IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ATHRUR B. STARK,

Respondent.

SUPREME COURT CASE
NOS. 76,406 & 76,819

REPLY BRIEF OF THE FLORIDA BAR

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STATEMENT OF CASE AND FACTS

Respondent states at page one (1) of his brief that Mr. Friedman did not understand that Respondent could take advance fees (T. 18-19). Further, the Referee specifically found that the Respondent failed to remit $8,466.29 of monies owed to Mr. Friedman and that Respondent used Mr. Friedman's funds for his own purposes (page 2, paragraphs 5 and 6, Report of Referee). Respondent incorrectly states on page 22 of his brief that "[t]he Referee further found that Mr. Stark's continuing representation of a client after the Order of April 25, 1990 was to assist a client at a summary judgment hearing."

The Referee found that Respondent advised ... that he was assisting the client.... (See paragraph 30, page 6, Report of Referee). The Referee found "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." (See paragraph 33, pages 6-7, Report of Referee). On page 23 of his brief, Respondent has conveniently stated an incomplete recommendation of the Referee as follows, "[t]he Referee recommended that Mr. Stark should be suspended for a period of two years, nunc pro tunc, to May 25, 1990 and pay reasonable casts associated with this proceeding." Id. The Referee in this cause found as follows:

> I recommend that the Respondent make restitution to the Client 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. (Emphasis supplied) (pages 9-10, paragraph IV, Report of Referee).

Most importantly, Respondent testified that if the Referee gave him ninety (90) days to make restitution, he would get it done. (T. 296-297). It is clear from the above-stated recommendation of the Referee, that his suspension recommendation only came into place if restitution was made within ninety (90) days. Attached as Appendix VII are pages 348 and 349 af the transcript wherein Judge Shahood, Referee, made the above-referenced recommendation. Further, Judge Shahood, Referee, stated at the final hearing:

> The question is, under the decisional law of the State, is that mitigation sufficient, the facts of the case, to avoid a disbarment, because as I say it is a question of a) disbarment, or b) a lengthy suspension. That's what the case is about. (T. 157).

Respondent did not make restitution as required by the Referee within ninety (90) days, which would have made operative his recommendation of a two (2) year suspension. (See Appendix II to The Florida Bar Initial Brief in this cause).

Stricken 4.13.92

SUMMARY OF ARGUMENT

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

The Referee clearly recommended that Respondent receive a two (2) year suspension nunc pro tunc only if restitution was made within a period of ninety (90) days (Report of Referee, pages 9-10). Respondent advised the Referee under oath that he would comply with such a condition (T. 296-297). However, Respondent has failed to make said required restitution. The Referee in this cause found that the Respondent knowingly used clients' funds for purposes other than those for which the funds were entrusted, knowingly used clients' monies for his own use, used funds of third parties without their knowledge or consent, engaged in the unauthorized practice of law by practicing while suspended and in violation of this Court's Order and had a dishonest or selfish motive.

Based upon the criteria set forth in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), Respondent must be disbarred as anything less than disbarment under the facts of this case would not be fair to society and would not be severe enough to deter others. Respondent can certainly present evidence of rehabilitation at the appropriate time to the Board of Bar Examiners upon an application for readmission to The Florida Bar from a discipline of disbarment.

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

The facts of this issue are not in dispute, only whether the legal interpretation of said facts is erroneaus.

Respondent has admitted that he failed to fully comply with The Florida Bar's subpoena in this cause without filing any pleading requesting relief from the subpoena (T. 93, 96, 97). Respondent only complied after he was ordered suspended by the Court for said failure to comply. (The Florida Bar's Appendix V and VI). Same is not full and free disclosure and cooperation.

ARGUMENT

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

The Florida Bar believes that the Referee's disciplinary recommendation was erroneous. This Court has stated that it is not bound by the Referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). Accordingly, this Court has imposed greater discipline that recommended by referees when deemed appropriate. The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983); The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982); The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); and The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981).

The Florida Bar submits that Respondent's misconduct was wholly inconsistent with high professional standards of the legal profession. Disbarment is, therefore, more appropriate that the disciplinary sanction of suspension recommended by the Referee if the prerequisite condition of restitution was met. The criteria established by the court in determining appropriate discipline and the misconduct of Respondent fully support the Bar's position. Disbarment is the only appropriate discipline under the facts *of* this case and the findings and recommendations of the Referee. The Referee clearly recommended:

> That restitution shall be made ninety (90) days to the Client Security Fund of The Florida Bar. If that condition is met, I then recommend that the Respondent be suspended far a period of two (2) years nunc pro tunc to May 25, 1990. (Report of Referee, page 9-10, paragraph IV).

Accordingly, the Referee's recommendation for a two year suspension only became operative if the Respondent met the prerequisite condition of restitution within ninety (90) days. Respondent failed to make said restitution. (See Appendix 11). Respondent in his brief objects to The Florida Bar's Appendix II which clearly evidenced Respondent's failure to make the required restitution. Obviously, Respondent would prefer for this Court not to be aware that be has failed to perform the prerequisite condition for the Referee's recommendation of suspension to be operative.

The Referee at page 157 of the transcript of the final hearing stated that it was a question of disbarment or a lengthy suspension (T. 157). As Respondent has failed to comply with the Referee's prerequisite, to wit: restitution, then the Referee's recommendation of a lengthy suspension does not become operative, and the only discipline left pursuant to the Referee's statements is disbarment, (T. 157). Even, if Respondent had complied with the Referee's prerequisite condition of restitution within ninety (90) days, disbarment would have been warranted under the facts of this case, However, Respondent has failed to comply with said requirement.

Most importantly, at the final hearing in this cause the Respondent stated to the Referee under oath that he would make restitution within ninety (90) days if ordered to do so by the Referee. (T. 296-297).

Respondent incorrectly cites page 26 of his brief the case, The Florida Rar v. Weiss, for the proposition that the "extreme

sanction of disbarment" rarely is improsed when rehabilitation of an attorney is probable. Weiss, 586 So.2d 1051 (Fla. 1991), does not support said proposition. In Weiss this Court found that Respondent did not commit any intentional misconduct, but that his shortages were due to poor record-keeping and misplaced reliance. Id. at 1054. Contrary, in the instant case, the Referee found that the Respondent knowingly used client's funds far purposes other than those for which the funds were entrusted, knowingly used clients monies for his own use, used funds of third parties without their knowledge or consent, engaged in the unauthorized practice of law by practicing law while suspended and had a dishonest or selfish motive. (Report of Referee, pages 3, 4, 11). Respondent also cites the case, The Florida Rar v. Hartman, 519 So.2d 606 (Fla. 1988). Said case is inapplicable as in Hartman there was a finding that Respondent acted without intent. Id. As evidenced above in the case at bar, the Referee found that Respondent acted knowingly and had a dishonest or selfish motive. (Report of Referee, pages 3, 4, 11).

Respondent incredibly states at page 26 of his brief that it is unchallenged that Respondent would be the most perfect candidate for rehabilitation, The Florida Bar never concurred with said statement as the evidence proved and the Referee found that the Respondent knowingly misappropriated funds, had a dishonest or selfish motive and practiced law while under a suspension order by this Court.

Respondent can certainly demonstrate rehabilitation to the Board of Bar Examiners upon his application for readmission to The

Florida Bar if he is disbarred by this Court. The showing of rehabilitation is not limited to cases wherein attorneys have been suspended. This Court has stated that, "in the hierarchy of offense 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). Further, Respondent's serious act of misappropriation is compounded by Respondent's blatant and wanton disregard for this Court's Order of temporary suspension by continuing to practice law and failure to fully comply with this Court's Order of Temporary Suspension.

Respondent points out that in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), Respondent was suspended and not disbarred based upon mitigating factors, In Pahules this Court stated three purposes in discipline cases, to wit in pertinent part: 1) being fair to society; 2) being fair to the respondent and; (3) being severe enough to deter others who might be prone or tempted to become involved in like violations. Id. at 132. The Florida Bar submits that under the facts of the instant case it would nat be fair to society or severe enough to deter others if a suspension was imposed instead of disbarment. In this cause, Respondent has engaged in cumulative misconduct. He misappropriated funds and then engaged in the unauthorized practice of law. Respondent then failed to comply with the Referee's prerequisite of restitution within ninety (90) days even though Respondent agreed to do so under oath if required by the Referee. (T. 296-297).

Respondent has cited The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991) wherein Respondent McShirley was suspended for

three (3) years for knowingly converting client funds. In McShirley, most importantly, the respondent made restitution before The Florida Bar was aware of his misconduct and the referee found a timely good faith effort to make restitution. However, in the instant case the Referee found as an aggravating factor Respondent's lack of good faith effort to make restitution and failure to make restitution. (See page 11, Report of Referee). Respondent in his brief cites law review articles for the proposition that large corporate law firms are rarely exposed to bar disciplinary procedures. Said arguments are irrelevant to the case at bar wherein Respondent has been found by the Referee to have knowingly engaged in serious misconduct with a dishonest or selfish motive. Respondent at page 31 of his brief assumes that he would not have an opportunity for rehabilitation if disbarred. Same is not the case. Rule 3-5.1(f) of the Rules of Discipline provides that a disbarred attorney may be admitted again upon full compliance with the rules and regulations governing admission to the Bar. Id.

The testimony of prominent character witnesses and the mitigating factors found are not sufficient to mitigate against disbarment in this case. Based upon Respondent's failure to comply with the Referee's prerequisite condition of making restitution within ninety (90) days, knowing Respondent's misappropriation and continuing to practice law in violation of this Court's Order of Temporary Suspension and the authorities cited in The Florida Bar's initial brief in this cause, suspension should not be considered as disbarment is mandated.

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

The facts of this issue are not in dispute. The only dispute concerns the legal interpretation of the facts. Respondent has admitted that upon receipt of The Florida Bar subpoena he failed to fully comply with said subpoena without filing any protective order or other pleading requesting relief from complying with the subpoena. (T. 93, 96, 97). Respondent failed to comply with The Florida Bar's subpoena until he was suspended by this Court for said failure to comply and complied to have said suspension lifted. (See Appendix number V and VI).

Respondent's witness, Richard Gerstein, Esquire, testified that "there is a prescribed manner for objecting to the contents of a subpoena which would consist of filing objections with the Court and moving to quash the subpoena." (T. 167). Respondent admitted that he did not do so. (T. 93, 96, 97). Accordingly, the Referee erred in finding that Respondent gave full and free disclosure when he in effect ignored the portion of the subpoena that he disliked. If the Referee's finding of this mitigating factor is left standing, Respondents can believe that they can ignore a Florida Bar subpoena if they wish to do so without filing the appropriate pleadings for relief from the subpoena prior to the effective date of the subpoena.

The Florida Bar is not contesting any other findings made by the Referee and submits that the Referee's findings establish serious and cumulative misconduct evidencing misappropriation of

funds and holding himself out as an attorney while under an Order of Temporary Suspension from this Court. Accordingly, for the above-stated reasons the Referee erred in finding as a mitigating factor that Respondent gave full and free disclosure to the Disciplinary Board and had a cooperative attitude toward the proceedings.

CONCLUSION

WHEREFORE, for the above-stated reasons and the reasons stated in The Florida Bar's Initial Brief in this cause, 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,,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of The Florida Bar was mailed to Paul A. Louis and Evan J. Langbein, Attorneys for Respondent, 169 East Flagler Street, Suite 1125, Miami, Florida 33131, and a copy was mailed to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 17th day of March, 1992.

JACQUELYN P. NEEDELMAN

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MR. LOUIS: As to Mr. Friedman, Mr. Stark said that he thought he had an understanding. But we haven't disputed that.

THE REFEREE: You haven't really disputed it, though.

MR. STARK: I hesitate to consent, being a lawyer for forty years --

THE REFEREE: I understand, but realistically -- let me enter a finding.

Mr. Stark is guilty of all three charges.

However, with all of the mitigating factors that the Court just reflected on, it would be the recommendation that Mr. Stark be disciplined by initially repayment of $8,466.29 to the Florida Bar Client, Security Fund within a period of ninety days.

Thereafter, if in fact that condition is met, then it would be the recommendation of this Referee that he be suspended for a period of two years -- I keep going dawn in my thought process -- two years nunc pro tunback to the day of

the discipline, May 25, 1990, and thereafter, he be subject to readmission upon approval of rehabilitation and upon appropriate auperviaion as may be deemed appropriate by the Florida Bar.

Who is going to prepare the ruling reflecting all this?

MR. LOUIS: If the court reporter will type it up, I would like to take a shot at it.

THE REFEREE: Is that agreeable?

MS. NEEDELMAN: Either that, or since I know the format --

THE REFEREE: There is a specific format that they have.

MR. LOUIS: That suits me. You will let me see it before you submit it and not say, "Dear Paul, I am sending this up tomorrow"?

Give me a chance to chew and digest it.

THE REFEREE: Yes, because this is a relatively new one as far as I am concerned.

MS. NEEDELMAN: Your Honor, is there