IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ISAAC H. NUNN, JR.,

Respondent.
_____/

Case No. 77,~~354~~ 254
TFB No. 89-10,870(20A)

COMPLAINANT'S ANSWER BRIEF

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Case No. 77,~~354~~ 77,254
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COMPLAINANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SYMBOLS AND REFERENCES

In this Brief, the appellant, Isaac H. Nunn, Jr., will be referred to as "Respondent." The appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar." "RB" will denote the Respondent's Brief. "TR 1" will refer to the transcript of the hearing of July 11, 1991. "TR 2" will refer to the transcript of the hearing of April 7, 1991. "TR 3" will refer to the transcript of the hearing of August 9, 1991. "RR" will denote the Report of Referee in the instant case. "RR 1" will refer to the Report of Referee in Supreme Court Case No. 71,084. "SC 1" will refer to the Supreme Court Order in Case No. 71,084. "SC 2" will refer to the Supreme Court Order in Case No. 72,209. "CE" will refer to Complainant's Exhibits.

STATEMENT OF FACTS

In 1987, Respondent was hired by Ms. Toni Crawford to represent her son in a personal injury case. (RR, p.1). In October 1987, Amerisure Insurance Company sent Respondent two (2) checks totalling $6,051.15 as benefits under the personal injury protection (P.I.P.) provision of Ms. Crawford's policy. The money was directed to Toni Crawford as parent to Reggie Crawford, claimant. The checks clearly indicated the money was being paid for "medical expense." (RR, p.1). Ms. Crawford endorsed the checks and gave them to Respondent for the specific purpose of paying the medical bills of Reggie Crawford. On November 12, 1987, Respondent personally deposited the Crawford money into his law office operating account at First Florida Bank, rather than placing the money into a client trust account as mandated by Rules Regulating The Florida Bar. (RR, p.1).

When the money was given to Respondent by Ms. Crawford, he advised her that he could not disburse the money from the trust account for ten (10) to fifteen (15) days because he needed to allow time for the checks to clear. (RR, p.1). Although Respondent made this representation to his client, he in fact, deposited the money into his operating account and he began writing checks drawn against the Crawford deposit within four (4) days. Prior to depositing the checks, Respondent had a deficit in his office account, and several checks drawn on his operating account had been returned for insufficient funds, on November 9th

and November 10th. (CE 1). No funds other than the Crawford money were deposited into the operating account from November 12, 1987 until December 3, 1987. (CE 1).

By November 27th, fifteen (15) days after the date the Crawford checks were deposited, the balance in Respondent's operating account had been reduced to $1,062.44. By December 30, 1987, Respondent had reduced the balance in his operating account to $3.61. (CE 1). The Crawford money deposited into Respondent's operating account was expended by the Respondent for purposes unrelated to his representation of Reggie Crawford. (RR, p.2). Checks drafted against the Crawford money were used by Respondent to pay for repairs to Respondent's office, general office expenses, dry cleaning costs, secretarial salaries, and in several instances, the checks were made out to cash or to Isaac Nunn (Respondent) for salary. Mr. Nunn's signature was on those checks drawn against the Crawford money. (CE 3). Respondent was aware the trust funds were being used for purposes not authorized by his client. (RR, p.8).

On July 31, 1987, approximately three (3) months prior to receipt of the Crawford money, Respondent had been personally served with a subpoena to appear before The Florida Bar auditor, Pedro Pizarro, on August 3, 1987, and to produce at that time all client trust account records required to be kept pursuant to Rules Regulating The Florida

Bar for the period "from January 1, 1985 to the present, and to produce all bank accounts where clients' trust funds had been deposited." The subpoena was issued during the investigation of a Florida Bar case other than the Crawford matter. (CE 5). Efforts to obtain records from August 3, 1987 up to and beyond September 25, 1987, were not successful. It was during ongoing efforts to audit his accounts that Respondent deposited the Crawford trust money into his operating account.

After giving the P.I.P. checks to Respondent, Toni Crawford contacted Respondent on two (2) or more occasions because medical providers had been asking her why their bills had not been paid. (TR 1,p.55, L.9, p.56, L.20). When she contacted him, Respondent told her not to worry about it, that he was taking care of it. (RR, p.2).

Six months after receiving the Crawford trust money, on April 14, 1988, Respondent was temporarily suspended from the practice of law in Supreme Court Case No. 72,209. The Order suspending him directed that he produce at the office of The Florida Bar in Tampa, Florida, within ten (10) days following the date of the Order, all trust account records. (CE 10). None were produced.

In 1988, Mrs. Crawford hired Wilbur Chaney, Esquire, to complete her son's personal injury case. Attorney Chaney contacted Respondent regarding the Crawford trust money in approximately October, 1988, a year after Respondent received the money. (RR, p.2). Respondent conceded that he

had received $6,051.15 on behalf of Reginald Crawford, and told Mr. Chaney that the money was in a trust account. (TR 1, p.158, L.18-25). When he advised Wilbur Chaney that the Crawford trust money was in a trust account, Respondent had already used the trust money for his own purposes. In fact, no money was being held in Respondent's trust account for Ms. Crawford.

Wilbur Chaney sent a follow-up letter, dated October 28, 1988, to Respondent, advising him that if word were not received from Mr. Nunn by November 2, 1988, the office of Wilbur Chaney would be forced to contact The Florida Bar concerning Respondent's refusal to cooperate. (CE 8).

Following the letter of October 28, 1988, Respondent sent a check for $3,000.00 to Mr. Chaney. (RR, p.2). That check was not drafted on a trust account. Although Respondent had informed Mr. Chaney that he would indicate the name, address, telephone number, and account number of Respondent's bank in which the funds for medical bills had been placed into a trust account, he did not do so.

During the course of these proceedings, the Respondent failed to cooperate in the disciplinary process. He did not appear before the Grievance Committee, and did not answer the Complaint, nor the original Request for Admissions. Further, Respondent was served with interrogatories, but failed to answer them within the required period. On March 28, 1991, an Order was issued directing Respondent to answer

Complainant's Interrogatories within fifteen (15) days, but Respondent failed to comply with the Order. Then Respondent appeared before the Referee on April 17, 1991 at the first time scheduled for a final hearing and advised the Court that his previous failure to cooperate had been because he had felt defeated. He then indicated that he was now ready to address the issues before the Court. At that hearing, he was orally directed to answer the interrogatories within fifteen (15) days. (TR 2, p.24, L.2-3). He failed to do so and was consequently found in contempt of court. (TR 2, p.24, L.2-3; RR, p.4).

Respondent submitted false evidence, made false statements, or engaged in other deceptive practices during the disciplinary process. (RR, p.4). For example, at the April 17th hearing, Respondent advised he had made full restitution and had records to prove it. (RR, p.5). However, a member of Respondent's Florida Lawyer's Assistance treatment group at F.L.A., reported that Respondent indicated eight months to a year before the hearing of July 1991, that Respondent converted the money. (TR 1, p.35, L.4-16). At the hearing on July 11, the Respondent admitted he had not paid the medical bills. (RR, p.5).

SUMMARY OF ARGUMENT

Disbarment is the appropriate discipline for theft of client funds, absent substantial mitigating evidence. In the instant case, aggravating factors far outweigh any mitigating factors. Further, Respondent's dishonesty and failure to cooperate in the disciplinary process continued long after he ceased abusing drugs, and can not reasonably be attributed to his drug abuse.

ARGUMENT

DISBARMENT IS THE APPROPRIATE DISCIPLINE FOR THEFT OF CLIENT TRUST MONEY, SUBMISSION OF FALSE STATEMENTS AND DECEPTIVE PRACTICES DURING THE DISCIPLINARY PROCEEDINGS, PARTICULARLY IN LIGHT OF RESPONDENT'S OVERALL DISCIPLINARY OFFENSES.

On numerous occasions, this Court has stated that misuse of client funds is one of the most serious offenses a lawyer can commit. The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989); The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990). Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment. Farbstein, 570 So.2d at 936. That presumption is rebuttable by various acts of mitigation. Id. The issue before the Court is whether Respondent's theft, past disciplinary history, and conduct in the disciplinary proceedings warrant disbarment in spite of the evidence offered in mitigation. The Referee carefully considered that question, and found disbarment warranted.

The Respondent has suggested in his Brief that the Referee's recommendation of disbarment is based on a single misappropriation, failure to make restitution, and what Respondent terms "de minimus" client prejudice. (RB, p.3).

In actuality, the Referee cites far more extensive misconduct than that suggested by Respondent. He describes a pattern of misconduct, deceptive practices during the disciplinary process, the vulnerability of the victim, Respondent's past disciplinary record, the failure to make restitution even by the date of the final hearing, and

Respondent's extensive legal experience, including his past work for the Attorney General's Office. (RR, p.3-8). Respondent engaged in a pattern of repeated misrepresentations and failure to cooperate with The Florida Bar to conceal his theft. The misrepresentations and failure to cooperate continued up until the July 11, 1991 hearing in the instant case, long after Respondent had ceased to engage in substance abuse.

The misconduct in the instant case is part of a pattern of misconduct, not an isolated incident. In fact, it parallels the type of conduct for which Respondent has previously been disciplined. In The Florida Bar v. Nunn, No. 71,084 (Fla. Oct. 6, 1988), the following was noted: During the period from January 1985, through April 1986, Respondent had approximately fifty (50) checks drawn on his client trust account at a Ft. Lauderdale bank which were returned for insufficient funds. The Ft. Lauderdale trust account was closed by the bank on May 19, 1986. In his report, the Referee in Case 71,084 noted that Respondent had failed to cooperate with the investigation of that trust account being conducted by The Florida Bar. In spite of his lack of cooperation, it was nevertheless established that Respondent had withdrawn funds from his trust account to satisfy personal and business obligations. (See SC 1; RR, p.1). Respondent subsequently moved his law practice from Ft. Lauderdale to Ft. Myers.

Likewise, in the instant case, Respondent failed to cooperate in the inventory of his trust account and used trust funds to satisfy personal and business obligations.

In the instant case considered alone, the misconduct was far greater than the an isolated event. On July 27, 1987, Respondent was served with a subpoena to appear before The Florida Bar Auditor and to produce all client trust records and all bank accounts into which client trust funds had been deposited. Not only were efforts to obtain Respondent's cooperation unsuccessful (CE 5), just as they had been in the earlier Bar case, but the trust money was converted during the period that the Bar was still attempting to obtain records of trust funds pursuant to the subpoena of July 27, 1987. It was only three and one half months after Respondent's records were initially subpoenaed that Respondent deposited the Crawford trust money into his operating account and proceeded to use the money for his own purposes. (CE 1). He needed the money to pay office expenses, and for other personal reasons, so he concealed his theft by not placing the Crawford money into a trust account.

In an order dated April 14, 1988, Case No. 72,209, this Court temporarily suspended Respondent from the practice of law, and ordered him to produce all trust account records. (SC 2). No trust account records were produced. Nevertheless, six (6) months later Respondent advised Attorney Chaney that Respondent had the Crawford trust money

in a trust account, though Respondent had already used that money for his own purposes. He bolstered his statement that the money was in a trust account by indicating to Attorney Chaney that he would provide specific information on the trust account in question, including the name, address, telephone number, and account number of Respondent's bank into which the P.I.P. money had been placed. He further advised that he would contact Mr. Chaney in one day regarding the trust money, but did not follow through on his promise. It was not until after Mr. Chaney sent a follow-up letter, dated October 28, 1988, advising Respondent that if he did not receive word from Respondent by November 2, 1988 he would contact The Florida Bar, that Respondent sent a check for $3,000.00 to Mr. Chaney. (CE 8; RR, p.2).

Other actions by Respondent further demonstrated the extent of his attempts to deceive, and his failure to be honest and cooperative. On April 17, 1991, Respondent claimed before the Referee that he believed that he had not misappropriated the Crawford money. (RR, p.4-5). However, a member of Respondent's treatment group at the Florida Lawyer's Assistance, Inc. program reported to the Court that eight (8) months to a year before the hearing of July 1991, Respondent had indicated that he had converted the money. (TR 1, p.35, L.4-16). Respondent made a knowing misrepresentation to the Referee. At the final hearing on July 11, 1991, he finally admitted to the Bar and the Court

that he had not paid the bills and had used Ms. Crawford's trust money. (RR, p.5).

Respondent's attempts to mislead the Referee involved more than just the claim that he believed that he had not misappropriated the money. He claimed on April 17, 1991, that The Florida Bar had been all through his escrow account, that they had had all his records for a long period of time, and that they knew from day one about the irregularities. (TR 2, p.6, L.10-14). However, as noted above, Respondent had not cooperated with The Florida Bar and had not provided the records requested. Respondent suggested to the Referee that the instant case was the first time anything had come up with misappropriation or conversion of funds, even though he had been prosecuted previously and successfully for using client funds. (TR 2, p.6, L.17-18).

Clearly, Respondent engaged in deception and failed to cooperate in the disciplinary proceedings for an extended period, including the many months after he ceased abusing drugs. Respondent labels the damage to Ms. Crawford as "de minimus." He suggests that the Referee was reacting to the financial status of the victim as opposed to any actual damages suffered by her. (RB, p.6). Respondent neglects to consider that the ultimate responsibility for payment on the medical bill is Ms. Crawford's, and that she had been billed for these services. Certainly it should not accrue to the benefit of the Respondent in the disciplinary proceeding

that the medical provider had not yet taken any legal action against Ms. Crawford to collect the unpaid bills. Also she suffered non-monetary damage. Respondent himself during his testimony stated that Toni Crawford was "too poor," had three other children besides the injured boy, no husband, and didn't deserve the mental anguish, pain, and suffering he caused her. He also said "she was doing the best she could for her kids and didn't deserve to suffer any more mental anguish from my (Respondent's) taking the money." (TR 1, p.106, L.8-19). While Respondent testified concerning his remorse and the great anguish he had caused to his client, he now takes the position that that great anguish was "de minimus."

Respondent protests that the Referee "relies heavily" upon Respondent's failure to make restitution. However, failure to make restitution by the time of the final hearing was only one of the many factors considered in aggravation. That failure was appropriately considered aggravating. Further, even after admitting the anguish he caused Ms. Crawford, and after saying he had the means to repay her, Respondent continued to not make restitution. At the disciplinary hearing on August 9, 1991, Bar Counsel pointed out to the Referee that restitution had not been made and argued that that fact should be considered as an aggravating factor. (TR 3, p.19, L.6-15). It was subsequent to the

August 9, 1991 disciplinary hearing that restitution finally was forthcoming to the client. The timing of the restitution speaks to Respondent's lack of genuine concern for his client.

As noted in Respondent's brief, a number of individuals testified that they found Respondent's professional ability to be higher than average, that Respondent had been an expert and had been highly respected when working as an aid to the State Senate, and because he was respected and respectful, had been considered by Senator Girardeau to have extremely high moral character. (TR 1, p.43, L.14-16). Judge Isaac Anderson indicated that Respondent's moral character is good, and Attorney Hendry indicated that Respondent was forthright, truthful, and honest in what he did with Attorney Hendry in his program of recovery. (TR 1,p.31, L.11-16). Charles Hagan, Executive Director of Florida Lawyer's Assistance, Inc., testified: "I do believe what Mr. Nunn tells me." (TR 1,p.20, L.25). It was suggested that Respondent's judgment was previously clouded by his use of drugs, and that he now has the ability to accept responsibility for his behavior and change that behavior. (TR 1, p.63). Respondent testified that during the period in which the theft in the instant case occurred, he was using illegal drugs (cocaine). Concurrent with his drug abuse, he committed a number of serious violations which caused substantial problems and injuries to his

clients, a fact noted by this Court in The Florida Bar v. Nunn, Supreme Court Case Nos. 72,209 and 72,960. (Fla. Dec. 15, 1988). Respondent received an eighteen (18) month suspension. It has been suggested that, but for Respondent's abuse of drugs, his misconduct would not have occurred, and the testimony of Respondent's witnesses certainly leaves the impression that it occurred because his judgment was clouded by drugs. That particular argument bears close examination.

Respondent has been drug free for about two (2) years. Although Respondent failed to comply with his initial (Feb. 1988) contract with the Florida Lawyer's Assistance program, and additionally failed to comply with a second contract entered into in June, 1988, the director of F.L.A., Inc., Charles Hagan, did testify that Respondent has done a satisfactory job of complying with his contract of November 1, 1989. Beginning even prior to this compliance, since May, 1989, Respondent has had numerous drug screenings which were negative for the presence of drugs. In addition, since the November, 1989 contract, Respondent has provided random urine samples, all of which were drug free. (TR 1, p.11, L.6,p.13, L.14). Respondent's wife testified that Respondent has not engaged in substance abuse over the "last couple of years". (TR 1, p.148, L.8-10). Respondent has re-established in his witnesses a reputation for honesty, or at least a belief that he has returned to being honest.

However, even though he has been able to engender trust in him among those who counsel and supervise him in the Florida Lawyer's Assistance program, individuals whom he has known in the past, and his wife, Respondent made false statements to the Court in the instant case, and engaged in other deceptive practices during the disciplinary process.

After having been off cocaine for two (2) years, after convincing those who know him that he is an honest individual, Respondent elected to be dishonest with both the Court and The Bar. Whatever mitigation may have been provided by Respondent's efforts to be forthright with people in his private life and the controlled setting of drug rehabilitation, that mitigation is far outweighed by other considerations.

Respondent argued to the Referee that this is the third time that he has had a hearing with the Bar, and that all matters arise from the same time period and issue. It is true that Respondent has previously received a public reprimand for commingling, misuse of client funds, and general trust accounting irregularities. However, the misconduct considered in Respondent's previous case, as it related to trust accounting, ceased in April, 1986 when the trust account was closed.

Misappropriation of client funds in the instant case occurred in November of 1987, one and one half years later and after Respondent had transferred his practice from Ft. Lauderdale to Ft. Myers. The misconduct therefore did not

occur during the same time period.

The Referee appropriately took into consideration Respondent's prior disciplinary history. This Court has made it abundantly clear that in disciplining attorneys, it deals more severely with cumulative misconduct than with isolated instances. The Florida Bar v. Baron, 392 So.2d 1318, 1321 (Fla. 1981).

Further, this Court has noted that cumulative misconduct of a similar nature should warrant and even more severe discipline than might dissimilar conduct. The Florida Bar v. Adler, No. 75,670 (Fla. Nov. 14, 1991).

In The Florida Bar v. Nunn, No. 71,084 (Fla. Oct. 6, 1988), Respondent received a public reprimand for his trust account problems. In addition, in The Florida Bar v. Nunn, Nos. 72,209 and 72,960 (Fla. Dec. 15, 1988), Respondent was suspended for eighteen (18) months for misconduct including: failing to appear at hearings; claiming he needed a continuance in a criminal case in order to review discovery he had already obtained; failing to notice three (3) different clients of his temporary suspension and leaving them unrepresented by counsel; and numerous other instances of taking fees and then not earning them. His pattern of misconduct includes the use of client funds in Ft. Myers a year and one half after the same problems occurred in Ft. Lauderdale. When the instant case is considered in conjunction with the Respondent's prior misconduct, it is clear that Respondent's penchant for violating the Rules

Regulating The Florida Bar is pervasive and long term.

The problems of lack of cooperation, failure to comply with Court orders, and misrepresentation have continued for nearly two (2) years after Respondent ceased using drugs. In light of Respondent's overall disciplinary problems, a retroactive disbarment is more than reasonable.

In support of Respondent's argument that his conduct does not warrant disbarment, Respondent points out that this Court has often imposed suspensions rather than disbarments in misappropriation cases involving far greater sums than that taken by Respondent. (RB, p.12). It is true that Respondent's theft of $6,051.15 was less than taken by many other individuals who were not disbarred. For example, Respondent cites The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991). McShirley received a three (3) year suspension for misusing over $27,000.00 in trust funds.

However, there is no evidence that McShirley engaged in the misrepresentations as did Respondent in the instant case. Also in contrast with the instant case, McShirley had no disciplinary history, was cooperative towards the disciplinary proceedings, and no client was harmed by him. In addition, McShirley made timely restitution even before The Florida Bar had initiated its audit. In spite of the substantial mitigation offered by McShirley, in the dissenting opinion of Justice Ehrlich, in which Justices Shaw and Kogan concurred, the conduct was labeled as

extremely egregious and a disbarment was felt to be the proper discipline.

Respondent also cites to The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990), in which a three (3) year suspension was given in spite of trust shortages exceeding $21,000.00. In Farbstein, the Court noted that disbarment was not warranted in light of Mr. Farbstein's full restitution, and his recovery from the alcohol and drug addiction which had given rise to the misconduct. The Court indicated that upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment, but observed the following: by the time of the final hearing, Farbstein had made full restitution to all clients, had cooperated with The Florida Bar, and was remorseful. Nevertheless, Justices Ehrlich, Shaw, and Kogan dissented, indicating that the appropriate discipline was disbarment. In Farbstein, there is no indication of a prior disciplinary history, nor of the type of deceptive conduct exhibited by the Respondent during the two (2) year period after he ceased to use illegal substances, nor of a continued delay in making restitution in spite of the ability to repay the stolen money.

Respondent also cites to The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), noting that Mr. Schiller was suspended for three (3) years for misappropriating $29,000.00 of his client's money. Like McShirley, Mr. Schiller had no prior history of discipline when he received

the three (3) year suspension, and in mitigation the Referee specifically noted that Schiller was cooperative with The Florida Bar investigation and had made restitution. No clients were harmed by Schiller's misappropriation, and in fact, they were not even aware of the misappropriation.

Further cited by Respondent is The Florida Bar v. Tunsil, 503 So.2d. 1230 (Fla. 1986), in which an attorney who misappropriated $10,500.00, received a one (1) year suspension. The Court observed that Tunsil had a prior disciplinary history (a private reprimand for neglecting a legal matter), and further the Court took into consideration the effect of his alcoholism, his cooperation with The Florida Bar, and his remorse. There is no indication that Attorney Tunsil had a history of the very serious misconduct exhibited by the Respondent, that his misconduct covered such an extended period of time, or that he made misrepresentations in the disciplinary proceeding. In addition, the Respondent in the instant case failed to make restitution until well after the disciplinary proceedings were under way, and in fact not until after the argument on discipline had taken place.

In The Florida Bar v. Kent, 484 So.2d 1230 (Fla. 1986), also cited by the Respondent, Attorney Kent received a three (3) year suspension for misappropriating approximately

$33,000.00 of client trust money. Attorney Kent had, by the time of the final hearing, made full restitution and had virtually withdrawn from the active practice of law. Kent was reasonably well thought of in his community, having served on the city council and as Mayor. Respondent's misconduct in the instant proceedings is clearly distinguishable from that in Kent. Respondent did not cooperate with The Florida Bar, did not make restitution prior to the time of the final hearing, engaged in the misconduct during a period when he was already under investigation for similar misconduct, and in addition, Respondent has two (2) prior disciplines. Further, Respondent's misconduct during the two (2) year period following his discontinuation of using illegal drugs, including misrepresentations to the Referee in the instant case, and his persistent efforts to conceal his thefts, are far more egregious than the conduct in Kent.

Respondent also cites The Florida Bar v. Roth, 471 So.2d 29 (Fla. 1985), where a three (3) year suspension was received for misappropriating $80,000.00; The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981), where a two (2) year suspension for misappropriating nearly $60,000.00 was ordered; and The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), leading to a six (6) month suspension for misappropriating $24,000.00. Each of these cases is distinguishable from the case at bar. Welty continually and

completely cooperated with The Bar in its investigations, admitted his improprieties, but argued that his misappropriations were due to the chaotic state of his trust account. By the time that grievance proceedings were instituted, he had corrected all shortages in his account. There was no specific finding in Welty that he had intentionally misused client trust funds.

While Pincket misappropriated nearly $60,000.00, it should be noted that Pincket also cooperated fully with The Florida Bar by voluntarily advising the Bar of deficiencies in his trust account, stipulating to a temporary suspension and extending an unconditional plea of guilty, thereby waiving both grievance and referee proceedings, and making restoration of converted trust funds. There is no indication that Pincket had a prior history of discipline, nor that he engaged in the substantial misrepresentations and failure to cooperate characteristic of the Respondent in the instant case.

In The Florida Bar v. Roth, the attorney misappropriated approximately $80,000.00. He received a three (3) year suspension. As with other cases cited by the Respondent, there are substantial differences between the circumstances of Roth and Respondent's conduct. Unlike Respondent in the instant case, Roth had made restitution prior to the commencement of the disciplinary action. In addition, he had never previously been the subject of a disciplinary proceeding in spite of the fact that he had been a member of

the Bar for over fifty-one (51) years. The Court took into consideration Roth's prior contribution to the profession, including substantial pro bono services and voluntary services to many charitable causes, his age, and restitution to clients. The Court ordered a three (3) suspension.

Respondent in the instant case advises that the majority of the attorneys in the cases referenced above were not suffering from the debilitating effects of substance abuse. Clearly this Court has said repeatedly that an addicted attorney who has demonstrated positive effects to free himself of his drug dependency should have that fact recognized in determining the appropriate discipline to be imposed. The Florida Bar v. Jahn, 509 So.2d 285, 287 (Fla. 1987). The Referee did recognize and weigh Respondent's rehabilitation for substance abuse. After considering the contribution of Respondent's drug problems, and further considering additional aggravating circumstances, the Referee elected to recommend a disbarment retroactive to the date of Respondent's temporary suspension. (RR, p.8). In light of the Respondent's overall disciplinary history, the persistent pattern of misconduct, and his misconduct during the two (2) year period following his ceasing to use illegal substances, (RR, p.8) the Referee was more than generous in not ordering a non-retroactive disbarment or a disbarment in excess of five (5) years. (RR, p.8).

Certainly the fact that Respondent was addicted to drugs and had participated in rehabilitation does not in and of itself mandate that he not be disbarred. In The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990), this Court found that disbarment was the appropriate discipline even though Shuminer was addicted to alcohol at the time of his offenses. The Court specifically noted that Shuminer failed to establish that his addictions rose to a sufficient level of impairment to outweigh the seriousness of his offenses, in that he used a significant portion the stolen funds not to support or conceal his addictions, but rather to purchase an automobile. While the Respondent did not purchase a car with his stolen money, he did use it to operate his law practice, a repetition of what he had done a year and a half earlier in another city where he had practiced. Shuminer presented as mitigation an absence of prior disciplinary problems, great personal and emotional problems including his disease of addiction, his family and material problems, a good faith effort at restitution to all clients, cooperation with the Bar, his entering into an unconditional guilty plea, inexperience in the practice of law, good character and reputation as testified to by two (2) judges, mental impairment due to drug addiction, his successful involvement in rehabilitation for over one year, and genuine remorse. In spite of these mitigating factors, Shuminer was disbarred. Certainly no lesser discipline is warranted for

Respondent in the instant case.

Mental problems, as well as judgment impaired by alcohol and drug problems, are discussed in The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991). Shanzer misappropriated trust funds and had trust account shortages. The Referee in Shanzer found three (3) aggravating circumstances: (1) dishonest or selfish motives; (2) a pattern of misconduct; and (3) multiple offenses. As mitigating circumstances, the accused attorney pointed out his emotional problems during the nine (9) month period of his defalcations, as well as his full cooperation with the Bar, his remorse, rehabilitation, and payment of restitution. He argued that his depression, primarily over marital and economic problems, lead him to use the trust account for personal purposes. The Court stated that mental problems, as well as alcohol and drug problems, may impair judgment so as to diminish culpability; however, it found that the Referee did not abuse his discretion in not finding Shanzer to be a case where that was applicable.

The Referee in the instant case noted that Respondent's cooperation with the Bar and restitution efforts should be considered upon reapplication for membership in The Florida Bar. While Respondent in the instant case has presented factors in mitigation, those factors do not outweigh his misconduct, and the Referee did not abuse his discretion in finding that the contribution to his problems from

addiction, and his rehabilitation, were outweighed by other significant misconduct. While Respondent's rehabilitation should be considered upon his reapplication for membership in The Florida Bar, it does not provide sufficient mitigation to warrant any discipline other than disbarment.

CONCLUSION

The seriousness of Respondent's misconduct in the instant case, considered together with Respondent's extensive disciplinary record, indicates that the Referee's recommended discipline of a disbarment is the minimum appropriate discipline.

WHEREFORE, The Florida Bar respectfully requests that this Court order Respondent's immediate disbarment from the practice of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief has been furnished by U.S. Regular Mail to Scott K. Tozian, Counsel for Respondent, at 109 Brush Street, Suite 150, Tampa, Florida, 33602; and also by U.S. Regular Mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 20 day of November, 1991.

Thomas E. DeBerg

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