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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

CASE NO: 77,254

vs.

ISAAC H. NUNN, JR.,
Respondent.

RESPONDENT'S REPLY BRIEF

✓
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SUMMARY OF ARGUMENT

Complainant urges disbarment as opposed to suspension in this cause in large measure due to Respondent's prior disciplinary history and his lack of cooperation and candor in the disciplinary proceedings. Furthermore, Complainant attempts to distinguish the cases cited in Respondent's Initial Brief primarily pointing out the lack of prior disciplinary history of many of the accused attorneys as well as the cooperation exhibited in some cases. However, this Court has previously suspended, not disbarred, attorneys who have failed to cooperate or be candid with The Florida Bar in the prosecution of misappropriation cases. Additionally, given the considerable mitigation set forth by Respondent and given this Court's treatment of alcohol and drug impaired attorneys in the past, it is clear suspension is the appropriate discipline in this cause.

ARGUMENT

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

Complainant maintains that due to Respondent's disciplinary history, the period of time over which the misconduct occurred, and his lack of candor in the disciplinary proceedings, disbarment is the appropriate discipline. However, this Court has previously declined 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 problems spanned between April, 1986 and November of 1987, a period of one and one half years. [Complainant's Answer Brief at 15]. Additionally, the shortage below is approximately one-fifth the

amount taken by Schiller. Moreover, while Schiller made restitution and "seemed to be . . . remorseful", the Respondent below also made restitution and expressed remorse at the Referee Hearing. Unlike Schiller, Respondent had the additional mitigating factors of personal or emotional problems, character and reputation, and imposition of other penalties or sanctions; i.e., his temporary suspension in April of 1988. In light of this Court's decision in Schiller, any discipline exceeding a three 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. Incredibly, 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. Despite fraud in attempting to conceal the theft, his lack of remorse, and his bold denial at trial that he had done nothing wrong, Roth was only suspended for three (3) years. Roth's mitigation included his contributions to the profession, his age and restitution.

Respondent's conduct cannot be said to be as egregious as the conduct set forth in either the Schiller or Roth cases. Schiller's misappropriations spanned over five years, while Respondent's trust problems occurred over a two year period. Furthermore, Roth misappropriated in excess of thirteen 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. More importantly, neither Roth nor Schiller presented as compelling a showing of mitigation based upon the debilitating effects of Respondent's drug usage.

Very recently, in The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991) the accused attorney received a three year suspension for misappropriation in excess of \$27,000.00 over a period of nearly six years. Accordingly, this Court has recently refused to disbar an attorney who engaged in a course of trust impropriety of far greater proportions over a period of time far in excess of the time Respondent experienced trust problems. In McShirley, this court 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.

Despite Complainant's contentions to the contrary, the period of time over which Respondent experienced trust accounting problems and shortages does not compel disbarment in this case, as evidenced by the decisions in McShirley, Roth and Schiller. Additionally, based upon this Court's findings in Roth and Schiller, Respondent's failure to cooperate or be candid concerning the trust shortages prior to referee hearing, likewise does not compel disbarment.

The Referee below found that Respondent's misconduct in this cause pre-dated his December, 1988 suspension and that his "troubles seem to be directly linked to his addiction". Such a scenario mandates retroactive punishment as recognized by the Referee. see eg., The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987) and The Florida Bar v. Sommers, 513 So.2d 665 (Fla. 1987).


The Referee also acknowledged in his Report that Respondent had made efforts at rehabilitation and found that Respondent is capable of rehabilitation. [Referee Report at 8]. Given the past decisions of this Court and in consideration of all of the mitigation shown, disbarment is clearly inappropriate. As this Court said in The Florida Bar vs. Davis, 361 So.2d 159 (Fla. 1978), "[d]isbarment is an extreme penalty and should only be imposed in those cases where rehabilitation is highly improbable. at 162. The Referee found below that Respondent's rehabilitation is possible, accordingly, disbarment is inappropriate in this cause and this Court should impose a lengthy retroactive suspension.

CONCLUSION

The Respondent's disciplinary problems were indisputedly brought about by his drug addiction. [Report of Referee at 7]. Since controlling his problem Respondent has shown "deep and genuine remorse" for his conduct and currently enjoys a good reputation for character. [Report of Referee at 7]. Given all the facts of this case and the past decisions of this Court, a retroactive (to the date of his December 1988 suspension) suspension of three years is the appropriate discipline in this cause.

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 Respondent's Reply Brief has been furnished by U. S. Mail delivery this 13 day of December, 1991, to: Thomas E. DeBerg, Esquire, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607.



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