IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

CASE NO. 76,782
(TFB NO. 90-10,587 (12B))

DAVID L. WARD,

Respondent.

_____/

INITIAL BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

The purpose of disciplining lawyers as enunciated by this Court is to protect the Bench, the Bar and the Public from misconduct by lawyers and to deter other lawyers from engaging in similar misconduct. The purpose of discipline is not to punish lawyers for misconduct and the sanctions imposed by the Court for misconduct must be fair to the Respondent/Lawyer.

Under the facts of this case as found by the Referee and as reflected by the record demonstrate that the conduct of which Respondent is guilty caused no harm to the bench, the administration of justice, the Bar or the public in as much as none of these were in any way threatened or effected thereby and there is no indication in the record that allowing Respondent to practice law will in any way pose such a threat.

The only reason for imposing any sanction in this case is to deter other lawyers from engaging in misconduct. This is a valid reason and requires a sanction of suspension for some period of time. Respondent submits that suspension of thirty (30) days when coupled with a general awareness by the Bar of the gravity of the economic and psychological damage already suffered by the Respondent would be sufficient to deter any lawyer from engaging in like misconduct. Respondent recognizes that thirty (30) days suspension is an arbitrary period and the Court must exercise its discretion in determining the sanction. In this connection, Respondent submits that any suspension of more than ninety (90) days duration would serve no purpose consistent with the general

purpose of disciplining lawyers and would constitute punishment alone and would be unfair to Respondent.

STATEMENT OF THE CASE AND FACTS

After a finding of probable cause by the 12th Judicial Circuit Grievance Committee B for violation of Rule 4-8.4(c) of the Rules of Professional Conduct, Complainant filed its Complaint in this matter against Respondent, a member of the Florida Bar.

Respondent filed his Answer admitting all of the allegations in the Complaint and alleging an Affirmative Defense in Mitigation.

Hearings were held before the Referee who filed his Report recommending that Respondent be found guilty of violating Rule 4-8.4(c) of the Rules of Professional Conduct and that he be disbarred from the practice of law in Florida for one (1) year.

Rule 3-5.1(f) Rules Regulating the Florida Bar provides among other things:

> A Judgment of Disbarment terminates Respondent's status as a member of the Bar. A former member who has been disbarred may only be admitted again upon full compliance with the Rules and Regulations Governing Admission to the Bar except as may be otherwise provided in these rules. No application for admission may be entered within five (5) years after the date of disbarment or such longer period as the Court may determine in the Disbarment Order.

Thus, the recommended sanction was inconsistent in that although the "disbarment" as recommended was for only one (1) year,

Respondent could not apply for readmission for five (5) years and therefore constituted error. Staff Counsel and Respondent's Counsel were both dissatisfied with the Referee's recommendation, the former believing that precluding Respondent from practicing law for only one (1) year was unduly lenient and the latter believing that precluding him from practicing for one (1) year was unduly harsh. Counsel agreed that each would file a Motion for Rehearing setting out the error in the recommended sanction and suggesting that the word "suspension" be substituted for the word "disbarment." Neither side wanted to appear to waive their objection to the sanction of one (1) year suspension. As a result, Staff Counsel, as a second ground for rehearing, took the position that one (1) year's suspension was too lenient and Respondent's Counsel took the position that it was too harsh.

No hearing was sought on the Motion for Rehearing and none was held. On July 22, 1991, the Referee filed his Amended Report, wherein he "corrected" his original Report by deleting the words "for one (1) year" and in doing so recommended that "the Respondent be disbarred from the practice of law in Florida," thereby precluding the Respondent from practicing law for five (5) years instead of one (1) year.

Respondent timely filed his Petition for Review of Referee's Report as Amended.

Most of the Referee's Findings of Fact are supported by clear and convincing evidence and those so supported constitute the facts of this Appeal. These facts, in the words of the Referee are:

"The Respondent became indebted in excess of his ability to readily pay. Furniture purchases are mentioned as the principal inducement for the embezzlement of sums of money from the law firm for which the Respondent was employed. The Respondent found himself in a situation whereby it became very simple to draw expense funds without actually expending the money. He did this on several occasions until the amount embezzled became in excess of $12,000.00. Upon discovery of the scheme by a member of the firm, the Respondent was terminated from employment...

The Respondent has no other Florida Bar complaints and enjoys a good reputation among bar members and judicial personnel. Additionally, it appears that the Respondent is repentant.

The aggravating facts in this case are that the Respondent violated a trust placed in him by one of the most, if not the most, prestigious law firm in Lee County... Further, upon being questioned about one of the several transactions, the Respondent initially denied his misconduct. At a later time on the same day, he made a complete admission. The Respondent's conduct cannot be justified from the standpoint of necessity. His testimony that the thefts were committed in order to cover personal unessential obligations is outrageous.

On the other hand, the following factors in mitigation

exist:

1. An absence of any other discipline.
2. A good faith effort at restitution.
3. Cooperation with the Florida Bar.
4. His reputation is outstanding. (Testimony of Attorneys)
5. He has made an excellent professional adjustment. (Testimony of Witnesses)
6. He has expressed and shown remorse. (Testimony of Witnesses)

The Referee also found "upon discovery of the scheme by a member of the firm, the Respondent was terminated from employment after receipt of restitution for all embezzled advances." The underscored portion of this quote is not supported by any evidence but is contrary thereto. The evidence reflects that on the afternoon or the morning after the Respondent's conduct was discovered, he resigned from the law firm (Tr.P.15). Respondent sold his interest in the law firm which was a P.A. and in the business to the law firm and after off-setting the monies that he owed the law firm against the monies that the law firm owed him, the law firm owed him approximately $7,000.00. This settlement was not accomplished until the Spring of 1991 (Tr.P.17,18)."

The Findings of Fact by the Referee to the effect that "it did not appear that the Respondent otherwise intended to repay the

embezzled money" is not supported by any evidence. The Referee cites for this finding (Tr.P.21,22, June 18). The Referee also found that "Respondent seized upon an opportunity to defraud his associates with no contingent plan for undoing the harm." The citation for this prior finding is actually a portion of Respondent's attorney's closing argument. During the course of the closing argument, the Referee asked Counsel, "how would he put it back?" How would he put it back without being discovered?" Counsel was not under oath and was not testifying. In response to this question, Counsel advised the Court that the Respondent was confronted absolutely with the necessity of putting it back or getting caught, one way or the other, and Counsel did not know how Respondent would have or could have put it back without getting caught. In this connection, the unrefuted and unquestioned testimony of the Respondent reflected that when he took the money, he knew that it was wrong and intended to pay it back; he intended to pay it back immediately by getting a loan, "or more likely to pay it from my bonus that would have been paid to me in December and January 1989, which in that year based upon the prior three (3) years' history of the firm would have been in the $50,000.00 to $70,000.00 range." The interest which he had in the law firm exceeded the amount of the misappropriation. (Tr.P. 12,13)

Further, the testimony is unrefuted that Respondent fully cooperated with the law firm after his resignation in straightening out his files, assisting the law firm in the

collecting all of the Respondent's old accounts receivable (Tr.P.16,17), waived all of his rights to any of the accounts receivable and any rights to his bonus for that fiscal period (Tr.P.18).

POINT INVOLVED

Under the facts of this case are the sanctions recommended by the Referee in both his Amended Report and his Original Report so unduly harsh as to be punitive and unfair to Respondent and thus contrary to law.

ARGUMENT

Recognizing that this Court, if it does not approve the Referee's Report, will probably determine the sanctions to be imposed, Counsel will question the recommendations in both the Amended and the Original Reports believing that the Court will impose sanctions which better effectuate the purpose of and philosophy behind disciplining lawyers.

The Referee in his original Report obviously intended to preclude Respondent from practicing law for one (1) year. Mistakenly, he labelled the sanction as "disbarment for one (1) year." Realizing that under the rules regulating the Florida Bar, "disbarment" was for a minimum of five (5) years, both Staff and Respondent's Counsel attempted to assist the Referee in correcting an obvious error and filed their Motions for Rehearing which Motions were identical as to this Referee's error. For reasons not disclosed in his Amended Report, the Referee recommended "disbarment" without any time limitations. The imposition of disbarment would preclude Respondent from practicing law for a minimum of five (5) years plus the time it would take him to be admitted to the Bar through his application to the Florida Board

of Bar Examiners.

It has always been the philosophy of this Court that the purpose of assessing sanctions is to protect the public interest and to give fair treatment to the accused attorney. State ex rel. Florida Bar v. Ruskin 126 So.2d 142 (Fla. 1961). The discipline should be corrective and the controlling considerations should be the gravity of the charges, the injuries suffered and the character of the excused. Holland v. Frournoy 195 So.138 (Fla. 1940). The penalty assessed should not be made for the purpose of punishment. The Florida Bar v. King 174 So.2d 398 (Fla. 1965) Neither prejudice nor passion should enter into the determination. State ex rel Florida Bar v. Bass 106 So.2d 77. (Fla. 1958)

It has more recently been stated that the purpose of discipline is to protect the Bench, the Bar and the Public and to deter other lawyers from engaging in like misconduct.

This Court in State ex rel Florida Bar v. Murrell 74 So.2d 221 (Fla.1954), in considering the sanction of disbarment stated:

> "disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the Bar, otherwise suspension is preferable. For isolated acts, censure, public or private, is more appropriated. Only for such singular

reasons as embezzlement, bribery of a juror or Court Official and the like, should suspension or disbarment be imposed, and even as to these, the lawyer should be given the benefit of the doubt, in particular where he has a professional reputation and record free of offenses like that charged against him." (Emphasis Supplied)

In Murrell, Supra, this Court quoted with approval Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.E.d. 646 as follows:

"To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family."

This Court then stated:

"A removal from the Bar should therefore never be decreed where any punishment less severe, such as a reprimand, temporary suspension, or fine, would accomplish the end desired. T h e following cases enlighten the question (Citations Omitted). The last cited opinion was by Chief Justice Vanderbilt and is interesting because of the circumstances out of which it derived and the ground for disbarment. But all these situations tell of professional lapses and attitude that on their face would not be indulged in by any

responsible lawyer. They are important because they give us the approach of the best legal authority on disbarment for unprofessional conduct."

All of the cases cited herein, the quotations quoted and the views expressed are just as true today as they where when those cased were decided. This Court has consistently followed this philosophy and reasoning and has consistently ruled accordingly.

In this case, admittedly, the conduct of the Respondent was wrongful. It was not and cannot be justified. It is not his position that some sanctions should not be imposed upon him. It is his position that disbarment or any suspension for more than ninety (90) days is not required for the protection of the Bench, the Bar and the Public and to deter other lawyers from engaging in like misconduct. Any more severe sanction would serve only as punishment.

The record in this case reflects that:

1. Respondent misappropriated for his own use approximately $12,000.00 of his law firm's funds.
2. Respondent knew that this conduct was wrongful (T.r.P.12).
3. The equity which Respondent had in the Professional Association and the building owned by the partnership exceeded the amount misappropriated.

4. Respondent did not intend to permanently deprive the law firm of the $12,000. He fully intended to reimburse itand he knew that if he did not voluntarily reimburse it, the misappropriation would be discovered by it and the firm had the ability to force restitution (T.r.P.14).

5. This misappropriation was discovered and, after a momentary delay, he acknowledged his conduct and resigned from the law firm (T.r.P.15).

6. After his resignation, he cooperated with the law firm in turning client files over to the law firm, completed the billing of the files handled by him, notified clients that he was leaving the firm, worked three or four weeks tying up loose ends prior to leaving and helped the law firm in collecting accounts receivables (T.r.P.16,17).

7. He waived all of his rights to all accounts receivable and to a bonus and sold his interest in the firm and in the building to the firm and after making restitution, received from the firm approximately $7,000.00.

8. He cooperated fully with the Florida Bar in its investigation of this matter and in these disciplinary procedures.

9. He is not angry with either the law firm or the Florida Bar (T.r.P.19,20). He is remorseful as a result of this experience and he has learned that he must live within his means.

10. He had practiced law almost nine (9) years and had no prior disciplinary record and he still enjoys a good reputation among Bar members and Judicial personnel.

11. He has made an excellent professional adjustment.

The conduct of Respondent did not in any way threaten or harm the clients of his law firm or other members of the public because they were in no way involved. There is nothing in this record reflecting that any sanction is necessary to protect the public.

Respondent's conduct did not in any manner affect the administration of justice and there is nothing in the record indicating that he poses any threat to the judicial system or the administration of justice.

The record reflects that Respondent has learned his lesson in a harsh school and there is no reason to believe that he will ever again engage in any form of dishonest conduct.

In brief, neither the Bench, the Bar or the Public needs any protection from the Respondent.

However, as heretofore stated, one other purpose of discipline is to deter other lawyers from engaging in similar misconduct. A careful and thoughtful reading of the record in this case would

disclose the economic and psychological effects of Respondent's conduct on Respondent. He has paid dearly economically and has suffered great humiliation and embarrassment. The price which he has paid in these regards should deter any other lawyer who prides himself in the practice of his profession from engaging in like misconduct. Unfortunately, the record in this case will not be generally available to members of the Bar. They will read only the opinion of this Court as it appears in the Southern Reporter. Respondent submits that a suspension of the Respondent from the practice of law for a period of time may well be required to get the attention of the members of the Bar. Respondent suggests that a suspension of thirty (30) days would get the attention of other members of the Bar. The length of the suspension rests within the discretion of this Court, but Respondent submits that any suspension of more than ninety (90) days is not required by the purposes of discipline.

This Court has been confronted with this problem before. In The Florida Bar v. Stalnaker 485 So.2d 815 (Fla. 1986) Stalnaker accepted money from clients in excess of his salary which he deposited in his personal account and then gave the law firm less than the full amount which he had received. The Referee recommended Stalnaker be suspended for twelve (12) months and thereafter until he proved his rehabilitation. Petition for Review was filed alleging among other things that the recommended discipline was excessive. The Referee's Report recommending a finding of guilt was affirmed but the suspension was reduced to

ninety (90) days.

In Florida Bar v. Gillin 484 So.2d 1218 (Fla. 1986) Gillin misappropriated monies belonging to his law firm intending to use the same for the purpose of purchasing a Porche automobile. The record in that case reflects that the Referee found that nobody suffered any real damage as a result of Gillin's misconduct, Gillin had no prior disciplinary record, he had been active in church and civic activities and he had been active in local Bar functions. Under these circumstances, the Referee recommended Gillin be suspended for six (6) months. This recommendation of the Referee was approved by the Court.

In this case, Respondent fully intended to reimburse his law firm for the monies misappropriated and realized that if he did not voluntarily do so, the law firm would, in a relatively short period of time, discovered the misappropriation (which is what happened) and force him to reimburse the firm out of his equity in the firm's assets. He had neither the intent nor the ability to permanently deprive the law firm of $12,000.00. The bench, the judicial system, the administration of justice, the Bar, the public and the law firm were in no way threatened or harmed by his conduct. He alone suffered the full consequences thereof both economically and psychologically which consequences were and still are serious. Under all of these circumstances, Respondent submits that a suspension from the practice of law for a period of thirty (30) days will adequately effectuate all of the purposes of discipline as heretofore enunciated by this Court.

CONCLUSION

In this case, the Respondent is guilty of serious misconduct. His conduct was unjustifiable and inexcusable and he has made no effort to justify or have it excused. No one was hurt by his misconduct excepting only the Respondent who has been and as a result of this matter will be severely punished. He recognizes that what he did was wrong and he is remorseful and penitent. Prior to this matter, he had no disciplinary record and there is nothing to indicate in this record that he will engage in misconduct again. Under these circumstances, any sanction precluding him from engaging in the practice of law for longer than a very short period of time will serve no useful purpose whatsoever and will constitute punishment only and result in not only depriving him of his means of earning a livelihood and serving the public but will result in severe economic consequences to his family and will deprive the public of the services of a lawyer well skilled in his field.

Respectively submitted,

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CERTFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's initial brief has been send by U.S. Mail this 13th day of September 1991 to:

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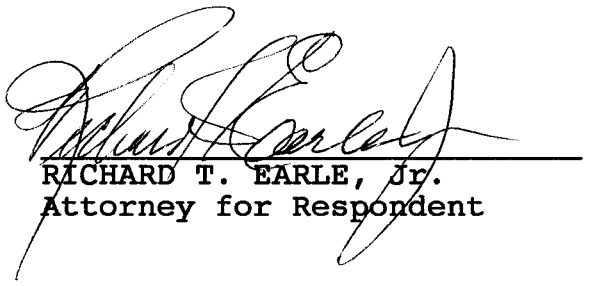

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