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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD P. CONDON,

Respondent,
_____/

Case Nos. 77,463
78,723
TFB Nos. 89-10,273(13A)
90-11,271(13A)
91-11,063(13A)
92-10,054(13A)
92-10,821(13A)

COMPLAINANT'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

The following symbols and references will be used in this brief:

TR1: Transcript of February 6, 7, 1992 in the proceedings before the referee.

TR2: Transcript of March 6, 1992 in the proceedings before the referee.

TR3: Transcript of March 13, 1992 in the proceedings before the referee.

TR4: Transcript of April 10, 1992 in the proceedings before the referee.

TR5: Transcript of November 23, 1992 in the proceedings before the referee.

TR6: Transcript of January 8, 1993 in the proceedings before the referee.

Depo: Deposition on December 30, 1992 of Dr. Joseph Rawlings.

ARR: Amended Report of Referee.

C's. Exh.: Will denote exhibits of The Florida Bar, appellant, which will be further identified by The Florida Bar (TFB) Case Number.

The Florida Bar, or The Bar - Appellant

Standards, or Standards for Imposing Discipline: Florida Standards for Imposing Lawyer Sanctions

STATEMENT OF FACTS AND OF THE CASE

(Statement of the Case)

On March 12, 1991, The Honorable Brandt Downey, III was appointed to serve as referee in Supreme Court Case No. 77,463. On October 15, 1991 Judge Downey was appointed as referee in Case Number 78,723. The cases were consolidated for trial. Hearings were held on January 26, February 6-7, March 13, April 10, and July 13, 1992. At the July 13, 1992 hearing, the Referee announced findings of fact and his recommendations regarding discipline. On August 12, 1992 Respondent filed a motion requesting a hearing on discipline. The Report of Referee was issued October 19, 1992. On October 27, 1992 Respondent filed a motion for rehearing, requesting an opportunity to present mitigating evidence and to argue discipline. The motion was granted, and the hearing took place January 8, 1993. An Amended Report of Referee was issued on May 4, 1993.

(Referee's Recommendation of Guilt)

In the amended report, the Referee recommended Respondent be found guilty of violating numerous technical regulations governing trust account record keeping, and in addition the following Rules Regulating The Florida Bar:

As to Case Number 77,463, Count I: Rule 5-1.1 (using client trust money for unauthorized purposes); Rule 4-1.15(a) (failing to place trust funds into a trust account); Rule 4-8.4(c) (dishonesty, due to his misuse of trust funds). (ARR, p.1).

As to Case Number 78,723, Count I: Rule 5-1.1 (by placing trust money into his general account and using it for unauthorized

purposes); and Rule 4-8.4(c) (misrepresentation, by stating in writing that trust funds were in trust when they were not). (ARR, p.2).

As to Case Number 78,723, Count II: Rule 4-8.4(d) (conduct prejudicial to the administration of justice). (ARR, p.2).

As to Case Number 78,723, Count III: Rule 4-1.3 (lack of diligence); Rule 5-1.1 (conversion, for placing trust funds of the estate into his general account, and for misuse of trust funds). (ARR, p.2).

(Statement of the Facts)

Respondent converted trust funds given to him to settle or partially pay certain taxes of Woolf Printing Company. He then stated in writing that the funds were held in escrow, knowing that to be untrue. (ARR, p.1, Case No. 78,723, Count I). He also failed to diligently handle an estate, and converted the estate funds (ARR, p.2, Case No. 78,723, Count III), the majority of which were later granted to him as fees. In addition, in May 1990, Respondent converted a settlement check, but later paid the client the $400 which a court determined the client was to receive. (ARR, p.1, Case No. 77,463).

The testimony and exhibits in Case Number 78,723, Count III, indicate that in July 1986, Respondent was retained to represent Nancy Boren and Paula Travis, co-personal representatives and beneficiaries of the Estate of Edna Sherlock. (TR4, p.35, L.1-16). During the pendency of the estate case,
Respondent was contacted numerous times by the Court and the personal representatives with concerns about the delay in closing

the estate. (TR4, p.23, L.12-21; TR3, p.230, L.7-23; C's. Exh.1, 4, 6, 7, 11 - TFB 89-10,273(13A)). The certificate of administration was filed December 1, 1986, but the notice of administration was not filed until June 20, 1987, nearly six months later. (TR3, p.152, L.11-13; TR3, p.153, L.11-12). The notice was filed after the probate court had issued an order to show cause. (TR3, p.154, L.12-22). The personal representatives testified that due to the delays in closing the estate, they made several trips to Florida, including three for show cause hearings, and that they paid several estate bills themselves because collection agencies were threatening. (TR3, p.246, L.15-19). Respondent billed the estate for his appearances at the show cause hearings (TR3, p.247, L.20-23), which Judge Alvarez felt should not have been done since he believed the time spent was due to Respondent's fault. (TR4, p.23, L.12-21). The fees were not challenged in Court by the beneficiaries.

The Referee found that Respondent received $5,348.60 in estate money and deposited the money into his general account instead of his trust account. (ARR p.2, III). However, this finding of fact is inconsistent with both the documentary evidence and the testimony. The estate money was deposited into Respondent's trust account as received. For example, the first deposit was December 18, 1986 in the amount of $1263.86. (C's. Exh.21, TFB 89-10,273(13A); TR3, p.203, L.2-24). Respondent used the clients' money without authorization, and there was a deficit in his trust account from March 1986 until April 1990. (C's. Exh. 21, TFB 89-10,273(13A)). By July 31, 1987, Respondent had received

$4,084.75 in trust, but the trust account already had a shortage of $1,494.97 even if claimed fees were credited to Respondent. (C's. Exh.21, p.2, 4 - TFB 89-10,273(13A); TR3, p.219, L.23-25).

There was no evidence of fees drawn specifically against the Sherlock Estate trust account (TR3, p.204, L.2-3); and no checks were drawn on the Estate account for attorney's fees. (TR3, p.205, L.6-7). Nevertheless, Respondent claimed he charged fees against the estate and took those fees. In fact, during the audit Respondent presented a time schedule for fees in the estate case (TR3, p.204, L.4-8). Respondent claimed he believed that he was entitled to take fees as he earned them. Judge Alvarez and The Florida Bar's expert witness on probate testified that, at least in Hillsborough County, an attorney may not take attorney's fees in a probate case without authorization of the personal representative or approval of the court. (TR3, p.160, L.16-25; p.161, L.2; TR4, p.20, L.8-18). Respondent was not authorized by the court nor by the personal representatives to take fees prior to the time the estate was closed. (TR4, p.56, L.17-22).

By December 30, 1988 the estate trust obligation minus Respondent's claimed earned fees was $2,418.53 (TR3, p.212, L.6-15, C's. Exh.21, p.2, L.27, TFB 89-10,273(13A), TR3, p.213, L.7-10), but there was only $479.17 in the account; the estate was still open. At a hearing regarding closing the estate, Respondent for the first time presented the bill for lawyer's services to the personal representatives. (TR3, p.247, L.24, p.248, L.2). Previously he had requested that the beneficiaries approve the fee, but had not presented them with a bill. When they requested an

itemized bill in the waiting room of the Judge's chambers, Respondent threw his bill at the beneficiaries, and began shouting at them that they were greedy, uncooperative, and not thinking rationally. (TR3, p.248, L.5-p.249, L.2). They did not contest the bill. The court granted the unchallenged request for $3,016.95 for attorney's fees and costs. On April 26, 1990 the $826.58 balance of estate money, after claimed attorney's fees were awarded, was sent to the beneficiaries. (TR3, p.215, L.9-12). The trust account had been in an overdraft status prior to a March 2, 1990 deposit of $3,000 of trust money for another client, Woolf. (TR3, p.215, L.9-25). The money to the beneficiaries was repaid using the Woolf trust money. The written order closing the estate was issued May 2, 1990.

In Supreme Court Case No. 77,453, the Referee found that Respondent deposited the settlement check of his client, Olga Austin, into Respondent's general account and then used the money for purposes unrelated to his client. (ARR p.1; C's. Exh. 9, TFB 90-11,271(13A)). These client monies were used in January 1990 by Respondent to pay his overdue phone bill. (TR1, p.28, L.10-17; C.'s Exh.12, 13, TFB 90-11,271(13A)). Respondent testified that in January and February 1990, he was not behind in any significant way with creditors, and that then his financial condition was ok. (TR1, p.311, L.6-12). However, Respondent's secretary testified that during the period from mid November 1989 to May, 1990, Respondent was having financial difficulties; a lessor was threatening to remove the copy machine, the IRS was seeking past due tax payments, and there were liens on Respondent's condominium.

(TR1, p.127, L.4-11; p.119, L.5-11). Earlier, in May, August and September of 1989, there had been shut off notices from Tampa Electric. (C's. Exh.1, TFB 89-10,273(13A)).

After Respondent converted Ms. Austin's money, she attempted to reject the settlement offer, believing the settlement money had not been timely received. (TR1, p.81, L.19-23; TR1 p.82, L.22-25). In July 1990 a court found that the settlement was binding. When Ms. Austin had originally agreed to accept the settlement, Respondent advised her that if she would take the offer, he would not take a fee. However, in the July hearing to enforce the settlement, Respondent requested and "got two hundred dollars because Olga was being a real royal prick." (TR1, p.324, L.22, p.325, L.1, p.40, L.9-18; p.41, L.10-16).

Based on the complaint filed by Olga Austin, on May 8, 1990 Respondent was served with a subpoena for his trust account records. Pursuant to the subpoena, on May 14, 1990 he brought a box containing trust account records to The Florida Bar's Tampa office. The box contained very few of the records covered by the subpoena. Respondent was subsequently given a detailed list of the specific records needed to comply with the subpoena, and he promised to deliver those records to the Bar on or before May 25, 1990. On May 25, Respondent asked that the auditor go to Respondent's office to clarify what was being requested. During the visit to Respondent's office, on May 29, Respondent produced records which were once again incomplete. However, Respondent testified before the Referee that he had had the documents available, but that the auditor was in a hurry to get out of there,

so another date was set to complete the review. (C's. Exh.7, p.1-4, TFB 90-11,271(13A); TR1, p.290, L.4-13). The auditor's testimony indicates that was not true.

On May 31, 1990, 2 days after Respondent's failure to comply with the subpoena for the trust account records, Respondent first saw psychiatrist Dr. Rawlings for depression; (Depo., p.10, L.3).

Although Respondent produced some additional records on June 5, 1990, documentation regarding two specific cases (Johannsen and Woolf (Klein)) were not produced. Respondent promised to provide those records within 48 hours, but never did produce them. (TR1, p.229, L.1-6; C's. Exh.7, p.1-4, TFB 90-11,271(13A)). Then when asked at trial if he had provided Johannsen with a copy of billing statements, Respondent replied "It is none of the Bar's business." (TR1, p.331, L.4-22). Respondent claimed to the Referee that he had cooperated with the investigation by The Florida Bar of his Trust accounts, and provided the information subpoenaed by The Florida Bar in connection with his trust account. (TR6, p.65, L.6-12; TR1, p.331, L.10-p.332, L.25). The Referee found "apparent lack of cooperation with The Florida Bar." (ARR p.4).

On May 14, 1991, Respondent advised the Bar auditor that Respondent had deposited the Olga Austin settlement check for $600.00 into his general account with the intention of paying his client later during the day. (TR1, p.18, L.9-12). Then on May 29, 1991, he advised the auditor and a Bar investigator that the check had never been deposited into the general account. (TR1, p.19, L.16-18). When advised by the auditor that this statement was inconsistent with his earlier representation, Respondent pulled an

envelope containing money from his drawer, and stated the money in the envelope must have been the money obtained when the Austin check was cashed. (TR1, p.24, L.11-16; p.25, L.14-18).

Other testimony indicated that Respondent had advised Detective Philippi, who was investigating a complaint filed by Respondent's client regarding the money, that he had given the check to his client on January 22, but she had been unable to cash it, so he deposited it into his general account and withdrew the money to give to her. He claimed that after she refused the money, he placed it into an escrow account in the client's name. However, no cash had been withdrawn from the general account as represented by Respondent. No money was placed into escrow for the benefit of the client. (C's. Exh.9, TFB 90-11,271(13A)). He did not indicate to the officer that he had retained the money in a drawer in his desk. (C's. Exh.3, TFB No. 90-11,271(13A); TR1, p.150, L.10-13).

At trial Respondent then claimed that he had cashed out his client's check by giving her money from a collection of one hundred dollar bills he had, and therefore he was entitled to deposit her check and use the money for his own purposes. (TR1, p.305, L.21-p.305, L.11). On May 14, 1990, Respondent had told the Bar Auditor he had designated $600.00 of fee funds in trust for Olga Austin on February 22; however, the funds in trust that date belonged to another client. (TR1, p.35, L.22-p.36, L.3; p.39, L.15-23).

On May 29, 1990 Respondent presented The Florida Bar auditor with a printout containing a list of clients with partial activity evidenced by receipts and disbursements. Later, Respondent indicated that the print-out was incorrect for payments charged to

Johannsen funds, claiming those amounts were personal payments to him (Respondent). (TR1, p.228, L.10-p.230, L.7). Respondent never provided documentation to clarify the Johannsen $7,000 amount. (TR1, p.228, L.1-6).

Regarding the audit related to the complaint of Woolf, in a letter dated August 27, 1991 addressed to counsel for the Respondent, specific information was requested to enable certain discrepancies in Respondent's records and representations to be clarified. The information requested was never provided. (TR2, p.60, L.11-20).

In Case No. 78,723, the facts in Count I show that Respondent began representing Chlotielde Woolf in October 1989. (TR3, p.5, L.10-12). The Woolf Printing Corporation had filed a Chapter 11 Bankruptcy Petition in 1987, and there was an outstanding 1986 pre-petition obligation for tangible personal property taxes. Respondent was retained by Ms. Woolf to negotiate partial payment on that obligation. In March 1990, Ms. Woolf gave Respondent a check for $7,000 specifically to be escrowed for payment towards the tangible taxes. (TR3, p.7, L.5-p.8, L.7). Respondent placed the money into his general account, April 4, 1990, (C's. Exh.9,10, TFB 92-10,054(13A)) and, during the period from March to May 1990, Respondent converted the entire $7,000 to his own use. (ARR p.1-2; Count I); Respondent then sent two letters to the tax collector advising that on April 3, 1990, Woolf Printing Corporation had placed with his office in escrow $7,000. (C's. Exh.8). In fact, the funds were not held in escrow by Respondent, but had been placed in his general account, and converted by Respondent. The

tax assessor advised that on October 10, 1990 he was telephonically again advised by Respondent that the money had been escrowed. Based on these representations, the tax assessor did not at that time seize the assets of Woolf Printing Corporation to partially satisfy the tax debt. (TR2, p.22, L.5-17).

Under oath before the Referee, Respondent denied converting the money and he testified that when Ms. Woolf gave him the $7,000 it was agreed between them that it was for advance payment of fees (TR3, p.78, L.8-17), and that it was not his understanding that the money was to be held in escrow. (TR3, p.79, L.16-20). Respondent testified that he entered into an agreement with Ms. Woolf to misrepresent to the tax assessor that $7,000 was being held in escrow. (TR3, p.88, L.1-4). He further testified that he decided to make what he characterized as an "equivocal statement" in order to get the tax assessor off his client's back; and that while not telling a falsehood, he "did bend the truth significantly" to help his client. (TR3, p.80, L.22- p.81, L.7).

On November 6, 1990 Allen Andreason, financial consultant to Woolf Printing Corporation, received a copy of a letter from the tax assessor regarding the delinquent taxes. Shortly thereafter he contacted Respondent, and during the conversation, he testified, he was asked by Respondent if Ms. Woolf owed Andreason any money. Respondent then commented to Andreason that they could eat up the escrow, or it could be offset against the escrow. (TR2, p.40, L.17-p.42, L.21). There was, however, already no Woolf money left in escrow.

When Respondent was asked at trial if he was having rather

severe financial difficulties during the period from about October 1990 up until about February 1991, he answered no, but then upon further cross-examination, Respondent acknowledged that he filed a Petition for Chapter 13 reorganization November 16, 1990. (TR3, p.90, L.6-15).

In Case No. 78,723, Count II, the facts show that on January 7, 1991, Respondent cursed at and threatened Steven Berman, an attorney who was deposing Respondent during the pendency of garnishment proceeding against Woolf Printing Corporation. During the deposition Attorney Berman was attempting to inquire into $7,000 of Woolf Printing Corporation money he believed had been escrowed with Respondent, asking whether any trust account money or any money had been deposited or had been suggested to be deposited in Respondent's trust account in October or September. (C's. Exh. 1, p.9, L.23-p.10, L.2; TFB 91-11,063(13A)). At the deposition Respondent indicated he had received fees in October 1989, December 1989, and February 1990; and that in June 1990 a fee check bounced. (C's. Exh.1, p.11, L.11-14). He did not mention or allege any fee payment in April 1990 or between his first conversion from the $7,000 and the deposition. When further inquiry was attempted, Respondent said "it is none of your friggin business" (C's. Exh.1, p.12, L.2-9), then Respondent threw a stapler and the top and bottom of a candy dish, threatened to grab Attorney Berman's glasses off his face and blind him with them - the deposition was terminated. (C's. Exh.1, TFB 91-11,063(13A)). In the instant proceedings, Respondent denied that the $7,000 about which Mr. Berman was attempting to inquire was the same $7,000 escrowed with

him by Woolf, but claimed that instead it was some "nonexistent funds that Mr. Andreason said was created in the deposition." (TR3, p.150, L.7-14; TR3, p.148, L.22-25; p.149, L.6-9). He also testified that he did not intentionally throw the stapler, or the candy dish lid which sailed between the court reporter and the attorney deposing him, nor the candy dish which flew over the attorney's head before damaging the court reporter's office wall about 6 feet away. He explained that each of the items slipped out of his hand while he was vigorously gesturing. (TR3, p.145, L.1-p.146, L.7).

On February 06, 1991 Ms. Woolf filed Chapter 7 personal bankruptcy, (TR2, p.68, L.13-22) and listed Respondent as an unsecured creditor to whom she owed $5,530 in attorney's fees. (C's. Exh.4, TFB 92-10,054(13A)). The amount was based on a statement dated January 10, 1991 received from Respondent (TR3, p.16, L.20- p.17, L.5; C's. Exh.13, TFB 92-10,054(13A)). Prior to the March 18, 1991 Bankruptcy 341 meeting, the Trustee called Respondent, and was advised by Respondent that no money was being held for the company or Ms. Woolf by Respondent. (TR2, p.71, L.12-p.73, L.8). Ms. Woolf then received a bill dated April 18, 1991 from Respondent for attorney's fees, listing "$7,000 fee credit", with the date of credit given as April 18, 1991. (C's. Exh.7, TFB 92-10,054(13A)). When asked at trial why the $7,000 had not been credited to his client's bill earlier, Respondent stated that his wife prepared the bills and did not know about the $7,000. (TR3, p.93, L.21-p.95, L.6). Respondent had begun converting the escrow money in April 1990, long before it was credited. (C's. Exh.10,

TFB 92-10,054(13A)).

(Aggravation and Mitigation)

As aggravating factors the Referee noted Respondent's lengthy period of practicing as an attorney (22 years), apparent lack of cooperation with Bar auditor, and that "he should be able to better manage a limited case load." (ARR p.4).

The Referee noted the following mitigating factors: Absence of prior disciplinary action; remorse; and continuing medical treatment. He noted that Respondent has been and is being treated by Dr. Rawlings for depression and anxiety, recognizing this as a mitigating factor but for which the recommendation of discipline would have been much more severe. The Referee found "the impairments caused Respondent's personal, emotion and marital problems." (ARR p.3). The discipline recommended was a six month suspension and thereafter until Respondent has paid the costs of the disciplinary proceedings, obtained clearance from the treating physician that Respondent is competent to practice, and completed a Florida Bar course in law office management and trust accounting. In addition, it was recommended that for an indefinite period following reinstatement Respondent be required to submit quarterly trust account reports and submit to informal audits of the trust accounts. (ARR p.3). Respondent was on anti-depressant medication from 1983 until 1988. Respondent then discontinued his medication until after he began treatment with psychiatrist Dr. Rawlings May 31, 1990. Respondent advised his psychiatrist that he (Respondent) was in a lot of debt, including debts to the IRS, that other bills were considerable, (Depo., p.20, L.13-16) and indicated his wife

was being critical of his work habits and his inability to earn a living for them. (Depo., p.10, L.21-24). Respondent's marriage was in jeopardy. Relying on Respondent's verbal reports, and without psychometric testing (Depo., p.11, L.21,23; p.20, L.1-5), the psychiatrist found Respondent suffered from recurrent severe depression that might cause him to suffer from forgetfulness or lack of memory, and to be emotionally impaired in his ability to practice law. (Depo., p.16, L.15-21). The psychiatrist felt Respondent had been forthright with him (Depo., p.24, L.16-19), which was not true. Respondent represented to the psychiatrist that pending Florida Bar actions had to do with an insignificant amount of money and were due to sloppy procedures (Depo., p.24, L.20-25), and that the accusation of misusing $7,000 was a matter of sloppy bookkeeping. (Depo., p.25, L.13-16).

The psychiatrist felt that Respondent's representation to the Referee that he had sent a letter to a taxing authority misrepresenting that there was money in the trust account would be hard to explain as due to confusion.(Depo., p.22, L.9-24). The psychiatrist also noted that if there were a conspiracy to mislead the taxing authority, that would place the problem in a realm other than the psychological (Depo., p.23, L.8-12), although depression could account for bad judgment. (Depo. p.23, L.8-17). The psychiatrist reported he saw no indication that Respondent's memory for past events was distorted. (Depo., p.29, L.23-25).

In early 1988, Sandra Slick Condon, Respondent's wife since 1988 and his office manager, had encouraged Respondent to see a doctor for depression. Respondent wasn't functioning well and

didn't feel like going to the office. (TR6, p.22, L.19-p.23, L.3). Financial problems with Mrs. Condon's weight reducing clinics were causing stress in the marriage, as did other problems. Mrs. Condon at times called on Respondent to pay her rent for these businesses if he had the money. (TR6, p.28, L.21, p.29, L.22). Nevertheless, she testified that at no time did anyone come to the law office and complain about Respondent's competence in representing them (TR6, p.27, L.19-24). There was no evidence that he was unable to make good decisions and exhibit good reasoning in his representations, though he did seem to procrastinate. (TR6, p.25, L.25-p.28, L.6). In the hearing on discipline, Respondent testified that he never let depression hurt his clients, and that he has an inner source of power ... a well of strength...to do the task necessary when it has to be done. (TR6, p.61, L.13-24).

Another witness for Respondent testified that during the period in question, Respondent represented her parents effectively in a bankruptcy and harassment suit, and she saw no indication that he was confused nor evidence that he was forgetful regarding details of the case. (TR6, p.38, L.4-18).

A licensed mental health counselor with Masters degrees in clinical and counseling psychology, who has known Respondent for nineteen years, also appeared as Respondent's witness. (TR6, p.39, L.10-11; TR6, p.40, L.1-2; TR6, p.40, L.14-16). Between about 1987 and 1989, she had an office close to Respondent's law office and was able to observe Respondent's practice. (TR6, p.42, L.25, p.43, L.1). She noted some characteristics of depression, such as lack of interest in life and trouble concentrating. (TR6, p.44, L.2-8).

Nevertheless, she on occasion referred people to Respondent for legal services and there was never a period when she felt unwilling to send a referral to him because of any concerns she had about him. (TR6, p.44, L.14-25).

SUMMARY OF ARGUMENT

The Referee's recommendation of a six month suspension is inappropriate based on both case law and Standards for Imposing Lawyer Sanctions. Disbarment is the appropriate discipline under the facts of this case. The presumption of disbarment for misappropriation has not been rebutted by the evidence offered in mitigation. There has been no proof that Respondent's judgment was so impaired throughout the period of misconduct that the presumed discipline is incorrect. Further, aggravating factors outweigh any mitigation. Throughout the proceedings before the Referee, and during The Florida Bar's investigation, Respondent made numerous misrepresentations.

ARGUMENT

The Referee found Respondent had misappropriated money from the Estate of Sherlock, beginning in March 1986 and continuing until the estate was closed in April 1990. When the estate was closed and attorney's fees authorized, Respondent paid the balance of estate escrow money to the beneficiaries by using another client's money without authorization. Then in April 1990, Respondent converted $7,000 belonging to another client which had been given to him to be escrowed towards tangible taxes. That money has never been placed back into an escrow account or transferred to a third party. In May 1990, Respondent misappropriated a third client's settlement for $600.00. That client later received $400.00 of the settlement, the amount a court determined should be paid to her. Because Respondent intentionally misappropriated client funds, disbarment is presumptively the appropriate discipline.

The Florida Supreme Court has repeatedly held that misuse of client trust funds is one of the most serious offenses a lawyer can commit. The Florida Bar v. Shanzer, 572 So. 2d 1382, 1383 (Fla. 1991). In any case of misappropriation of client funds, the presumption is that disbarment is the appropriate discipline. Id. In the overwhelming majority of recent cases, attorneys who have misappropriated client funds have been disbarred notwithstanding mitigating evidence. Id.

At the same time, this Court has rejected arguments that disbarment for misappropriation should be automatic. In determining whether disbarment is appropriate, the Court has

recognized that drug, alcohol, or mental problems may impair judgment so as to diminish culpability. Id. at 1384. If the evidence does not clearly show that the misappropriation was due to impaired judgment, the proper sanction is disbarment.

It is axiomatic that personal problems alone are not a basis for excusing an attorney for dipping into his trust account to solve those problems. Id. Respondent misappropriated money because he was in severe financial distress. He advised his psychiatrist of that distress when he saw him in mid-1990. Respondent had a lot of debts, including to the I.R.S. During the period of his thefts, he received shut off notices on his electricity, had over due phone bills, and apparently was threatened with repossession of his copy machine. Ultimately he filed for reorganization under Chapter 13 of the Bankruptcy Code. His marriage was in jeopardy in part due to financial pressures. The depression he experienced is understandable. Nevertheless, as this Court noted in Shanzer, an attorney cannot be excused for dipping into his trust account as a means of solving personal problems. Id.

Mental problems may impair an attorney's judgment so as to diminish culpability, but like Shanzer, the instant case is not one of those instances. Disbarment is the appropriate discipline. In Shanzer, the attorney argued that his depression, primarily over his marital and economic problems, led him to use his trust account for personal purposes. The Court noted Shanzer's cooperation with The Florida Bar, remorse, rehabilitation from drug addiction, and restitution, yet found disbarment to be the appropriate discipline.

The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986), is also instructive on the role of mitigation due to impairment. Robert Knowles argued that his defalcations were the direct result of his alcoholism. Over a period of four years, Knowles had converted $197,900 from trust funds of several elderly clients for whom he held powers of attorney. The Court pointed out that during that period, his income did not decrease discernably. There was no apparent effect from the alcoholism on his ability to work regularly. Id. at 142. The Court recognized alcoholism as the underlying cause of Knowles' misconduct, but found it was not sufficiently mitigating under the facts of the case. The Referee's recommendation of disbarment was upheld.

Similarly, in The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990) again disbarment was ordered in the presence of evidence of impairment. The Referee found that Shuminer had great personal and emotional problems, including his disease of addiction, was clearly mentally impaired due to that addiction, made a timely good faith effort at restitution to clients, cooperated with the Bar, was remorseful, and inexperienced in the practice of law. The Court noted that Shuminer failed to establish that his addictions rose to a sufficient level of impairment to outweigh the seriousness of his offenses, and that he worked effectively during the period in issue. Id. at 432. Shuminer was disbarred. Id. at 433.

In the instant case, the Referee found that depression caused Respondent's personal, financial, and economic problems. Clearly, Respondent has been depressed periodically for many years. He has

been diagnosed accordingly and has received treatment and medication to assist with his difficulty. However, the Referee did not find that the Respondent's thefts would not have occurred but for impaired judgment caused by that depression. The direct casual connection between depression (impaired judgment) and the thefts is absent. It is not sufficient to merely show he was depressed.

The psychiatrist testified that a misrepresentation by Respondent in a letter to a taxing authority regarding trust money would be hard to explain as due to confusion, and that if there were a conspiracy, that would place the problem in a realm other than psychological. He also reported that he had seen no indication that Respondent's memory for past events was distorted.

Respondent might claim as mitigation that ultimately all clients were reimbursed. The Florida Bar v. Anderson, 594 So. 2d 302 (Fla. 1992), addresses circumstances where the theft is ultimately not from the client. Anderson had forged signatures on housing authority checks and embezzled $4,500 of publicly owned funds. She used the money for her own purposes. In Anderson the referee declined to recommend disbarment, finding as mitigation a payment of $3,500 in restitution prior to criminal charges being filed, that no client funds were misappropriated, remorse, and emotional problems. However, the Court held that theft of public funds is at least as serious as misappropriating client funds, stating "Anyone entrusted with public monies is directly responsible to society as a whole." Id. at 304. Loretta Anderson was disbarred. Respondent stole funds escrowed for payment of

taxes. Even if his client thereafter had no claim to the funds, as Respondent suggests, the taxing authority as a creditor did have a claim to the funds. At the time the funds were converted, no discharge in bankruptcy had occurred. Respondent breached not only his obligations to his client, but also that to the tax collector, as a representative of the public to whom those funds arguably belonged.

Respondent's depression does not explain Respondent's conduct. Dr. Rawlings, Respondent's therapist since May 1990, did suggest that Respondent's depression might cause him to be forgetful, to suffer from lack of memory, and to be emotionally impaired in his ability to practice law. He stated that depression could account for bad judgment, but did not state conclusively that had occurred in Respondent's case. Respondent was receiving treatment and medication for depression from 1983 until 1988. He discontinued his medication in early 1988 after he married, then resumed anti-depressant medication in May 1990 when he resumed treatment for depression. Even in therapy and on medication, he lied and misappropriated money.

A therapist who had known Respondent for 19 years and saw him regularly noted that Respondent demonstrated some characteristics of depression, such as trouble concentrating. However, she was confident in his legal abilities during the period from 1987 to 1989, and when his office was close to hers, referred her clients to him for legal services. There was never a period when she felt unwilling to do so because of any concerns about him. During this same time, Respondent was converting client trust money.

Respondent's wife, who has been his office manager beginning in early 1988 through the present time, testified there was no evidence he was unable to make good decisions and exhibit good reasoning in his representations, though he did seem to procrastinate. She noted no clients came to the office and complained about his representation. Another witness testified that during April 1990 through October 1990, Respondent's representation of her parents was effective, and she saw no indication that he was confused nor evidence he was forgetful regarding details of the case. This character witness for Respondent, who observed him in his daily life and/or practice of law do not report impaired judgment.

A major aggravating factor in the instant case is Respondent's misrepresentations to the Referee. This Court has stressed the importance of truthfulness by attorneys who testify, stating: "Our system of justice depends for its existence on the truthfulness of its officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such conduct is grounds for disbarment." The Florida Bar v. O'Malley, 534 So. 2d 1159, 1162 (Fla. 1988); The Florida Bar v. Smiley, 18 Fla L. Weekly S291, 292 (Fla. April 13, 1993).

As noted in The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992), misappropriation, failure to follow trust account procedures, and repeated misrepresentations and false testimony while under oath demonstrate an unfitness to practice law. Dishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members.

Graham had lied to the Bar regarding an inquiry concerning disposition of settlement funds, falsely testified that he had restored misappropriated funds, and had trust account shortages as high as $30,503.13.

Graham argued that disbarment was inappropriate because of significant mitigating facts such as absence of a prior disciplinary record; personal and emotional problems stemming from his father's death, mother's illness, and financial obligation which contributed to his emotional state and personal problems; and a timely good faith effort at restitution. This Court reiterated its position in Shanzer, Supra, that the Court cannot excuse an attorney's use of client funds to solve life's problems. After suggesting the absence of evidence of mental, alcohol or drug problems impairing the lawyer's judgment so as to diminish culpability, the Court ordered Graham be disbarred. Graham, 605 So. 2d at 359. This is consistent with the Florida Standards for Imposing Lawyer Sanctions, Standard 6.11(a): Disbarment is appropriate when a lawyer, with the intent to deceive the court, knowingly makes a false statement or submits a false document.

The Respondent's testimony on many material facts was determined by the Referee to be false. The Referee rejected Respondent's claim he had cashed out his client's settlement check for $600.00, along with Respondent's detailed statement about the circumstances surrounding the event. Respondent's lengthy explanation of how he conspired with his client to mislead the taxing authority into believing $7,000 was escrowed for taxes although he and the client agreed the $7,000 was for fees was also

found to be false. Other testimony likewise demonstrated Respondent's attempts to mislead the Court and conceal the truth. He denied having financial problems during the period from about October 1990 up until February 1991, but then admitted filing for Chapter 13 reorganization in November 1990. He falsely denied that in a deposition an attorney was attempting to inquire into the $7,000.00 escrowed for tangible taxes. He even testified that two objects which had been launched from his hand in the general direction of the attorney deposing him had slipped while he was gesturing, even though one of the objects went five to eight feet across the room and put a small indentation high on the wall. He testified that he had provided The Florida Bar with all records requested, which was not true. The misrepresentations in the referee proceedings occurred during the period from February 6, 1992 up through January 8, 1993. Respondent had been back on medication for depression and in therapy since October 1990. Respondent's therapist pointed out that there was no indication Respondent's memory for past events was impaired. Therefore, the misrepresentations were made intentionally and knowingly.

Respondent argued before the Referee that his failure to pay restitution, or make arrangements to do so by determining to whom the $7,000 is owed, was not done because "I did not know that I had been told to take $7,000 and do something particularly with it;" (TR6, p.66, L.18-23) because the Referee said there is no restitution to be made; and because the Supreme Court had not yet instructed him to do so. (TR6, p.67, L.13-25). Although the client apparently no longer has any claim to the money it should

have gone to either creditors in the Woolf Printing Corporation Bankruptcy or to the taxing authority. Respondent took no steps to determine entitlement to the $7,000 and it remains as converted funds.

The Referee found Respondent to be remorseful. Respondent, however, denied virtually all misconduct. The evidence demonstrates that Respondent continues to be bitter towards those whose money he stole, and towards The Florida Bar. In the proceedings, when testifying he is "accepting responsibility" for his acts, he said he would have "no objection to whatever interference that The Florida Bar desires to make into my practice and my personal life." (TR6, p.64, L.8-20). When asked why he requested his contingency fee after telling a client he would waive it if she took the settlement, he said "because she was being a real royal prick." In discussing requests by The Bar Auditor for information on trust records, he said "I was getting so frustrated with him and his peculiar rules that I never knew existed and ramming them down my throat." (TR1, p.298, L.2-7). He noted that the auditor "suffers from cognitive dissonance - he is convinced there is an error and everything fits into this error." (TR1, p.314, L.1-9).

Earlier, when the estate case he neglected was being closed and the clients asked about his fee (which he had taken without authorization), he threw his file and called them greedy and uncooperative. Then the referee proceeding, in an effort to discredit the clients, he related that they had contacted him about probating an estate before their terminally ill relative was dead,

saying "To quote Judge Mann who said, 'To man, the sophisticated scavenger, cash is carrion.' I did not find it unusual. I found it, however, despicable." (TR4, p.34, L.10-15). Respondent accepted the case. Respondent's overall conduct during hearing on misconduct does not suggest remorse. In fact, any suggestion of remorse came only after he was found guilty by the Referee. Prior to that he adamantly denied misusing client funds and verbally attacked his accusers.

Further, Respondent was not cooperative with The Florida Bar (the Referee noted apparent lack of cooperation). Respondent several times promised to deliver subpoenaed records to The Bar auditor, but never fully complied in spite of his further assurances to the contrary. His counsel was even given a specific list of items needed. That information was never provided. He then misrepresented to the Referee that he had provided the information requested.

Respondent misappropriated client money and lied under oath during the referee proceedings. These are two of the most serious offenses an attorney can commit and clearly demonstrate his unfitness to practice. The appropriate discipline is disbarment.

CONCLUSION

Respondent has misappropriated client money and testified falsely in grievance proceedings. He failed to cooperate with the trust account investigation by The Florida Bar, and gave false assurances that records would be provided to complete the trust account audit. He has demonstrated, prior to and during the disciplinary proceedings, anger and resentment towards those from whom he took money and those attempting to determine what he had done.

Respondent's depression does not provide sufficient mitigation to warrant a discipline other than disbarment. Respondent's misconduct occurred both when he was on medication for depression and receiving treatment, and when he was not. It was caused by his financial and marital problems, and later his attempts to conceal his misconduct. The appropriate discipline in the instant case is disbarment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Initial Brief has been delivered by Regular U. S. Mail to Donald K. Smith, Counsel for Respondent, at 109 North Brush Street, Suite 150, Tampa, Florida, 33602, this 11 day of June, 1993.

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