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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LARRY G. RIGHTMYER,

Respondent.

_____/

Case No. 78,615
TFB No. 90-11,348(6D)

INITIAL BRIEF

DA
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SYMBOLS AND REFERENCES

In this Brief, the Appellee, Larry G. Rightmyer, will be referred to as the "Respondent." The Appellant, The Florida Bar, will be referred to as "The Florida Bar." "TR" will refer to the transcript of the Final Hearing held on March 20, 1992. "RR" will refer to the Report of Referee. "R" will refer to the **Record.** "**RR1**" will refer to Referee's Response To Motion To Amend And For Rehearing And To Respond To Motion For Rehearing.

STATEMENT OF THE CASE AND THE FACTS

The basic facts of this case are not in dispute. Respondent has admitted all of the allegations as stated in the Complaint of The Florida Bar. (TR p. 7 L. 1-9). On March 15, 1990, Respondent was charged by Information in the Sixth Judicial Circuit of Pinellas County, Florida, on twenty five (25) felony counts of Perjury. On January 24, 1991, Respondent pled nolo contendere to three (3) felony counts of Perjury. The remaining counts were dismissed. On January 24, 1991, Respondent was adjudicated guilty, and placed on probation for four (4) years. On February 13, 1991, The Florida Bar filed a Notice of Determination or Judgement of Guilt. On February 20, 1991, The Supreme Court of Florida entered an Order suspending Respondent from the practice of law, effective March 22, 1991.

Respondent's perjured testimony occurred during the course of a civil suit brought by Respondent on behalf of Jack Wilson against Rocco Builders Inc. Respondent was a partner of Rocco Fullerton in a construction project. Rocco requested that Respondent secure a $50,000.00 loan to make payroll on a project. (TR p. 56 L. 23-25). Respondent contacted Jack Wilson and arranged for a $50,000.00 loan to be repaid in thirty (30) days, for a total of $55,000.00. The amount to be repaid was the $50,000.00 principal plus $5,000.00 interest. The loan was secured by property owned by someone known by Respondent. (TR p. 57 L. 21-22). This person was also a friend of Rocco. (TR p. 57 L. 19). The loan was also secured by some real estate lots owned by Rocco. The monies were not repaid, and

a complaint was filed on behalf of Wilson, who sought to foreclose the property given as security far the loan. The defense to the lawsuit was that the loan was usurious and unenforceable. Wilson, through Respondent, falsely denied the loan was usurious and claimed that there was actually another $5,000.00 loaned to Rocco for a total of $55,000.00. Respondent then perjured himself regarding the $5,000.00 difference between fifty-five and fifty thousand dollars. (TR p.58 L. 13-15). Respondent's perjury took place during deposition and trial testimony in the civil suit.

Based upon Respondent's felony arrest, The Florida Bar conducted an audit of Respondent's trust account records. The trust accounting examination revealed the following violations: a) Rule 4-1.15(a) (Trust funds were commingled with Respondent's funds in an account not designated as a trust account); b) Rule 5-1.1 (The shortages in the trust account represented use of clients' funds for purposes other than the specific purpose for which they were entrusted); c) Rule 5-1.1(b) (Not all records were preserved for six years and/or produced for inspection); d) Rule 5-1.2(b)(2) (No deposit slips were produced for trust account 0160192732 from October, 1986 to August, 1988); e) Rule 5-1.2(b)(3) (No canceled checks were produced for trust account 0160192732 from October, 1986 to August, 1988); f) Rule 5-1.2(b)(5) (No cash receipts and disbursements journal was provided); g) Rule 5-1.2(b)(6) (Many ledger cards were not produced for inspection); h) Rule 5-1.2(b)(7) (Bank statements were not provided for trust account 0160192732 from October, 1986 to August, 1988); i) Rule 5-1.2(c)(1)a (Bank

reconciliations were not prepared on a current basis for each month. They were prepared by the Respondent's law office for the audit, but none were prepared for account 0160192732 from October, 1986 to August, 1988, nor for twelve months for account 01060101154); j) Rule 5-1.2(c)(1)b. (No monthly comparisons between the reconciled bank balance and the total of the trust ledger cards were provided); k) Rule 5-1.2(c)(2) (No annual listings of unexpended balances were provided); 1) Rule 5-1.2(c)(3) Reconciliations, comparisons, and listings were not retained for at least six years); and m) Rule 5-1.2(c)(4) (No evidence was provided that the bank had been authorized and requested to notify The Florida Bar in the event any trust check is returned due to insufficient or uncollected funds, absent bank error).

Following a Final Hearing on March 20, 1992 regarding the above trust accounting violations (referred to as Count I by the referee) and Respondent's perjury conviction (referred to as Count II by the referee), the referee found Respondent guilty of both Counts. (RR). The referee recommended that Respondent be disciplined by a one year suspension relative to Count I to run consecutive to a three year suspension for Count II retroactive to March 22, 1991. The referee's recommended suspension was for a total suspension of three years. (RR and RR1).

The Florida Bar Board of Governors reviewed the referee's findings and recommendations at its meeting which ended August 1, 1992, and voted to approve the referee's findings of fact and guilt, but to appeal the recommendation as to discipline and seek

disbarment.

The Bar petitions this Court for a review of the referee's recommendation of discipline.

SUMMARY OF THE ARGUMENT

Respondent was convicted of three (3) counts of felony perjury. The referee's recommendation that Respondent receive a three year suspension is an insufficient disciplinary sanction for this misconduct. Suspending Respondent is not consistent with The Florida Standards for Imposing Lawyer Sanctions and case law which indicate that disbarment is the proper discipline for perjury.

Additionally, Respondent has committed numerous trust accounting violations which in and of themselves merit a suspension. When Respondent's cumulative misconduct is viewed together with his prior disciplinary history, disbarment is warranted. Respondent's alcohol, marital and psychological problems are insufficient mitigation to lessen the discipline from disbarment.

The Florida Bar asks that the referee's recommendation of discipline be disapproved and disbarment ordered.

ARGUMENT I

Disbarment rather than a three year suspension is the appropriate sanction for an attorney convicted of three felony counts of perjury.

Respondent's conduct in the instant case clearly warrants disbarment under The Florida Standards For Imposing Lawyer Sanctions and case law. Disbarment is the appropriate discipline under the applicable Standards.

Standard 5.11(a), Failure to Maintain Personal Integrity, states that disbarment is appropriate when a lawyer is convicted of a felony under applicable law, and Standard 5.11(f) states that disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. It is undisputed that Respondent was convicted of three (3) counts of perjury in the Sixth Judicial Circuit of Pinellas County, Florida. Therefore, Respondent's misconduct clearly merits disbarment under Standards 5.11(a) and 5.11(f).

Further, Standard 6.11(a), False Statements, Fraud and Misrepresentation, states disbarment is appropriate when a lawyer, with the intent to deceive the court, knowingly makes a false statement or submits a false document. Respondent intentionally offered false testimony at a deposition and again at trial in the civil case Wilson v. Rocco Builders. Therefore Respondent's

misconduct warrants disbarment under Standard 6.11(a).

Standard 7.1, Violations of Other Duties Owed as a Professional, states that disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public or the legal system. Respondent "deliberately and unequivocally lied under oath". (RR p. 6). "Respondent was acting on his own, and in furthermore, of his own greed and self-serving interest." (RR p. 9). Respondent's misconduct merits disbarment under Standard 7.1. Respondent's dishonest and selfish motive also constitute an aggravating factor under Standard 9.22(b).

In The Florida Bar v. Manspeaker, 428 So. 2d 241 (Fla. 1983), Manspeaker was disbarred for perpetrating a fraud on a client and then giving false testimony under oath to a Bar grievance committee. Manspeaker induced his client to sign a blank warranty deed. Manspeaker or his agent later filled in the blank warranty deeds signed by his client. Manspeaker then delivered a completed warranty deed with his client's signature to a third party. Manspeaker was later requested by his client to return the warranty deeds. Manspeaker delivered to his client a warranty deed which he represented to be the completed deed. Across the face of the deed was the word "void". Manspeaker then testified before a Bar grievance committee and gave false testimony.

In The Florida Bar v. Dodd, 118 So. 2d 17 (Fla. 1960), Dodd

was disbarred for urging several persons, including his clients, to give false testimony in two (2) personal injury actions. The Court in Dodd stated:

> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty. Id. at 19.

Likewise, in The Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1980), Agar was disbarred for allowing a client to perpetrate a fraud upon the court by introducing false testimony. Agar represented the husband in an uncontested divorce. Agar presented the wife to the court as the residency witness. Agar concealed from the court that the witness was the wife, as she was precluded from testifying as a residency witness pursuant to the apparent practice of the judge assigned to the case. Agar knew the witness was the wife and did not inform the court of the fraud. The husband and wife later testified that Agar suggested that the wife falsely represent herself and her relationship with the husband to the court. The Court in Agar reaffirmed the reasoning set forth in Dodd and disbarred Agar. Id. at 19.

In The Florida Bar v. Ryder, 540 So. 2d 121 (Fla. 1989), Ryder was convicted of three (3) counts of perjury in connection with sworn testimony before a Grand Jury and in a trial was disbarred. In The Florida Bar v. Leon, 510 So. 2d 873 (Fla. 1987) former Judge Leon was disbarred after being convicted of perjury in connection with an investigation into ex-parte communications between an

attorney and the court concerning the disposition of a criminal case. Leon improperly secured the alteration of criminal sentences. Leon agreed with another Judge to falsely deny the communications and then later made false statements to the Judicial Qualifications Commission.

In The Florida Bar v. O'Malley, 534 So. 2d 1159 (Fla. 1989), O'Malley was suspended for three years for removing collateral from a safe deposit box and lying under oath as to the whereabouts of the collateral. The Court in O'Malley held that disbarment would have resulted but for O'Malley's showing of the following mitigating factors: marital difficulties, serious alcohol problems, remorse, inexperience in the practice of law (2 1/2 years), restitution of nearly seventy thousand dollars ($70,000.00), and a good reputation for honesty. However, unlike O'Malley, who had only two and one half (2 1/2) years experience in the practice of law, Respondent is an experienced attorney who has been in practice since 1965. Substantial experience in the practice of law is an aggravating factor to be considered under Standard 9.22(i).

The presentation of good character and reputation evidence is not sufficient to justify a discipline less than disbarment where Respondent was convicted of perjury. The Florida Bar v. Ryder, supra. In The Florida Bar v. Forbes, 17 FLW S240 (1992), an attorney plead guilty to fraud in the filing of false information on a loan application and was disbarred despite the lack of a prior disciplinary record and a showing of remorse. Therefore, Respondent's attempt at showing good character and remorse in the

present case is insufficient mitigation to warrant a discipline less than disbarment.

The Referee herein found that the following mitigating factors warranted a discipline less than disbarment: alcohol problems, possible psychological problems, remorse, marital difficulties, and no financial harm to anyone. (RR p. 7).

Respondent claims to have alcohol and psychological problems which contributed to his misconduct. However, Respondent has never sought counseling for his alcohol problem. (TR p. 92 L. 11-16). Respondent also has failed to seek treatment for his psychological problems. Respondent was merely evaluated by a psychologist in 1984 and reevaluated in 1991. There was never any treatment and there were no evaluations for the period between 1984 and 1991. (TR p. 42 L. 2-15).

Respondent further claims that his alcohol problem is a mitigating factor in determining discipline. Respondent must show that his alcohol problem has risen to a sufficient level of impairment to outweigh the seriousness of the misconduct. The Florida Bar v. Shuminer, 567 So. 2d 430, 432 (Fla. 1990). Respondent herein admits to drinking only at night and not being impaired at the time of the perjury. Respondent knowingly and intentionally committed the perjury. (TR p. 70 L 16-25). In The Florida Bar v. Knowles, 500 So. 2d 140, 142 (Fla. 1986), alcoholism was not a sufficient mitigating factor to warrant a discipline less than disbarment where Knowles converted client trust funds for personal use.

Respondent has failed to show sufficient mitigating factors to warrant a discipline less than disbarment.

ARGUMENT II

A felony perjury conviction, when combined with trust account violations and prior disciplinary history, warrants disbarment.

Respondent's felony conviction on three counts of perjury warrants disbarment under The Florida Standards For Imposing Lawyer Sanctions, and case law. In addition, Respondent has committed numerous trust accounting violations and has a prior disciplinary history which exacerbates the misconduct.

When determining the appropriate sanction in a discipline case, the Court considers prior misconduct and cumulative misconduct and deals more severely with cumulative misconduct as opposed to an isolated incident. The Florida Bar v. Greenspahn, 386 So. 2d 523 (Fla. 1980); The Florida Bar v. Welch, 272 So. 2d 139 (Fla. 1972). The Court must consider Respondent's prior discipline as well as Respondent's cumulative misconduct in this matter. Respondent's prior discipline is an aggravating factor under Standard 9.22(a), and an aggravating factor under 9.22(c) for a pattern of misconduct. Respondent received a prior public reprimand for neglect and misrepresentation made in a medical malpractice case. The Florida Bar v. Rightmyer, 488 So. 2d 532 (Fla. 1986). The Court must also consider Respondent's cumulative misconduct. Respondent's perjury conviction, when combined with his trust account violations and prior misconduct merits disbarment

Standard 4.12, Failure To Preserve The Client's Property, states that suspension is appropriate when a lawyer knows or should

know that he is dealing improperly with client property and causes injury or potential injury to a client. Respondent's trust account violations warrant suspension under Standard 4.12.

The use of trust funds for purposes other than those for which they were entrusted is among the most serious offenses an attorney can commit. The Florida Bar v. Breed, 378 So. 2d 783 (Fla. 1979). Absent mitigating factors, disbarment is warranted for misappropriating client funds and failing to maintain adequate trust account records. The Florida Bar v. Newhouse, 539 So. 2d 473 (Fla. 1989); The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986); The Florida Bar v. Harris, 400 So. 2d 1220 (Fla. 1981).

Case law suggests that a distinction exists between cases where a lawyer has deliberately and intentionally committed trust accounting violations and cases where the attorney acted negligently. Even gross negligence may not warrant disbarment where the misappropriation was not intentional or knowing. The Florida Bar v. Weiss, 586 So. 2d 1051 (Fla. 1991). In The Florida Bar v. Adler, 589 So. 2d 899 (Fla. 1991), an attorney was given an eighteen month suspension for commingling his own funds with client trust funds, using trust funds for purposes other than for which they were entrusted, and failing to keep adequate trust account records. Respondent in the instant case had shortages in his trust account, used trust money for his own purposes, commingled trust funds with his own funds, and failed to maintain proper trust account records. (TR p. 68, 69).

On September 8, 1986, a check was issued from Respondent's

trust account to Respondent in the amount of $3,662.04. Again on October 1, 1986, another trust account check in the amount of $5,000.00 was issued to Respondent. Both checks were issued against other client's funds in the trust account. On November 3, 1989, a transfer was made from Respondent's business account in the sum of $8,662.04 to the trust account. Respondent's use of client's funds for personal use is at best gross negligence in the management of his trust account and merits suspension. (R. Bar Exh. #3).

When the trust accounting violations are combined with the perjury conviction and the prior discipline, Respondent's cumulative misconduct warrants disbarment.

CONCLUSION

Disbarment is the appropriate discipline in the instant case. Perjury and trust accounting violations are among the most serious offenses a lawyer may commit and must be dealt with severely. Any mitigation claimed by Respondent is strongly outweighed by the gravity of the misconduct. The Florida Bar requests that this Court approve the referee's findings of fact and recommendation of guilt, but reject the recommended discipline of a three year suspension. It is requested that Respondent be disbarred from the practice of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Joseph McDermott, Attorney for Respondent, 501 1st Avenue North, Suite **701**, St. Petersburg, Florida 33701; and John T. Berry, Staff Counsel, The Florida Bar, **650** Apalachee Parkway, Tallahassee, Florida **32399-2300**, on this 2nd day of Sept., **1992.**

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