IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

Supreme Court Case
No. 85,953

v.

SUSAN M. TILLMAN,

The Florida Bar File
No. 95-51, 614 (17D)

Respondent.

_____/

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

SUSAN M. TILLMAN, Respondent, acting pro se submits this brief in support of her position that she should not be disbarred as recommended in the report of the referee, Elizabeth Maas dated February 16, 1996. Pursuant to Rule 3-7.7 (5) of the Florida Civil Rules of Discipline it is the burden of the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified. It is Respondent's position that the findings of the referee do not accuratley reflect what the record of the trial actually demonstrates and this is erroneous, unlawful and unjustified.

FACTS OF THE CASE

Respondent was admitted to practice law in Florida in December of 1989. She practiced as a sole practitioner with a general civil litigation practice until June of 1995 when she was suspended from the practice of law on an emergency basis. Areas of specialization were worker's compensation, personal injury and dissolution of marriage.

Prior to this action Respondent had no prior disciplinary history. She had a bookkeeper who handled her trust account.

Respondent was charged by the bar with theft of client's monies, failure to promptly remit funds to clients and third parties, commingling her monies with client's monies and improper trust accounting.

A trial was held on all issues and referee, Elizabeth Maas rendered her decision on February 16, 1996 after reviewing written closing arguments.

At trial the bar put on as witnesses the Respondent and the bar auditor, William Luongo only. Respondent testified on her behalf. She called Darryl Hall, C.P.A., and Philip Disque, a C.P.A. and an attorney as her witnesses.

In the referee's report there are numerous contradictions with the actual record of the proceedings that would make a significant difference in the grave punishment being sought in this matter if actually reviewed.

A 342 page record was transcribed in this case.

It was the finding of the referee that Respondent should be disbarred.

Each charge will be discussed below.

I. THEFT OF CLIENT MONIES

The referee states in her report that the most serious allegation against respondent concerns permitting personal expenses to be paid from her trust account and covering this impropriety by

charging the expenses to client's accounts.

No trust account checks were introduced into evidence showing personal payments to the Respondent's or to employees. No bank personnel was called to testify, nor was any other evidence or testimony presented to prove the bar's guesses and allegations. The whole basis for this theft charge were some operating account checks written to three different employees which were cashed against the Trust Account in 1993 and 1994. Respondent testified at trial that she had no knowledge of these actions by the bank and never received any notices of debits against her Trust Account by the bank.

This is not tantamount to clear and convincing evidence that Respondent committed theft.

The referee deduced that Respondent committed theft because three employees allegedly cashed their payroll checks against the Trust Account on nine occassions in 1993 and 1994. No testimony was taken from these employees that this activity ever occurred. No bank employee testified as to the markings on the back of these checks. No bank video was produced to show who actually cashed these operating account checks.

However, the referee indicates on page four of her report that the bar presented evidence that the internal bank notations on the checks reverse side indicate that they never left banking custody until there were paid from Trust. This is an erroneous statement. No bank expert or any expert in banking testified that this is what

Further, it was not proven that Respondent had any knowledge of this activity which is a vital element in a charge of theft.

All checks discussed at trial and submitted into evidence were Operating Account checks, not Trust Account checks.

The referee continues to state facts which are not in the record. She states on page four of her report that Respondent received debit memos from the bank indicating that these Operating Account checks had been paid from the Trust Account and failed to voluntarily release these debit memos to the bar. In fact, Respondent testified that she never saw these debit memos. Not that she refused to give them to the bar. (Page 146 of transcript of trial - cross examination of Respondent)

In The Florida Bar vs. Schiller, 537 So. 2d 992 (Fla 1989) the court holds that disbarment is the presumed sanction for theft of client's monies but that theft must be proven by clear and convincing evidence. In that case Respondent testified that he took client monies, immediatley put $9000.00 in his Trust Account when audited. He further admitted to knowingly writing checks on his Trust Account without authorization and using his client's monies for his own purposes.

In the case at bar, Respondent testified that she hired the services of a bookkeeper while in practice. There was no testimony that she intentionally deprived any client of monies nor did any client testify that they had been deprived monies. There were no Trust Account checks written for Respondent's personal expenses

submitted into evidence. The record will reflect in the testimony of Philip Disque, C.P.A. and lawyer that he saw no evidence of theft and in many cases clients were overpaid. (General discussion in transcript of trial pp. 10 - 32, in particular page 26 testimony if Philip Disque).

This allegation was a mere assumption as no testimony was taken at trial.

II. WITHDRAWAL OF UNEARNED AND EXCESSIVE FEES FROM TRUST ACCOUNT

The referee states that Respondent testified that she routinely withdrew fees on personal injury and worker's compensation cases prior to settlement funds clearing her Trust Account.

In fact Respondent testified at trial that she only took settlement attorney fees early when a case was definitley settled and she had enough of her owned earned legal fees in trust to cover the amount. She at no time intended or borrowed against a client's funds.

No client testified at trial that they had been deprived of their monies. Fred Haddad, Esq. entered into the court as an exhibit a copy of an Affidavit signed by William Luongo, the bar auditor, wherein he swore that Respondent did in fact keep her own earned legal fees in trust. Respondent testified that she did so in the event an insurance draft was returned on her account for any reason so that no client's account would be debited.

However, the referee states on page six of her report that in

actuality Respondent never had a buffer in her account and quotes only what the bar auditor stated - that there were shortages growing from $2500.00 in April of 1993 to $25,000 in July of 1995. But if one reviews the actual record of the trial, Mr. Luongo, the bar auditor contradicts his testimony three different times as to the amount of shortages. In the first part of his testimony he states that shortages were as hight as $67,000. On (p. 160 of the transcript he testifies that the shortages were as high as $32,000. Then at page 163 Mr. Luongo testifies the shortage went from $2600.00 to $25,000.

In fact, Philip Disque testified at (pg. 14-21) of the transcript that it appeared that the bar auditor had posted questionable items improperly and this would have affected his analysis of the alleged shortages

The testimony of Philip Disque, C.P.A., lawyer is totally ignored. He stated in the record (p.p. 10-32) that contrary to the bar auditor's numbers, there were many months with overages. He did not concur with the bar auditor's figures.

But Mr. Disque's testimony in this regard was totally ignored. This is an erroneous reading of the record. Daryl Hall, C.P.A., also testified that to the best of his knowledge there were earned attorney fees in Trust during the time period in question. This testimony was also just ignored.

III. MEDICAL PAYMENTS

The referee states on page six of her report that it was her

regular practice to move funds from her Trust Account to her Operating Account sufficient to satisfy outstanding medical bills one a personal injury case had settled; attempt to negotiate the bills down; and later pay the health care providers, returning any remainder to the client. In fact Respondent testified that it was not her regular practice and did so only on a couple occassions when she attempting to negotiate a medical bil to a lower amount and save the client money. Another contradiction.

The referee mentions the Fetterman case which was settled for $80,000 and states that Respondent took a fee of $30,863.00. What is absent from this report is the testimony of Respondent elicited on cross examination by her attorney, Fred Haddad, Esq. wherein Respondent explained that the retainer agreement provided for a 33 1/3% fee prior to an Answer being filed and 40% after an Answer being filed. Even though there was no testimony by the client as to the amounts received, the bar auditor acknowledged on (pg. 222) of the transcript that 40% of $80,000 would be an attorney fee of $34,000.00. Respondent in fact only took a fee of $30,863.00.

At no time during the trial did Respondent testify that she knowingly or intentionally failed to pay medical bills. No medical providers testified at trial that they had not been paid.

In fact Respondent testified at trial that she returned another $2,000.00 to Mrs. Fetterman after she successfully negotiated a medical bill lower than what was originally billed.

Likewise, in the Caruso case the referee states that even

though as Satisfaction of Lien was produced at trial by Respondent and the lien was paid by Respondent, it has been proven that Respondent did not intend to pay the lien.

Once again, there was no testimony from the attorney for State Farm that this was the case. Hearsay correspondence from State Farm Insurance attorney Tucker Craig were submitted into evidence with no foundation offered as to the source.

The logic utilized in this situation does not prove by clear and convincing evidence that Respondent intented to deprive the client or anyone out of sums due to them. Additionally, the testimomy revealed that all amounts due to the client and third parties have been paid.

There is completley untrue allegation made on page eight of the referee report when she indicates that improper amounts have been paid from the Trust account including wages for Ms. Tillman's staff and a private wallpaper bill. There were no Trust Account checks submitted into evidence indicating she paid a wallpaper company nor an employee. Respondent testified at trial that no Trust Account checks were written to employees. Only cost expenses.

On page nine of the referee's report, she stated that Respondent's record keeping was abysmal even though the bar auditor stated in his testimony at (page 163) that it was not that bad.

IV. COMMINGLING

The referee states that Respondent failed to timely remove

earned fees from her Trust Account resulting in commingling of
Respondent's Brief in Support of Petition For Review
personal funds and client funds in contravention to Rule 4-1.15(a) and Rule 4-1.15(c).

Respondent admitted in her testimony that she engaged in this practice due to the fact that she worked heavily with insurance companies and many times the settlement checks came back stamped inproper endorsement and she left her own earned fees in Trust to prevent a client's account from ever being debited.

It appears to be contradictory that on the one hand the referee is stating that Respondent had no buffer in her Trust Account (page six of referee report) but on the other hand on (page nine) of the referee report, the referee indicates that the bar proved by clear and convincing evidence that Respondent commingled personal and client funds.

Although commingling is a violation if the Rules, Philip Disque, C.P.A., lawyer testified at trial that he advises all of his clients to keep a buffer in their accounts for the exact purposes stated by Respondent.

V. IMPROPER TRUST ACCOUNTING PROCEDURES

The referee determined that Respondent did not maintain the required detail required by the Rules. However, from the records kept though, it was possible, with reasonable certainty to compute what monies were owed clients and respondent on any given case.

Respondent's expert, Phil Disque, C.P.A., lawyer however,

stated on page 35 line 11-19 of the transcript:

even on checks that were properly paid to doctors,

there is no designation on a lot of those checks as to what client they were. The problem in looking at this and in doing the reconciling were all throughout it. Even on everything that was legitimate, just not properly documented.

The referee could not logically find by clear and convincing evidence that the Respondent's record keeping was so abysmal that the bar auditor could not conduct his compliance audit. Respondent and her experts testified that there were ledger cards and reconciliations.

CONCLUSION

The referee has concluded that Respondent misappropriated client monies, commingled her monies with that of her client's and failed to follow proper trust accounting procedures.

The standard for disciplinary actions is clear and convincing evidence. Neither the testimony of the witnesses nor the evidence submitted prove that Respondent intentionally deprived clients of any funds. At best it is a supposition. The record of the proceedings exhbits the contradictions with the referee's findings and the actual testimony.

The referee cites The Florida Bar vs. Schiller, 537 So. 2d 992 (Fla. 1989) for the holding that there is a presumption of disbarment in theft cases. But in that case the Respondent admitted that he wrote Trust Account checks for an improper purpose and put $9000.00 back into the Trust Account when an audit was conducted.

In the case at bar, the referee is deducing from no testimony of Respondent, any client or bank representative or anyone that the fact certain employee operating account checks may have been cashed at the Trust Account bank is evidence that Respondent knowingly and intentionally tried to deprive client's of funds.

The other examples that are given are also without clear and convincing proof. In the Fetterman case Mrs. Fetterman received all monies she was entitled to receive and was not at trial to testify otherwise. Nancy Caruso was likewise paid all that she was entitled and the worker's compensation lien was paid.

The argument by the referee that taking settlement fees before the actual settlement draft came in was refuted in testimony by both Respondent, Phil Disque, C.P.A., lawyer and Daryl Hall, C.P.A. and William Luongo's Affidavit that Respondent actually had earned legal fees in Trust and she was only taking sums that actually belonged to Respondent.

The case of The Florida Bar vs. Shanzer, 572 So. 2nd 1382 is also put forward by the referee to state that the presumption of disbarment can be overcome by adequate mitigation. But in fact in that case the Respondent was disbarred for admitting that he had an alcohol problem and used his trust account for personal purposes. In the instant case Respondent did not admit that she used her trust account for personal purposes nor has it been proven that she did nor did she use mitigation as a defense to any allegations.

In reviewing the mitigating factors in the Florida Standards

for Imposing Lawyer Sanctions the referee found that two factors were present:

absence of a prior disciplinary record

relatively short period of time Respondent was practicing

In terms of aggravating factors however, the referee found:

dishonest or selfish motive

a pattern of misconduct and multiple offenses

refusal to acknowledge wrongful nature of misconduct

little or no remorse

Based on the above, the referee recommended disbarment.

In The Florida Bar v. Simring, 612 So. 2nd 561 (Fla 1993) the Respondent took a very cavalier attitude and admitted paying personal bills out of his Trust Account and throwing away the trust records. Respondent threw away his trust account records and the bar auditor had to totally reconstruct same.

The Respondent here has fully complied with all bar requests for information. No Trust Account checks have been introduced into evidence to prove Respondent paid personal bills out of Trust, no records were thrown away and the bar auditor was able to conduct a compliance audit based on Respondent's compliance.

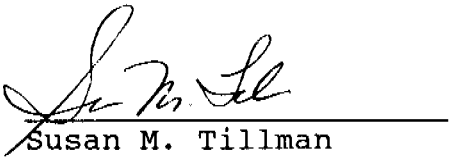
No client was produced at trial to prove that any monies were stolen, there was no need for Respondent to show remorse or acknowledge wrongful nature of her conduct if she believed no harm or wrongful conduct had occurred or been proven by the bar.

Respondent did admit that she commingled her fees with those of clients and that is stated in the transcript as well as admitting that her Trust Accounting procedures were not totally correct and that she relied too heavily on her bookkeeper.

Based on the many contradictions in the referee's report and the actual record of the proceedings and the fact that no actual intentional theft has been proven, coupled with the Respondent's prior lack of disciplinary history and relatively short period in the practice of law, Respondent respectfully requests this honorable court to reduce the recommendation of the referee from disbarrment to attendance in the Disciplinary Diversion School.

Respondent has now been suspended on an emergency basis for almost eleven months, was a sole practitioner until that time and would greatly benefit from education, not punishment, which is the aim of this program.

Respectfully submitted

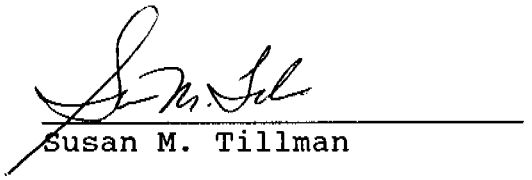


Susan M. Tillman
Pro Se
10758 N.W. 17th St.
Coral Springs, Florida
33071
(954) 755-7707

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief in Response to Petition For Review was mailed this 1st day of May, 1996 to John A. Boggs, Director of Lawyer

Regulation, The Florida Bar, 650 Appalachee Parkway, Tallahasee, FL 32399-2300 and Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Ave., #835, Ft. Lauderdale, Florida 33309, Kevin Tynan, Esq., Bar Counsel, 5900 N. Andrews Ave., #835, Ft. Lauderdale, Florida 33309 and was sent via Federal Express to The Honorable Sid White, Clerk of The Supreme Court of Florida, The Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399-1927



Susan M. Tillman