IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

TERRANCE PATRICK MCNAMARA

Respondent.
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CASE NO. 80,693

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

REPLY BRIEF

OF

THE FLORIDA BAR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 FACTS AND OF THE CASE

Respondent's Answer Brief states that "Respondent did not intend to permanently deprive any client of any money or property". Temporary deprivation constitutes theft. The Referee did find that "Respondent knowingly used the client's money for his operating expenses". (R.R. paragraph II, section eight (8)).

REPLY TO RESPONDENT'S ARGUMENT

DISBARMENT IS THE APPROPRIATE SANCTION FOR AN ATTORNEY WHO KNOWINGLY AND INTENTIONALLY MISAPPROPRIATED CLIENT FUNDS, RATHER THAN THE REFEREE'S RECOMMENDED SANCTION OF A THIRTY-SIX (36) MONTH SUSPENSION WHICH IS CONTRARY TO THE EVIDENCE AND THE LAW.

Respondent argues that the Bar's reliance on The Florida Bar v. Nunn, 586 So. 2d 1053 (Fla. 1992) is misplaced. However, in Nunn, as in the instant case, restitution was made with an eye toward the disciplinary proceedings, rather than with the well being of the client in mind. In the instant case, Respondent did not make restitution until July 23, 1992, the date by which his response to the Bar's Petition for Emergency Suspension was due. Since the Respondent's restitution occurred after the Bar's Petition for Emergency Suspension, it should be considered a "forced or compelled restitution", which is neither an aggravating nor mitigating factor. (See Rule 9.4(a) of The Florida Standards for Imposing Lawyer Sanctions). The Respondent did not make a "timely good faith effort" at restitution which would have been necessary to be considered as a mitigating factor under Rule 9.32(d) of The Florida Standards for Imposing Lawyer Sanctions.

The Respondent argues that there was a full and free disclosure to the disciplinary board, a cooperative attitude toward the proceedings. To the contrary, during the course of deposition discovery Respondent asserted the fifth amendment and refused to provide discovery despite his prior denial in his Answer that he had converted the $5,000.00 to his personal or office use. (see

paragraph 10 of the Complaint and paragraph 10 of Respondent's Answer). While Respondent's assertion of his constitutional privilege against self incrimination should not be considered an aggravating factor, neither should he be able to claim cooperation as a mitigating factor. Respondent cannot be said to have demonstrated full disclosure or cooperation under Rule 9.32(e) of The Florida Standards for Imposing Lawyer Sanctions.

Respondent mentions as other mitigating factors his inexperience in the practice of law and his absence of a prior disciplinary record. Respondent was not so inexperienced that he would not know that he was engaging in theft. In fact, Respondent admitted that he knowingly converted the funds. (TR. II, p. 10, L. 18-22). Lack of experience should provide no mitigation in the instant case. The Respondent's absence of a prior disciplinary record provides little, if any, mitigation as he has only practiced for four (4) years. As for remorse, the evidence is insufficient to warrant finding Respondent was remorseful for his actions.

The Respondent cites several cases in which attorneys have been suspended rather than disbarred. In The Florida Bar v. Starke, 616 So. 2d 41 (Fla. 1993), Starke was suspended for three (3) years as a result of the shortages in his trust accounts. However, the Referee found that Starke had been practicing for almost forty (40) years without a single disciplinary violation, had personal and emotional problems, attempted to rectify the consequences of his misconduct, made disclosure, had a cooperative attitude, and was remorseful. Moreover, Starke presented testimony

consequences of his misconduct, made disclosure, had a cooperative attitude, and was remorseful. Moreover, Starke presented testimony of good character and reputation from eleven (11) attorneys, six (6) circuit court judges, two (2) judges of the Third District Court of Appeals, one (1) federal judge, one (1) county court judge, and one (1) general master. Respondent's record of four (4) years without a disciplinary violation cannot constitute sufficient mitigating evidence to result in the same discipline ordered in Starke.

Respondent also cited The Florida Bar v. McShirley, 573 So. 2d 807 (Fla. 1991), wherein McShirley received a three (3) year suspension. However, McShirley was found to have several mitigating factors. Further, McShirley replaced the converted funds before the Bar initiated action against him. The Respondent herein did not return the money until after The Florida Bar had petitioned for an emergency suspension. Respondent also claims that his case is similar to The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992). However, along with having several mitigating factors, MacMillan reimbursed the funds within two (2) weeks. The Respondent in the instant case waited approximately ten (10) months, until after the Bar's intervention to reimburse the funds.

The Respondent argues The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992) provides support for suspension as a more appropriate sanction than disbarment. However, in Neu this Court found that the record supported the Referee's findings that Neu did not intend to convert his client's funds. It was Neu's negligent commingling

of his personal and trust account funds which resulted in the trust violations. This Court held:

> The misuse of client funds is one of the most serious offenses a lawyer can commit. The Florida Bar v. Schiller, 537 So. 2d 992, 993 (Fla. 1989). However, this Court's case law draws a distinction between cases where the lawyer's conduct is intentional and deliberate and cases where the lawyer acts in a negligent or grossly negligent manner. Compare The Florida Bar v. Diaz-Silveira, 557 So. 2d 570 (Fla. 1990)(intentional and deliberate misuse of client funds warranted disbarment) with The Florida Bar v. Whigham, 525 So. 2d 873 (Fla. 1988)(a lawyer's gross negligence in managing a client trust account, absent willful misappropriation of client funds, warrants a three (3) year suspension, but not disbarment). Neu at 269.

Neu received a suspension because he showed substantial mitigating factors, acted negligently rather than intentionally, and it was his first disciplinary sanction in over twenty-two (22) years of practicing law. In the instant case, the Respondent intentionally and knowingly converted funds as opposed to Neu where the attorney was negligent.

Respondent knowingly converted client funds to his own use. He had a dishonest or selfish motive in doing so and his actions are not mitigated by the facts of this case. Accordingly, disbarment is the appropriate sanction.

CONCLUSION

The Respondent had a dishonest or selfish motive in converting client funds to his own use. The Respondent knowingly and intentionally misappropriated the funds and did not demonstrate sufficient mitigating factors. In accordance with the case law and The Florida Standards for Imposing Lawyer Sanctions, disbarment is the appropriate sanction. Accordingly, the Bar requests that the Referee's Recommendation of a three (3) year suspension be set aside and that the Respondent be disbarred.

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 17th day of Sept., 1993.

David R. Ristoff
Attorney No. 358576