IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

Supreme Court Case
85,953

v.

SUSAN M. TILLMAN,

Respondent-Appellant.

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

_____/

RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

PAGES

STATEMENT OF THE CASE AND FACTS.....ii

SUMMARY OF ARGUMENT.....iii

ARGUMENT IN RESPONSE AND REBUTTAL TO ARGUMENT PRESENTED IN ANSWER BRIEF..... 1

I. **THE REFEREE INCORRECTLY FOUND RESPONDENT GUILTY OF STEALING CLIENT MONIES, COMMINGLING AND FAILING TO KEEP THE MINIMUM REQUIRED TRUST ACCOUNTING RECORDS. THE REFEREE'S REPORT IS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED. STANDARD OF CLEAR AND CONVINCING EVIDENCE WAS NOT UTILIZED IN THE EVALUATION NOR WAS PROPER EVIDENCE SUBMITTED TO SUBSTANTIATE THE BAR'S ALLEGATIONS. BASED ON THE FACTS IN THE RECORD, RESPONDENT SHOULD NOT BE DISBARRED AS DISBARMENT IS TOO HARSH A SANCTION FOR AN INDIVIDUAL WITH NO PRIOR DISCIPLINARY HISTORY, NO PROOF OF THE ALLEGATIONS PUT FORWARD BY THE BAR AND A SHORT TERM IN SOLE PRACTICE. AT MOST, RESPONDENT SHOULD BE GIVEN CREDIT FOR THE ONE YEAR ALREADY SERVED AND ALLOWED TO ATTEND THE DIVERSIONARY SCHOOL SHOULD THE COURT FIND THAT THERE WAS ANY COMMINGLING OR IMPROPER TRUST ACCOUNTING PROCEDURES**.....3

II. **NO PROOF OF THEFT OF CLIENT MONIES, IN TANDEM WITH NO REAL PROOF OF COMMINGLING OR IMPROPER TRUST ACCOUNTING PROCEDURES DOES NOT WARRANT DISBARMENT.** 11

CONCLUSION.....13

CERTIFICATE OF SERVICE.....14

STATEMENT OF THE CASE AND FACTS

The Florida Bar in its answer brief indicates that Respondent did not provide a statement of the case and of the facts in her initial brief. In fact, Respondent did provide a **FACTS OF THE CASE** in her initial brief.

SUMMARY OF ARGUMENT

The referee's findings of fact in the instant matter are not soundly supported by the evidence or by the record. Most of the evidence submitted was not authenticated. Much of the evidence submitted was heresy. the bar's only witnesses were the respondent and the bar auditor. The testimony of Philip Disque, C.P.A., lawyer was largely ignored as it demonstrated drastic discrepancies on the issue of shortages and theft.

Further, the referee's recommended sanction is not appropriate under relevant case law and extremely harsh under the circumstances. Therefore, the conclusions drawn are unlawful, injustified and erroneous.

The fact that respondent had no prior disciplinary history and had practiced for only six years as a sole practitioner and the fact that theft was not proven by clear and convincing evidence all lend to the conclusion that disbarment is too harsh a punishment.

Finally, the criterion set forth in the Florida Standards For Imposing Lawyer Sanctions have not been fully addressed nor proven against respondent.

Therefore, respondent should not be disbarred and seeks an Order from this honorable court reinstating Respiondent to practice and giving respondent credit for the one year already served under the emergency suspension order dated 6-15-96 and be allowed to attend the Disciplinary Diversion School should this court find any misconduct.

The bar has not proven by clear and convincing evidence that respondent has intentionally stolen client monies nor commingled her funds with those funds of her clients nor have they proven that respondent did not keep proper trust accounting records by clear and convincing evidence.

ARGUMENT

I. THE REFEREE INCORRECTLY FOUND RESPONDENT GUILTY OF STEALING CLIENT MONIES, COMMINGLING AND FAILING TO KEEP THE MINIMUM REQUIRED TRUST ACCOUNTING RECORDS. THE REFEREE'S REPORT IS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED. THE STANDARD OF CLEAR AND CONVINCING EVIDENCE WAS NOT UTILIZED IN THE EVALUATION NOR WAS PROPER EVIDENCE SUBMITTED TO SUBSTANTIATE THE BAR'S ALLEGATION. BASED ON THE FACTS IN THE RECORD, RESPONDENT SHOULD NOT BE DISBARRED AS DISBARMENT IS TOO HARSH A SANCTION FOR AN INDIVIDUAL WITH NO PRIOR DISCIPLINARY HISTORY,NO PROOF OF THE ALLEGATIONS PUT FORWARD BY THE BAR AND A SHORT TERM IN SOLE PRACTICE (6 YEARS). AT MOST, RESPONDENT SHOULD BE GIVEN CREDIT FOR THE ONE YEAR ALREADY SERVED AND ALLOWED TO ATTEND THE DIVERSIONARY SCHOOL SHOULD THE COURT FIND THAT THERE WAS ANY COMMINGLING OR IMPROPER TRUST ACCOUNT PROCEDURES.

This is not a theft case and disbarment is too harsh a sanction for the allegations put forth by the bar and not proven by clear and convincing evidence.

The bar cites The Florida Bar vs. Schiller, 537 So. 2d 292 (Fla 1989). In that case the record disclosed that Respondent had a deficit in his Trust Account of $10,000. Prior to the meeting with the bar, Respondent deposited $9,000 of his own funds toward the deficit. The audit showed that deficits occurred gradually increasing to over $29,000. The Respondent testified that he "knowingly wrote checks on the trust account without authorization and that he used clients' money for his own purposes." The referee recommended a two year suspension. The Supreme Court suspended Schiller for three years on the basis that disbarment was not the appropriate punishment. By the time of the final hearing, Schiller

had replaced in his trust account all the money he misappropriated. There was no indication that the misappropriation damaged any clients.

In the case at bar, Respondent never testified nor did the bar prove that Respondent knowingly wrote checks on her trust account without authorization or that she used client's money for her own purposes. No client complained at trial that they were damaged.

The bar's allegation that Respondent stole trust account funds was based on the allegation that Respondent paid payroll out of trust. No trust account checks were produced at trial to prove this allegation nor was any former employee produced at trial to testify that they were paid out of trust.

Respondent testified at trial that she had no knowledge that any employee cashed their payroll check against the trust account. Further, no evidence was put forth by the bar to prove that Respondent used her trust account for her own purposes.

Yet, the bar cites Schiller who admitted he took funds as a case similar to the one at bar. And Respondent in that case of knowingly misappropriating client funds was only suspended for three years.

COUNT I

The bar alleged that Respondent converted client monies to her own use and stated that a two step analysis must be made.

First. Shortages must be confirmed or client funds must be used for purposes other than for which they were entrusted.

Second. The bar must demonstrate that all or part of the

monies which caused such shortages were intentionally converted by Respondent.

A. Shortages. The bar auditor testified that in all months audited the trust account balance was insufficient to cover extent client liabilities.

Conversely, Respondent's expert, Phil Disque, C.P.A., lawyer testified that he found many months were there were overages, that his figures were different than the bar auditor and that he saw no evidence of theft. This testimony was largely ignored by the referee. Thus, the report of the referee is erroneous, unlawful and unjustified as she failed to weigh all evidence which conflicted.

Therefore, as the record reveals, the bar has not proven by clear and convincing evidence that Respondent's trust account was persistently insufficient to meet all of respondent's client liabilities.

B. Intentional Theft. The bar has also not established by clear and convincing evidence that Respondent intentionally converted client funds to her own use. Not only did Respondent testify that there was no intent to convert client funds, she also testified that to the best of her knowledge there was no conversion. No evidence was entered to prove intentional theft nor was any client's testimony introduced to prove that any client had been damaged.

The bar cites The Florida Bar v. Simring, 612 So. 2d 561 (Fla.

1993) to compare alleged like activity in the instant case.

However, unlike the case at bar, Simring can clearly be distinguished. In Simring Respondent when asked by the bar auditor for his trust account records and client files said, "I threw them away." In the instant case not only did Respondent fully comply with the bar auditor's requests for ledger cards, deposit slips, reconciliation reports and client files but on the record the bar auditor when asked by Respondent's attorney said Respondent's trust account records "were not that bad." Obviously they were sufficient enough for the bar auditor to conduct his compliance audit and they were certainly more sufficient than the Simring case were Respondent threw his records away and everything had to be reconstructed.

Secondly, unlike the Respondent in Simring who put two personal loans and the proceeds of three separate pieces of personal real estate into his trust account, the Respondent in the instant case testified that the only way in which she may have commingled funds was by leaving her earned legal fees in trust too long after monies on a case had been disbursed and on the advice of her accountant. Respondent in the case at bar never deposited personal loans or personal business monies into her trust account.

Thirdly, the record in the Simring case showed that Respondent had written twelve checks totalling $21,435.08 to pay personal and office obligations including car, insurance and credit card payments, and personal loan obligations. There is absolutely no similarity with this record and the case at bar. There is nothing

in the record to evidence personal use of Respondent's trust account other than the bar's allegation the a few employee's cashed their payroll checks written on Respondent's Operating account against the trust account and that Respondent knew about the activity. Unlike Simring there was never any proof submitted that personal expenses were paid out of Respondent's trust account.

Finally, unlike Simring, there is a discrepancy as to whether there were persistent shortages or persistent overages in Respondent's trust account. The bar states that there are numerous indications. But, Respondent's expert, Phil Disque, C.P.A., lawyer disputes this allegation throughout his testimony.

The bar argues that Respondent intentionally did not produce all of her banking records and the bar subpoenaed same. Conversely, Respondent testified that she produced all records that she had. Further, the subpoenaed documents produced at trial by the bar were microfiche copies of checks. No bank representative testified at trial that these were in fact copies of original checks. There was in fact no authentication of these documents at all. It was mere speculation. The bar at trial asked Respondent to authenticate same. Respondent testified that they looked like they could be checks she wrote on her operating account only.

Bar counsel then states that both auditors agreed that paying payroll from a trust account is evidence of an intentional theft even though neither auditor is a lawyer and qualified to testify what constitutes an intentional theft and even though no payroll was in fact ever paid from the trust account.

The same type analogy if applied in the bar's explanation of medical payments. Bar counsel erroneously states that Respondent admitted that it was her usual practice to remove funds from trust and put said sums in operating account to pay medical bills. Respondent, when asked if it was her regular practice stated that it was not.

Further, bar counsel erroneously states that on many occasions Respondent informed clients through settlement statements that she would make payments to health care providers and then failed to do so. In fact, at trial Respondent testified that in six years of practice and over eight hundred clients, she failed to pay three medical bills to the best of her knowledge due to inadvertence. When she realized the bills were not paid she began paying said bills until her office was closed via the emergency suspension order. She also realized that an error had been made on the settlement sheet and she had not taken the correct amount of attorney fees. This was on one case, Fetterman. It was not on Caruso as the bar states. Caruso involved no unpaid medical bills and the client was paid in full.

Fetterman involved a case wherein the client agreed to pay a 40% attorney fee when litigation commenced and an answer was filed. Therefore, all of the outstanding medical bills could not be paid as the attorney fees in this case were $32,000. The bar attempts to put forth a scheme however where it appears that Respondent did not pay medical bills when in fact Respondent was owed additional

funds for attorney fees not taken. The record discusses the case in detail and Respondent's attorney brings forth the truth in his cross examination. In fact, the Respondent should not have been safeguarding any of the funds relating to the Fetterman case as all remaining funds were owed to Respondent as attorney fees. As the bar so succinctly explains, Respondent drew $31,338.10 when she was owed $32,000.00 plus costs. The bar relies on the fact that the settlement sheet stated $26,773.29 when in fact it was explained at trial that the $26,773.29 was in error and should have been $32,000.00. But the bar fails to mention that the client received all monies owed to her as well as an additional $2,000.00 due to Respondent's successful effort in reducing a medical bill.

In the Caruso case it was proven at trial that Respondent took $1300.00 to pay an outstanding worker's compensation lien, paid the worker's compensation lien and the satisfaction of lien was submitted into evidence at trial by Respondent's attorney. But the bar attempts to prove that because the notation of the payment of the lien was put on the wrong ledger card that Respondent is guilty of theft. Once again, no client was damaged. All sums owed were paid. No witness testified at trial that they were not paid or that they were harmed. It is mere speculation and insinuation by the bar that foul pay existed.

Although the bar states that Respondent's testimony throughout the trial was to attempt to explain away each of The Florida Bar's allegations, rather Respondent attempted to explain how the bar's allegations of misconduct were unfounded and without proof.

Respondent admitted that she removed monies from trust on cases that had been settled and she was waiting for proceeds only when she had earned attorney fees in trust. As the evidence clearly established by the bar auditor's affidavit submitted into evidence, the testimony if Phil Disque, C.P.A., lawyer and the bar's allegation of commingling, there were earned legal fees belonging to Respondent remaining in trust. This activity is not tantamount to theft. Client's monies were not utilized to cover anticipatory fees. But instead Respondent was merely taking earned fees.

Although the bar states that the chart prepared by the bar auditor shows persistent shortages on the dates these checks were cashed, the testimony of Phil Disque totally refutes the chart as he testifies to persistent overages as well as shortages. Rather than taking fees prior to settlement proceeds being deposited, Respondent was taking earned fees from other cases actually owed to her.

The Respondent testified at trial that she was very familiar with worker's compensation. She also explained that the worker's compensation retainer agreement is approved by the court and this allows an attorney to take costs prior to settlement of the case. The bar is attempting to refute this in arguing that this procedure is not correct. The defense is that a review of the actual retainer proves that Respondent's defense is without merit. However, the bar produced no worker's compensation expert at trial to discuss proper procedure, no witness was produced to testify

that they had not received their proper settlement.

The bar enters into a discussion regarding Respondent's Operating Account even though this account is not the subject matter of this hearing. The bar erroneously states that this account was constantly overdrawn even though at trial the bar produced only one operating account statement. Respondent testified that on that one statement produced at trial there were only two checks which were not honored. This is very much different than the bar's allegation that this account was constantly overdrawn. Additionally, it was demonstrated at trial that there was never an insufficient fund check written or returned on Respondent's trust account which is the subject matter of this case.

The bar states that Respondent's defenses of fee entitlement and sloppy bookkeeping are mutually inconsistent. Rather than a defense, these statements by Respondent were offered as an explanation as to why there was no intentional theft in this case. In reality, the bookkeeping was not so sloppy as all experts involved in this case were able to audit same. The bar auditor was able to draw his conclusions there were persistent shortages, commingling and theft. Respondent's experts were able to determine that there were overages, earned attorney fees left in trust and no evidence of theft. The referee's reliance on the bar auditor's testimony alone is erroneous, unlawful and unjustified.

COUNT II

Respondent admitted commingling but finds it mutually inconsistent that the bar can state on the one hand that Respondent had no earned attorney fees left in trust so that she was guilty of using client's funds but yet agree that for commingling charges Respondent did leave her earned fees in trust.

COUNT III

Respondent admitted that she did not follow all trust accounting procedures to the letter of the law but she did submit the following to the bar:

1. All client ledger cards requested which contained dates of entry, amount of entry and name of client, deposits and withdrawals.

2. All original deposit slips requested with notations on the slips as to whose account said deposit slip related.

3. All original trust account checks requested.

4. All original monthly reconciliation reports prepared by bookkeeper.

5. All settlement sheets available were provided to the bar. Due to the nature of the cases, some cases did not warrant the preparation of a settlement sheet.

6. All original trust account check ledgers requested.

7. All original operating account checks and statements requested.

II. NO THEFT OF CLIENT MONIES, IN TANDEM WITH NO REAL PROOF OF COMMINGLING OR SUBSTANTIAL IMPROPER TRUST ACCOUNTING PROCEDURES DOES NOT WARRANT DISBARMENT

The bar has not proven that Respondent has stolen client's funds. The cases cited by the bar are clear cases where individuals admittedly took client's monies for their own purposes, paid personal expenses out of trust and kept no trust account records or threw them away.

Admittedly, misuse of client funds is one of the most serious offenses that a lawyer can commit. But the bar must prove by clear and convincing evidence that theft has occurred.

The bar in this case has by insinuation only attempted to prove theft of client monies by alleging that a few employees in 1993 cashed their payroll checks against the trust account, that Respondent knew about it even though she testified that she did not.

No real proof was introduced. No client testified to not having received their monies. No checks were written on trust to pay personal bills as in the Schiller case. The bar has proven nothing but insinuated via heresy evidence that a couple past employees cashed their payroll checks against the trust.

Respondent should not be disbarred and should instead be reinstated to practice within a reasonable time to be determined by this court and given credit for the eight months suspension already imposed as a result of the emergency suspension order.

The bar cites The Florida Bar v. McShirley, 573 So. 2d 807 (Fla. 1991) for the holding that where the attorney had replaced converted funds prior to bar action it is a mitigating circumstance. In the instant case the bar has not proven that

Respondent has stolen any monies to be replaced.

Utilizing the Florida Standards for Imposing Lawyers Sanctions, the following aggravating factors do not exist to justify a recommendation of disbarment:

(a) no prior disciplinary offenses;

(b) no dishonest or selfish motive

(c) no pattern of misconduct

(d) no multiple offenses

(e) no bad faith obstruction of the disciplinary proceeding

(f) no deceptive practice during the disciplinary process

(g) no refusal to acknowledge wrongful nature of conduct - merely defended on all allegations

(h) vulnerability of victim; There were no victims

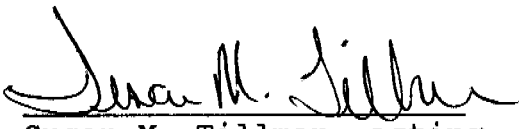
(i) substantial experience in practice law. Respondent has only been in practice six years.

(j) indifference in making restitution. There was no amount identified at trial that was owed to anyone and at the close of trial it was stipulated that there is $2500.00 remaining in trust.

CONCLUSION

Based on the erroneous, unlawful and unjustified nature of the referee's report which failed to take into consideration the record in this case Respondent requests that this court to reinstate Respondent and give her credit for the one year suspension already served and to waive costs of this action requested by the bar.

Respectfully submitted,



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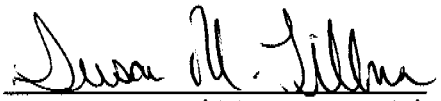
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing have been forwarded this 3rd of June, 1996 by Federal Express to Clerk of Supreme Court of Florida, 500 South Duval St., Tallahassee, Florida 32399 and by regular mail to Kevin Tynan, Esq. and Lorraine Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Ave., #835, Ft. Lauderdale, Florida 33309 and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar,650 Apalachee Parkway, Tallahassee, Fl 32399-2300, via regular mail and John Berry and John F. Harkness, Jr., 650 Appalachee Parkway, Tallahassee, Florida 33309.



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