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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

COMPLAINANT'S REPLY 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

RB: Respondent's Answer Brief

STATEMENT OF FACTS

Case No. 77,463: Respondent indicates in his Answer Brief that Olga Austin returned the settlement check to his office, and that he did not have contact with her when she did so. (RB, p.2). He testified that he assumed that there was a hold on her check. (TR 1, p.305, L.3-14). These statements in the Brief are based on Respondent's testimony, uncorroborated by other witnesses. The referee did not make findings of fact compatible with his representations.

As Respondent further indicates in his brief, he testified that he agreed to deliver cash to Olga Austin from his collection of one hundred dollar bills. (RB, p.2; TR1, p.305, L21 - p.306, L.11). But, Detective Philippi of the Temple Terrace Police Department testified that Respondent had advised him that Respondent withdrew six hundred dollars ($600) from Respondent's operating account and gave it to Olga Austin. However, no cash was withdrawn at time of the deposit. (TR1, p.150, L.10 - 23; C's Exh. 9). The detective testified that Respondent later told him that the money was placed in an escrow account in the victim's (Olga Austin's) name and later transferred to a general fund account. (TR1, p.151, L.7 - 18). At no time did Respondent advise the detective that the money had been retained in Respondent's office. (TR1, p.151, L.19 - 23). Regarding the collection of one hundred dollar bills, when asked in the referee proceeding why he had the alleged sixty one hundred dollar bills in his office on January 22,

Respondent answered "it's none of your business." (TR1, p.327, L.13 - 15). When asked if the money was from a client, and how long the money had been in his office, he also replied, "That, sir, is none of your business." (TR1, p.327, L.16 - 25). Sandra Slick (Condon), Respondent's wife and office secretary/bookkeeper in January 1990, testified that she did not know Respondent to have in excess of a thousand dollars in his office, nor to have excess amounts of cash in his desk; she testified that she had never seen any cash stashed in the office. (TR3, p.61, L.9 - 24).

Case No. 78,723: Count I: Respondent testified that the $7,000 received from Ms. Woolf on April 4, 1990 was an advance payment of fees, and that at the conclusion of the problems, the client would receive back anything which had not been used. Respondent further claimed that he had an agreement with his client that the $7,000 would be evenly split at the conclusion of the litigation. (TR3, p.78, L.3 - 17). He testified that after the bankruptcy was discharged, Ms. Woolf called him and asked for her half of the $7,000 which he had assisted her in hiding, specifically $3,500. He said this was close to the April 1990 agreement between Respondent and his client (TR3, p.83, L.1 - 14), but that Respondent had earned over the $7,000 amount. (TR3, p.83, L.16 - 23). No money was returned to Ms. Woolf.

Respondent notes in his brief that the check submitted by Ms. Woolf to the Florida Bar contained a notation which was not present on the original check. (RB, p.3). Ms. Woolf testified that the

notations on the check were a folio number and the words "Tangible Taxes Escrow." She reported that she placed the language on the cancelled check when she got the check back from the bank, which she did sometimes with checks. (TR3, p.8, L.14 - p.9, L.24).

Case No. 78,723: Count II: In addition to the flying stapler and candy dish mentioned by Respondent in his brief, the testimony indicates a candy dish top "flew" from Respondent's hands. (RB, p. 4). Respondent denied to the referee that the latter happened. (TR3, p.146, L.15 - 17). Patricia Goff, the court reporter at the Berman deposition of Respondent, testified that Respondent first banged the stapler on the table, then picked it up and threw it; that he threw a lid to a candy jar (sic) after threatening the attorney deposing him; and that after the court reporter threatened to call the police, Respondent picked up the rest of the jar and threw it five to eight feet; the jar struck the office wall and made an indentation. (TR3, p.110, L.13 - p.112, L.12).

Case No. 78,723: Count III: Respondent testified that delays in the estate were due in part to his not being able to obtain stock certificates from the Bank of New York for about six months (TR4, p.49, L.3 - 17); the failure of the personal representative to sign the initial waiver of accounting necessary for closing the estate because, Respondent believed, they did not trust him (TR4, p.39, L.8 - 18); and he also discussed the facts surrounding the sale of the home belonging to the estate. (TR4, p.40, L.3 - p.43, L.9).

Further, he states in his answer brief that the fees were not contested. (RB, p.5).

Judge Alvarez, former chief judge of the probate division, testified that while he would not have any personal knowledge regarding the transfer of the title to the stock certificates (TR4, p.26, L.7 - 12), he did not recall ever being advised of any problem in closing this estate on that basis. (TR4, p.19, L.1 - 7). Richard Bauman, an attorney testifying as an expert witness in probate, testified that the transfer of the stock did not delay the closing of the estate. (TR3, p.173, L.20 - 24).

Respondent indicates in his answer brief that the fees were not contested. (RB, p.5). Ms. Boren, the co-personal representative, with the other representative concurring, testified that Respondent had requested that the fees be approved, but without providing an itemized bill. (TR3, p.248, L.5 - 9; TR3, p.258, L.13 - 24). They also indicated that at the show cause hearing the personal representatives demanded an itemized bill. They were not shown an itemized bill until a later hearing was held to close the estate. (TR3, p.247, L.24 - p.248, L.11). They testified that at the latter hearing, Respondent began screaming at them, accusing them of all sorts of things, and threw the bill at them - they did not examine the bill at length. (TR3, p.248, L.10 - p.249, L.8).

Respondent notes that several notices to show cause were issued in the estate case, but that there was no determination of contempt. (RB, p.5). Judge Alvarez testified that not finding

Respondent in contempt did not indicate that the handling of the case was satisfactory. (TR4, p.12, L.19 - 24), and that he did not think Respondent spent the quality time that was required in the case. (TR4, p.25, L.3 - 5).

Case No. 77,463 (Trust Audit): Respondent suggests he fully cooperated with the Florida Bar in the cases against him. (RB, p.11-13). However, the Florida Bar auditor testified that there were just a few of the subpoenaed items in a storage box presented in response to a subpoena. (TR1, p.14, L.4-9). Respondent contested that representation and testified that he brought a file storage box that contained all his bank records, cancelled checks, monthly statements, check stubs; that he brought his safeguard ledger and a brief case with more stuff. (TR1, p.289, L.6 - 15). He claimed items the auditor then placed on a list of items to be produced were among the documents previously presented, and that they were presented at a second meeting as well. (TR1, p.290, L.4 - p.291, L.10). This was also contrary to the auditor's testimony. (See TR1, p.335, L.8 - p.337, L.10).

REPLY TO RESPONDENT'S ARGUMENT

The Referee's findings of fact come to this Court cloaked in a presumption of correctness and should be upheld absent a showing that the findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Colclough, 561 So. 2d 1147, 1150 (Fla. 1990).

The Referee in the Austin case found that Respondent violated Rule 4-1.15(a), Rules Regulating The Florida Bar, by his failure to deposit the settlement check of Olga Austin into trust. (ARR, p.1). Respondent's position appears to be that the check was not funds/money, and therefore need not be deposited into trust. It is contended that because the entire amount was for the client, and none was due to the firm, there was no requirement to deposit the check into trust. (RB, p.9 - 10). However, Rule 4-1.15(a) indicates that funds or property of clients must be held in trust, separate from the lawyer's own property. The rule further states that the lawyer may in no event commingle the client's funds with the lawyer's or law firm's funds. The check was property/funds belonging to the client, as indicated by the referee's findings that Rule 4-1.15(a) was violated. (See ARR, p.1). There was substantial evidentiary evidence to support the referee's finding that Rule 4-1.15(a) was violated in the Austin case. The settlement check was deposited into Respondent's operational account, and the money was used by him to pay his personal telephone bill. (ARR, p.1; C's Exh. 9, TFB 90-11,271(13A)).

Respondent did claim that he cashed out his client's check from his own funds, and therefore was entitled to use the money from the deposited check for his own purposes. (TR1, p.305, L.21 - p.305, L.11). However, testimony of other witnesses and exhibits demonstrated that Respondent was having financial difficulties during the period in question, and his explanations for what he had done with the Austin check and funds generated by it were not credible, nor consistent. For example, on May 14, Respondent told the Florida Bar auditor that on February 22, Respondent had designated six hundred ($600) of fee funds in trust as belonging to Ms. Austin. But those funds belonged to another client. (TR1, p.35, L.22 - p.36, L.3; TR1, p.39, L.15 - 23). Respondent also claimed at another time that he had kept money representing the Austin trust funds in Respondent's desk drawer at his office. (TR1, p.305, L.21 - p.306, L.11). The referee had more than an adequate basis to support his finding; the check and the funds in Respondent's account generated by its deposit were client funds. Respondent violated Rule 4-1.15(a) in the Austin case.

Respondent also claims that the Referee incorrectly applied the rule to the facts in the Chlotielde Woolf complaint. Respondent insists that he did not violate Rule 4-1.15(a) because Respondent and his client had agreed to misrepresent to the tax collector that Respondent was holding funds in escrow for application to the corporation's overdue tangible tax assessment. (RB, p.3). Respondent contends that a misleading statement, an "equivocal statement", was made to the tax collector for the

benefit of the client. (RB, p.3). It is startling that Respondent's defense to misuse of trust money is that Respondent conspired with his client to mislead the taxing authority (RB, p.3). Even more startling is Respondent's testimony before the referee that he in essence conspired to conceal the money from the bankruptcy court, and agreed to return $3,500 of the concealed funds after the bankruptcy if the money had not been earned by him as fees. (TR3, p.83, L. 1-14). Far from being a defense, Respondent's version of what occurred is at least as serious as the referee's findings of fact. Conspiracy with a client and fraud on a court and a taxing authority are not mitigating. In The Florida Bar v. Anderson, 594 So. 2d 302 (Fla. 1992), Anderson had conspired with her supervisors in a fraud involving public money, then doubled her offense by converting the money to her own use. This Court failed to see under those circumstances how the offense could be regarded as anything other than of the most serious order. Id. at 304. No mitigation was found in the fact that public money, not client money, was involved. The Court wrote "When a nonlawyer steals from the public, it is a serious evil. ... a lawyer who wilfully misappropriates public funds commits a disciplinary offense as serious as misuse of client funds..." Id. at 303.

Accepting for the sake of argument that Respondent's statement is true, his conduct constituted very serious violations of various Rules Regulating The Florida Bar, including Rule 4-1.15(a). However, as noted above, the referee's findings of fact are presumed correct unless clearly lacking in evidentiary support.

There clearly is substantial evidence. For example, Respondent indicated in his letter to the taxing authority that the money was in escrow (C's Exh. 8); the taxing authority testified that he was telephonically advised that it was in escrow (TR2, p.22, L.5 - 17); and Ms. Woolf testified that the money was to be retained in escrow pending the resolution of the tax issue. (TR3, p.7, L.5 - p.8, L.7). Because of the substantial evidentiary support for the referee's findings of fact, those findings should be upheld.

Regarding Case No. 78,723, Count II, Respondent contends that there was no evidence of conduct prejudicial to the administration of justice. (RB, p.10 - 11). The question before this Court is whether an attorney swearing at and threatening an attorney deposing him, coupled with throwing objects and otherwise causing a deposition to be terminated, is conduct prejudicial to the administration of justice. In arguing that the Rule does not apply to the circumstances of his case, Respondent cites The Florida Bar v. Pettie, 424 So. 2d 734 (Fla. 1982). In Pettie the Court held that DR1-102(A)(5) was not intended to proscribe all conduct, but those activities ... or any other conduct which undermines the legitimacy of the judicial process. Id. at 737. Respondent notes there was no "judicial prejudice." (RB, p.11). Pettie involved whether participation in a conspiracy to import marijuana was conduct prejudicial to the administration of justice. That type of conduct is a far cry from disrupting a deposition of a witness (Respondent) who has been subpoenaed as part of discovery in an ongoing case. Such outrageous conduct is indeed prejudicial to

the administration of justice. The deposition was being done in an effort to determine if the Respondent had possession of or had been given $7,000 by his client Woolf. (C's Exh.1, p.9, L.23 - p.10, L.2, TFB 91-11,063(13A)).

II. Respondent bemoans the Referee's finding of apparent failure to cooperate with The Florida Bar. Respondent indicates that Respondent timely complied with the May 1990 subpoena (RB, p.12), but that is contrary to the testimony of The Florida Bar Auditor. The records provided May 14 were incomplete, and the critical Austin records were not included. (C's Exh.7, p.1 - 4, TFB 90-11,271(13A); TR1, p.290, L.4 - 13). Respondent then argues that at the next meeting, additional documents were provided. (RB, p.2). However, the auditor testified that once again the requested documents were absent. The auditor subsequently again requested documents in writing, and once again they were not provided. (TR1, p.336, L.24 - p.337, L.2; C's Exh.7, p.1 - 4, TFB 90-11.271(13A)). Further, Respondent made several material misrepresentations to The Florida Bar, such as that the Woolf funds were for fees (TR1, p.337, L.7 - 24), and the Austin funds were in escrow (TR1, p.19, L.16 - 21). Respondent's statement that he cooperated and the evidence that he references to support his contention is misleading at best.

III. Respondent argues that Respondent's misconduct was caused by his impairment, (referencing RR section V) and the work function and his marriage was impaired by his ceasing to use anti-depressant medication in 1988. (RB, p.16; Depo 10, 12, 13).

Respondent goes on to say he was functioning at a better occupational level, and his condition has improved. (RB, p.16). Therefore, he concludes, rehabilitation has been established as of December 30, 1992. (RB, p.16).

The suggested causal connection between the impairment/ medication and the dishonesty is not supported by the evidence. Testimony from Respondent's wife/office manager, as well as from a licensed mental health counselor who had known Respondent for 19 years, indicated that Respondent's reasoning ability and ability to represent clients was unaffected by the depression, and that the depression primarily affected his ability to concentrate and caused him to procrastinate. (TR6, p.40, L.1-16; TR6, p.44, L.2-25). The casual connection between depression and misconduct, other than procrastination, is refuted by Respondent' own witnesses. Respondent himself testified that he never let depression hurt his clients, that he has an inner source of power ... to do the task necessary when it had to be done. (TR6, p.61, L.13 - 24).

If one accepts rehabilitation (from depression), the problem of procrastination may have been alleviated or tempered. On the other hand, it does not alter Respondent's lack of fitness to practice law. After December 1992 , the time Respondent offers as his date of rehabilitation in his brief, Respondent signed his brief in the instant case in which he points out, inter alia, that he only conspired to deceive the tax assessor. (RB, p.3). Respondent still does not appreciate the seriousness of his misconduct, nor of the conduct offered as mitigation.

The psychiatrist does not say all of Respondent's misconduct was caused by Respondent impairment. The psychiatrist did find him to be emotionally impaired in his ability to practice law. (Depo, p.16, L.15-21). The psychiatrist's opinions were based in large part on Respondent's self reports. (Depo., p.11, L.21 - 23; p.20, L.1 - 5). The psychiatrist reported as a generality that depression could account for bad judgment (Depo. p.23, L.8-17), but that a misrepresentation by Respondent to a taxing authority about trust money, or a conspiracy to mislead the taxing authority, would place the problem in a realm other than psychological. (Depo., p.23, L.8-17; Depo. p.22, L.9-24). Contrary to Respondent's suggestion, the psychiatrist did not conclude that Respondent was rehabilitated.

The testimony does not explain nor suggest that Respondent's medical/emotional condition accounts for his practicing for twenty years and representing 3,000 clients without discipline and then committing acts of misjudgment during a short period of time, as Respondent would have this Court believe. (RB, p.14). In actuality, the evidence indicates that after he became an attorney, Respondent was on medication for depression from 1983 until 1988. (See TR6, p.56, L.21 - p.58, L.10; Depo. p.10, L.7 - 15). There is no evidence that he was on medication from 1970 to 1983, when he was able to conduct his practice without receiving discipline. The significant differance between the years when he did not receive discipline and those when he did was the existence of financial and marital difficulties, which directly relate to the thefts. Further,

medication did not eliminate Respondent's unethical behavior. The dishonesty in the instant proceedings occurred after he returned to medication in about May 1990.

Respondent notes treatment for depression and anxiety as a mitigating factor. (RB, p.15). Treatment certainly should not be mitigating in the absence of an honest participation in the treatment process, and resolution of the problematic attitude or conduct by that treatment. The therapist's testimony clearly shows Respondent lied to his therapist during treatment. For example, he advised his therapist that the accusation of misusing $7,000 was a matter of sloppy bookkeeping (Depo. p.25, L.13-16), which is contrary to both the referee's finding and Respondent's conspiracy defense.

Respondent argues he was not determined to have committed a theft of client trust funds, nor was he the subject of criminal charges (RB, p.17). The case law cited by The Florida Bar stands for the proposition that in any case of misappropriation of client funds, disbarment is presumed to be the appropriate discipline. The referee found that Respondent used client money for a wrongful purpose in three different instances, and that due to his misuse of the Olga Austin funds, he violated Rule 4-8.4(c) (dishonesty). The correct discipline for such offenses is disbarment.

Respondent argues the Referee made no finding of misrepresentation. (RB, p.18). The Referee did , however, find Respondent's testimony to not be credible regarding the Olga Austin trust funds (Respondent claimed, ultimately, the money was in trust

in his desk drawer; the Referee found conversion (ARR, p.2)); the escrowed tax money in Woolf (Respondent argued the client agreed the funds were to be placed in Respondent's general account as part of a conspiracy (RB, p.3); the Referee found conversion); the alleged cooperation with The Florida Bar (Respondent alleged he provided all documents when they were subpoenaed and cooperated (ARR, p.4); the Referee found apparent lack of cooperation (ARR, p.4)). Also, there is the matter of a few objects flying out of Respondent's hands, where Respondent's testimony is contrary to other witnesses', the facts, and logic.

Respondent claims no aggravating factors reflect on Respondent's motive or indicates prejudice to a client. This position is contrary to the facts. Olga Austin rejected the settlement, believing the money was not timely received, and she received only $400.00 of the $600.00 Respondent said he would give her when she first agreed to the settlement (TR1, p.100, L.8 - 13). In the Sherlock Estate case, due to his delay, his clients flew to Florida for show cause hearings and incurred expenses in the process (TR3, p.247. L.24 - 248, L.11). Also, his conduct prejudiced others: the $7,000 Woolf money was either money to which the taxing authority was entitled or money to be provided for distribution among creditors (RB, p.3) - it was converted by Respondent. Under Respondent's "facts", he involved his client Woolf in a conspiracy to defraud the tax collector and/or Bankruptcy Court. Prejudice to a client and third parties is evident under all versions of the facts.

Respondent attempts to distinguish The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991) by arguing, in part, that there was a lack of selfish motive, pattern of misconduct, and of multiple offenses in the instant case. (RB, p.19). However, Respondent stole money to pay overdue bills, and misappropriated money from three clients by taking trust money (RB, p.1-2). Certainly selfish motive, a pattern of misconduct, and multiple offenses existed.

Respondent seems to suggest that the Bar's position is that this Court should disbar Respondent because in The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990), Shuminer was mentally impaired and disbarred. (RB, p.20). This is an interesting but misleading rendition of the Bar's position. However, the focus of The Bar's argument is that a critical question is whether the impairment was sufficient to outweigh the seriousness of the offense. In the absence of proof of significant impact on Respondent's ability to reason and to control his impulses, disbarment is the appropriate discipline. Since no casual connection has been established between the misconduct and the Respondent's impairment, disbarment is appropriate.

Respondent suggests that his violation of his duty in dealing with client property was due to negligence rather than an intentional or knowing act. (RB, p.22). He would have this Court accept a "negligent conspiracy" theory under his version of the facts, and a negligent misuse of client money to pay an overdue phone bill.

The Referee's recommended six month suspension is

inappropriate in light of the totality of circumstances in this case. 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Reply 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 04 day of August, 1993.

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