047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLES B. CORCES,

Respondent,
_____/

Case No. 78,969

TFB No. 91-11,571(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 referee hearing March 3, 1993.

TR2: Transcript of referee hearing April 22, 1993.

TR3: Transcript of referee hearing June 24, 1993.

RR: Report of Referee dated September 24, 1993.

C.'s Exh.: Complainant's Exhibit.

R.'s Exh.: Respondent's Exhibit.

STATEMENT OF THE CASE AND OF THE FACTS

Without client authorization, Respondent used client trust funds to pay his personal debts.

On or before April 29, 1988, Respondent directed Manufacturer's Bank to debit his client trust account for $6,755.83. The Bank was to issue two (2) checks from that sum to pay Respondent's personal debts at two (2) other banks, and to pay interest on two (2) of his personal loans. (RR, p.2). The Cashier checks were disbursed April 29, 1988. (TR1, p.56, 1.20-25). Respondent's trust account was debited by the bank on May 2, 1988. (C.'s Exh. 11). On April 29, 1988 and on May 2, 1988 Respondent was not entitled to any money from the client trust account. (RR p.2; C.'s Exh. 5). With these disbursements pursuant to the debit memo, Respondent increased the total deficit in his client trust account by May 3, 1988 from $112.98 to $6,868.81. (C.'s Exh. 4). In June, Respondent began to leave earned fees in the trust account to reduce the $6,868.81 deficit created by the unauthorized use of client funds. By July 13, 1988, the overall deficit in the account had been reduced to $1,539.34. The total deficit was finally eliminated by January 23, 1990, over twenty (20) months after the original misappropriation, and over eighteen months after the Respondent first began replacing the client's trust money. (C.'s Exh. 4).

Respondent's office manager/bookkeeper testified at the Final Hearing on March 3, 1993, that the misappropriation of client money from the trust account was due to her clerical error. (TR1, p.29, 1.6-8). On March 3, 1993, she suggested that

when Respondent asked her if there were sufficient funds belonging to the Respondent in the Sun Pharmacy account to cover the debit memo, she looked at the ledger card and noted a balance of over $11,000.00 was available. (TR1, p.38, l.23 - p.39, l.7). However, on April 29, 1988, when the inquiry would have been made, the ledger card reflected that the entire balance in the Sun Pharmacy trust account was not sufficient to cover the debit authorization memo. (RR 2; C.'s Exh.5). The total trust balance was $6,576.68; the fees balance was zero. (C.'s Exh. 5). The referee found it incredible that the office manager would misread a figure that was not in the ledger at that time. (TR3, p.32, l.19 - p.33, l.4). Even if she had misread the ledger card, looking at the total account balance rather than the fee balance, there still would not have been sufficient funds available to cover the debit authorization memo. (RR, p.2-3; C.'s Exh. 5). Further, the ledger card also clearly indicated the amount of money in the account owed to the attorney as fees was zero, and that attorney's fees in the Sun Pharmacy account had consistently been withdrawn the same day or within a few days of when the checks received from Sun Pharmacy were deposited. (RR, p.2; C.'s Exh. 5). Later, there was $11,516.68 in the account, after a trust check for $5,000.00 was deposited on May 3, 1988. (C.'s Exh. 5).

On April 22, 1993, the second time the office manager testified, the office manager altered her version of what had caused the misappropriation. She then testified that she thought there was enough money belonging to Respondent in the trust

account to cover the debit memo because she had erroneously added an undeposited April 21, 1988 Sun Pharmacy Account check to the balance of escrow funds indicated on the ledger card, thereby reaching the approximately $11,000.00 figure she relied upon, way over what was needed to be covered. (TR 2, p.100, l.10 - p.101, l.9). This second version of what occurred was found by the referee to be incredulous. (RR, p.3). The office manager handled the collection account, and was the only staff member doing so. She was aware of the percentage of monies collected to which Respondent was entitled, had recently placed the zero balance on the ledger card and had done the account balancing. (RR 3; TR1, p.19, l.2 - 21). The total fees due to Respondent prior to the deposit of the Sun Pharmacy check dated April 21, were clearly shown on the ledger card as zero. Further, the attorney's fee from the April 21, 1988 check (deposited May 3, 1988) was only $1,666.66, a fact well known to the office manager. The referee found Respondent's defense to be incredible. (RR, p.3).

Respondent's bookkeeper also testified that she recorded the debit memo on the ledger card, and the charge against the Sun Pharmacy account, or assumes she did, as soon as the debit memo was received from the bank. (TR1, p.31, l.22 - p.31, l.8). However, that debit memo was <u>never</u> recorded on the ledger card. (C.'s Exh. 5). When faced with this evidence at trial, she then testified that to the best of her recollection, this was because

> "I don't know that we didn't catch it before the debit memo came in and then it was done through another debit credit memo through the bank to transfer it back from the

> general account into that. So then there was never a transaction made on this because it all balanced anyway..... therefore there was no need to reflect the debit memo on the ledger card." (TR1, p.44, l.4-9).

However, no such transfer of fees occurred. (C.'s Exh. 5; C.'s Exh. 4).

The office manager/bookkeeper also testified that she always knew what was in the trust accounts, knew if there were deficits, and immediately brought deficits to Respondent's attention. (TR1, p.34, l.1-17). However, the account records during the period of misappropriation did not reflect the actual results of the reconciliations, since they did not indicate the deficit in the trust account, nor did they indicate the debit memo. The Sun Pharmacy ledger card did not show the debit memo, the deficit created by the misuse of client money, nor did it indicate the application of fees to reduce the deficit. Respondent's trust records also did not address steps taken to reconcile the deficit (RR3, C.'s Exh. 5). The referee stated that "this is not how clerical errors are addressed under any accounting system or bookkeeping practice. This is, however, how misappropriated funds are surreptitously restored." (RR, p.4).

The office manager also testified that she discovered the erroneous disbursement perhaps one to two months after it occurred, and brought it to Respondent's attention immediately, (TR1, p.24, l.10 - p.25, l.23), and that thereafter the money was replaced. (TR1, l.5 - l.13). Respondent testified in the discipline phase that they knew about the deficit within a matter of days. (TR3, p.82, l.1-6). All but $1,539.34 of the misused

funds was replaced by leaving fees in the trust account on June 22nd, July 8th, and July 13th. (C.'s Exh. 4).

During The Florida Bar audit, the Bar Auditor asked the office manager about three (3) disbursements against Sun Pharmacy funds shown on the ledger card, as the auditor could not locate those checks during his analysis. (TR1, p.60, 1.12 - p. 61, 1.17). Actually, the disbursements indicated on the ledger card reflected fees left in the account to cover the deficit. That was clear from the bank statement and the cash receipts and disbursement journal. The Florida Bar Auditor noted that during the audit when he asked the office manager/bookkeeper about the apparent deficit, at no time was he advised about any mistake, nor that there had been a deficit in the trust account during the time audited, even when the Sun Pharmacy account was specifically discussed. (TR 1, p.60, 1.18 - p.61, 1.12; p.67, 1.5-12; p.70, 1.21-24). The bookkeeper also testified that, pursuant to instructions from Respondent, she disclosed the debit memo problems to Pedro Pizarro, Florida Bar Auditor and advised him that the Sun Pharmacy money had been used by accident. (TR1, p.27, 1.9-21; TR1, p.42, 1.6 - p.43, 1.8). Mr. Pizarro unequivocally testified that was not true. He did ask her about the debit memo reflected on the firm's bank statement, but never got an explanation. (TR1, p.55, 1.1-18).

In the final argument on discipline, Respondent attempted to bolster the incredible testimony of his office manager by presenting testimony as to her reputation in the community for truth and veracity. (TR3, p.31, 1.9-p.35, 1.3; TR3, p.42, 1.12 -

p.43, 1.4; TR3, p.53, 1.9-13; TR3, p.55, 1.4-17). He did not correct her obviously false testimony. In fact the bookkeeper, Ann Akonom, was recalled by Respondent and asked if she testified truthfully on her two (2) previous appearances. She said she did. (TR3, p.65, 1.20 - p.67, 1.20).

After a finding of guilt, in the Discipline Hearing on June 24, 1993, Respondent testified for the first time. Respondent advised that he knew of the trust account problem within a matter of days after the misappropriation occurred (TR3, p.82, 1.4-9, p.89, 1.6-9), and knew that it was going to come to light after he received notice of the impending Bar audit (TR3, p.77, 1.14-16). Further, he indicated he did not try to hide anything from the Bar. (TR3, p.83, 1.13-14). He attributed his failure to notify The Florida Bar in 1988, 1989, and 1990 of the trust account problem to "bad decisions" and "my decision it would be remedied and never come to light." (TR3, p.89, 1.22 - p.90, 1.2). In 1988, 1989 and 1990, Respondent certified on his Florida Bar dues statement that his trust accounts were in substantial compliance with Rules Regulating The Florida Bar. When asked whether he had actually believed his trust accounts were in substantial compliance in 1988, 1989 and 1990, Respondent answered that "substantially all of my accounts were, but I should have brought it to the Bar's attention." (TR3, p.90, 1.6 - p.91, 1.16).

The Referee noted that from a careful examination of the numerous exhibits involving bank records and the client's trust account records, the conclusion was inescapable. The

misappropriation was an intentional act on the part of the Respondent and not a clerical error on the part of his office manager/bookkeeper. (RR p.4).

In the Report of Referee, it is recommended that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: Rule 4-1.15(a) (commingling); Rule 5-1.1 (money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose); Rule 5-1.1(a) (any bank or savings and loan association account maintained by an attorney is and shall be clearly labeled and designated as a trust account); Rule 5-1.1(b) (an attorney shall preserve the records of all bank and savings and loan association accounts pertaining to clients' funds for at least six years); Rule 5-1.1(d) (Interest On Trust Accounts (IOTA) program); Rule 5-1.2(b)(1) (a separate bank account shall be maintained and clearly labeled and designated as a "trust account"); Rule 5-1.2(b)(3) (original canceled checks, all of which must be numbered consecutively, must be maintained); Rule 5-1.2(b)(5) (a separate cash receipts and disbursements journal must be maintained); Rule 5-1.2(b)(6) (a separate file or ledger with an individual card or page for each client or matter must be maintained); Rule 5-1.2(b)(7) (all bank or savings and loan association statements for all trust accounts must be maintained); Rule 5-1.2(c)(1)ab, (2), (3) (bank reconciliations must be maintained; monthly comparisons and annual listings must be maintained; Rule 3-4.3 (commission of an act which is unlawful or dishonest); Rule 4-8.4(b) (criminal act reflecting

adversely on the lawyer's fitness to practice); and Rule 4-8.4(c) (dishonesty).

The referee noted that there was no client complaint in this case nor loss to the client. All funds involved were fully restored prior to the Bar audit. The referee also noted that the audit indicated this was an isolated act discovered long after the client was made whole. (RR p.4).

The Report of Referee was issued on September 24, 1993. He recommended a one year suspension and taxed costs against the Respondent. The Board of Governors considered the case at their meeting ending December 10, 1993, and voted to seek disbarment. A Petition for Review of Referee's Report was submitted December 10, 1993 by The Florida Bar. Respondent's cross petition was filed December 28, 1993.

SUMMARY OF ARGUMENT

Respondent's intentional misappropriation of client trust money, even when the money was returned prior to The Florida Bar's involvement, warrants disbarment. Given that the misappropriation was followed by presentation of false testimony to the referee, and to The Florida Bar auditor, and by Respondent's submission to The Florida Bar of false dues statements certifying that his trust account was in substantial compliance with Rules Regulating Trust Accounts, disbarment is clearly the appropriate discipline.

ARGUMENT

Respondent knowingly and without client authorization used client trust money to pay two (2) of his personal loans. Prior to or shortly after he directed the bank to debit his client trust account and issue checks to his debtors, he contacted his office manager to determine if there were sufficient funds in trust for the Sun Pharmacy account to cover the payments. There were not. None of the Sun Pharmacy trust account money on the date of inquiry belonged to Respondent. By causing the client trust account to be debited, Respondent created a trust account deficit of $6,868.81. With Respondent's knowledge, the misappropriated trust money was replaced over an eighteen month period by Respondent leaving some of his fees in the account as they were earned.

When Respondent was audited, an attempt was made to conceal the misuse of client money. Throughout the final hearing in the instant case, including during the discipline phase, false testimony was presented by Respondent in an attempt to conceal that the misappropriation was intentional.

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

the mitigating evidence presented. Id.

This Court makes a distinction between instances where the lawyer's conduct is intentional and deliberate, and cases where the lawyer acts in a negligent or grossly negligent manner. The Florida Bar v. Neu, 597 So. 2d 266, 269 (Fla. 1992). Therefore, one important factor in determining the discipline in the instant case is the presence or absence of intent. There is no credible evidence to support Respondent's position that the money was misused due to an error by his office manager/bookkeeper. Respondent needed money to pay personal debts, and "borrowed" it from trust. Then with Respondent's knowledge, the money was gradually replaced over a period of eighteen months. Respondent did replace the money converted before The Florida Bar audit was initiated. Nevertheless, as the Referee found, the misappropriation was an intentional act, and the money was surreptitiously restored to conceal the misuse of client money.

Based on Respondent's intentional conversion, and even if there were only isolated acts of misrepresentation to conceal the theft, disbarment, or at the very least a more substantial suspension, would be warranted. Similar facts of conversion were considered by The Florida Supreme Court in The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992). MacMillan was acting as a guardian for a minor, and in that capacity transferred $4,000.00 from the guardianship account to his personal account without providing notice to the court or to the child's parent. On his own initiative, he reimbursed the money to the guardianship account within two weeks of the transfer, but in filing the

return of guardian of property with the court, he did not disclose the use of the money. This Court found that the transfer of funds, and the failure to disclose that transfer, were intentional. In determining the appropriate discipline, the following mitigating factors were considered: no prior discipline record, cooperation, the attorney's good reputation, and the good faith effort to make restitution. As aggravating factors the referee considered: substantial experience in the practice of law, dishonest motive, the cover-up in the filing of the return of guardian of property, and a pattern of misconduct.

In MacMillan, The Florida Supreme Court noted that under Florida Standards for Imposing Lawyer Sanctions, "Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." Further, Standard 6.11 of Florida Standards for Imposing Lawyer Sanctions was cited in MacMillan for the proposition that disbarment is called for when a lawyer knowingly submits a false document with the intent to deceive a court. After noting that disbarment was presumptively the appropriate discipline for the type of misconduct present in MacMillan, this Court pointed out that presumption could be rebutted by various acts of mitigation, such as cooperation and restitution. This Court supported the Referee's recommendation of a two (2) year suspension.

There are significant similarities between The Florida Bar v. MacMillan and the instant case. Like MacMillan, Respondent misused money from his client's trust account for his own personal purposes without notifying the client. Further,

misrepresentation occurred in both cases.

There are also some similarities in mitigating circumstances. In both MacMillan and the instant case, there is no indication that it was the intent of the attorney involved to permanently deprive their client of trust money, and the money was returned prior to involvement by The Florida Bar.

But unlike MacMillan, during the Referee proceedings in the instant case, the Respondent presented evidence with the intention of creating a false impression that the misappropriation was unintentional and caused by a bookkeeper's error. In addition, during the investigation by The Florida Bar, falsified records were presented to the Bar auditor in an attempt to conceal the theft. However, unlike MacMillan, Respondent did not cooperate with The Florida Bar by being candid during the investigation.

Also, many of the aggravating circumstances are similar. Like MacMillan, Respondent has substantial experience in the practice of law, engaged in a pattern of misconduct, and used the money due to a dishonesty motive, for his own personal purposes.

The most telling difference between MacMillan and the instant case is the extensive incredible misrepresentation presented by Respondent to the referee through the office managers' trial testimony - the attempt to conceal that the misuse of client money was intentional. The misrepresentations in the instant case included false testimony that the Florida Bar auditor was advised of the deficit; failure to record the debit memo on the ledger card; creating a falsified ledger card that

suggested trust money was disbursed for fees when it was not; false claims that the bookkeeper caused the misuse of client funds by reading the wrong column on the ledger card; falsely claiming the error was due to adding an undeposited check to a trust balance rather than to the zero in the fees balance column and erroneously believing the total was fees; trying to present witnesses to bolster the bookkeeper's credibility even after her testimony was shown to be incredulous and the Referee had so found; and Respondent's filing three different dues statements certifying the trust account was in substantial compliance when he knew there were deficits in the trust account due to his misappropriations. The misappropriation of client money, coupled with the extensive efforts to conceal, the presentation of false testimony, and with the false Bar dues statements, makes disbarment the appropriate discipline.

Certainly, a major aggravating factor in the instant case is the false testimony noted above that was presented 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, 622 So. 2d 465, 467 (Fla. 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, and falsely testified that he had restored misappropriated funds. He had trust account shortages that had reached 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; his mother's illness; financial obligations which contributed to his emotional state; personal problems; and a timely good faith effort at restitution. This Court reiterated its prior position in The Florida Bar v. Shanzer, 527 So. 2d 1382 (Fla. 1991) that the Court cannot excuse an attorney's use of client funds to solve life's problems. After pointing out the absence of evidence of mental, alcohol or drug problems impairing the lawyer's judgment so as to diminish culpability, this Court ordered Graham be disbarred. Graham, 605 So. 2d at 359. The disbarment was seen as 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 presentation of false testimony ("incredible" testimony), must likewise be grounds for disbarment. Attorneys who present witnesses who lie under oath on the attorney's

behalf, who do not correct the record and in fact try to bolster the testimony, should not be subject to any less sanction than the attorney who testifies falsely.

Presentation of false witness testimony was considered by this Court in The Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1981). The referee found that Agar "did (1) arrange, either actively or passively, for a witness to falsely testify before a court of competent jurisdiction, and (2) presented or called a witness on behalf of his client who he had good reason to know would falsely testify before a court of competent jurisdiction, and (3) as an officer of such court failed to immediately notify the judge of that court of such false testimony or in the alternative to withdraw his prayer for relief."

Agar later entered a nolo contendere plea to a misdemeanor offense of solicitation to commit perjury. The Court noted "it is clear from the record that Agar knew the testimony in question on behalf of his client was false and that he did nothing to reveal the fraud to the court. It matters not, despite Respondent's arguments to the contrary, whether the testimony is capable, in and of itself, of affecting the outcome of the case in question. What is relevant is that respondent, by his own admission, allowed his client to perpetrate a fraud upon the court and, according to the testimony of his client and the false witness, was the one who suggested the fraud in the first instance." Id. at 406. Citing Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960), this Court reiterated that "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." Agar, supra. The Court pointed out that the general rule of this Court is strict discipline against deliberate, knowing elicitation or concealment of false testimony. Id.

The Respondent in the instant case, directly and through his bookkeeper, attempted to conceal his intentional misuse of client funds. On his Florida Bar dues statement, he certified that his trust accounts were in substantial compliance even though he knew he had a deficit due to misuse of client funds. His bookkeeper's testimony was "incredible", and Respondent had to know the testimony was false. Even after that testimony was presented and found by the referee to be unworthy of belief, through counsel Respondent tried to bolster his witness' credibility. He did not correct her false explanations regarding how her alleged errors were the cause of the misuse of client money. Respondent's misuse of client trust money, coupled with the persistent effort to deceive the court, warrants disbarment.

The Florida Standards for Imposing Lawyer Sanctions also indicate disbarment is the appropriate discipline. Standard 4.11 states: Disbarment is appropriate when a lawyer intentionally or knowingly converts client property, regardless of injury or potential injury. Standard 7.1 states: 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.....and causes serious or potentially serious injury to....the legal system.

In mitigation, the referee notes that respondent fully refunded the misappropriated funds prior to the Bar audit, that the misappropriation was an isolated incident, and that there was no client complaint nor loss to a client. However, the mitigation does not overcome the seriousness of respondent's conduct, and is far outweighed by aggravating circumstances.

Standard 9.22, factors which may be considered in aggravation, include the following, which are relevant to Respondent's conduct: (b) dishonest motive; (f) submission of false evidence, statements, or other deceptive practices during the disciplinary process; (i) substantial experience in the practice of law. Respondent has practiced law for thirteen (13) years and received a Master of Law in taxation in 1981. (TR3, p.70, l.22 - p.71, l.6).

Respondent intentionally misappropriated client money, presented false testimony during the referee proceedings and had previously through his bookkeeper presented false evidence to The Florida Bar Auditor in an attempt to conceal his conduct. Misappropriation and presenting false evidence 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 intentionally misappropriated client money, presented false testimony during the referee proceedings and had previously presented falsified records to The Florida Bar Auditor in an attempt to conceal his misconduct. Misappropriation and presenting false evidence are two of the most serious offenses an attorney can commit and clearly demonstrate Respondent's unfitness to practice. The appropriate discipline 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 Anthony Gonzalez, Counsel for Respondent, at 4314 Gainsborough Court, Tampa, Florida, 33624, this 07 day of January, 1994.

Thomas E. DeBerg
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