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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

DAVID A. GRAHAM,

Respondent-Appellant.
_____/

Supreme Court Case No. 77,150

The Florida Bar File No.
90-50,557 (15A)

ANSWER BRIEF OF THE FLORIDA BAR

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COUNTERSTATEMENT OF NATURE OF CASE

In that appellant has not specified the misconduct indulged in by him underlying the referee's recommendation of disbarment, the bar regards it as necessary to present this counterstatement.

APPELLANT'S THEFT OF CLIENT FUNDS.

Heretofore, respondent represented one Darrell Kramer, an infant (hereinafter referred to as "infant"), in connection with a claim to recover damages for injuries sustained by the infant as a result of having been struck in the eye by a projectile launched by a third party. This was admitted to by appellant in his answer.

Appellant effected a settlement of the infant's claim and secured a court order dated June 19, 1989 approving such settlement. A copy of such order is attached hereto as Appendix I. Appellant admitted the foregoing at the outset of the final hearing (5).*

In July, 1989, appellant received the settlement proceeds as recited in the June 19, 1989 order approving the settlement and deposited the same to his trust account. This was admitted to by appellant in his answer.

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* All page references are to transcripts of the final hearing or of the hearing had upon appellant's application to terminate the temporary suspension. If the page reference is a number, alone, the reference is to the final hearing. If the letters TS precede the page reference, then the reference is to the transcript of the hearing upon the motion to terminate the temporary suspension.

Of the $37,000.00 collected by appellant pursuant to the terms of the above referenced order, appellant received $20,000.00 as and for his attorney's fee and costs, as provided in the order, remitted an additional amount of $3,500.00 to the infant's mother, claims to have paid from such proceeds $762.32 in medical expenses on account of the infant and misappropriated the balance of $12,737.68. This was admitted to by appellant upon the final hearing (5, 6).

MISREPRESENTATIONS TO THE FLORIDA BAR.

By letter dated November 2, 1989, the bar requested that appellant specifically address the disposition of funds received by him relating to the infant's case. This was admitted to by appellant upon the final hearing (7). A copy of the bar's November 2, 1989 letter is attached hereto as Appendix II.

By letter dated November 15, 1989, appellant responded to the bar, as follows:

> The case of Donna Nardone is one involving an injury to her minor son. There was a settlement whereby a court approval was obtained. My fee was set at $20,000.00 which is where the "traveler's checks" money came from. The rest of the money is being distributed for various medical bills, medical insurance reimbursement, payment of some itemized expenses of his mother and some emergency relief to the minor and his mother and half-sister due to the step-father leaving home. The balance will continue to be held in trust for the minor until his 18th birthday at which time further funds will go directly to him as part of a structured settlement.

This was admitted to by appellant in his answer.

Appellant's representation to the bar regarding the disposition and holding of the infant's funds was false when made by him to the bar and known by him to be false when made. This was admitted to by appellant upon the final hearing (7).

In truth and in fact, appellant had not continued to hold the settlement proceeds in trust as represented in his November, 1989 letter but had misappropriated the same to his own uses and purposes. This was admitted to by appellant upon the final hearing (7).

On April 16, 1990, appellant, testifying under oath in response to a grievance committee subpoena, stated as follows:

> Q. To what extent, sir, did you use funds earmarked to the Nardone settlement -- and I make reference to the Court's June 17, 1989, order -- out of trust?
>
> A. Yes. I would say that it must be approximately $13,000.
>
> Q. Have you restored that $13,000 to your trust account?
>
> A. Yes.
>
> Q. When?
>
> A. Last week.
>
> Q. Which trust account did you restore it to?
>
> A. First Union.
>
> Q. What's the source of the $13,000? Is that what you put in, $13,000?
>
> A. Yes.
>
> Q. What was the source of that?
>
> A. A loan.

This was admitted to by appellant upon the final hearing (7, 8).

Such sworn testimony was false when made by appellant and known by appellant to be false when made. As a matter of fact, appellant specifically identified what he claimed to be the source of the restitution of the $13,000.00 in question. He specifically

testified that he had borrowed that exact sum from one Thomas Bulson but admitted upon the final hearing that he had not, in fact, borrowed any such funds from Mr. Bulson and in fact had not replaced the $13,000.00 at the time he testified that he had (22, 23).

In truth and in fact, appellant had not restored the $13,000.00, referred to in his testimony, to his trust account at the time he gave his April 16, 1990 sworn testimony. This was admitted to by appellant upon the final hearing (8).

NEGLECT AND MISAPPLICATION OF INFANT'S FUNDS.

Understanding the fact that the order compromising the infant's claim directed payments to the infant's mother, Donna Nardone, as guardian for the infant, appellant thereafter did not establish a guardianship account for the infant until after his suspension nor did appellant timely conclude his representation of the infant. This was admitted to by appellant upon the final hearing (9).

Notwithstanding the order compromising the infant's claim and the specific provisions thereof, appellant knowingly and deliberately made payments to the infant's mother outside of the guardianship without leave of court. This was admitted to by appellant in his answer.

APPELLANT'S FAILURE TO APPLY FUNDS ENTRUSTED TO HIM FOR THE SPECIFIC PURPOSE OF THE ENTRUSTMENT.

Heretofore respondent represented a client with the surname Seeger in connection with a claim by Seeger to recover damages for personal injury sustained by Seeger in an accident. This was admitted to by appellant in his answer.

As a result of a settlement in the Seeger case, appellant received settlement funds for the specific purpose of application to attorney's fees, payment to Seeger and payment to medical service providers. Appellant admitted this in his answer.

As of August 31, 1989, appellant was obligated to pay from the Seeger settlement proceeds, a physician's bill in the sum of $3,210.00. Appellant admitted this upon the final hearing (15).

As of April 16, 1990, appellant was obligated to pay from the Seeger settlement proceeds, on account of the same physician, the sum of $1,400.00. This was admitted to by appellant upon the final hearing (15).

On April 16, 1990, appellant testified, under oath, with reference to the Seeger settlement, as follows:

> Q. Did you have a contingent fee agreement with your clients?
>
> A. Yes.
>
> Q. What was the contingency?
>
> A. Forty percent
>
> Q. Have you disbursed all monies from that settlement?
>
> A. Yes.

Appellant admitted the foregoing in his answer.

Such representation was false when made and known by appellant to be false when made. In truth and in fact, appellant had not disbursed all of the monies from the Seeger settlement and was, as of the date of his April 16, 1990 testimony, obligated in the Seeger matter to the extent of $1,400.00 for payment of the physician's bill he admittedly owed. Appellant denied the foregoing upon the final hearing. He testified, however, as follows:

> Q. Now, as a matter of fact, sir, you had not disbursed all of the monies from the Seeger matter as of the date your testimony made reference to in paragraph 23, isn't that so?
>
> A. I guess it comes down to a matter of semantics as far as "disbursed." All of the money was disbursed.
>
> Q. Well, you hadn't disbursed it for the purpose for which it was entrusted and received by you, sir?
>
> A. That's a fair statement, sir, I think.
>
> Q. And you knew that when you testified?
>
> A. I knew on the Seeger case that there was an outstanding bill to this Dr. Nemerofsky, and at the same deposition I explained that to you. I gave you my entire Seeger file. I gave you specifically a letter to and/or from the doctor's office confirming that we had a payment agreement whereby they were being paid $200.00 a month. And how that got twisted into this, I have no idea, but they were in fact being paid. They had not yet been paid, and that was the only obligation that was still outstanding (27, 28).

On April 16, 1990, when appellant testified, under oath, that he had disbursed all monies from the Seeger settlement, appellant had a shortage in his trust account to the extent of $30,503.13 (49). The obligation to Seeger's physician constituted part of that $30,503.13 shortage (52). Appellant's counsel specifically acknowledged that the shortage constituted a misappropriation (51).

COMMINGLING, ISSUANCE OF TRUST FUND CHECKS RETURNED FOR INSUFFICIENT FUNDS AND GENERAL TRUST ACCOUNT SHORTAGES

In a bank account which appellant referred to as his "master account", appellant deposited checks totally unrelated to his practice of law, issued therefrom numerous checks returned for insufficient funds and over a six (6) month period incurred shortages ranging from $12,852.93 to $29,013.80. All of the allegations of commingling,

issuance of trust account checks returned for insufficient funds and trust account shortages were admitted to by appellant either in his answer or upon the final hearing. See Count VII of the bar's complaint, appellant's answer thereto and page 64 of the transcript of the final hearing where denials, previously asserted by appellant, were withdrawn and admissions substituted in place and stead thereof.

VIOLATIONS RELATING TO SEPARATE TRUST ACCOUNT MAINTAINED BY APPELLANT.

Appellant maintained a second trust account. During a four (4) month period he sustained shortages ranging from $15,999.40 through $30,025.25. The bar's allegations pertaining to this separate account appear in Count VIII in the bar's complaint. The shortages were admitted to by appellant in his answer.

The bar also demonstrated how appellant had to deposit funds to his separate trust account from his operating account in order to ward off a shortage. These allegations were established through testimony of the bar's auditor (66).

EXPENDITURES BY APPELLANT'S WIFE FROM APPELLANT'S TRUST ACCOUNT FOR PURPOSES HAVING NO NEXUS TO APPELLANT'S LAW PRACTICE.

The bar established that appellant had designated his wife as a signatory to one of his trust accounts. Appellant's wife issued twenty-four (24) checks from such account for purposes having no nexus to respondent's law practice which checks totalled $3,178.52. Most significantly, at all times that appellant's wife issued such checks

and each of such checks, the reconciled balances in the account from which the checks were drawn, constituted trust account shortages. These facts were admitted by appellant upon the final hearing (19).

FAILURE TO MAINTAIN MINIMUM TRUST ACCOUNTING RECORDS AND TO COMPLY WITH MINIMUM TRUST ACCOUNTING PROCEDURES:

By his answer, appellant admitted to having failed to maintain even the minimum trust accounting records mandated by Rule 5-1.2(b), Rules Regulating Trust Accounts and he further admitted that he failed to comply with the minimum trust accounting procedures mandated by Rule 5-1.2(c), Rules Regulating Trust Accounts.

APPELLANT'S LACK OF COMPREHENSION REGARDING TRUST ACCOUNT RESPONSIBILITIES:

Appellant demonstrated a total lack of comprehension regarding an attorney's trust account responsibilities. He complained that the reason for the dispute between his totally undocumented and unfixed client liability obligation and that of the bar auditor was due to the fact that "they won't take my word for it. All they will take is documentation" (TS 102). Petitioner denied having any addiction problems during the period covering his misconduct and was not treating for any physical or mental maladies (TS 107-108).

In an astounding display of ignorance, petitioner, questioning the bar auditor's conclusion regarding the thousands of dollars drawn against a trust account by petitioner's wife, identified twenty-four (24) such checks and insisted: "(t)his is not a trust account" (TS 110). The full colloquy establishing petitioner's total lack of comprehension vis a vis trust account responsibility, follows:

Q. Were you aware of up until this moment, Mr. Graham, the extent of the checks drawn by your wife?
A. Well, I might point out to you, Mr. Barnovitz, first of all, this is not a trust account. You keep saying that this is a trust account. This is the master account. This is the only checking account from which monies were disbursed for personal expenses, etcetera. Every one of these checks that I gave to my wife and they all look like things that were for her for routine things that she would purchase for herself or for the children. You said several thousand dollars. I didn't add these up. It looks like $2,000.00 or $3,000.00 max, something like that, and out of that a good size chunk of it is for the dentist.

So to answer your question, yes, my wife signed these checks and, yes, I gave her these checks and every penny of that is something I would have given her if she had asked me for it.

Q. You say this wasn't a trust account?
A. It was a master account.

Q. Well, as a matter of fact, sir, you used this account both as a trust account and as a personal account, did you not?
A. Yes.

Q. You reposed in this account funds that were entrusted to you by clients for specific purposes, did you not?
A. Yes, sir.

Q. But you didn't regard that as a trust account and you still don't regard that as a trust account; is that correct?
A. The bank described it as a master account. Every check that I was to write was to be --

Q. I want to get your understanding, Mr. Graham, as you sit here today in November 1990, as to whether or not you today do not regard that account, no matter who labeled it what, as having constituted a trust account?

MR. TOZIAN: I am going to object to the question. I think it's confusing. I think his previous testimony was established he was using just one account for both fees and client costs. He's admitted he commingled and at the time he should not have been commingling.

I don't understand the purpose of the question. I guess my objection is the question has been asked and answered and we are now in a semantical problem whether or not he at the time referred to it as a trust account.

THE COURT: You may proceed. I will clarify in my own mind, though, Mr. Graham as I understand this account, Banker's Trust, was the only account you had?

THE WITNESS: Yes sir. That's correct.

THE COURT: And who were the authorized signatures that could withdraw on that account?

THE WITNESS: My wife could sign a check as I could sign a check. However, he's pulled out approximately 24 checks out of probably hundreds that were written. The only time she had access to a check was when I gave her one. She was on there basically because if something happened to me, I would want her to be able to pay whatever expenses had to be paid for my clients and I also gave her some checks, but it wasn't like she could carry around a checkbook and write a check for whatever she wanted.

THE COURT: Your wife is not an attorney.

THE WITNESS: No (TS 109-112).

Petitioner admitted having no knowledge of the necessity of securing closing statements in personal injury cases (TS 116).

The referee inquired of petitioner regarding whether or not he had, subsequent to his admission to the bar, taken any courses on trust account procedures. Petitioner claims to have attended a seminar (TS 125). He was then asked and answered the following question:

> Q. Mr. Graham, at all times you knew in this matter, did you not, regardless of whether you took an ethics course or a hundred ethics courses, that it was wrong for you to use funds entrusted to you for a specific purpose, for any purpose other than the specific entrustment, did you not?
> A. Yes (TS 126).

RESTITUTION

Appellant did not make restitution prior to the bar's entry upon the scene. Even at his November 30, 1990 temporary suspension hearing, appellant, concededly, had not made full restitution. According to the bar auditor's report (TS Exhibit 2) there was yet owing the sum of $4,535.81. Due to appellant's total lack of record keeping, there was even a small balance due upon the February 27, 1991 final hearing which appellant concedes to at page 3 of his initial brief.

SUMMARY OF ARGUMENT

Appellant's theft of client funds, his conversion thereof to his own use, his misrepresentations to the bar in an attempted cover-up, his permitting his wife access to and expenditure of his clients' funds, his inability to understand the trust fund concept, his total lack of trust account record keeping and his failure to adhere even to the most minimum trust account procedures constitute such overwhelming antiethical behavior so as to mandate his disbarment.

ARGUMENT

I. BOTH FACTS AND PRECEDENT INDICATE THAT APPELLANT MUST BE DISBARRED.

Appellant seeks to have the Court discount the referee's recommendations of fact and guilt regarding Counts V and VI of the bar's complaint. In each instance, the referee found, as fact, each and every allegation as alleged by the bar and each and every violation ascribed to such facts by the bar. While both counts will be addressed latter in this brief, it is respectfully submitted that a preoccupation therewith constitutes a diversion and whether such counts are included, or not, the totality of appellant's misconduct, absent such counts, mandates that appellant be disbarred.

Thus, it is the bar's intention in this argument, to set aside Counts V and VI and concentrate on the facts and violations where there is no disagreement. In so doing, a distillate of antiethical behavior of such magnitude is produced as to warrant and indeed, in the bar's view, mandate disbarment regardless of Counts V and VI.

In the first instance, the Court's attention is directed to appellant's representation of his infant client, Darrell Kramer. There, it was stipulated to by appellant, that he undertook representation of the infant in connection with a claim to recover damages for personal injuries sustained when the infant was struck in the eye by a pellet. Upon securing a court order approving a proposed settlement of the infant's claim (Appendix I), appellant proceeded to collect the $37,000.00 settlement proceeds, deposit the same to his trust account and by his own admissions, misappropriate $12,727.68 thereof. See Count I of the bar's complaint, appellant's answer thereto and admissions stipulated to at page 5 of the transcript of the February 27, 1991 final hearing.

To add insult to injury, appellant did not establish a guardianship account for his infant client until after being temporarily suspended from the bar and did not attend to his client's case in a timely fashion. See appellant's admissions by stipulation at pages 8 and 9 of the transcript of the February 27, 1991 final hearing. In addition, disregarding the settlement order (Appendix I) as though it did not exist, appellant knowingly and deliberately made payments to the infant's mother outside of the guardianship without leave of the court. This, appellant admitted in his answer.

Appellant not only failed to cooperate with the bar in its investigation, but, through misrepresentations, attempted to convince the bar that he was appropriately holding his infant client's settlement proceeds in trust. The bar made specific inquiry of appellant regarding the infant's case (See Appendix II). In response to such inquiry, appellant assured the bar that "[T]he balance will continue to be held in trust for the minor until his 18th birthday..." Appellant knew that his representation to the bar was false when he made it. He admitted this by stipulation appearing at page 7 of the transcript of the February 27, 1991 final hearing.

Not content with lying to the bar in response to the bar's inquiry regarding the infant's claim, appellant determined to compound his misrepresentations upon a deposition in aid of the bar's audit. There, when directly asked regarding whether or not he had made restitution of the approximate $13,000.00 he had misappropriated from his infant client, appellant testified, under oath, that he had restored the $13,000.00 to his trust account specifying both the trust account to which it had allegedly been restored and the source of the funds constituting the alleged restitution. The full colloquy appears at page

4, paragraph 13 of the bar's complaint which was admitted to by appellant, by stipulation at page 8 of the transcript of the February 27, 1991 final hearing. While appellant denied that his sworn testimony was false when made and known by him to be false when made, he could offer no explanation for his testimony other than to suggest that either he or the court reporter had made an error. The referee, who had the unique advantage of observing appellant and making determinations regarding appellant's credibility, obviously found appellant's attempts to explain away his sworn testimony as not worthy of belief. It is axiomatic that a referee's findings of fact are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Seldin, 526 So.2d 41 (Fla. 1988); The Florida Bar v. Neely, 502 So.2d 1237 (Fla. 1987). By not only asserting that he had made restitution, but by specifying the exact source of the alleged restitution, when, in fact, none had been made, it can hardly be stated that the referee's findings are lacking in evidentiary support.

In addition to the theft of client funds and attempted cover-up by misrepresenting to the bar, appellant designated his wife a signatory to his trust account and permitted her to draw checks for non-law related purposes even though the account contained shortages upon the issuance of each and every check drawn by Mrs. Graham.

Appellant maintained three (3) trust accounts, each of which reflected substantial shortages and which shortages continued for approximately one (1) year. From August, 1989 through January, 1990

the shortages ranged from $12,852.93 to $29,013.80. From February, 1990 through May, 1990 the shortages ranged from $15,999.40 to $30,503.13. In June and July, 1990 the shortages continued, ranging from $4,535.81 to $5,686.33.

Appellant issued numerous checks which were returned for insufficient funds. Such checks were issued for both law related purposes and for personal purposes. In short, appellant disregarded all minimum trust account procedures and maintained no minimum trust account records.

The totality of appellant's misconduct, without regard to Counts V and VI mandates imposition of the sanction of disbarment.

In 1980, this Court issued a clarion warning in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980) advising the bar that "henceforth we will not be reluctant to disbar an attorney for this type of offense (misuse of clients' funds) even though no client is injured." Over the next decade, the Court disbarred most attorneys in misappropriation cases, but, in a sui generis approach, imposed lesser sanctions in a myriad of theft cases producing a potpourri of sanctions for bar counsel and respondents selectively to cite. Appellant has done just that in his brief, urging that his misconduct is no worse than that of the respondents in the five (5) cases he cites, viz., The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981), The Florida Bar v. Dietrich, 469 So.2d 1377 (Fla. 1985), The Florida Bar v. Greenfield, 517 So.2d 16 (Fla. 1987), The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986) and The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980).

Appellant's argument fails for two (2) reasons. Firstly, the cases he cites are inapposite to his own. It must be remembered that appellant, when called upon to aid the bar in its investigation, lied to the bar. He first, in letter form, indicated that the funds in question were held by him in trust, a lie, and then, upon a deposition in aid of the bar's audit, claimed to have restored the missing funds, a perpetuation of his lie. In each of the five (5) above referenced cases, relied upon by appellant, without exception, the Court took note of respondents' cooperation with the bar. Thus, in Anderson, supra, reference is made to respondent's "full, honest and complete cooperation." In Dietrich, supra, the Court noted that respondent "cooperated fully with The Florida Bar." In Greenfield, supra, it is noted: "Upon inquiry by The Florida Bar, respondent was cooperative and did not attempt to conceal any facts." In Tunsil, supra, notice was taken of respondent's cooperation and restitution.

Thus, unlike the cited cases, appellant not only failed to cooperate with the bar, but, rather, lied about his defalcations.

The second reason appellant's argument must fail is due to the Court's painstaking definition of the position of attorney theft in the hierarchy of discipline cases and its fine tuning of the yardstick to be applied in fashioning an appropriate sanction. Reference is made to the trilogy of cases decided by the Court in January, 1991.

Thus, in The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991), faced with a misappropriation case, the court, in ordering a disbarment, stated as follows:

This Court has repeatedly asserted that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment. The Fla. Bar v. Farbstein, No. 74,290 (Fla. Nov. 29, 1990); The Fla. Bar v. Newman, 513 So.2d 656 (Fla. 1987). In some cases we have found that presumption rebutted by mitigating evidence, and we imposed the slightly lesser discipline of suspension. See, e.g., The Fla. Bar v. Schiller, 537 So.2d 992 (Fla. 1989). In the overwhelming number of recent cases, we have disbarred attorneys for misappropriation of funds notwithstanding the mitigating evidence presented. See The Fla. Bar v. Shuminer, 567 So.2d 430 (Fla. 1990); The Fla. Bar v. Golub, 550 So.2d 455 (Fla. 1989); The Fla. Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989); The Fla. Bar v. Gillis, 527 So.2d 818 (Fla. 1988); The Fla. Bar v. Newhouse, 520 So.2d 25 (Fla. 1988); The Fla. Bar v. Bookman, 502 So.2d 893 (Fla. 1987); The Fla. Bar v. Knowles, 500 So.2d 140 (Fla. 1986); The Fla. Bar v. Rodriguez, 489 So.2d 726 (Fla. 1986); The Fla. Bar v. Ross, 417 So.2d 985 (Fla. 1982).

In the case before us, we likewise fail to find that the mitigating evidence submitted warrants a discipline less than disbarment.[2] Respondent argues that his depression, primarily over his marital and economic problems, led him to use his trust account for personal purposes. These problems, unfortunately, are visited upon a great number of lawyers. Clearly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems. We recognize that mental problems as well as alcohol and drug problems may impair judgment so as to diminish culpability. However, we do not find that the referee abused his discretion in not finding this to be one of those cases.

We are not unmindful of respondent's cooperation with the Bar and restitution efforts,[3] and these efforts should be considered upon any reapplication for membership in The Florida Bar.

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[2] Respondent's testimony about his problems was the only evidence presented to the referee.

[3] Although we note that respondent still owes $3,643.76 in restitution.

Two (2) weeks later, the court had an opportunity, once again, to discuss its position, this time involving a situation where the respondent had improperly handled estate funds. In The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991) the court ordered a disbarment where the respondent had mismanaged estate funds, noting that such sanction was appropriate notwithstanding complete restitution and regardless of whether or not the withholding of funds to estate beneficiaries was intentional or through negligence.

Sandwiched between such cases is The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991) where a sharply divided court (4-3) in a case of attorney theft, ordered a three (3) year suspension rather than disbarment. Acknowledging its struggle in selecting a three (3) year suspension rather than disbarment, the court characterized its decision as a "close one." The saving factor, tipping the scale in favor of the suspension, was that respondent had made full restitution prior to involvement by the bar. To underscore how seriously it views such violations, however, the court took pains to point out:

> On the other hand, anything less than a three-year suspension may not sufficiently deter other attorneys who might be tempted to avail themselves of their clients' readily accessible funds. Regardless of the mitigating circumstances involved, the intentional misappropriation of client property remains a most serious offense.

Unlike McShirley, supra, appellant did not make restitution, partial or full, prior to the bar's involvement. Unlike Shanzer, supra, where disbarment was imposed, there was no cooperation with the bar on appellant's part.

If the Shanzer, McClure, McShirley trilogy is intended by the Court, as the bar believes it is, to constitute the yardstick for attorney misappropriation cases, then appellant must be disbarred. Indeed, appellant's deliberate and unequivocal lies under oath form a basis for disbarment absent any other misconduct. In The Florida Bar v. O'Malley, 534 So.2d 1159 (Fla. 1988) this Court, in addressing the issue of attorney perjury, stated:

> A lawyer may commit no greater professional wrong. Our system of justice depends for its existence on the truthfulness of its officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment. The Florida Bar v. Manspeaker, 428 So.2d 241 (Fla. 1983).

II. THE REFEREE'S RECOMMENDATIONS REGARDING COUNTS V AND VI ARE SUPPORTED BY EVIDENCE AND SHOULD BE ADOPTED BY THE COURT.

Counts V and VI of the bar's complaint concern a letter of protection that appellant issued in favor of a physician on behalf of a client named Seeger. In Count V, the bar alleged and appellant admitted in his answer that he received the Seeger settlement proceeds "for the specific purpose of application to ... medical service providers" (See page 6, paragraph 20 of the bar's complaint and paragraph 20 of appellant's answer). By stipulation, appellant admitted that as of April 16, 1990, he was obligated to the physician to the extent of $1,400.00 (15). Appellant also admitted that on April 16, 1990, when he concededly owed the physician in question $1,400.00, that he testified that day, under oath, that he "disbursed all monies from that (the Seeger) settlement" (See page 6, paragraph 23 of the bar's complaint admitted to by appellant at paragraph 23 of his answer).

Appellant now urges that as all of the Seeger settlement proceeds had, in fact, been disbursed as of April 16, 1990, his response under oath, did not constitute a misrepresentation as charged by the bar and found by the referee. In fact, appellant's response constituted a deliberate and unequivocal attempt to mislead the bar in its audit and to create an impression that there was no shortage vis a vis the Seeger matter.

On March 31, 1990, appellant's trust account shortage amounted to $16,043.49. By April 30, 1990, his shortage increased to $30,503.13 (See pages 10, 11, paragraph 48 of the bar's complaint admitted to by appellant at paragraph 48 of his answer). The bar's auditor testified that the $1,400.00 obligation to the Seeger physician constituted part of the April 30, 1990 shortage of $30,503.13 (63).

There can be no doubt regarding the purpose of appellant's April 16, 1990 deposition which was taken in aid of the bar's audit. The entire deposition transcript was admitted into evidence at the final hearing as the bar's Exhibit 4 (26). The context of the questions posed to appellant during the course of the April deposition was to ascertain from appellant whether or not he, in fact, disbursed the Seeger settlement proceeds in accordance with the specific entrustment to him which he conceded included payment of the physician's fees. His response, that all proceeds had been disbursed, could have had no purpose other than an attempt to lead the bar's auditor to believe that appellant had disbursed all proceeds in accordance with the specific purposes for which he received them. The fact that the total disbursement of the Seeger settlement proceeds was accomplished by appellant's misappropriation of a portion thereof, should not inure to appellant's benefit in assessing whether or not his response to the bar's

questions constituted a misrepresentation. After all is said and done, appellant's argument upon this appeal is that because he had misappropriated a portion of the Seeger proceeds, thereby creating a total disbursement of such proceeds leading to a trust account shortage in the sum of $30,503.13, his testimony that he had disbursed all such funds, was true, accurate and correct and did not constitute a misrepresentation to the bar. It is respectfully submitted by the bar that the only accurate and true response to the bar's question regarding disbursement of the Seeger proceeds is that "I disbursed all such proceeds but a portion of the disbursement constituted the use of some of the fund for purposes other than those forming the basis of the entrustment to me."

Queried regarding his response at the final hearing, appellant testified:

> Q. Now, as a matter of fact, sir, you had not disbursed all of the monies from the Seeger matter as of the date your testimony made reference to in paragraph 23, isn't that so?
> A. I guess it comes down to a matter of semantics as far as "disbursed." All of the money was disbursed.
>
> Q. Well, you hadn't disbursed it for the purpose for which it was entrusted and received by you, sir?
> A. That's a fair statement, sir, I think (28).

Count VI of the bar's complaint merely charges that appellant misappropriated the Seeger funds received by him for the specific purpose of payment of the physician's bill, applying such funds to appellant's own uses and purposes (See page 7, paragraphs 26 and 27 of the bar's complaint). There simply can be no dispute regarding the bar's allegation. As mentioned above, appellant owed the Seeger physician $1,400.00 as of April 19, 1990. His trust account shortage at the time was somewhere between $16,043.49 and $30,503.13. The bar's

auditor explained that the $1,400.00 liability created by the letter of protection constituted part of the overall shortage. The fact that appellant may have disbursed all of the settlement proceeds without making full fee payments to himself is hardly an excuse for misappropriating the $1,400.00 entrusted to him for the specific purpose of application to the physician's bill. He had an absolute obligation to pay the bill from the proceeds and didn't. As stated by the auditor in his August 17, 1990 report (TS Exhibit 2); "The shortage was caused by the use of trust funds to pay bills, salaries, and things of that sort per David A. Graham in his deposition of April 16, 1990 ...."

CONCLUSION

The cumulative weight of appellant's misconduct measured by this Court's prescription for sanction in misappropriation cases as enunciated in Shanzer, McShirley and McClure, supra, mandates that appellant be disbarred.

All of which is respectfully submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished to Scott K. Tozian, Esquire, attorney for respondent, 109 N. Brush St., Ste. 150, Tampa, FL 33602, by regular mail, on this 28th day of June, 1991.

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