

017

**FILED**  
SID WHITE  
JUL 16 1991  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,  
Complainant,  
vs.  
DAVID A. GRAHAM,  
Respondent.

CASE NO: 77,150

---

RESPONDENT'S REPLY BRIEF

SCOTT K. TOZIAN, ESQUIRE  
SMITH AND TOZIAN, P.A.  
109 North Brush Street  
Suite 150  
Tampa, Florida 33602  
(813)273-0063  
Fla. Bar No: 253510

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS . . . . .	ii
STATEMENT OF THE FACTS . . . . .	1
SUMMARY OF ARGUMENT . . . . .	3
ARGUMENT:	
RESPONDENT'S FAILURE TO COOPERATE IMMEDIATELY WITH THE FLORIDA BAR'S INVESTIGATION, IN LIGHT OF ALL OF THE ATTENDANT FACTS, MITIGATION, AND COMPARABLE DECISIONS OF THIS COURT MANDATES SUSPENSION, NOT DISBARMENT . . . . .	4
CONCLUSION . . . . .	9
CERTIFICATE OF SERVICE . . . . .	10

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>The Florida Bar v. Kent,</u> 484 So.2d 1230 (Fla. 1986) . . . . .	7
<u>The Florida Bar v. McShirley,</u> 573 So.2d 807 (Fla. 1991) . . . . .	7
<u>The Florida Bar v. Pincket,</u> 398 So.2d 802 (Fla. 1981) . . . . .	4
<u>The Florida Bar v. Roth,</u> 471 So.2d 29 (Fla. 1985) . . . . .	6, 8
<u>The Florida Bar v. Schiller,</u> 537 So.2d 992 (Fla. 1989) . . . . .	5, 6, 8

STATEMENT OF THE FACTS

Due to Complainant's misstatement of the facts, Respondent is compelled to provide the following brief, factually correct statement.

Complainant erroneously informed this court that Respondent had shortages ranging from \$12,852.93 to \$29,013.80 in his master account over a six month period, [Comp. Brief at 6], and shortages in a "second trust account" ranging from \$15,999.40 to \$30,025.25, over a four month period. [Comp. Brief at 7].

The pleadings and exhibits clearly establish that the shortages attributed by Complainant to the "second trust account" actually constitute the combined shortages of both the "master account" and "second trust account".

Reference to the Complaint filed by Complainant contradicts these misleading contentions. The Complaint, on page 10 and 11, reads in pertinent part;

44. The reconciled balances from respondent's master account and his client trust fund at months ends reflected the following shortages:

February 28, 1990 -	\$15,999.40
March 31, 1990 -	\$16,043.44
April 30, 1990 -	\$30,503.13
May 31, 1990 -	\$30,025.25

(emphasis added).

Moreover, reference to the Complainant's auditor's report which was introduced as Petitioner's Exhibit #2 at the first

hearing before the referee confirms that these figures constitute combined shortages from all accounts.

Accordingly, the Respondent's total trust shortage was never greater than \$30,503.13, despite Complainant misleading statements to the contrary.

SUMMARY OF ARGUMENT

Complainant urges disbarment as opposed to suspension primarily due to Respondent's lack of candor in the early stages of the proceedings. Complainant, like the referee below, fails to consider or even acknowledge the substantial mitigation presented by Respondent as mandated by the previous decisions of this Court. It is clear that mitigation must be considered in arriving at the appropriate discipline to be imposed herein. In light of the mitigation shown in the record below, and the decisions of this court involving misappropriation of greater amounts over longer periods of time, suspension is the appropriate discipline.

## ARGUMENT

RESPONDENT'S FAILURE TO COOPERATE IMMEDIATELY WITH THE FLORIDA BAR'S INVESTIGATION, IN LIGHT OF ALL OF THE ATTENDANT FACTS, MITIGATION, AND COMPARABLE DECISIONS OF THIS COURT MANDATES SUSPENSION, NOT DISBARMENT.

Complainant maintains that the cases cited in Respondent's initial brief are inapplicable as each case cited therein involved an attorney who had cooperated with The Florida Bar. Complainant contends that because Respondent did not initially admit to the shortages and incorrectly claimed to have replaced the money at his deposition on April 16, 1990, that he must be disbarred.

However, Complainant fails to acknowledge or recognize that Respondent cooperated after the institution of formal proceedings and that he had replaced over 80% of the trust shortages within a couple of months of the taking of the deposition. Clearly, Respondent admitted to nearly all of the allegations at the final hearing. Moreover, while the trust shortages during the month of his objectionable deposition were \$30,503.13, [Complaint para. 44], by June 30, 1990, some sixty days later the shortages had been reduced to \$5,686.33. [Complaint, para. 46].

Respondent contends that such action on his part constitutes cooperation and restitution. This Court has indicated that both cooperation and restitution, inter alia, must be considered in mitigation. The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981).

However, assuming arguendo that Respondent's overall conduct is not characterized by this court as cooperative, his early misstatements as to the status of his trust account do not require disbarment as urged by the Complainant.

This court has previously refused to disbar uncooperative attorneys who were guilty of obstructing bar investigations or concealing misappropriations.

In The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), the accused attorney was found to have had trust shortages for a period of in excess of five (5) years. These deficits gradually increased to over \$29,000.00. The accused initially understated the deficit to The Florida Bar, and thus, in the words of Justice Ehrlich "lied to The Florida Bar to cover his theft". at 993. While Schiller made restitution after an audit revealed the exact deficit, he still owed money to medical providers on behalf of clients at the time of his hearing. Under these facts, this court suspended Schiller for three (3) years.

Unlike Schiller, Respondent's trust shortages spanned only ten (10) months prior to the institution of restitution. Moreover, while Schiller made restitution and "seemed to be . . . remorseful", the Respondent below had the additional mitigation of, absence of prior disciplinary record, personal or emotional problems, character and reputation, and imposition of other penalties or sanctions. In light of this court's



decision in Schiller, any discipline exceeding a three (3) year suspension cannot be justified.

Moreover, the facts below compare favorably to the facts in The Florida Bar v. Roth, 471 So.2d 29 (Fla. 1985) wherein this court imposed a three (3) year suspension. In Roth, the accused attorney misappropriated \$80,874.15 from an estate he was handling. Additionally, in order to conceal the taking, Roth manipulated the bank accounts to inflate the estate account balance prior to his being deposed pursuant to an accounting. Moreover, Roth testified that based upon his longstanding relationship with the heirs' parents, he felt justified in handling the money in any fashion he deemed appropriate. Roth flatly declared he was not guilty of misappropriation. Like Respondent, Roth was experiencing IRS problems. Despite fraud in attempting to conceal the theft, and his lack of remorse, and considering other mitigating circumstances, Roth was suspended for three (3) years. Roth's mitigation included his contributions to the profession, age and restitution.

Respondent's conduct cannot be said to be as egregious as that in Schiller or Roth. Schiller's misappropriations spanned over five years, while Respondent's shortages occurred for only ten (10) months prior to the commencement of restitution. Furthermore, Roth misappropriated nearly three (3) times the shortage present in this instant case, and Roth denied any wrongdoing, even at referee hearing. Nevertheless, due to

mitigating considerations neither Roth nor Schiller was disbarred. Moreover, there are other recent cases involving large misappropriations which resulted in suspensions, not disbarments. The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991) and The Florida Bar v. Kent, 484 So.2d 1230 (Fla. 1986).

In McShirley, this court recently reiterated the need to consider mitigation. The court stated "[t]o disbar McShirley without considering the mitigating factors involved, would be tantamount to adopting a rule of automatic disbarment where an attorney misappropriates client funds. Such a rule would ignore the threefold purpose in Pahules, fail to take into account any mitigating factors, and do little to further an attorney's incentive to make restitution." Id. at 809. It should be noted that McShirley's shortages spanned nearly six years.

It is clear that the Referee was incorrect in not mentioning or considering the substantial mitigation presented by Respondent at the two hearings held below. The evidence established that Respondent had practiced law without disciplinary incident for seventeen (17) years prior to this case. Additionally, two circuit judges and two attorneys testified to Respondent's excellent professional reputation and character, and Respondent's remorse over the problem. There was no evidence of client harm and Respondent returned all but a minute portion of the funds by the time of the hearing before

the referee. Respondent also received the instruction and guidance available from The Florida Bar's Law Office Management Advisory Service to correct his deficient trust accounting practices which contributed to his misconduct. Finally, Respondent was suffering from personal problems due to the death of his father and serious illness of his mother.

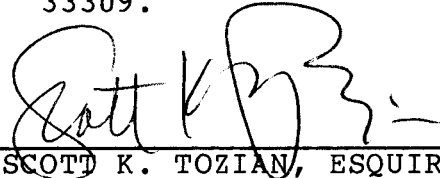
If these factors in mitigation are given consideration, and comparing the facts and discipline in Roth and Schiller, it is clear that a suspension of two (2) to three (3) years is sufficient and appropriate.

### CONCLUSION

Complainant's reliance on Respondent's early non-cooperation in requesting disbarment is misguided. Respondent admitted nearly all of the Complainant's allegations, made restitution and sought The Florida Bar's assistance in the proper handling of trust funds after formal proceedings were instituted. Moreover, Respondent practiced law for seventeen (17) years and enjoyed an excellent reputation for professional ability and character. The referee erred in failing to consider these mitigating factors. Given this court's handling of similar situations in the past, suspension is the proper discipline.

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 15 day of July, 1991, to: David M. Barnovitz, Esquire, Assistant Staff Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309.



---

SCOTT K. TOZIAN, ESQUIRE  
SMITH AND TOZIAN, P.A.  
109 North Brush Street  
Suite 150  
Tampa, Florida 33602  
(813)273-0063  
Fla. Bar No. 253510