047 11-01-91

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DAVID L. WARD,

Respondent.

_____/

Case No. 76,782

TFB No. 90-10,587(12B)

ANSWER BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the Appellant, David L. Ward, will be referred to as the "Respondent". The Appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "TR. I" will refer to the transcript of the Final Hearing held on May 30, 1991. "TR. II" will refer to the transcript of the Final Hearing held on June 18, 1991. "R" will refer to the record. "RR" will refer to the Report of Referee.

STATEMENT OF THE CASE AND FACTS

While practicing as a tax attorney with the law firm of Henderson, Franklin, Starnes & Holt (TR. I, p. 6, L. 24-25, p. 7, L. 3-7), Respondent created thirteen (13) separate fictitious expense advances. (TR. I, p. 10, L. 12-20). During the period between March 15, 1989 and August 4, 1989, Respondent misappropriated funds in excess of $12,000.00 from the operating account of his firm. (TR. I, p. 10, 20-24). Respondent embezzled these funds to purchase furniture for his home. (R. Complaint, paragraph 5, and Answer; TR. I, p. 26, L. 21-25, p. 29, L. 13-15). The furniture was purchased by Respondent for his residence at a cost of $35,000.00. (TR. I, p. 29, L. 18). Respondent could not afford to purchase the furniture even though Respondent earned approximately $120,000.00 in 1988. (TR. I, p. 9, L. 1-3). Respondent's salary for 1989 increased to $78,000.00 and his anticipated bonus was $65,000.00. (TR. I, p. 19, L. 11-15).

When Respondent's scheme was discovered and he was confronted by a member of his firm, Respondent initially denied any wrongdoing. (TR. I, p. 15, L. 9). Later that day, Respondent admitted that he misappropriated the funds from his firm. Respondent then resigned from the law firm and made restitution.

On June 26, 1990, the 12th Judicial Circuit Grievance Committee B found probable cause that there had been a violation of the Rules of Professional Conduct, Rule

4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). The Florida Bar filed its Complaint in this matter with The Supreme Court of Florida on October 16, 1990. The Honorable Oliver L. Green, Jr. was appointed by this Court to act as the Referee in this disciplinary case.

The Final Hearing was held on May 30, 1991 and June 18, 1991. Subsequent to the Final Hearing, the Referee found the Respondent guilty of violating Rule 4-8.4(c) of the Rules of Professional Conduct and recommended that he be disbarred from the practice of law in Florida for one (1) year.

Both Staff Counsel and Respondent filed a Motion for Rehearing, setting forth the error in the recommended sanction. No rehearing was granted. In his Amended Report, the Referee corrected his original Report by deleting the words "for one (1) year" and recommended that Respondent be disbarred from the practice of law in Florida.

The Respondent filed a Petition for Review on August 22, 1991. The Respondent served his Initial Brief, dated September 13, 1991, on The Florida Bar. This brief is filed in Answer to the Respondent's Initial Brief.

SUMMARY OF THE ARGUMENT

Respondent's Initial Brief presents several arguments, alleging that the Referee's recommendations of guilt are erroneous; that the mitigating factors should have outweighed the aggravating factors; it also points out that the purpose of discipline is not to punish lawyers for misconduct, but to protect the Bench, The Bar and the Public from the misconduct by lawyers and to deter other lawyers from engaging in similar misconduct.

The Referee found that Respondent devised a scheme to steal monies from his firm's operating account in order to buy expensive furniture for his home. The Referee also found that Respondent engaged in this plan for purely greedy purposes and that he never intended to repay the stolen funds. Respondent embezzled a total in excess of $12,000.00, doing so by thirteen (13) separate thefts over the course of four (4) months.

The Referee's Findings of Facts are presumed to be correct and it is the Respondent's burden to demonstrate that the Report of Referee is erroneous, unlawful or unjustified. The Respondent has failed to rebut the presumption of correctness. The facts in this case, taken as a whole, clearly support not only the Referee's Findings of Facts, but also his recommendation of guilt.

The Respondent's argument that he intended to reimburse his law firm for the monies misappropriated is not supported by any evidence and is therefore without merit. The

Respondent's argument that the Referee should have recommended a suspension for 30 days because no one was threatened or harmed by Respondent's conduct is without merit. Disbarment is the appropriate discipline for Respondent's misconduct.

The Florida Bar respectfully requests that this Court approve the Referee's Findings of Facts, recommendations of guilt, and the recommended discipline of disbarment.

POINT INVOLVED

Whether disbarment is so unduly harsh as to be punitive and contrary to law.

ARGUMENT

The Respondent has challenged the Referee's Findings of Fact, and his recommended sanctions as unduly harsh. It is well settled that a Referee's Findings of Fact will be upheld unless they are clearly erroneous or without support in the evidence. The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986). The Findings of Fact herein are based upon clear and convincing evidence and should be upheld.

Respondent further argues that the Referee "obviously intended" to preclude Respondent from practicing law for only one (1) year. (Initial Brief p. 9, paragraph 3). If so, the Referee, in his Amended Report, would have recommended a one (1) year suspension instead of disbarment. In the Amended Report of Referee it is abundantly clear that the Referee recommended disbarment.

Respondent attempts to mitigate his misconduct by stressing his alleged intention to repay the $12,135.00 he misappropriated from his law firm. (Initial Brief p. 13, paragraph 1). However, the Referee rejected Respondent's explanation for his wrongful conduct. He found Respondent deliberately and intentionally embezzled the money, and noted Respondent's motivation -- greed. Respondent's actions were not a whim. This plan was well thought out. Respondent devised a scheme, which took place on thirteen

(13) separate occasions over a period of several months. (TR. I, p. 10, L.9-20). Although Respondent claims he merely "borrowed" the monies, his plan did not include a repayment of the stolen funds. Respondent denied taking the money when one of his partners confronted him. (TR. I, p. 15, L. 2-10).

There is no evidence indicating that Respondent ever planned on replacing the monies. The evidence actually suggests that Respondent would have continued to steal funds if he was not caught.

In fact, when Judge Green asked Respondent's Counsel how Respondent would put the money back without being discovered, Counsel stated that he could not figure out how Respondent would return the money. (TR. II, p. 22, L. 16-19).

The basic facts are as follows:

1. Respondent knew his conduct was wrong. (TR. I, p. 12, L. 19-21);

2. Respondent concealed his actions from everyone including his wife. (TR. I, p. 9, L. 21-24);

3. Respondent repeatedly stole money over an extended time period. (TR. I, p. 10, 19-20);

4. Respondent failed to make attempts to stop stealing money or to return any of the stolen money before getting caught. (TR. I, p. 14, L. 15-17);

5. Respondent made payments on the furniture with the stolen funds. (TR. I, p. 26, L. 19-25; p. 27, L. 1-4);

Respondent cited several cases in order to support his position, but these cases are distinguishable from Respondent's case. Respondent cites State ex rel Florida Bar v. Murrell, 74 So. 2d 221 (Fla. 1954), wherein Murrell was suspended from the practice of law. However, unlike Respondent, Murrell was charged with solicitation, not embezzlement or misappropriation. The Court in Murrell stated:

> "the charge against respondent cannot be said to be one that is the product of innate baseness or depravity, like the embezzlement or misappropriation of funds..." Id. at 227.

Respondent then argues that the mitigation herein warrants a suspension. The Referee was aware of Respondent's mitigating circumstances and still found that disbarment was proper. The Referee also had the opportunity to evaluate the testimony of the witnesses and found that Respondent engaged in conduct that involved dishonesty, deceit, fraud and misrepresentation.

This Court in The Florida Bar v. Shanzer, 572 So. 2d 1382, 1383 (Fla. 1991) stated that in the "overwhelming number of recent cases" we disbarred attorneys for misappropriation of funds notwithstanding the mitigating evidence present. Shanzer misappropriated trust funds. This Court held that emotional problems, full cooperation with The Bar, remorse, rehabilitation and restitution did not mitigate disbarment. The Court explained that any

restitution efforts should be a consideration upon reapplication for admission to The Bar, not during proceedings for disbarment.

In The Florida Bar v. Margadonna, 511 So. 2d 985 (Fla. 1987), Margadonna was disbarred for using his official position as substitute temporary equity receiver to willfully and knowingly retain and convert approximately $145,000.00 to his own use. Margadonna had numerous mitigating factors, including gambling, alcoholism, psychiatric and health problems. Margadonna was disbarred even though it was recognized that the conversion was directly attributable to his gambling problem.

Respondent infers that since the Court in The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986), reduced Stalnaker's suspension to 90 days, Respondent's recommended discipline is too severe and should also be reduced. Like Respondent, Stalnaker misappropriated funds (fees) belonging to the firm for his own use. Yet, what distinguishes Respondent's case from the Stalnaker case is that Stalnaker believed he had the firm's permission to divert the funds in question. The evidence shows that Respondent knew he did not have the consent of his firm. The Court in Stalnaker held that Stalnaker's actions fell "short of a deliberate attempt to steal from the association." Id. at 817.

In The Florida Bar v. Farver, 506 So. 2d 1031 (Fla. 1987) Farver was suspended for one (1) year for depriving his firm of fees paid by the firm's clients. Farver argued

that his recommended suspension was too harsh. The Court disagreed because the record showed that Farver intentionally deprived his law firm of fees paid to him by the firm's clients. In Justice Ehrlich's opinion, concurring in part and dissenting in part, he stated that the Court should have imposed a more severe discipline and "absent extenuating circumstances there should be no place in The Florida Bar for lawyers who steal from whomsoever." Id. at 1032.

In The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986), Gillin diverted monies which belonged to his firm to purchase a Porsche automobile. Although Gillin received a six (6) month suspension for his misconduct, Respondent's obvious greed and total disregard for his partners and firm warrant disbarment. Like Gillin, Respondent misappropriated funds for a personal, unessential obligation. However, Gillin argued that his actions would in "some way aid in resolving a dispute he had with the firm regarding the fee distribution formula." Id. at 1219. This Court stated it would not "tolerate misguided, irrational acts of self-help involving disputes among partners who are members of The Bar." Id. at 1219. Such was not the case herein, Respondent deliberately misappropriated the funds without any dispute among the partners as to entitlement. Respondent should be disbarred.

In mitigation, Respondent argues he had sufficient equity in the law firm to offset the money embezzled and

therefore there was no risk of harm to the firm. Respondent's greed caused economic risk to his firm. Under Respondent's employment contract, the firm had the option upon Respondent's retirement or resignation to pay out over a five (5) year period. Because Respondent owed the firm in excess of $12,000.00, the firm opted to off-set Respondent's share of the partnership and business in full in consideration for the misappropriated funds. (TR. I, p. 29, L. 7-12).

In a case similar to Gillin, The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990), Shuminer was disbarred for stealing client's funds to purchase a luxury automobile. This Court disbarred Mr. Shuminer despite the following mitigation found by the Referee:

1. An absence of any prior discipline.
2. Great personal and emotional problems.
3. A timely and good faith effort at restitution.
4. Cooperation with The Bar.
5. Inexperience in the practice of law.
6. Good character and good reputation.
7. Clearly a mental impairment due to his addiction.
8. Serious, productive rehabilitation for over one (1) year.
9. Remorse.

Respondent stole money and should be disbarred. In Gillin, Justice Ehrlich stated in his opinion concurring in part and dissenting in part:

> "It is my opinion that stealing by a lawyer whether from a client, a member of the general public or from his law firm, is utterly reprehensible, and that by such act the lawyer has forfeited his position in society as a member of the bar and an officer of the Court, and disbarment is the proper discipline...If respondent had stolen from a client or from the public, I feel quite confident that this Court would have imposed a much harsher discipline. Why should it be otherwise when the victims are the lawyer's partners?" Gillin, 484 So. 2d at 1220.

According to the Standards for Imposing Lawyer Sanctions, Standard 5.11 (f), "disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Standards 9.2 and 9.3 discuss Aggravation and Mitigation. The following aggravating factors apply Standard 9.22: dishonest or selfish motive, a pattern of misconduct, and multiple offenses. The mitigating factors of Standard 9.32 under consideration consist of an absence of a prior disciplinary record and a cooperative attitude

toward the proceedings. Forced or compelled restitution is neither an aggravating nor a mitigating factor, so restitution is not mitigating in the instant case. Disbarment is the appropriate discipline. The Referee also found that Respondent had an outstanding reputation; that Respondent made an excellent professional adjustment; and that Respondent has shown remorse.

Respondent attempts to portray himself as the victim by arguing that he alone suffered the full consequences both economically and psychologically. (Initial Brief p. 16, paragraph 2). Respondent, as a sole practitioner, netted approximately $92,000.00 in 1990. It is difficult to understand how Respondent can consider this salary a severe economic loss. (TR. I, p. 19, L. 6-19). Furthermore, in his cries of self-pity, Respondent totally disregards the tremendous embarrassment he hurled upon a very prestigious firm among its peers and its community. Respondent jeopardized the reputation of a well-respected firm for some outrageously expensive furniture. Respondent displayed an obsession for material possessions that surpassed his respect for his obligation as an attorney.

The Referee summed up the gravamen of this offense. The "...testimony that the thefts were committed in order to cover personal, unessential obligations is outrageous." (RR. paragraph IV, p. 2).

CONCLUSION

As the trier of fact, the Referee had the opportunity to assess the credibility and observe the demeanor of the witnesses. Accordingly, his findings and recommendations should be upheld. Respondent's thefts were committed in order to purchase expensive furniture. Such deliberate, calculated, and greedy acts warrant disbarment.

WHEREFORE, The Florida Bar asks this Court to uphold the Referee's findings and approve the Referee's recommended discipline of disbarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer Brief of The Florida Bar has been sent by U.S. Mail this 7th day of Oct., 1991 to:

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