make restitution and failure to make restitution (Report of Referee, page **11**)

The Referee found the following as mitigating factors:

- (a) absence of prior disciplinary record
- (b) personal or emotional problems
- (c) attempt to rectify consequences of misconduct
- (d) full and free disclosure to the disciplinary board and cooperative attitude toward proceedings, and good character or reputation and

(e) remorse;

Twenty-two prestigious members of the judiciary and attorneys testified on behalf of the respondent. However, said mitigating

factors are not sufficient to lessen the enormity of the Respondent's misconduct and disbarment is mandated.

In The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988), this Court held that the mitigating factors were not sufficient to prevent disbarment wherein the Respondent had engaged in theft and fraud on the court and that either offense was sufficiently grave to justify disbarment. Similarly, in the instant case either Respondent's misappropriation of funds or practicing law while under an Order of temporary suspension is sufficiently grave to justify disbarment and cumulatively together disbarment is necessary.

On April 23, 1991, at the conclusion of the final hearing, Judge Shahood, Referee, stated his findings and recommendations that the Respondent make restitution to the Clients' Security Fund of The Florida Bar in the amount of \$8,466.29 within a period of ninety (90) days and if that condition is met, he recommended that the Respondent be suspended for a period of two (2) years nunc pro tunc to May 25, 1990, the effective date of Respondent's temporary suspension in Case Number 75,828. (T. 348-349). The Referee's written report containing said recommendation was signed on September 27, 1991. Although the Respondent has known of this condition since April 23, 1991, to date the Clients' security Fund of The Florida Bar is unaware of any restitution having been made by the Respondent. (See Appendix II, Affidavit of Teresa Bartlett, dated January 2, 1992).

For all of the above-stated reasons, disbarment is required in this cause based upon the serious and cumulative misconduct.

II. THE REFEREE ERRED IN FINDING AS A MITIGATING FACTOR THAT THE RESPONDENT GAVE FULL AND FREE DISCLOSURE TO THE DISCIPLINARY BOARD AND HAD A COOPERATIVE ATTITUDE TOWARD THE PROCEEDINGS.

After the complaint of Bert Friedman was pending against the Respondent, the Eleventh Judicial Circuit Grievance Committee "J" issued and served upon the Respondent a subpoena duces tecum dated September 21, 1989 to produce trust account records. Respondent failed to produce all of the required records and The Florida Bar filed a Rule to Show Cause in this Court, case number 75,027, regarding Respondent's failure to fully comply with the Grievance Committee's subpoena by the required time period. Attached as Appendix III is a copy of said Rule to Show Cause and attachments.

This Court issued an Order to Show Cause in Case Number 75,027 and on December 8, 1990, Respondent submitted his answer to the Rule to Show Cause. Said answer is attached hereto as Appendix IV. On January 26, 1990, this Court issued an Order suspending the Respondent from The Florida Bar until he fully complied with the Grievance Committee's subpoena (a copy of said Order is attached as Appendix V). Subsequent to receiving this Court's Order of suspension, Respondent complied fully with the subpoena and produced the required records. (See certificate of compliance dated February 2, 1990 attached hereto as Appendix VI. T, 97). Said attached items are part of Composite Exhibit 7.

Respondent has admitted that upon receipt of the subpoena, Respondent partially complied with same and failed to comply with the remainder of the subpoena without filing any protective order

or other pleading requesting relief from complying with the subpoena. (T. 93, 96, 97).

Respondent only objected to the subpoena in a pleading after he was ordered to file a Response to The Florida Bar's Order to Show Cause. (Appendix IV, 97).

At the final hearing, Respondent testified that he thought the subpoena was too broad. He acknowledged that he did not file for a Protective Order or other relief from complying with the subpoena (T. 96-97).

The Referee found as a mitigating factor on Page 10 of his report that the Respondent gave full and free disclosure to the disciplinary board and had a cooperative attitude toward the proceedings. The referee rejected The Florida Bar's argument that the respondent failed to cooperate with The Florida Bar because he failed to comply with the Grievance Committee's subpoena duces tecum until he was suspended by this Court for said failure. The Referee further found that the Respondent had the constitutional right to question a subpoena. (Report of Referee, Page 10).

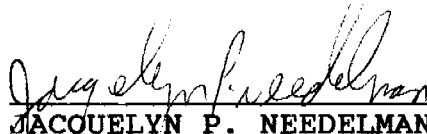
The Florida Bar agrees that the Respondent has the right to question a subpoena. However, any challenge to a subpoena should be done prior to the due date of the subpoena. The Respondent ignored the portion of the subpoena that he did not wish to comply with until he was suspended for said failure to fully comply. Accordingly, The Florida Bar believes that the Referee's finding of a mitigating factor of a full and free disclosure and cooperative attitude toward the proceedings was in error. Respondent's failure to comply fully with the Grievance

Committee's subpoena is further evidence of Respondent's failure to comply with and abide by the rules of this Court.

CONCLUSION

WHEREFORE, for the above stated reasons, The Florida Bar respectfully requests this Honorable Court to (1) enter an Order imposing a discipline of disbarment, (2) disallow the Referee's finding as a mitigating factor that the Respondent gave full and **free** disclosure to the disciplinary board and had a cooperative attitude toward the proceedings, and (3) tax the **costs** of these proceedings against the Respondent in the amount of \$3,690.55.

Respectfully submitted,



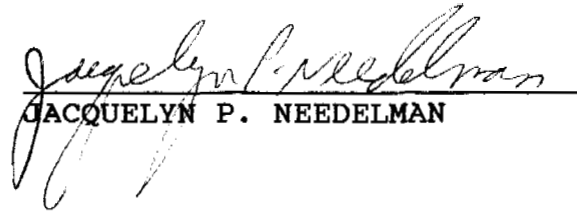
JACQUELYN P. NEEDELMAN
Bar Counsel
Attorney No. 262846
The Florida Bar
444 Brickell Avenue
Suite M-100
Miami, Florida 33131
(305) 377-4445

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

JOHN F. HARKNESS, JR.
Executive Director
Attorney No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 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 mailed to Paul Louis, Attorney for Respondent, 169 E. Flagler St., Suite 1125, Miami, Florida 33231, and a copy was mailed to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 3rd day of January, 1992.


JACQUELYN P. NEEDELMAN

INDEX TO APPENDIX

- I Report of Referee
- II Affidavit of Tereasa Bartlett, dated January 2, 1992
- III The Florida Bar's Rule to Show Cause,
and attachments in Case No, 75,027
- IV Respondent's Answer to the Rule to Show Cause
- V Supreme Court's January 26, 1990 Order in Case Number 75,027
- VI Respondent's Certificate of Compliance



APPENDIX ONE

_____ **APPENDIX TWO**

_____ **APPENDIX THREE**

_____ **APPENDIX FOUR**

_____ **APPENDIX FIVE**

_____ **APPENDIX SIX**

_____ **APPENDIX SEVEN**

_____ **APPENDIX EIGHT**

_____ **APPENDIX NINE**

_____ **APPENDIX TEN**

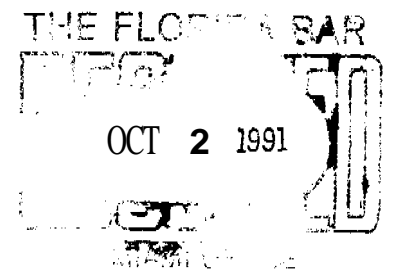
_____ **APPENDIX ELEVEN**

_____ **APPENDIX TWELVE**

_____ **APPENDIX THIRTEEN**

_____ **APPENDIX FOURTEEN**

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)



The Florida Bar,
Complainant,

V. Case Nos. 76,406 & 76,819

Arthur Stark,
Respondent.

REPORT OF REFEREE

I. Summary of Proceedings: The undersigned was duly appointed as referee to conduct proceedings in these causes. The final hearing was held on April 22 and 23, 1991. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:
For The Florida Bar Jacquelyn P. Needelman
For The Respondent Paul A. Louis

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below me, pertinent portions of which are commented upon below, I find:

In General

1. Respondent, Arthur B. stark, is, and at all times hereinafter mentioned was, a member of The Florida Bar

subject to **the** jurisdiction and disciplinary rules of **the** Supreme Court of Florida.

As to Count I of Case Number 76,406

2. Bert Friedman, a court **reporter**, retained the Respondent to handle the collection of court reporting fees owed to him and his firm, Friedman, Lombardi, Eendron and Brumm .

3. Respondent represented Mr. Friedman in numerous collection matters **from** 1985 through approximately **October** 1988. The Respondent has known and represented Mr. Friedman for **over** thirty years.

4. The agreement between Mr. Friedman and the Respondent was that the Respondent would receive 1/3 of the collected funds as his fee and the remaining 2/3 of monies would be forwarded to Mr. Friedman.

5. In his representation of Mr. Friedman, the Respondent collected monies owed to Mr. Friedman and failed to remit \$8,466.29 of said funds to Mr. Friedman. This \$8,466.29 constituted the 2/3 of monies collected that was owed to Mr. Friedman.

6. Respondent used Mr. Friedman's funds for his own purposes.

7. In **October**, 1988 and subsequent thereto, Mr. Friedman and his new counsel demanded receipt from the Respondent of **the** monies owed to Mr. Friedman **and** the Respondent failed to remit said funds.

8. Mr. Friedman received \$8,466.29 from the Client Security Fund of The Florida Bar.

As to Count II of Case Number 76.409

9. An audit was conducted by The Florida Bar of the Respondent's trust accounts by Carlos J. Ruga, Branch Staff Auditor, for The Florida Bar.

10. During the period of May 13, 1985 to June 30, 1989, Respondent maintained a trust account at Florida National Bank, Miami, Florida, account #0003150218 (hereinafter referred to as "F.N.B. trust account")

11. During the period of May 5, 1989 to on or about February 28, 1990, Respondent maintained a trust account at United National Bank, Miami, Florida, Account #3-112831-7 (hereinafter referred to as "U.N.B. trust account").

12. Mr. Ruga's audit of Respondent's U.N.B. trust account covered the period of May 5, 1989 to February 28, 1990.

13. Respondent knowingly used clients' funds for purposes other than those for which the funds were entrusted.

14. Respondent knowingly used clients monies for his own use and to satisfy unrelated liabilities.

15. Respondent's trust account liabilities exceeded the funds available.

16. During January 1990, Respondent had checks dishonored on his trust account due to insufficient funds.

17. As of November 14, 1989, Respondent had a shortage in his trust account of at least \$17,066.29.

18. During the period of May 5, 1989 to February 28, 1990, Respondent incurred sixteen (16) overdrafts in his trust account at United National Bank . The Respondent testified that he had an arrangement with United National Bank to cover said overdrafts which the bank apparently did until January 1990. In January 1990, four (4) checks were dishonored and not covered by the bank.

19. On October 2, 1989, Thomas Smith and his wife, buyers, gave a check in trust to the Respondent, attorney for the seller, in the amount of \$7000.00 as a deposit to purchase real property. As of October 14, 1989, the Smiths' funds were used by the Respondent. Subsequently, at the time of the closing Respondent used funds from other sources to complete the closing.

20. Respondent used the funds of Mr. and Mrs. Smith without the knowledge or authorization of Mr. and Mrs. Smith.

As to Count III of Case Number 76,406

21. The audit of Respondent's trust accounts evidenced that Respondent failed to maintain the minimum required trust accounting records.

22. Respondent failed to maintain original or duplicate deposit slips and, in the case of currency or coin, an additional cash receipts book, clearly identifying the date and name of all trust funds received and the client or matter for which the funds were received.

23. Respondent failed to maintain documentary support for all disbursements and transfers from the trust account.

24. Respondent failed to maintain a separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers and the account balance and containing at least: the identification of the client or matter for which the funds were received, disbursed or transferred; the date on which all trust funds were received, disbursed or transferred; the check number for all disbursements; and the reason for which all trust funds were received, disbursed or transferred.

25. Respondent failed to maintain a separate file or ledger with an individual card or page for each client or matter showing all individual receipts, disbursements or transfers and any unexpended balance, and containing the identification of the client or matter for which trust funds were received, disbursed or transferred; the date on which all trust funds were received, disbursed or transferred; the check number for all disbursements; and the reason for which all trust funds were received, disbursed or transferred.

As to Case Number 76,819
(Rule to Show Cause)

26. On April 25, 1990, in case number 75,828, Respondent was temporarily suspended from the practice of law in the State of Florida, effective May 25, 1990.

27. From May 25, 1990 to date, Respondent remains suspended pursuant to the April 25, 1990 Order in case number 75,828.

28. Subsequent to the effective date of his suspension in case number 75,828, Respondent continued to have office signs stating Law Offices of Arthur B. Stark and continued to be listed in the building directory as an attorney.

29. Subsequent to the effective date of his suspension in case number 75,828, Respondent continued to have his attorney business cards displayed on his desk and allowed a Florida Bar investigator to take one such card without advising him that the Respondent was suspended from the practice of law.

30. Subsequent to the effective date of his suspension, the Respondent continued to practice law by appearing in court and arguing on behalf of a client on two occasions and by filing pleadings and motions in the cause styled Metropolitan Dade County, a political subdivision of the State of Florida, Plaintiff/Counter-Defendant vs. Bertram Craven, Defendant/Counter-Plaintiff, in the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, Case Number 85-49205 CA 02.

31. Regarding the Craven matter, Respondent did not advise the Court he appeared before that he was suspended.

32. Respondent has advised that he did not receive funds from his client Bertram Craven during the time he was suspended and that he was assisting the client as the client could not afford other counsel.

33. This Referee finds that it was improper and a violation of the Supreme Court's Order dated April 25, 1990

for Respondent to continue representing a client while suspended from the practice of law.

34. This Referee finds that it was improper and a violation of the Supreme Court Order dated April 25, 1990 for the Respondent to continue to display attorney business cards and to have office signs stating "Attorney at Law" and to be listed as an attorney in the building directory.

35. This Referee finds that the Respondent further violated the Supreme Court's April 25, 1991 Order by failing to timely notify his clients in writing of his suspension and failed to provide The Florida Bar with an affidavit listing all clients informed of the suspension order and that Respondent failed to do so until after The Florida Bar had failed its Rule to Show Cause in this matter.

36. This Referee finds that the Respondent failed to timely notify all banks in which he maintains accounts of the provisions of his suspension, failed to provide the banks with a copy of the Supreme Court's Order and failed to timely provide The Florida Bar with a copy of the notice Respondent was required to send to each bank.

37. This Referee finds that the Respondent failed to timely provide The Florida Bar with an affidavit stating the names, addresses, amounts and location of all funds or property belonging to clients which were being held in trust.

38. Respondent's actions listed above in paragraph twenty-six (26) through thirty-seven (37) constitute contempt

of the Supreme Court's April 25, 1990 Order in Case Number 75,828.

III. Recommendations as to whether or not the Respondent should be found guilty: As to each charge, I make the following recommendations as to guilt or innocence:

As to Count I of Case Number 76.406

I recommend that the Respondent be found guilty specifically that he be found guilty of violating the following:

Florida Bar Integration Rule, article XI, Rules 11.02(3)(a) (commission of any act contrary to honesty, justice or good morals); 11.02(3)(b) (commission of a crime); 11.02(4) (using funds entrusted for a specific purpose or for a purpose other than that for which it was entrusted) and Rules 3-4.3 and 3-4.4 (commission of act unlawful or contrary to honesty and justice and commission of a crime) of the Rules of Discipline, and Rule 4-8.4(4) (commission of a criminal act reflecting on lawyer's honesty, trustworthiness or fitness as a lawyer) of the Rules of Professional Conduct, and Rule 5-1.1 (money entrusted for a specific purpose must be used only for that purpose) of the Rules Regulating Trust Accounts.

As to Count II of Case Number 76.406

I recommend that the Respondent be found guilty specifically that he be found guilty of violating the following:

Rules 3-4.3 and 3.4.4 (commission of any act unlawful or contrary to honesty and justice and commission of a crime) of the Rules of Discipline and Rule 4-8.4 (commission of a criminal act reflecting on lawyer's honesty, trustworthiness or fitness as a lawyer) of the Rules of Professional Conduct, and Rule 5-1.1 (money entrusted for a specific purpose must be used only for that purpose) of the Rules Regulating Trust Accounts.

As to Count III of Case Number 76,406.

I recommend that the Respondent be found guilty specifically that he be found guilty of violating the following:

Rules 5-1.1 (trust accounts as official records) and 5-1.2 (trust accounting records and procedures) of the Rules Regulating Trust Accounts.

As to The Florida Bar's Rule to Show Cause
In Case Number 76,819

I recommend that the Respondent be found in contempt of the Supreme Court of Florida's Order dated April 25, 1991 in Case Number 75,828.

IV. Recommendation as to disciplinary measures to be applied:

I recommend that the Respondent make restitution to the clients security fund of The Florida Bar in the amount of \$8,466.29 within a period on ninety (90) days. If that condition is met, I then recommend that the Respondent be suspended for a period of two (2) years nunc pro tunc to May 25, 1990, the effective date of his temporary suspension in

case number 75,828. Thereafter, Respondent would be subject to readmission upon approval of rehabilitation and appropriate supervision as deemed appropriate by the Florida Bar.

I find the following mitigating and aggravating factors to be present pursuant to sections 9.2 and 9.3 of Florida's Standards for Imposing Lawyer Sanctions.

Mitigating Factors:

(a). Absence of prior disciplinary record and Respondent has practiced law in the State of Florida since June 1951.

(b). Personal or emotional problems as Respondent was caring for his mother.

(c). Attempt to rectify consequences of misconduct.

(d). Full and free disclosure to the disciplinary board and cooperative attitude toward proceedings. I reject The Florida Bar's argument that Respondent failed to cooperate with The Florida Bar because he failed to comply with a subpoena duces tecum issued by the Grievance Committee until he was suspended by the Supreme Court of Florida for said failure. I find that the Respondent has the constitutional right to question a subpoena. I find that the Respondent cooperated after he was compelled by the Supreme court of Florida to turn over his trust account records.

(e). Character or Reputation.

Eleven attorneys, six Circuit Court Judges, two Judges of the Third District Court of Florida, one Federal Judge,

one retired County Court Judge and one General Master testified as character witnesses for the Respondent.

(f). Remorse.

Aggravating Factors:

(a). Dishonest or selfish motive.

(b). Substantial experience in the practice of law.

(c). Lack of good faith effort to make restitution and failure to make restitution.

A copy of pages 338-349 of the transcript of the final hearing is attached hereto and is incorporated herein for the purpose of enabling any reviewing persons to understand the basis of this Referee's recommendation.

V. Personal history and past disciplinary record:

Age: 65

Date Admitted to Bar: June 1951

Prior disciplinary record: None

VI. Statement of costs and manner in which cost should be taxed:

I find the following costs were reasonably incurred by The Florida Bar.

Administrative costs:	\$500.00
Court reporter costs:	\$1,792.25
Service of Process:	\$36.00
Audit costs:	\$1,227.60
Reduction of trust account charts	\$134.70
	<hr/>
	\$3,690.55

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the

Respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgement in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 27th day of September, 1991

GEORGE A. SHAHOOD
GEORGE A. SHAHOOD, REFEREE
Broward County Courthouse
201 S.E. 6th Street, Room 999
Ft. Lauderdale, FL 33301

Copies to:
Jacquelyn P. Needelman, Bar Counsel
Paul A. Louis, Attorney for Respondent
John T. Berry, Staff Counsel

A TRUE COPY