IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD P. CONDON,

Respondent,
_____/

Case No. 81,824

TFB No. 92-10,821(13A)

COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

The following symbols and references will be used in this brief:

TR1: Transcript of September 29, 1993 proceedings before the referee.

TR2: Transcript of December 1, 1993 in the proceedings before the referee.

TR3: Transcript of February 6, 7, 1992 in Supreme Court Case No. 77,463 (TFB No. 90-11,271(13A)

Depo: Deposition on December 30, 1992 of Dr. Joseph Rawlings.

RR: Report of referee

C's Exh.: Exhibits of The Florida Bar, Complainant.

R's Exh.: Exhibits of the Respondent.

RB: Respondent's Brief

The Florida Bar: Complainant or The Bar

Standards, or Standards for Imposing Discipline: Florida Standards for Imposing Lawyer Sanctions

STATEMENT OF FACTS

Respondent represented the Freemans in three separate mortgage foreclosure suits against their personal residence; the mortgagee was American Funding Limited. (RR p.2). After payments on the mortgage were rejected because the Freemans had issued a bad check, the Freemans began sending money owed on their mortgage to Respondent to be placed in escrow. (TR1, p.199, L.18-25). The mortgage payments were to be escrowed pending the resolution of the foreclosure action so that if the Freemans ever "got to a bottom line", they would have the money to pay the mortgage arrearages. (TR2, p.38, L.12-21). Respondent testified that Mr. Freeman sought to borrow money from the escrow account, but that Respondent refused to give it to him because it was Mrs. Freeman's money, not Mr. Freeman's. (TR2, p.106, L.22- p.107, L.3).

On July 18, 1989, counsel for American Funding Limited, Douglas Zahm, sent a written settlement offer of $9,500.00 to Respondent in the foreclosure action. (C's. Exh. 17). Respondent advised Mr. Freeman that an additional $1,000.00 was needed to bring the escrow account up to $9,500.00, and that Mr. Freeman took an additional $1,000.00 in cash to Respondent. (TR1, p.131, L.5-23; TR1, p.145, L.4-9). In response to that offer, Respondent prepared a letter of acceptance, writing "enclosed please find our trust account check in the amount of $9,500.00, pursuant to the terms of your letter of July 19, 1989." (TR1, p.133, L.1-21). Douglas Zahm did not receive the letter nor the trust account check (TR1, p.84, L.5-14) at that time or any subsequent time. The trust money also

was not sent to American Funding Limited. (TR1, p.84, L.10-14; TR1, p.18, L.18-p.19, L.10; RR p.2). Nevertheless, for about six (6) months, Respondent misrepresented to the Freemans that he had sent the trust money to Attorney Zahm. (TR1, p. 133, L.9-19; RR p.2).

In a letter dated December 28, 1989, Respondent advised Gary Siegel, an attorney for American Funding Limited, that there was $11,103.00 in escrow. (TR1, p.14, L.2-13; C's Exh. 1). On January 8, 1991, Respondent received a letter from the Freemans discharging him as their attorney. (R's Exh. 14; TR2, p.53, L.17 - p.54, L.3). The next day the Freemans hired new counsel, A. J. Musial, Jr. who substituted for Respondent as counsel for the Freemans in their foreclosure proceeding. At one point during discussions with Attorney Musial about Freeman funds, Respondent advised him that the Freemans had $8,500.59 in trust with Respondent (TR1, p.38, L.3-21), an amount closely corresponding with the $8,529.59 Respondent advised Mrs. Freeman in a June 28, 1989 letter that he had received as escrow deposits. (C's Exh. 6, p.2). Mr. Musial was later provided with a copy of a letter dated December 31, 1990 to Mrs. Freeman from Respondent, listing escrow deposits totalling $10,222.59 (TR1, p.38, L.4-p.39, L.16; C's Exh. 6, p.3), an amount corresponding with what Mr. Freeman believed he had by then provided to Respondent. (TR1, p.204, L.5-12). Mr. Musial was not advised when the letter was sent to him by Respondent that the money listed as escrow deposits was in fact not in an escrow account. (TR1, p.39, L.10-18).

No trust monies provided by Freemans to Respondent were sent by Respondent to American Funding Limited subsequent to the filing of the second foreclosure action, nor were they sent by Respondent after Mr. Musial's entry into the case on behalf of the Freemans. (TR2, p.32, L.20-25). As the Freemans' new counsel, Attorney Musial requested that their trust money be turned over to him. After initially indicating that he would comply with the request, Respondent failed to transfer the money to Mr. Musial. When Attorney Musial subsequently contacted him, Respondent told Attorney Musial that he had made a business decision to retain the money because he felt that if he released the money, he might not get paid by the Freemans. (TR1, p.43, L.9-p.44, L.6).

After Attorney Musial became counsel for the Freemans in the mortgage foreclosure action, he also sought an order directing the release of the escrow money, but was unsuccessful. The amount requested by Attorney Musial was $10,229.59. (TR2, p.55, L.5-25; p.56, L.1-6). Before the court, Respondent asserted a charging lien. The court felt it did not have jurisdiction to resolve that dispute. (TR1, p.45, L.4-11). Respondent did not advise the court that the funds were not in escrow. (TR1, p.45, L.4-11). Respondent claims that he had advised the Freemans that there was no money in the trust account. (TR2, p.56, L.7-13). At that point, he reported, he began to conclude that the money had been pledged to him by the Freemans, and that he had a lien. He claims the bottom line was he did not know what had happened to the escrow money. (TR2, p.56, L.17-21).

Respondent has acknowledged that the monies given to him by the Freemans were for the Freemans' mortgage payments (TR2, p.38, L.18-21), and that he knew that was the purpose. Respondent was never authorized by the Freemans to apply the mortgage money to his fees. (TR1, p.104,L.20 - p.105, L.2; TR1, p.122, L.4-9; TR1, p.127, L.2-6; TR1, p.215, L.5-14). In fact, Mr. Freeman testified that Respondent was handling the case in exchange for being paid only if the American Funding Limited was ordered to pay fees in the usury case. (TR1, p.226, L.19-22; p.214, L.21-25). Respondent knew that there was no money in the Freeman escrow account. Respondent himself testified before the referee that: at one point there should have been a grand total of $9,033.04 in trust; (TR2, p.37, L.16-20); that he only had $9,000.00 in escrow (TR1, p.41, L.24-25); and that after a discussion with Attorney Musial regarding the trust funds, Respondent "expected" that the amount was $10,222.00. (TR1, p.42, L.25 - p.43, L.4).

When Respondent wrote the July 27, 1989 letter to Attorney Zahm purportedly accepting the $9,500.00 settlement offer, and when he sent that letter to the Freemans to make them believe the trust money had been sent to American Funding Limited, he had $1,570.36 in trust and less than $2,377.19 total in all his trust and non-trust accounts. (C's Exh. 22). When on December 28, 1989 he told Attorney Siegel there was $11,103.00 in escrow, he had about $89.29 in trust and a total of $659.07 in all his accounts. (C's Exh. 22). When Respondent advised Attorney Zahm and the Freemans, by letter dated December 31, 1990 and a copy thereof, that there were

$10,222.59 in escrow deposits, his trust account balance was $59.21. By January 8, 1991, when Respondent was contacted by Attorney Musial regarding the escrow funds and when he represented that there was $10,252.00 held in trust, the trust account balance had reached zero. (C's Exh. 22).

In an audit in a prior case, a document styled "Escrow 90" was provided to The Florida Bar by Respondent. It indicated that all listed Freeman deposits, such as $906.22, $1,203.00, and $822.15, were each "transmitted", therefore suggesting to the auditor that there was no requirement that Freeman money be located in the trust account. (C's Exh. 23). Actually, of the amounts listed in Escrow 90, some were deposited into Respondent's operating account, and some amounts reported on the Escrow 90 document have not been located. In cross-examination, Respondent claimed that the word "transmitted" on the Escrow 90 document was not quite the correct word, that the word should have been "deposited", but that although the word was misleading, the document was designed for his own use. (TR2, p.78, L.5-15).

Respondent testified that although he had provided superb legal services to the Freemans, he was physically unable to properly maintain records. (TR2, p.71, L.1-7). When Respondent's conversions occurred, from April 1988 to June 1991, Respondent was not handling a lot of trust money. (TR2, p.44, L.9-19). When he received $6,203.44 from the Freemans, he placed $3,084.22 of that money into his trust account, and $3,119.22 into a general or operating account. An additional $3,939.15 of the escrow money

received by him could not be located in any of the accounts. (TR1, p.249, L.5-7; TR1, p.250, L.2-p.251, L.2; C's. Exh. 21). Respondent advised the referee, "I do not recollect ever taking one cent out of the Freemans' account for my own use or benefit, but I must have." (TR2, p.99, L.22-24).

The misappropriations can not be explained away as due to record keeping problems. Bank statements and Freeman records clearly showed that the Freeman money was being used by Respondent. On May 16, 1988, the balance of the Freeman funds should have been $2,092.00, but only $510.71 was in trust. (TR1, p.254, L.14-23). On April 28, 1989, the total Freeman escrowed funds should have been $7,306.44; the total funds in Respondent's trust and non-trust accounts was $1,450.73. (TR1, p.255, L.10-16). On December 28, 1989 when Respondent advised Mr. Siegel that there was $11,103.00 of the Freeman money in escrow, his trust account balance was a negative $89.29. By June 31, 1991, the Freeman balance was $10,222.59 and the balance actually in trust was zero. (TR1, p.255, L.17-25; C's Exh. 22). The psychiatrist did not say Respondent was unable to do basic accounting, such as comparing a bank balance to escrow deposits and determining that liabilities exceed assets.

Respondent was on anti-depressant medication from 1983 until 1988. Respondent then discontinued his medication until May 31, 1990 when he began treatment with psychiatrist Dr. Rawlings. (Depo., p.10, L.3-14). On May 31, 1990, Respondent advised his psychiatrist that he (Respondent) was in a lot of debt, including

debts to the Internal Revenue Service, that other bills were considerable, (Depo., p.20, L.13-16) and indicated his wife was being critical of his work habits and his inability to earn a living for them. (Depo., p.10, L.21-24). Respondent's marriage was in jeopardy. Relying on Respondent's verbal reports (Depo., p.11, L.21-23; p.20, L.1-5), the psychiatrist found Respondent suffered from recurrent severe depression that might cause him to suffer from forgetfulness or lack of memory, and to be emotionally impaired in his ability to practice law. (Depo., p.16, L.15-21). The psychiatrist felt Respondent had been forthright with him (Depo., p.24, L.16-19), which was not true. For example, Respondent misrepresented to the psychiatrist that pending Florida Bar actions had to do with an insignificant amount of money and were due to sloppy procedures (Depo., p.24, L.20-25), and that the accusation of misusing $7,000 (funds of a client other than Freeman) was a matter of sloppy bookkeeping. (Depo., p.25, L.13-16). Actually, by May 31, 1990, Respondent had converted the $7,000.00 from Woolf, and $10,222.59 of Freemans' money.

The psychiatrist felt that Respondent's misrepresentation in a previous Bar matter that he had sent a letter to a taxing authority falsely indicating that there was money in the trust account would be hard to explain as due to confusion (Depo., p.22, L.9-24), although depression could account for bad judgment. (Depo. p.22, L.9-p.23, L.19). The psychiatrist reported he saw no indication that Respondent's memory for past events was distorted. (Depo., p.29, L.23-25).

SUMMARY OF ARGUMENTS

I. The referee's findings of fact are supported by competent, substantial evidence and therefore are considered to be conclusive. Respondent has acknowledged being unable to account for money entrusted to him. Conversion is also evidenced by witness testimony, bank statements, client ledger cards and letters to opposing counsel. The evidence also clearly establishes that Respondent lied repeatedly to conceal his misappropriations.

II. The referee's recommendation of disbarment is appropriate under the case law and Standards for Imposing Lawyer Sanctions. Respondent's judgment was not so impaired throughout the period of misconduct that the presumption of disbarment for misappropriation is overcome. The amount of trust money in his trust account during the time in question was minimal, and only a simple comparison of a bank statement to the Freeman client ledger card was necessary to show the misuse of trust funds. Even long after resuming medication for treatment of depression and while in therapy, Respondent misrepresented to opposing counsel that the Freeman money was still in escrow. He has presented false evidence to The Florida Bar Auditor, to attorneys, and to the Freemans before and after returning to treatment. His conduct demonstrates a pattern of knowing conversion and deceit.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND THEREFORE ARE CONSIDERED TO BE CONCLUSIVE.

Respondent contends that the Referee's findings of fact are unsupported by the record. For example, he suggests that the Referee concluded there should have been $9,500.00 in the trust account, but that the conclusion is based on Freeman's testimony, which is based in large part on the statement of others. Respondent goes on to say that the estimates of what should have been in trust are based upon defective data input from Condon (Respondent) since they are based on reviews of Condon's record.

Respondent argues that there is nothing to support the Referee's conclusion as to any amount of trust funds other than $5,000.00 agreed to in settlement of a civil dispute between Mr. Freeman and Respondent over alleged fees owed to Respondent and the missing escrow funds. His argument is without merit. Respondent's letters to opposing counsel in the American Funding Limited case, his lists of amounts of escrow monies received, testimony of the Freemans and receipts provided by them, all clearly support an amount in excess of the $5,000.00. Mr. Freeman testified that he only settled with Respondent for $5,000.00 because he was running out of money to pay his attorney in the civil case. He stated in clear and strong terms that he did not feel that he had received back all of the escrow money taken from him by Respondent. (TR1, p.137, L.11-22). In fact, he testified that Respondent had agreed to be paid for the mortgage foreclosure case where usury was the

defense only if attorney fees were obtained from the other side.

There is other evidence that the amount converted was $5,000.00 and more. The Bar Auditor located $6,203.44 of the Freeman money, which had been deposited almost equally into a trust account and an operating account. He was unable to find another $3,939.15 which, based on the Freeman records and Condon records, should have been in trust. Regardless of the precise amount misappropriated, Respondent converted several thousand dollars. In fact, long before the settlement agreement to pay back $5,000 of the Freeman money, Respondent had converted every penny of the Freeman escrow money that had made it into Respondent's client trust account.

Further evidence supports the referee's findings of conversion. On July 18, 1989, Counsel for American Funding Limited, Douglas Zahm, made a written settlement offer to Respondent. In response to that offer, Respondent prepared a letter of acceptance which purportedly had enclosed with it a trust account check for $9,500. The addressee of the letter, Douglas Zahm never received the letter nor did he receive any trust monies from Respondent. Nevertheless Respondent advised the Freemans that he had sent the letter and the trust monies. (RR p.2).

Respondent objects to the Referee's acceptance of Mr. Freeman's testimony that he took $1,000.00 in cash to Respondent after Mr. Freeman was advised of the settlement offer for $9,500.00 and that there was only $8,500.00 in trust. (RB, p.21-22). Respondent argues that this is clearly false testimony because it

is in conflict with Complainant's Exhibit 19, which indicates three (3) escrow payments were made by the Freemans after the date of the settlement letter. The existence of these payments supposedly refutes the finding that there had been a settlement offer or perhaps settlement agreement. However, the three (3) payments following the July, 1989 offer of settlement are not inconsistent with the existence of the settlement offer or even of an agreement. Certainly the wisdom of continuing to make mortgage payments into escrow until there was a written acceptance of the offer is clear. In fact, Mr. Freeman testified that for a period of six months, Respondent lead him to believe that the settlement offer had in fact not been accepted, but that the money had been tendered. The absence of hard evidence in Respondent's records of his receipt of this $1,000.00 is also not proof that the event did not occur, given that numerous escrow payments made by the Freemans to Respondent were not deposited into trust.

In January, 1991, the Freemans hired new counsel, A.J. Musial, Jr. Respondent first verbally advised Musial that the Freemans had money in trust with him (RR p.2), then in February, 1991, after Attorney Musial wrote a letter to Respondent to verify the trust amount (RR p.2-3), Respondent sent escrow statements to Musial falsely indicating the money was in trust. When he was corresponding with Attorney Musial, Respondent believed the balance in the Freeman trust account was zero. (RR p.3). Respondent intentionally misled and lied to the Freemans and Attorney Musial regarding the trust monies provided to him. (RR p.3).

Respondent objects to the Referee's conclusion that the Freeman money was to be held only for mortgage payments. He indicates that this is contrary to his testimony concerning a pledge of escrow funds to guarantee his fees. (RB p.25). Even if at some point Respondent had exerted a valid lien on the escrow funds, he would have been unable to appropriate those funds to his own use without court order or approval of the Freemans. But there was no agreement to allow Respondent to spend, use, or seize as a guarantee for fees the monies which had been escrowed. (TR1, p.123, L.24-p.124, L.15). Even under one of Respondent's own versions of what occurred it was after he discovered the Freeman money was not in trust that he began to conclude that he had a lien on the money.

The Freemans gave Respondent money to be escrowed for their mortgage payments. (RR p.4). Clearly the money was mis-appropriated. (RR p.5). There is substantial competent evidence to support the referee's findings of fact, therefore the findings of fact are considered to be conclusive. The Florida Bar v. Anderson, 594, So. 2d 302(Fla. 1992).

ARGUMENT

II. THE REFEREE'S RECOMMENDATION OF DISBARMENT IS APPROPRIATE UNDER THE CASE LAW AND STANDARDS FOR IMPOSING LAWYER SANCTIONS. RESPONDENT'S JUDGMENT WAS NOT SO IMPAIRED THROUGHOUT THE PERIOD OF MISCONDUCT THAT THE PRESUMPTION OF DISBARMENT FOR MISAPPROPRIATION IS OVERCOME. HIS CONDUCT DEMONSTRATES A PATTERN OF KNOWING CONVERSION AND DECEIT. FURTHER, AGGRAVATING FACTORS OUTWEIGH ANY MITIGATION.

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

At the same time, this Court has rejected arguments that disbarment for misappropriation should be automatic. In determining whether disbarment is appropriate, the Court has recognized that drug, alcohol, or mental problems may impair judgment so as to diminish culpability. Id. at 1384. But if the evidence does not clearly show that the misappropriation was due to impaired judgment, this Court has found the proper sanction is disbarment.

Respondent correctly notes that in imposing discipline for trust account violations, this Court makes a clear distinction between cases where the lawyer's conduct is deliberate or intentional and those cases where the lawyer acts in a negligent or

grossly negligent manner. (RB, p.15, citing The Florida Bar v. Weiss, 586 So. 2d 1051 (Fla. 1991)). Respondent contends that disbarment should not be the discipline in the instant case because there was not a specific finding of "intentionality." (RB p.15). It is his contention that the record negates the possibility of making a clear and convincing case of intentionality, since Respondent was suffering from a medically recognized disability, a trait of which is a diminished ability to think or concentrate. He reports that his illness of depression interfered with his performance of his accounting function (RB p.17), but not his ability to provide excellent legal assistance to the Freemans.

The conversions in question occurred between April 1988 and November 1989, and misrepresentations that the money was in trust continued until after January 1991. It is uncontested that Respondent was on anti-depressant medication from 1983 until 1988. Respondent purportedly discontinued his medication in 1988. Respondent then resumed the medication when he began treatment with psychiatrist Dr. Rawlings on May 31, 1990. (Depo. p.10, L.3-17). Based solely on Respondent's verbal reports, the psychiatrist concluded that Respondent was suffering from recurrent severe depression that might cause him to suffer forgetfulness or lack of memory, and to be emotionally impaired in his ability to practice law. (Depo., p.11, L.21-23; p.20, L.1-15; p.16, L.15-21).

In discussing his depression with the psychiatrist, Respondent advised that he was in a lot of debt and that his bills were considerable. (Depo., p.20, L.13-16). The psychiatrist felt the

Respondent had been forthright with him (Depo., p.24, L.16-19), which in actuality was not true. For example, the Respondent represented to the psychiatrist that pending Florida Bar actions had to do with an insignificant amount of money and were due to sloppy procedures (Depo., p.24, L.20-25), and that an accusation of misusing $7,000.00 (not the Freeman money) was a matter of sloppy bookkeeping. (Depo., p.25, L.13-16). Not coincidentally Respondent had gone to the psychiatrist shortly after receiving a subpoena from The Florida Bar for his trust account records. When he made the statement to the psychiatrist about sloppy bookkeeping and an insignificant amount of money, not only was the $7,000.00 being investigated, but in addition Respondent had to be aware that he would not be able to account to The Florida Bar for over $10,000.00 of the Freeman trust account funds. Respondent's depression is understandable under the circumstances. At no point did he advise the psychiatrist that he had done anything wrong in dealing with his clients.

The psychiatrist related that depression could account for bad judgment (Depo., p.23, L.8-17), but also indicated that he saw no evidence that Respondent's memory for past events was distorted. (Depo., p.29, L.23-25). He did not say Respondent could not do simple mathematics or compare two numbers, one on a bank statement and one on a ledger card. Respondent claims that he did not intentionally use the Freeman money, that his mental condition caused him to not be able to do the trust accounting necessary to keep track of his funds. But as Respondent acknowledged, the

amount of money in his trust account during the time period in question was minimal. In fact, when he prepared a fraudulent accounting of the Freeman funds for the Bar Auditor, and when he advised opposing counsel the money was in escrow, the trust account bank balance statement clearly showed the money in trust was far below the amount that should have been escrowed for Freeman. (C's Exh. 21). He knew he had used the money. To conceal that use, he intentionally lied to the Freemans and Attorney Musial (RR, p.3), to Attorney Zahm, Attorney Siegel and The Florida Bar Auditor.

The facts support a conclusion of knowing and intentional misuse of client trust money. By February 21, 1989, the Freeman trust account balance should have been $6,103.44. On that date, Respondent received an additional $906.22 from the Freemans, but his trust account bank statement total balance showed only $474.02. On April 28, 1989 he received $1,203.00 more in Freeman trust money, bringing the total Freeman funds that should have been in trust to $7,306.44, in a situation where only $56.40 was in his trust account. (C's Exh. 22). No trust accounting ability would have been required to realize the Freeman money was being used.

To accept Respondent's position of an unintentional misuse of trust money, one would also have to believe that trust money was repeatedly accepted and then unintentionally used by Respondent during a time when Respondent knew opposing counsel was requesting the funds, even while he knew money previously received was absent from the trust account, and even though the bank statements showed the trust balance was far below the amount deposited. One would

have to accept that during a time when he was having financial problems, he received money to be placed in trust and unintentionally used it without ever placing it in trust.

Seven months after Respondent resumed medication for depression, Respondent was discharged by the Freemans in the bankruptcy case and contacted by the Freemans' new attorney, A. J. Musial, who requested $10,229.59 that was suppose to be escrowed. Although Respondent knew that there was no money in escrow, he claimed to Mr. Musial that he was making a business decision to place a lien on the trust money and refusing to release it. Later, when Attorney Musial attempted to obtain the escrow money through court action, Respondent avoided an order for release by advising the court that he had a lien on the trust money, at which point the court declined jurisdiction over the matter. Again, he knew there was no Freeman money in his trust account and misled opposing counsel and the court. Also, it was after beginning treatment with the psychiatrist, and while back on medication, that Respondent presented a document styled "Escrow 90" to The Florida Bar Auditor. On that document, prepared by Respondent, he indicated that several different amounts received from Freeman had been "transmitted", thereby explaining to the auditor the absence of Freeman funds in the trust account. (To the referee in this matter, on December 1, 1993, long after he had been under the care of the psychiatrist, he explained that on the document Escrow 90, "transmitted" was not quite the correct word, that the document was misleading but was designed for his own internal use). In June 1990 when Respondent

advised Mr. Pizarro that his only account liability was for a total of $720.00, the Freeman money was a trust account liability which Respondent had acknowledged to opposing counsel even prior to the Bar Auditor's visit.

Then by letter dated December 31, 1990, Respondent sent Mrs. Maras Freeman a list of escrowed deposits, totalling $10,222.59. He did not advise her that he had converted that money. He did not replace it in the trust account. (C's Exh. 6, p.3). On March 8, 1991, Attorney Musial filed a Motion for Order Substituting Counsel and Directing Disbursement of Funds, and in that motion requested that Respondent turn over trust account monies which had been requested but not provided (C's Exh. 7). Respondent did not advise Mr. Musial nor the court that he was not in possession of the escrow money. He did not correct his misinformation to The Florida Bar. This was nearly a year after he resumed treatment for depression, and in spite of trust account bank balance being less than $100.00.

As mitigation, Respondent attributes some of his difficulties to confused financial records, alleging part of the problem was created by frequent Bar audits, and by the Bar being physically in possession of Respondent's records. (RB p.11). Respondent also indicates that he was attempting to correct the record until the Bar impounded his files (RB p.18). Respondent complains that the Bar withheld the records, causing him to be able only to guess as to their contents (RB, p.19), which forced him to guess at the amount of money in escrow. However, Respondent acknowledged before

the Referee that he could have had his trust account records back if he had requested them (TR 2, p.58, L.11-23); further, his bank statement balance made the misappropriation obvious.

It is axiomatic that personal problems alone are not a basis for excusing an attorney for dipping into his trust account to solve those problems. The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991). Respondent misappropriated money because he was in severe financial distress. He had advised his psychiatrist of that financial distress when he saw him in mid-1990. In November 1990 he filed for reorganization under Chapter 13 of the Bankruptcy Code. Then Respondent lied to conceal his misappropriations. As this Court noted in Shanzer, an attorney cannot be excused for dipping into his trust account as a means of solving personal problems. Id. He also cannot be excused from intentionally lying to attorneys, clients and The Bar to conceal his thefts.

Mental problems may impair an attorney's judgment so as to diminish culpability, but as in Shanzer, the instant case is not one of those instances. In Shanzer, the attorney argued that his depression, primarily over his marital and economic problems, led him to use his trust account for personal purposes. The Court noted Shanzer's cooperation with The Florida Bar, remorse, rehabilitation from drug addiction, and restitution, yet found disbarment to be the appropriate discipline.

Similarly, in The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990) disbarment was ordered in the presence of evidence of impairment. The Referee found that Shuminer had great personal and

emotional problems, including his disease of addiction, was clearly mentally impaired due to that addiction, made a timely good faith effort at restitution to clients, cooperated with the Bar, was remorseful, and inexperienced in the practice of law. The Court noted that Shuminer failed to establish that his addictions rose to a sufficient level of impairment to outweigh the seriousness of his offenses, and that he worked effectively during the period in issue. Id. at 432. Shuminer was disbarred. Id. at 433.

Respondent cites several articles, not presented to the referee nor in evidence, to show that many attorneys and law students are depressed. (RB p.17-18). He has cited no articles that say depressed attorneys are so impaired that they lie and steal more often than non-depressed attorneys. He has presented no evidence, or articles not in evidence, that suggest a depressed attorney who intentionally lies about funds he has converted does not understand the severity of his conduct. And he has not proven that but for the depression, he would not have lied and stolen. Respondent's psychiatrist reported that he had seen no indication that Respondent's memory for past events was distorted. When Respondent lied about the trust money, he knew he was doing so.

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, falsely testified that he had restored misappropriated funds, and had trust account shortages 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, mother's illness, and financial obligation which contributed to his emotional state and personal problems; and a timely good faith effort at restitution. This Court reiterated its position in Shanzer, supra, that the Court cannot excuse an attorney's use of client funds to solve life's problems. After suggesting the absence of evidence of mental, alcohol or drug problems impairing the lawyer's judgment so as to diminish culpability, the Court ordered Graham be disbarred. Graham, 605 So. 2d at 359.

Respondent has been previously disciplined. In The Florida Bar v. Condon, 632 So. 2d 70 (Fla. 1994). The following violations were found: 1) depositing client Austin's settlement check into his general account, thus a violation of rule 4-1.5(a) of the Rules Regulating The Florida Bar; 2) using the Austin check for purposes unrelated to his client's interests, a violation of rule 5-1.1; and 3) based on an audit instigated by the above actions, violations of rule 4-8.4(c), rule 5-1.1(e), rule 5-1.2(b)(4), rule 5-1.2(b)(5), rule 5-1.2(b)(6), rule 5-1.2(c)(1), (2) and (3), and rule 5-1.2(c)(4). Condon at p.71. Respondent was suspended for eighteen months.

In Condon, the referee found Respondent committed the following violations: Count I: receiving funds from Woolf Printing for the settlement of a pending tax action, stating in writing that these funds were placed in escrow despite knowingly placing the funds in his general account and using such funds for other purposes, a violation of rule 5-1.1 and 4-8.4(c); Count II: prejudicial actions at a deposition involving the throwing of objects, a violation of rule 4-8.4(d); Count III: a lack of diligence in administering an estate and using the client's funds without authorization, maintaining a deficit in the trust account, charging fees against the estate without the required personal representative or court approval and the placing of estate funds in his general account when a trust account should have been used, a violation of rules 4-1.3 and 5-1.1. Id.

In the prior case, the referee recognized as mitigating factors the respondent's depression, anxiety, and absence of prior disciplinary action, remorse and continuing medical treatment. Aggravating factors related to his lengthy professional life of twenty-two years, a limited ability to manage a case load, and a lack of cooperation with the Bar auditors. On appeal, this Court noted that disbarment may be excessive discipline when mitigating evidence of mental or substance abuse problems casts doubt upon the intentional nature of the attorney's misconduct. Id. It agreed with the referee that Condon's mental and emotional state, his continuing medical treatment, an absence of prior disciplinary action, and his showing of remorse were factors that, in that

instance, mitigated against disbarment.

In the instant case, the referee considered the psychiatrist's deposition, mitigation offered by the Respondent, and the Respondent's candor and demeanor. The Florida Bar v. Condon, 632 So. 2d 70 (Fla. 1994) opinion was not yet published and not before this referee, nor was the panoply of misconduct listed therein part of his consideration. The referee recommended that Respondent be disbarred. His recommendations is consistent with the Florida Standards for Imposing Lawyer Sanctions. Standard 4.61 states disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer, regardless of injury. Standard 4.11 notes disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury.

Misappropriation and dishonesty are two of the most serious offenses an attorney can commit and clearly demonstrate a lack of fitness to practice. Respondent has misappropriated client money and lied repeatedly during his representation of the Freemans. He lied to his clients, several opposing counsel, and to the Bar Auditor. Disbarment is the appropriate discipline.

CONCLUSION

Respondent has misappropriated client money, and has lied to fellow attorneys, the Bar, and to his clients. Respondent's misconduct occurred both when he was on medication for depression and receiving treatment, and when he was not. It was caused by his financial and marital problems, and later his attempts to conceal his misconduct. Respondent's depression does not provide sufficient mitigation to warrant overturning the referee's recommendation of disbarment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief has been delivered Certified Mail, Return Receipt Requested, No. Z 789-214-079 to Richard P. Condon, Respondent, at 214 Bullard Parkway, Suite C, Temple Terrace, Florida 33617-5512; this 15 day of July, 1994.

Thomas E. DeBerg

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