047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DAVID A. GRAHAM,

Respondent.

CASE NO: 77,150

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The following abbreviations are used in the brief:

Resp. Ex.	=	Respondent's Exhibits
TFB Ex.	=	The Florida Bar's Exhibits
RR	=	Report of Referee
R. I.	=	Referee Trial Transcript November 13, 1990
R. II.	=	Referee Trial Transcript February 27, 1991

STATEMENT OF THE CASE AND OF THE FACTS

This disciplinary proceeding is before this Court upon Respondent's Petition for Review of the Report of Referee. The Florida Bar's Complaint consisted of twelve counts, principally involving Respondent's mishandling of trust funds and resulting trust shortages. Respondent, at the hearing conducted on February 27, 1991, admitted to the allegations of Counts I, II, IV, IX, X, XI, and XII. After hearing on February 27, 1991, which included by stipulation the testimony taken by the Referee at a temporary hearing on November 13, 1990, [R. II. 20], the Referee found Respondent guilty of all twelve counts and recommended that Respondent be disbarred from the practice of law in Florida. The matters admitted by Respondent and the evidence introduced at hearing showed the following facts.

Respondent has been a member of The Florida Bar since 1973 and has no prior disciplinary problems. [R. I. 22, 23]. In 1989, Respondent experienced federal income tax problems and was faced with tax liens. [R. II. 82]. Additionally, during that time period, Respondent suffered other emotional problems including the death of his father and the serious illness of his mother. [R. I. 108]. At that time, Respondent was utilizing a single bank account for the purpose of general and trust accounting, and personal expenses at Bankers Trust Company. [R. I. 75, 110].

In April, 1990, Respondent was subpoenaed to testify before a representative of The Florida Bar concerning his handling of trust funds. At that deposition, Respondent admitted to trust shortages which resulted in a Petition for Temporary Suspension being filed by The Florida Bar in May, 1990 under case number 76,028. [TFB EX. 4, 2/27/91 hearing].

Thereafter, on June 5, 1990 this Court ordered Respondent's temporary suspension under the referenced case number. Moreover, Respondent was prohibited from withdrawing any funds from any bank account and was directed to deposit all sums received from the practice of law into a specified account. Respondent held accounts at First Union Bank and Southcoast Bank. [R. I. 85].

Subsequent thereto, on August 17, 1990 and September 24, 1990, Mark Widlansky, Branch Auditor for The Florida Bar issued audit reports concerning Respondent's law office accounts. [TFB Ex. II, 11/13/90 hearing]. These audits revealed trust shortages when compared to client liabilities between the dates of August 31, 1989 and July 31, 1990. The shortages varied from $29,013.80 on October 31, 1989, to $4,535.81 on July 31, 1990. [TFB Ex. II, 11/13/89 hearing].

However, at the time of the first hearing only three (3) clients were entitled to funds being held in the accounts referenced above; Nardone/Kramer, Kemp, and Williams.

Moreover, at the time of the Referee Hearing on February 27, 1991, substitute counsel for Kemp and Nardone/Kramer stated that Respondent had borrowed from family and friends or replaced sufficient funds to satisfy the outstanding trust obligations to these two clients. [R. II. 83, 88, 98]. Respondent's only other trust liability was to Kimberly Williams, and sufficient funds were maintained in the First Union Account at the time of the hearing to satisfy Ms. Williams' entitlement. [R. II. 102]. While restitution appeared to be complete, nevertheless, according to calculations performed by the Complainant's Auditor at the final hearing, Respondent continued to have trust liability to Mr. Kemp and Ms. Nardone, over and above the funds on hand, in the total amount of slightly over $500.00. [R. II. 141, 142].

Additionally, there was testimony from four character witnesses on behalf of Respondent at the two hearings before the Referee. Thomas Wilson, Circuit Judge for the Eleventh Judicial Circuit in and for Dade County, Florida, testified that he had known Respondent for twenty years. [R. I. 13, 14, 15]. Judge Wilson testified that he had referred cases to Respondent and that those persons so referred were very satisfied and had received excellent results. [R. I. 17], Judge Wilson further testified that Respondent enjoyed a very good reputation among other attorneys and that Respondent's reputation for moral character and standing in the community

was excellent. [R. I. 18]. In the words of Judge Wilson, "I would give him the keys to my house. I would give him my check book and I know it would be paid back." [R. I. 29].

Moreover, Irwin Rever testified on behalf of Respondent. Mr. Rever has been a member of the New York Bar since 1932 and a member of The Florida Bar since 1974. [R. I. 33]. Mr. Rever had referred litigation matters to Respondent in the past. Mr. Rever testified that Respondent did a good job for each of these clients. [R. I. 35]. Mr. Rever further testified that Respondent was of good moral character and that Respondent realized his error and would never repeat it. [R. I. 35, 39].

Furthermore, Michael Maguire, Esquire testified as a character witness on behalf of Respondent. Mr. Maguire first met the Respondent in a law school. [R. I. 43]. Mr. Maguire testified that Respondent was a very competent attorney and had a reputation as such with other members of the legal community. [R. I. 44, 45]. Additionally, Mr. Maguire stated that Respondent was devoted to his family and that his character was the finest. [R. I. 45]. Mr. Maguire opined that Respondent initially misrepresented the status of his trust account because he could not face up to the fact that he had a problem. [R. I. 50]. However, Mr. Maguire believed that Respondent's trust problems stemmed from his desire to provide too much for his family. [R. I. 45].

Finally, Judge Richard Burk, Circuit Judge for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida testified on Respondent's behalf. Judge Burk, a licensed attorney for thirty-one years testified that he had known Respondent since 1982 when he became a Circuit Judge. [R. II. 12]. Judge Burk offered that Respondent was very professional and looked after his clients' interests well. [R. II. 13]. Judge Burk further indicated that his comments were based upon his relationship with Respondent solely in the court room and that he was not a social friend of Respondent. [R. II. 14].

Respondent also testified of his voluntary participation as a judge in moot court competition at Nova University, his unpaid service to the American Arbitration Association, and his work with his family's church. [R. II. 123, 124].

SUMMARY OF ARGUMENTS

Complainant failed to sustain its burden of proving by clear and convincing evidence the allegations set forth in Count V and Count VI of its Complaint. The evidence which was adduced with respect to Counts V and VI simply established that a letter of protection was overlooked at settlement time on a personal injury case. Therefore, a doctor's bill was paid at a later date over a period of time by Respondent. The testimony of Complainant's own auditor, established that Respondent had failed to take at least $4,000.00 in fee to which he was entitled from the proceeds of this case. Accordingly, the Referee's findings that Respondent had intentionally misrepresented the status of the funds and had misappropriated funds from this case were totally without evidentiary support.

Moreover, the Referee's recommendation of disbarment failed to give proper consideration to the existence of many mitigating factors. These factors included absence of a prior disciplinary record, personal or emotional problems, character and reputation, timely efforts at making restitution, interim rehabilitation, imposition of other penalties or sanctions, and remorse.

Based upon the decisions of this Court as well as the Standards For Imposing Lawyer Sanctions established by the Board of Governors of The Florida Bar, a retroactive suspension of no more than two years (to the date of the temporary suspension of June 5, 1990) is the appropriate punishment for the misconduct set forth herein.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AS TO COUNT V OF THE COMPLAINT WERE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

The Referee found that Respondent made false representations to representatives of The Florida Bar in his deposition of April 16, 1990. [RR 5]. The pertinent part of Respondent's testimony as set forth in the Complaint related to a client named Seeger and was as follows:

Q. Did you have a contingent fee agreement with your Client?

A. Yes.

Q. What was the contingency?

A. 40%

Q. Have you disbursed all monies from that settlement?

A. Yes.

The Complainant maintains and the Referee so found that Respondent's statement that all monies from the Seeger settlement had been disbursed was false. The basis for the Complainant's allegation and the Referee's finding appears to be an obligation to a Dr. Nemerofsky in the amount of $1,400.00, incurred by the client, Seeger, which at the time of disbursement was accidentally overlooked. However, there was an absolute absence of proof that the money from the Seeger settlement had not been disbursed in full at the time of the deposition.

The entire evidence relating to the disbursement of Seeger funds came from the unrebutted testimony of Respondent. Respondent testified that the Seeger matter was settled and the proceeds thereof disbursed in their entirety. [R. II. 31, 33]. However, there was an error in the disbursement of the Seeger proceeds, in that a letter of protection was overlooked. [R. I. 31]. When made aware of the obligation, Respondent undertook to satisfy the outstanding balance to the medical provider, Dr. Nemerofsky, by entering into a payment agreement. [R. I. 32]. Respondent believed that the money to be paid to the doctor had erroneously been paid to the client. However, since he was not able to determine the amount of overpayment due to poor record keeping, he assumed responsibility for the obligation due to his letter of protection. [R. I. 31, 36-39].

Even counsel for Complainant now appears to agree that the funds were disbursed in their entirety, albeit in error, at the time of the deposition testimony of April 16, 1990. This is shown in counsel's question to Respondent at the Referee hearing on February 27, 1991.

> Q. Isn't it further your testimony, sir, that while all those funds entrusted to you for that specific purpose were in fact disbursed, as of April 16, 1990, that to some extent they were improperly disbursed?

Respondent admitted that there had been an improper, but complete disbursement of the funds. However, he attributed the error to poor record keeping, expressed remorse, and acknowledged that it was his problem. [R. II. 37]. Accordingly, there was no testimony or evidence adduced at trial to establish that Respondent made false representations when he testified all Seeger funds had been disbursed on April 16, 1990.

It is obvious Complainant misapprehends its critical question of Respondent. It was simply "have you disbursed all monies from that settlement"? The truthful and correct answer was yes. Moreover, Respondent should not be found guilty of making a false statement because Complainant did not ask the question "were the monies properly disbursed", or "do any obligations of this settlement still exist due to error or improper disbursement"? Respondent's answer to the question asked, was, is, and will forever be, an accurate representation.

Respondent admitted to many of the allegations made by complainant which constitute acts of misconduct. However, he cannot admit to that of which he is palpably not guilty. Complainant's position in this regard is intractable, untenable, and unproven. The Referee's finding is clearly erroneous and lacking in evidentiary support and therefore must be overturned.

II. THE REFEREE'S FINDINGS OF FACT AS TO COUNT VI OF THE COMPLAINT WERE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

With respect to the handling of the Seeger matter, the Referee also found that Respondent misappropriated the funds to have been applied to Dr. Nemerofsky's bill at the time the Seeger proceeds were disbursed. Not only is the Referee's finding unsupported by the evidence, it is contrary to the testimony of the Complainant's salaried auditor at trial.

Mark Widlansky, Branch Auditor for The Florida Bar in Fort Lauderdale, testified concerning the handling of the Seeger proceeds. Mr. Widlansky testified that Respondent took only $4,500.00 as fee and paid doctor bills and his clients leaving a balance in his account in the amount of $20,668.33. [R. II. 46, 47]. Mr. Widlansky further testified the total settlement was in the amount of $73,464.33. [R. II. 46]. Accordingly, even if the $20,668.33 which was unaccounted for was used by Respondent for his own purposes, the total fee received by Respondent in this cause would have been $25,168.33. [R. II. 47]. Mr. Widlansky also allowed that assuming Respondent was entitled to a 40% fee, which Respondent testified to, Respondent would have been entitled to a fee of approximately $29,200.00. [R. II. 46, 47]. Accordingly, Mr. Widlansky agreed that Respondent had taken approximately $4,000.00 less from these proceeds than the fee to which he was entitled.

[R. II. 47]. Moreover, Mr. Widlansky testified that he did not know where the money that was owed to Dr. Nemerofsky ended up. [R. II. 48].

It is abundantly clear that since Respondent failed to take $4,000.00 in fees to which he was entitled, the money intended for the purpose of paying the doctor was not misappropriated by Respondent. Furthermore, the auditor agrees that Respondent did not take his full fee and that he does not know where the funds were directed.

Finally, Respondent testified that he believed he had paid his clients too much money during the settlement of the proceeds of this case. [R. II. 36]. Therefore, the only evidence of where the funds may have gone is that the clients received a windfall by receiving a portion of the attorney's fees as well as the money intended for the doctor, due to Respondent's poor record keeping. Accordingly, Complainant's naked assertion that Respondent misappropriated the funds intended for the doctor is wholly without evidentiary support and the Referee's finding that Respondent misappropriated said funds must be rejected.

III. THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS NOT APPROPRIATE UNDER THE FACTS OF THIS CASE, THE MITIGATION PRESENT, AND THE APPLICABLE STANDARDS AND CASE LAW IN FLORIDA

Upon finding Respondent guilty of each and every count of the Complaint, the Referee recommended that Respondent be disbarred from the practice of law in Florida. [RR 12]. Based upon the absence of proof in Counts V and VI, and the existence of substantial mitigating evidence in this case, the Referee's recommendation is inappropriate. It is noteworthy that the Referee, although having heard evidence of mitigation from character witnesses and Respondent, failed to make even faint mention of these mitigating circumstances in his report. It is clear from the Standards For Imposing Lawyer Sanctions, that the Referee should have considered the existence of the following mitigation pursuant to Rule 9.3 of the Standards; absence of prior disciplinary record; personal or emotional problems; timely good faith effort to make restitution and to rectify consequences of misconduct; character or reputation; interim rehabilitation; imposition of other penalties or sanctions; and remorse.

Prior to this incident, Respondent had been practicing law since October of 1973 and had no prior disciplinary record. Additionally, Respondent testified concerning the personal and emotional problems he was experiencing at the time of the violations, to wit: the death of his father and the serious illness of his mother, as well as tax liens and obligations.

[R. II 82, 108]. Furthermore, it is clear that between August of 1989 and the time of the final hearing, Respondent made restitution in excess of $29,000.00 to his trust account. Moreover, two Circuit Judges and two Florida attorneys testified as to Respondent's excellent reputation as a practitioner and good reputation for character and moral standing in the community.

With respect to interim rehabilitation, Respondent testified of remedial measures taken after the disclosure of the trust violations by way of his participation in The Florida Bar's Law Office Management Advisory Service (LOMAS). Respondent participated in the LOMAS program and received a letter from J. R. Phelps, Director of LOMAS, who indicated Respondent was equipped with the tools to properly operate a trust account after being advised by LOMAS staff. [Resp. Ex. 1, November 13, 1990 hearing].

In addition, Respondent was temporarily suspended on June 5, 1990 by order of this Court and suffered the additional penalty of being unable to practice law during the pendency of these proceedings and has been continuously suspended from the practice of law now for a period of over one (1) year.

Finally, Respondent expressed remorse in his testimony and recognized that his problems were his own doing. [R. II. 37].

This Court has previously issued a wide range of sanctions in cases involving mishandling and misappropriation of client trust funds. The Florida Bar vs. Welty, 382 So.2d 1220 (Fla.

1980), the Respondent had deficits in his trust account extending over a two year period which ranged from $11,600.00 to nearly $25,000.00. In Welty, as here, the deficits had been corrected by Respondent at the time of hearing. The Court, in Welty suspended the respondent for a period of six months and placed him on probation for a period of two years thereafter.

In The Florida Bar vs. Tunsil, 503 So.2d 1230 (Fla. 1986) the respondent misappropriated $10,500.00 that he was holding in trust. There, the respondent was criminally prosecuted for the theft and had made restitution at the time of final hearing. The accused in Tunsil received a one year suspension after which he would be placed on probation for a period of two years.

Additionally, the facts in the case of The Florida Bar vs. Greenfield, 517 So.2d 16 (Fla. 1987) are similar to the facts in the case at bar. In Greenfield, the respondent took approximately $20,000.00 from an estate to which he had no entitlement. While the Respondent characterized this taking as a "loan" the Referee found that nevertheless the respondent's actions constituted a misappropriation of client's funds. Moreover, as in the case at bar, Greenfield was experiencing Internal Revenue Service problems due to a lien foreclosure on his home. While the Court in Greenfield did not excuse the conduct based on the income tax problems, the Court and Referee did consider the matter in arriving at the disciplinary measure

to be imposed. Given these considerations, the Court suspended the respondent in Greenfield for a period of one year from the practice of law.

This Court has also issued suspensions for a two year period for substantially similar conduct. In The Florida Bar vs. Dietrich, 469 So.2d 1377 (Fla. 1985), the accused attorney had, as here, no prior disciplinary problems for a period of sixteen (16) years. As in case at bar, the respondent benefited from testimony concerning his honesty and integrity from other lawyers. Similarly, as of the date of the hearing the respondent had reimbursed or agreed to reimburse all funds to the parties so effected. Unlike here, the respondent was criminally charged with felonies for misappropriations. The respondent in Dietrich also had personal problems including marital and alcohol troubles. The accused attorney received a two year suspension based upon this conduct analogous to the case below.

Another two year suspension case is found in The Florida Bar vs. Anderson, 395 So.2d 531 (Fla. 1981). In Anderson, the accused attorney misappropriated trust funds of an undisclosed amount. As here, through loans and other funds, the accused attorney reimbursed all funds and no client was ultimately financially deprived. Moreover, as below, respondent had no prior disciplinary problems and she had also suffered personal, family and law practice circumstances which were considered in

mitigation. The Court ordered the respondent in Anderson to be suspended for a period of two years followed by a period of probation of two years.

Based upon the cases above, the substantial mitigating evidence presented by Respondent, the lack of client loss, or even client complaint in the case below, it is respectfully submitted that a maximum of a two year suspension is the appropriate discipline in this cause.

CONCLUSION

The Respondent practiced law for seventeen (17) years with distinction and without a disciplinary blemish on his record. The transgressions revealed below, while serious, did not ultimately result in any client loss, and in fact, no client ever complained. The testimony of character witnesses on behalf of Respondent portrayed an excellent, caring, practitioner who served his clients in an ethical manner. Had the Referee properly considered and commented upon the substantial mitigation he would have concluded that disbarment is too harsh under the circumstances.

A two year suspension would protect the public, deter other lawyers who might engage in similar conduct, and be fair to Respondent and encourage his reformation and rehabilitation; serving all purposes of the disciplinary system. The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

C E R T I F I C A T E O F S E R V I C E

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 19 day of June, 1991, to: David M. Barnovitz, Esquire, Assistant Staff Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309.

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