IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ISAAC H. NUNN, JR.,

Respondent.

CASE NO: 77,254

RESPONDENT'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

The following symbols and references will be used by the Respondent in this brief.

Comp.	=	Complaint of The Florida Bar
Rep. Ref.	=	Report of Referee dated August 28, 1991
Comp. Ex.	=	Complainant's Exhibit
Resp. Ex.	=	Respondent's Exhibit
R.I.	=	Transcript of hearing July 11, 1991
R.II.	=	Transcript of hearing August 9, 1991

STATEMENT OF THE CASE

Respondent petitions this Court for review of the Referee's recommendation of disbarment found in the Report of Referee dated August 28, 1991. [Rep. Ref. at 7]. Respondent's Petition for Review was timely filed on September 28, 1991.

STATEMENT OF THE FACTS

In 1987, Respondent was hired by Mrs. Toni Crawford to represent her minor son, Reginald Crawford in a personal injury claim. [Comp. at 1, R.I. 105]. In October, 1987, Respondent received two checks from Amerisure Insurance Company totalling $6,051.15 which constituted personal injury protection benefits for Reginald Crawford. [Comp. Ex. 2]. Thereafter, Respondent obtained the endorsement of Toni Crawford and executed his signature on the checks as well. [R.I. 53, Comp. Ex. 2]. Respondent deposited the checks into his office account and told his client that he would pay the medical bills after the checks cleared. [R.I. 54]. Mrs. Crawford later inquired as to whether the bills were paid and Respondent told her he was "handling it". [R.I. 55].

In 1988, Mrs. Crawford hired Wilbur Chaney, Esquire to complete her son's personal injury case when Respondent was forced to close his practice due to an earlier suspension. [R.I. 157]. Respondent advised Mr. Chaney that he had received approximately $6,000.00 on behalf of Mrs. Crawford's son, however, Respondent failed to promptly pay this amount over to Mr. Chaney. [R.I. 158]. In November 1989, Respondent paid $3,000.00 to Mr. Chaney on

behalf of Mrs. Crawford. [R.I. 161]. Thereafter, Respondent paid the balance of the restitution to Mr. Chaney after the conclusion of the hearing before the Referee. (See Notice of Supplement to Record).

SUMMARY OF THE ARGUMENT

The Referee has recommended disbarment of Respondent for his single misappropriation of $6,000.00 of client funds. This recommendation was predicated in large part upon Respondent's failure to make restitution and the perceived damage caused to the effected client. The record reveals that restitution has now been made in full and that the client prejudice was de minimus.

The Respondent has presented testimony which reveals that his professional problems all stemmed from his problems with drug abuse. Moreover, Respondent established substantial mitigating evidence at trial including the successful handling of his prior drug problems. The significance of this mitigation was noted by the Referee who found Respondent capable of rehabilitation. Given this finding and this Court's prior decisions, suspension is the appropriate discipline to impose.

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS NOT WARRANTED UNDER THE FACTS OF THIS CASE GIVEN THE REFEREE'S UNFOUNDED RELIANCE ON CERTAIN AGGRAVATING FACTORS AND RESPONDENT'S SHOWING OF SUBSTANTIAL MITIGATING CIRCUMSTANCES.

The Referee below recommended Respondent be disbarred from the practice of law based upon his factual findings and the "principles espoused" in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), The Florida Bar vs. McShirley, 573 So.2d 807 (Fla. 1991) and The Florida Bar vs. Farbstein, 570 So.2d 933 (Fla. 1990). [Rep. Ref. at 8]. However, it is important to note that while the Referee relies upon Pahules, McShirley, and Farbstein in making his recommendation of disbarment, none of those attorneys were disbarred for misconduct similar to that of Respondent. In fact, Pahules received a six month suspension and McShirley and Farbstein each received a three year suspension. Moreover, the facts in Farbstein are remarkably similar to the facts in the case at bar in that Farbstein's more considerable trust shortages were attributed to substance abuse.

While recognizing Respondent's "very significant mitigating" factors, the Referee found them outweighed by the countervailing aggravating factors. [Rep. Ref. at 8]. The Referee found, inter alia, that

> Respondent's conversion of funds (while relatively small) worked an especial hardship on his low income client . . . The misappropriation caused grievous injury to Mrs. Crawford. [Rep. Ref. at 8].

The Referee's finding of "especial hardship" and "grievous injury" was clearly erroneous and lacking in evidentiary support

and therefore must be overturned. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968).

The only testimony elicited at hearing relative to the damage suffered by the client came from Mrs. Crawford and her substitute counsel, Wilbur Chaney, Esquire. Mrs. Crawford's testimony revealed only that she had signed the checks for placement into Respondent's account with the Respondent's promise to satisfy the bills. [R.I. 54]. Thereafter, Mrs. Crawford indicated that she was questioned about the payment of the bills by her son's dentist and the doctor's secretary. [R.I. 54]. Mrs. Crawford's response to those medical providers was to refer them to Respondent. [R.I. 55]. Mr. Chaney confirmed that the only consequence of Respondent's failure to promptly pay the medical bills was Mrs. Crawford's receipt of "standard bills". [R.I. 162].

There is no evidence that any medical services were cut off, that the client's credit was damaged, or that any lawsuit was filed as a result of Respondent's non-payment. While Respondent described Mrs. Crawford as "poor", there was no evidence that any money was paid out of her pocket to cover the referenced medical services. [R.I. 106]. Moreover, it is clear that Mrs. Crawford was not directly entitled to any of the funds received. Accordingly, while Respondent concedes that any misappropriation constitutes serious misconduct, there is a total absence of evidence that any "especial hardship" or "grievous injury" resulted to Mrs. Crawford.

Rather, it appears that the Referee reacted to Mrs. Crawford's financial station in life, rather than give proper consideration to the actual consequences suffered by the client. Accordingly, it is clear that the Referee gave undue weight to the aggravating circumstance of hardship to the client.

Similarly, the Referee relies heavily in his decision for disbarment upon "Respondent's failure to make restitution". [Rep. Ref. at 8]. However, at the hearing before the Referee, Respondent offered to complete restitution. [R.I. 108]. Shortly prior to the issuance of the Referee's Report, Respondent paid an additional $3,000.00 to Mr. Chaney and has now completed restitution to Mrs. Crawford as evidenced by Respondent's Notice of Supplement to Record. Accordingly, the Referee's reliance upon the lack of restitution in recommending disbarment is no longer valid.

While it is clear that certain aggravating factors cited by the Referee are not valid considerations, Respondent also suggests that the Referee failed to give proper weight to the substantial mitigation presented below. This is particularly apparent in reviewing this Court's prior treatment of disciplinary cases involving misconduct precipitated by alcohol or drug abuse.

With respect to the mitigation shown, the testimony before the Referee revealed that Respondent enjoyed a good reputation for professional ability. Attorney John Hendry testified that he had known Respondent since the "middle 80's". [R.I. 28]. Mr. Hendry indicated that Respondent's professional ability is much higher than average. [R.I. 32].

The Honorable Isaac Anderson, Circuit Judge for the Twentieth Judicial Circuit of the State of Florida also testified as to Respondent's professional ability and characterized Respondent as competent. [R.I. 75]. Moreover, State Senator Arnett Girardeau testified that he became acquainted with Respondent in 1977 when Respondent served as an aide to the State Senate. [R.I. 38]. Senator Girardeau worked closely with Respondent and described him variously as "one of the most intelligent, . . . extremely talented . . . considered as an expert, . . . and highly respected . . .". [R.I. 39, 41]. It is thus clear that Respondent enjoyed an outstanding professional reputation.

Furthermore, many witnesses testified favorably as to Respondent's character. Senator Girardeau stated Respondent had "extremely high moral character". [R.I. 43]. Judge Anderson who has known Respondent a number of years indicated Respondent's moral character is good. [R.I. 77]. Furthermore, Attorney Hendry testified that Respondent is "forthright, truthful, and honest". [R.I. 31]. Additionally, Charles Hagan, Executive Director of Florida Lawyers Assistance, Inc., testified that "I do believe what Mr. Nunn tells me, I do have confidence in his reliability and his responsibility in that area". [R.I. 21]. Finally, Kathy Beehler, Executive Director for Goodwill Industries, Southwest Florida, testified before the Referee. Ms. Beehler indicated that Respondent temporarily worked under her at Goodwill beginning September, 1990, for a period of six months. Ms. Beehler praised

both Respondent's work product and moral character as excellent. [R.I. 90].

Finally, no less than five witnesses testified as to Respondent's drug addiction, its effects on his practice, and his successful efforts to control this problem. Charles Hagan testified that Respondent had initially contacted F.L.A., Inc. in February, 1988. [R.I. 11]. Thereafter, Respondent sporadically and unsuccessfully participated in F.L.A., Inc. until he executed a contract effective November 1, 1989. [R.I. 12]. Since signing the November, 1989 contract with F.L.A., Inc., Respondent has provided eleven random urine samples all of which were drug free. [R.I. 13]. Mr. Hagan even offered that Respondent's life had been restructured to the extent that it is appropriate for Respondent to once again practice law, albeit under F.L.A., Inc., supervision. [R.I. 15].

The Referee heard the further testimony of Kevin Lewis, Executive Director of the Southwest Florida Addiction Services. (hereinafter S.F.A.S.). Mr. Lewis was initially familiar with Respondent in conjunction with an outpatient program administered by S.F.A.S. [R.I. 59]. Mr. Lewis testified that since May, 1989, Respondent had twenty to thirty drug screenings, all of which were negative for the presence of drugs. Mr. Lewis opined that Respondent had made significant progress since the summer of 1989, and that Respondent now has the ability to accept responsibility for his behavior and change his behavior. [R.I. 63].

Furthermore, Respondent's wife testified that she noticed a

change in Respondent's behavior that was precipitated by his undisclosed drug abuse. [R.I. 145]. Mrs. Nunn related absence from work, breaking appointments, and not calling his home or office as some of these symptoms. [R.I. 145]. Mrs. Nunn testified that once Respondent admitted his problem, that he had not engaged in substance abuse over the last two years. [R.I. 147, 148].

Additionally, Mrs. Nunn recalls that checks were written to satisfy the medical bills in the Crawford case, however, due to the confusion and turmoil in Respondent's life at that time, she was not aware of what happened to these checks. [R.I. 150].

Finally, Respondent testified that his drug usage escalated in 1985 which caused his life to go downhill. [R.I. 96]. Respondent further described irresponsible acts, causing trust account problems and neglect of clients. [R.I. 96].

With respect to the handling of the insurance proceeds to which Reginald Crawford was entitled, Respondent described a period during which he was heavily addicted to drugs. [R.I. 105]. Respondent indicated that he avoided checking his records concerning these funds because he did not want to believe that he had taken the funds. As recently as April, 1991 he still had not checked his records in this regard. [R.I. 106]. Respondent attributed this conduct to the denial process he experienced with his drug addiction. [R.I. 107]. Finally, in May, 1991, Respondent's wife retrieved a document that established that the only medical bills which had been paid, were paid directly by the insurance company, not Respondent. [R.I. 107].

The Florida Bar and this Court first recognized the debilitating effects of alcoholism or drug abuse on a lawyers's practice in The Florida Bar vs. Larkin, 420 So.2d 1080 (Fla. 1982). In Larkin, the Respondent was found guilty of three counts of misconduct dealing with a failure to appear at trial and two instances of failing to carry out contracts of employment for which he had been paid. Larkin admitted to the referee that the complained of misconduct was the result of alcohol abuse, but asserted that the problem was now under full control. Like Respondent, he had previously been (disciplined one year) for similar misconduct. The referee recommended that the Respondent be suspended as a member of The Florida Bar for three years and that his reinstatement be conditioned upon proof that he receive professional treatment for his alcohol abuse.

The Court modified the referee's recommended discipline as follows:

> "... We modify the recommended discipline to a suspension for ninety-one days and until such time as Respondent establishes rehabilitation. We believe that this penalty is severe enough to protect society and to deter others from engaging in unethical conduct, while, at the same time, encouraging the Respondent to seek rehabilitation. It is clear from the facts of this case, as perceptively found by the referee, that Mr. Larkin's professional misconduct stems totally from the effects of alcohol abuse."
> Id. at 1081.

In rendering this decision, the Court noted that:

> ". . . If alcoholism is dealt with properly, not only will an attorney's clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal profession . . . In those cases where alcoholism is the underlying cause of professional misconduct and the individual attorney is

> willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline." Id.

This Court has consistently treated alcoholism and, additionally, drug addiction as a mitigating factor in arriving at the appropriate discipline since Larkin. see e.g., The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987); The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986); The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986).

As the Jahn court stated

> An attorney with a chemical dependency problem, whether the drug of his choice is alcohol, or illegal such as cocaine, should be encouraged to seek treatment to rid himself of the dependency. . . an addicted attorney who has demonstrated positive efforts to free himself of his drug dependency should have that fact recognized by the referee and this court when considering the appropriate discipline to be imposed. (emphasis added). Id. at 287

Moreover, the facts of the Rosen case and the rational of the court therein further mandate a suspension rather than disbarment here. In Rosen, the accused attorney was found guilty of felony charges of possessing cocaine with intent to distribute. The referee in Rosen found that "the crime for which he pleaded guilty was a result of his own addiction to cocaine at the time". Id. The referee further found, as here, that Rosen had "overcome his addiction, and no longer engages in illegal drug use". Id. at 181. The referee recommended a three year suspension. While The Florida Bar urged disbarment, the Court upheld the recommendation of the referee and imposed the suspension. In justification of the suspension the Rosen court stated that

> Because the extreme sanction of disbarment is to be imposed only 'in those rare cases where rehabilitation is highly improbable', The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978), and the finding has been made that '[Rosen] has an excellent chance of being a great asset to the bar of this state,' we, with the referee, must reject the recommendation of The Florida Bar that he be disbarred, since such a punishment appears not only too harsh in the circumstances, but may well deprive the legal community of the benefit of Mr. Rosen's participation as an attorney in the future, should he be found rehabilitated and reinstated after the suspension period.' (emphasis added).
> Id. at 494, 495.

In the case at bar, as in Rosen, there was ample evidence that Respondent has ceased to use drugs and has his problem under control. Additionally, like Rosen, the referee below made a finding that Respondent "is capable of rehabilitation". [Ref. Rep. at 8]. The referee further recognized "Respondent's efforts at rehabilitation". Id. Such findings and conclusions of the Referee here are inconsistent with a recommendation of disbarment which is appropriate "only in those rare cases where rehabilitation is highly improbable". Id. at 182. Accordingly, based upon the mandates of Rosen and the Referee's findings below, suspension, not disbarment is the appropriate sanction.

Moreover, the fact that misappropriation was involved should not effect the discipline imposed. This Court has often imposed suspensions in misappropriation cases involving far greater sums than the amount involved below. see e.g., The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991), (three year suspension for attorney who had trust shortages exceeding $27,000.00); The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990); (three year suspension of attorney who had trust shortages exceeding $21,000.00); The

Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), three year suspension of attorney who misappropriated $29,000.00; The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986), (one year suspension of attorney who misappropriated $10,500.00); The Florida Bar v. Kent, 484 So.2d 1230 (Fla. 1986), three year suspension of attorney who misappropriated $33,000.00; The Florida Bar v. Roth, 471 So.2d 29 (Fla. 1985), (three year suspension of attorney who misappropriated $80,000.00); The Florida Bar v. Pincket, 398 So.2d 302 (Fla. 1981), two year suspension of attorney who misappropriated nearly $60,000.00; The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), six month suspension of attorney who misappropriated $24,000.00.

Additionally, in several of these cases the guilty attorney had established a continuing long term scheme of misappropriation over a period of years without suffering the penalty of disbarment. In Welty the fluctuating trust shortages spanned a two year period. In the Schiller and McShirley cases the trust thefts spanned over five years. Certainly, Respondent's misconduct of a single misappropriation is less egregious conduct than the conduct of Welty, McShirley, and Schiller, and thus not deserving of disbarment.

Moreover, disbarment did not result in the Schiller, Kent, McShirley, Welty, Pincket, Roth and Tunsil cases although none of those offending attorneys were suffering from the debilitating effects of substance abuse and therefore could not establish as compelling a case of mitigation as Respondent below.

Accordingly, the Respondent respectfully suggests that based

upon the facts below, the Referee's finding that Respondent is capable of rehabilitation and this Court's previous treatment of cases involving facts both similar and more egregious to the instant case, that a period of suspension rather than disbarment is appropriate.

CONCLUSION

Respondent's misappropriation was an isolated incident of client harm over an extended period. The evidence established that all professional problems, including prior discipline experienced by Respondent were a result of this abuse. Since May, 1989, Respondent has had extensive counseling for his problem and provided thirty to forty random drug screenings which all proved negative for the presence of drugs.

It is well settled that disbarment should be imposed only in cases where rehabilitation is highly improbable or where there is a showing that the person charged should never be at the bar. The Florida Bar v. Carbanaro, 464 So.2d 549 (Fla. 1988). Given the extensive positive evidence relative to Respondent's, professional reputation, character, and rehabilitation efforts, it is abundantly clear that rehabilitation is likely and that suspension is the appropriate discipline.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 31 day of October, 1991, to: Thomas E. DeBerg, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607.

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