IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO: 80,963

vs.

TERRANCE PATRICK MCNAMARA,

Respondent.

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**RESPONDENT'S ANSWER BRIEF**

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## PRELIMINARY STATEMENT

The following abbreviations and symbols are used in this brief:

| | | |
|---|---|---|
| Comp. Br. | = | Complainant's Initial Brief |
| R.R. | = | Report of Referee |
| TR. | = | Transcript of June 10, 1993 hearing before Referee |

## STATEMENT OF THE FACTS AND OF THE CASE

In addition to the facts set forth by complainant, respondent offers the following facts. The evidence reflected that respondent had been practicing only four (4) years at the time of the misconduct and had been a solo practitioner for two (2) years in a struggling practice. [TR. 7]. Respondent did not intend to permanently deprive any client of any money or property. [TR. 8]. As a result of the circumstances surrounding this grievance, respondent voluntarily closed his practice in January, 1992. [TR. 7]. Thereafter, respondent repaid the client as soon as he was able. [TR. 9]. At the final hearing before the referee, respondent expressed remorse and acceptance of responsibility for his actions. [TR. 8].

## SUMMARY OF ARGUMENT

The referee below recommended a three (3) year suspension while the complainant argues disbarment is the appropriate sanction. The cases cited by complainant are far more egregious and factually dissimilar to the case below. The referee's recommendation is supported by the past decisions of this Court and The Florida Standards For Imposing Lawyer Sanctions and should be upheld.

## ARGUMENT

**THE REFEREE'S RECOMMENDATION OF A THREE (3) YEAR SUSPENSION IS SUPPORTED BY THE FACTS AND MITIGATION OF THIS CASE AND THE PAST DECISIONS OF THIS COURT.**

The referee recommended a three (3) year suspension retroactive to the date of respondent's voluntary closure of his office in January, 1992. [R.R. at 2]. The referee took note of the fact that respondent had made restitution in July, 1992, [R.R. at 2], five (5) months prior to the filing of the complaint in December, 1992.

Complainant argues that disbarment is the appropriate sanction in this case relying in large part on the fact that restitution was made after the complainant sought the emergency suspension of respondent. Complainant, citing The Florida Bar v. Nunn, 596 So.2d 1053, 1054 (Fla. 1992), insists that repayment of client funds does not constitute restitution when made after the commencement of charges against the attorney. [Comp. Br. at 7]. Complainant's reliance on Nunn is a patent misreading of this Court's decision therein.

In Nunn, the respondent made complete restitution after the final disciplinary hearing. (emphasis added). The referee found the failure to make restitution at an earlier date an aggravating factor. Nunn argued that restitution should be considered in mitigation, not aggravation. The Court, in rejecting Nunn's claim, stated simply that it could not say that the referee erred in treating restitution as he did. at 1054. The Court did not state,

as complainant suggests, that repayment after commencement of charges does not constitute restitution. In fact, in the past this Court has indicated that restitution is an important factor in arriving at the proper discipline. In The Florida Bar v. McShirley, 573 So.2d 807, 809 (Fla. 1991), this Court held that failure to take into consideration any mitigating factors including restitution would be tantamount to adopting a rule of automatic disbarment and do little to further an attorney's incentive to make restitution.

In the case at bar, the referee did not find the restitution was "forced or compelled" as complainant urges. Rather, the referee found that restitution was made "coincidentally" with the complainant's request for emergency suspension. [R.R. at 2]. While the referee did not specify whether she considered the restitution as mitigating, to the extent the recommendation of discipline reflects such treatment, it is proper.

Furthermore, other factors present below were proper to treat as mitigating considerations, despite complainant's insistence that only one mitigating factor is arguable. Rule 9.32(a) of the Florida Standards For Imposing Lawyer Sanctions lists, inter alia, the following factors which are supported by the record below; absence of a prior disciplinary record; timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude towards proceedings; inexperience in the practice of law; and remorse.

Nevertheless, complainant argues disbarment citing several cases, none of which is factually similar to the case at bar. In The Florida Bar v. Tarrant, 464 So.2d 1199 (Fla. 1985), upon which complainant relies, the respondent misappropriated the funds of two clients over a period of time. Additionally, Tarrant abandoned his law practice after accepting a fee from a client for whom no work was performed. Accordingly, at least three (3) clients were prejudiced or damaged and restitution was not made.

Moreover, Tarrant did not even request this Court review the referee's recommendation. Given, the pattern of misconduct, lack of restitution or any other mitigating factor, and respondent's obvious indifference to the proceedings, this Court disbarred Tarrant.

The complainant also cites The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991). In McClure, respondent was charged with and found guilty of three counts of misconduct. Two counts related to McClure's wrongful withholding of funds from two separate estates, the third count involved McClure's failure to properly perform trust accounting practices and procedures. McClure was disbarred. Once again, a pattern of misconduct was present as opposed to the facts below.

Complainant next cites The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991). In Shanzer, the respondent also displayed a pattern of misconduct in that he was found guilty of five (5) counts of misappropriation and shortages in his trust account. Moreover, Shanzer did not properly maintain trust accounting

records and improperly kept the interest on his trust accounts for his personal use. Furthermore, restitution had not been made in full and Shanzer was disbarred.

Finally, complainant relies on The Florida Bar v. Smiley, 18 F.L.W. S397 (July 1, 1993). Smiley, too, exhibited a pattern of misconduct including misappropriating $10,000.00 from a church he represented; improper maintenance of trust records as well as false certification to The Florida Bar concerning those records; false certification of his residency to avoid creditors; forgery or causing another to forge a signature on his bankruptcy petition; and lying under oath at his disciplinary hearing. Clearly, Smiley cannot be favorably compared to the facts below.

Accordingly, the cases relied upon by complainant in urging disbarment involve misconduct substantially more egregious than respondent's conduct below and are factually inapposite. Conversely, the referee's recommendation of suspension is supported by both the Standards For Imposing Lawyer Sanctions (hereinafter Standards), and prior decisions of this Court.

Rule 4.12 of the Standards states that "absent . . . mitigating circumstances [s]uspension 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".

Consistent with this Standard this Court has previously suspended attorneys who have knowingly dealt improperly with client property.

In The Florida Bar v. Stark, 18 F.L.W. S206 (April 1, 1993),

the respondent was found to have a trust shortage of approximately $17,000.00, failed to maintain proper trust records, and subsequent to his temporary suspension continued to practice law in contravention of this Court's order. Stark made restitution after the commencement of disciplinary proceedings. Citing Stark's cumulative misconduct, The Florida Bar urged disbarment. However, noting several mitigating factors, including restitution, the Court imposed a three year nunc pro tunc suspension, to the date of Stark's temporary suspension.

In The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991), the respondent was found guilty of trust shortages over a period of six (6) years. The shortages totalled $27,000.00. McShirley admitted to using the funds for personal real estate transactions and law office operating expenses among other things. Notwithstanding the repeated "dipping into" the trust account, this Court imposed a three year suspension in recognition of the mitigation present.

Similarly, in The Florida Bar v. MacMillan, 600 So.2d 457 (Fla. 1992), the respondent was found guilty of a pattern of misappropriation and other misconduct including a cover up to the court in accounting for guardianship funds he had coverted to his own use. The court found that MacMillan's misappropriation of $4,000.00 in guardianship funds and his failure to disclose the transfers in the guardian's report were intentional acts. However, this Court imposed a two year suspension citing four mitigating factors including restitution, no prior disciplinary record and a

cooperative attitude towards the proceedings. These same mitigating factors were present below.

Another recent case of this Court supports the imposition of a suspension in the case at bar. In The Florida Bar v. Rosen, 17 F.L.W. S684 (November 5, 1992), the offending attorney was found guilty of misusing funds from her trust account by issuing seven checks totalling over $18,000.00 that were subsequently dishonored for insufficient funds. Additionally, Rosen failed to produce trust records as requested by The Florida Bar. Furthermore, Rosen was on probation with The Florida Bar at the time of these offenses as a result of her prior suspension based upon her felony convictions for grand theft and breaking and entering. Citing Rosen's cumulative misconduct, this Court imposed a two year suspension.

Finally, the respondent cites The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992), in support of upholding the referee's recommendation of suspension. In Neu, the respondent withdrew over $52,000.00 from client trust accounts over a period of eighteen (18) months. Neu took $40,000.00 from a guardianship account, the majority of which he invested in a music venture for which he had not sought, nor received, court approval. Moreover, Neu used guardianship funds to pay personal taxes to the Internal Revenue Service in excess of $5,600.00. Finally, Neu's trust account earned over $6,300.00 during a two year period which Neu failed to remit to The Florida Bar Foundation.

The court found as here, that Neu did not intend to

permanently deprive or convert his client's funds. Neu was suspended by this Court for six (6) months as a result of this cumulative misconduct.

The case below is substantially more deserving of leniency than the facts in Stark, McShirley, MacMillan, Rosen, or Neu. In each of the aforementioned cases the accused attorney engaged in a pattern of misconduct or cumulative misconduct; whereas Respondent's misconduct was a single incident. Also, the usage or shortages of funds in McShirley, Neu, Rosen, and Stark was far greater than the shortages of respondent below. Moreover, in Rosen, the accused was guilty of prior misconduct, i.e., felony convictions.

The facts below require the imposition of a suspension rather than disbarment. Respondent was a young, single practitioner who had a struggling practice. Respondent's misconduct was an isolated incident and restitution has now been made. Moreover, respondent voluntarily closed his practice in January, 1992 and has expressed remorse. Therefore, the referee's recommendation of a three year suspension, nunc pro tunc, to January, 1992 should be upheld.

## CONCLUSION

The respondent, an inexperienced, single practitioner, was found guilty of an isolated instance of misconduct which he has rectified by making restitution. The Standards For Imposing Lawyer Sanctions and the past decisions of this Court involving similar facts dictate the imposition of a lengthy suspension. Accordingly, the recommendation of the referee of a three (3) year suspension is proper and should be imposed by this Court.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery this 9 day of September, 1993, to: David R. Ristoff, Esquire, Branch Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607.

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