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IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,

Complainant,

v.

TERRANCE PATRICK MCNAMARA

Respondent.
----------/

CASE NO. 80,~~693~~

TFB No. 92-11,031(6D)

INTITIAL BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the Respondent, Terrance Patrick McNamara, will be referred to as the "Respondent". The Florida Bar will be referred to as "The Florida Bar" or "The Bar". "RR" will refer to the Report of Referee. "TR. I" will refer to the transcript of the final hearing held on May 17, 1993. "TR. II" will refer to the transcript of the disciplinary hearing held on June 10, 1993.

STATEMENT OF THE FACTS AND OF THE CASE

On June 17, 1992, The Florida Bar filed a Petition for Emergency Suspension, alleging that the Respondent had misappropriated client funds. By Order dated July 8, 1992, The Supreme Court of Florida directed Respondent to file a response to the Petition by July 23, 1992. The Respondent filed his response to the Petition on July 23, 1992. On that same day, the Respondent paid back the money which he had misappropriated. This Court denied The Bar's Petition for Emergency Suspension.

On or about December 22, 1992, The Florida Bar filed its Complaint against the Respondent. The uncontested facts before this Court are as follows. (TR.I, p.3, L.4, L.23, and p.4, L.2). In or about September of 1991, Respondent represented U.S. Yacht Cushion, Inc. During Respondent's representation of U.S. Yacht Cushion, Inc., Hunter Marine Corporation entered into negotiations to purchase the assets of U.S. Yacht Cushion, Inc. In connection with the negotiations, on September 13, 1991, Hunter Marine Corporation delivered a check in the amount of $5,000.00 to Respondent. The check delivered to Respondent was accompanied by a letter from Hunter Marine Corporation's attorney, Mr. J. Peter Sokol, advising Respondent that the $5,000.00 deposit was to be held in escrow by Respondent, or in the alternative, used to lessen U.S. Yacht Cushion, Inc.'s tax obligation. On or about September 13, 1991, Respondent informed Mr. Sokol that he intended to cash the check for the purpose of offering the funds to the Internal Revenue Service as authorized by the letter received with the

$5,000.00 deposit. Respondent later indicated to the parties involved that the Internal Revenue Service did not accept the proffered payment of $5,000.00.

The negotiations between U.S. Yacht Cushion, Inc. and Hunter Marine Corporation concluded without an agreement being reached. Respondent failed to place the $5,000.00 deposit in his trust account. Respondent instead converted the $5,000.00 to his personal or office use.

On March 8, 1993, Respondent's deposition was taken. During the course of the deposition, the Respondent invoked the Fifth Amendment privilege against self-incrimination.

At a hearing before the Referee on May 17, 1993, the Respondent did not contest the charges and the Referee made a formal finding of guilt. (TR.I p.3, L.4, L.23 to p.4, L.2).

Accordingly, the Referee found Respondent guilty of the violations set forth in the Complaint as follows: Rule 3-4.3 (the commission by a lawyer of any act which is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline); Rule 3-4.4 (the commission of a felony or misdemeanor); Rule 4-1.15(a) (A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation); Rule 4-1.15(b) (upon receiving

funds or other property in which a client or a third person has an interest, a lawyer shall promptly notify the client or third person except as stated in this Rule or otherwise permitted by law and by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property if the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property); Rule 4-1.15(c) (when in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated by the lawyer as trust property); Rule 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 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). (RR, paragraph III).

On June 10, 1993, the disciplinary phase of the proceedings was held and the Respondent testified for the purpose of mitigation. The Respondent did not offer any explanation as to why he had converted the money to his own use, but did admit that he had knowingly done so. (TR.II, p.10, L.18-22).

On July 9, 1993, the Referee submitted a Report of Referee recommending that the Respondent be suspended for thirty-six (36) months, retroactive to January 1992 based on Respondent's testimony

that he voluntarily ceased the practice of law in January 1992. (TR.II, p.7, L.3-4).

At its meeting which ended July 22, 1993, The Florida Bar's Board of Governors reviewed The Report of Referee and voted to seek disbarment in this matter.

SUMMARY OF ARGUMENT

In September of 1991, the Respondent received $5,000.00 that was to be held in escrow, or in the alternative, used to satisfy his clients' obligation to the Internal Revenue Service. The Respondent knowingly converted the $5,000.00 to his own use. The Referee's Recommendation of a thirty-six (36) month suspension is not a sufficient sanction for such misconduct. Furthermore, the recommended discipline neither achieves the purpose for which disciplinary sanctions are ordered by this Court, nor is the recommendation consistent with current standards for imposing lawyer sanctions.

Therefore, The Florida Bar asks this Court to disapprove the Referee's recommendation of a thirty-six (36) month suspension and disbar Respondent from the practice of law.

ARGUMENT

I. WHETHER DISBARMENT IS THE APPROPRIATE SANCTION RATHER THAN THE THIRTY-SIX (36) MONTH SUSPENSION RECOMMENDED BY THE REFEREE FOR AN ATTORNEY WHO KNOWINGLY AND INTENTIONALLY MISAPPROPRIATES CLIENT FUNDS?

A thirty-six (36) month suspension is an insufficient discipline for the Respondent's conversion to his own use of $5,000.00 of client funds. This Court has stated 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 instant case, the Respondent converted client funds to his own use from September 1991 until July 1992. According to Standard 4.11, of the Florida Standards for Imposing Lawyer Sanctions, absent aggravating or mitigating circumstances, disbarment 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". Under Standard 9.22(b) of the Florida Standards for Imposing Lawyer Sanctions, a dishonest or selfish motive is an aggravating factor that may justify an increase in the degree of discipline to be imposed. Respondent in this case converted the money to his own use instead of complying with his client's wishes that the money be held in escrow or used to pay the Internal Revenue Service.

The factors which may be considered in mitigation are set forth in Standard 9.32 of the Florida Standards for Imposing Lawyer Sanctions. One factor that might be considered in mitigation is

that the Respondent made restitution. Standard 9.32(d), of the Florida Standards for Imposing Lawyer Sanctions states as mitigation, a "timely good faith effort to make restitution ....." (emphasis added). However, the Respondent did not return the money that he misappropriated from his client until July 23, 1992, the last date by which he had been ordered to respond to The Bar's Petition for Emergency Suspension. This Court has held that repayment of client funds converted to an attorney's use did not constitute restitution when made after the commencement of charges against the attorney, because the timing of the restitution indicated that the attorney "made full restitution with these proceedings, rather than the well being of his client, in mind." The Florida Bar v. Nunn, 596 So. 2d 1053, 1054 (Fla. 1992). In the case at bar, as in Nunn, the Respondent's repayment of the funds was in response to the disciplinary proceedings. According to Standard 9.4(a) of the Florida Standards for Imposing Lawyer Sanctions, forced or compelled restitution should not be considered as either an aggravating or mitigating factor.

The only arguable mitigating factor in the Respondent's case is the absence of a prior disciplinary record (pursuant to Standard 9.32(a) of the Florida Standards for Imposing Lawyer Sanctions). However, the Respondent had only practiced law for four (4) years.

Recent caselaw also supports the Bar's position that disbarment is appropriate for the Respondent's misconduct in this case. In The Florida Bar v. Tarrant, 464 So. 2d 1199 (Fla. 1985), Tarrant converted to his own use approximately $5,000.00 from two

real estate closings. Tarrant also received approximately $300.00 from another client and failed to pursue any action. Tarrant was disbarred for his actions.

In The Florida Bar v. McClure, 575 So. 2d 176 (Fla. 1991), this Court found that McClure wrongfully withheld funds from two estates and failed to perform trust accounting procedures as the rules required. McClure was disbarred.

In The Florida Bar v. Shanzer 572 So. 2d 1382 (Fla. 1991), Shanzer admitted to violating trust account record-keeping requirements, retaining interest on trust accounts for personal use, misappropriating funds, and for shortages in his trust accounts. Shanzer argued that his emotional problems during the nine (9) months which spanned his defalcations, his full cooperation with The Bar, his remorse, rehabilitation and the payment of restitution mitigated his conduct. Shanzer was disbarred.

In a very recent case, The Florida Bar v. Smiley, 18 F.L.W. S397, by order dated May 13, 1993, Smiley was given $10,000.00 to hold in trust to pay an anticipated Internal Revenue Service assessment. However, Smiley used the money to pay his office expenses and did not make full restitution until after the Bar's entry into the case. In addition, Smiley falsely certified that he kept all required trust records, and his representation of a family in bankruptcy proceedings caused them to lose their home. Smiley was disbarred for his actions.

"In the hierarchy of offenses for which lawyers may be

disciplined, stealing from a client must be among those at the very top of the list." The Florida Bar v. Shuminer, 567 So. 2d 430, 432-433 (Fla. 1990). Although this Court has sanctioned attorneys who engaged in negligent commingling of trust funds less severely than those who knowingly misappropriated funds, Standard 4.11 of the Florida Standards for Imposing Lawyer Sanctions clearly indicates that "disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." In the instant case, the Respondent intentionally and knowingly converted client funds to his own use.

The only arguable mitigating factor for the Respondent is a lack of a prior disciplinary record in his four (4) years of practicing law. However, the aggravating factor of a dishonest or selfish motive in the intentional and knowing theft of client funds outweighs the mitigation. Accordingly, the Respondent should be disbarred.

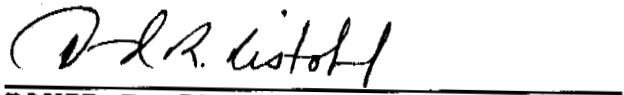
CONCLUSION

The issue before this Court is whether disbarment is the appropriate sanction rather than a three (3) year suspension for an attorney who converts to his own use $5,000.00 of client funds.

In accordance with recent caselaw and the Standards for Imposing Lawyer Sanctions, a three (3) year suspension retroactive to January 1992 is not sufficient for Respondent's misconduct. The Respondent intentionally and knowingly converted client funds. Disbarment is the appropriate discipline.

It is respectfully requested that this Court reject the Referee's recommended discipline and disbar Respondent from the practice of law and impose against the Respondent the costs of these proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished by Express Mail to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by U.S. Mail to Scott K. Tozian, attorney for the Respondent, 109 North Brush Street, Suite 150, Tampa, FL 33607; and a copy of the foregoing has been furnished by Regular U.S. Mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 18th day of August, 1993.

David R. Ristoff
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