IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

N. DAVID KORONES,

Respondent.
_____/

Case No. 92,873
TFB No. 97-11,179(6D)
98-11,073(6D)

INITIAL BRIEF
OF
THE FLORIDA BAR

David Robert Ristoff
Branch Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813)875-9821
Florida Bar No. 358576

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as **"The Florida**

Bar" or **"The Bar."** The Respondent, N. David Korones, will be referred to as **"Respondent."**

"**TR**" will refer to the transcript of the final hearing before the Referee in the instant case Supreme Court Case No. 92,873 held on November 20, 1998.

"RR" will refer to The Report of Referee dated December 4, 1998.

"**TFB Exh**." will refer to exhibits presented by The Florida Bar and **"R. Exh."** will refer to exhibits presented by the Respondent at the final hearing before the Referee in the instant case Supreme Court Case No. 92,873.

"Rule" or **"Rules"** will refer to the Rules Regulating The Florida Bar. **"Standard"** or **"Standards"** will refer to Florida Standards for Imposing Lawyer Sanctions.

"Stip." will refer to the Stipulation of Facts and Rule Violations agreed to by the parties in the instant case Supreme Court Case No. 92,873 on November 20, 1998.

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE FACTS

Supreme Court Case No. 92,873

On or about September 7, 1988, Respondent's uncle, Sol Korones, died testate in Buncombe County, North Carolina. The will of Sol Korones, which had been prepared by Respondent only days before his uncle's death, was admitted to probate. As a residual beneficiary, Respondent qualified as the executor of the estate. (Stip., para. 2). Following his appointment as executor, Respondent took control of his deceased uncle's property, disposed of both real and personal property, collected debts owed to his uncle, paid his uncle's bills, and took control of cash and securities. (Stip., para. 3). Respondent filed a ninety (90) day inventory with the Clerk of the Superior Court of Buncombe County, listing the approximate value of the estate as $343,752.00 as of October 4, 1988. (Stip., para. 4)

During the years 1989, 1990 and 1991, the Respondent converted $123,750.00 of the funds belonging to his uncle's estate to his own use and benefit. In addition, Respondent paid to himself the sum of $7,611.00 as fees, and made distributions to himself in excess of distributions to the other beneficiaries totaling $4750.00. He also made a distribution to his son of $7,000.00, which was greater than the total distributions to other beneficiaries. (Stip., para. 5). The $7,000.00 distribution to

Respondent's son was made in 1994 or 1995 after the son threatened to inform The Florida Bar about Respondent's misappropriations of estate funds unless he was paid. (TR, p. 117 L. 5-10).

On or about July 22, 1994, the Respondent sent a memorandum to each of the residuary beneficiaries and enclosed a purported final accounting. The final accounting, which was signed by Respondent under oath, stated that after receipts and payments made prior to July 25, 1994, there remained in the estate the amount of $115,291.53. (Stip., p. 6; TFB Exh. 11). This purported final accounting did not reflect the $123,750.00 misappropriated by the Respondent. In fact, the purported final accounting was false and misleading to the beneficiaries in that instead of the balance of $115,291.53, there were only a few dollars left in the estate account. (Tr. p 122, L. 15-20).

On or about August 29, 1995, a Petition to Reopen Estate was filed with the Clerk of the Superior Court of Buncombe County, North Carolina. (TFB Exh. 14). This Petition was filed on behalf of Madelon Fross and Donna Korones, two of the beneficiaries of the estate of Sol Korones. On November 1, 1995, pursuant to the aforementioned Petition, the Clerk revoked the Respondent's Letter of Administration, dismissed Respondent as the personal representative and appointed a substitute personal representative. (TFB Exh. 15).

The successor personal representative instituted a lawsuit naming the Respondent as the defendant in Case No. 96-CVS-00646, in the General Court of Justice, Superior Court Division in the County of Buncombe, State of North Carolina. The Superior Court entered a Judgment on April 8, 1997, wherein the following findings of fact and conclusions of law were made: that Respondent had converted estate funds to his own use; that Respondent had made excess distributions to himself and to his son; and that he had paid fees and expenses not approved by the Clerk of the Court, thereby causing damages to the estate in the amount of $168,609.00. (TFB Exh. 31)

The Superior Court also found that Respondent's intent in sending a false and fraudulent purported final accounting, purported petition to close the estate, and purported release to the beneficiaries was to deceive the beneficiaries as to the status of the estate, and to conceal his own wrongful conduct. The Superior Court found that the Respondent's fraudulent and deceptive conduct caused damages to the estate in the amount of $150,000.00. Additionally, finding Respondent's actions to be intentional and malicious, the Superior Court awarded to the estate, punitive damages in the amount of $150,000.00 and entered against Respondent a judgment in the amount of $468,609.00. (TFB Exh. 31).

Following the judgement, a complaint was filed with the Florida Bar based upon the recited conduct. Incidental to the complaint, the Bar reviewed certain of Respondent's trust account records to determine if funds of others had been converted. The assets of the Estate of Sol Korones were not handled as part of Respondent's trust account. The examination of Respondent's trust accounts revealed minor technical violations of the Trust Accounting Rules.(Stip., para. 9).

Pursuant to a Stipulation executed by Respondent's counsel and The Florida Bar, and filed with the Referee at the November 20, 1998 final hearing, Respondent admitted to violating the Following Rules Regulating The Florida Bar: As to Count I of the Complaint, TFB No. 97-11,179(6D); Rule 4-8.4(c) (Conduct involving dishonesty, fraud, deceit or misrepresentation; Rule 5-1.1(a) (Money or other property entrusted to an attorney for a specific purpose must be applied only to that purpose; refusal to deliver over such property on demand shall be deemed conversion); As to Count II of the Complaint, TFB No. 98-11,073(6D); Rule 5-1.2(b)(5) (Failure to maintain a Separate Cash Receipts and Disbursement Journal); Rule 5-1.2(c)(1) (Failure to maintain monthly reconciliations and comparisons of reconciliation of bank accounts); Rule 5-1.2(c)(2)(Failure to prepare annual detailed listing of trust balances); and Rule 5-1.2(3) (Failure to maintain records of trust account reconciliations, comparisons, and listings for 6 years).

STATEMENT OF THE CASE

As to Count I, of the Complaint, TFB No. 97-11,179(6D), the Sixth Judicial Circuit Grievance Committee found probable cause on January 13, 1998, as to Rules 4-8.4(c) and Rule 5-1.1(a). As to Count II of the Complaint, TFB No. 98-11,073(6D), on March 2, 1998, Respondent waived probable cause as to violation of the following Rules: Rule 5-1.2(c)(1), (2), and (3); and 5-1.2(b)(5). On April 27, 1998, The Florida Bar filed the Complaint in this matter. By order dated May 7, 1998, Judge Florence Foster was appointed as Referee in this matter.

On the day of the final hearing, November 20, 1998, the parties agreed to a Stipulated Statement of Facts and Stipulated Rule Violations. The parties further agreed that both sides were still free to present additional facts and evidence to the Court. (TR p. 6). For the purpose of judicial economy, the parties stipulated to the entry into evidence of The Florida Bar's Exhibits numbered 1- 29, and 31. (TR p. 6, 7). Based upon the stipulation as to Rule violations, the hearing proceeded to the disciplinary stage. Evidence presented by the Respondent included character witnesses, affidavits, the deposition Jerome Rygorsky, M.D., and the testimony of Respondent.

On December 4, 1998, the Referee issued a Report of Referee recommending that the Respondent be suspended from the practice of law for ninety days (90) days,

and assessed costs to the Respondent in the amount of $3,989.24. The Referee's report was considered by the Board of Governors of The Florida Bar at its meeting which ended February 12, 1999, at which time the Board voted to file a petition for review of the Referee's report and seek disbarment. The Florida Bar filed a petition for review of the Referee's report with this Court on or about February 23, 1999.

SUMMARY OF ARGUMENT

The Referee's recommended discipline of a ninety (90) day suspension and costs is wholly insufficient based upon the facts of the case, the Florida Standards for Imposing Lawyer Sanctions, and relevant case law. The discipline recommended by the Referee is clearly not sufficient to deter others from the same or similar conduct. Respondent intentionally misappropriated $123,750.00 in estate funds entrusted to him, converted these funds to his personal use, and then by misrepresentations attempted to cover up his theft. These are egregious acts of misconduct. Respondent has not shown sufficient mitigation to warrant discipline less than disbarment.

ARGUMENT

I. DISBARMENT IS THE APPROPRIATE SANCTION FOR RESPONDENT'S INTENTIONAL CONVERSION OF ESTATE FUNDS AND CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, AND MISREPRESENTATION BASED ON THE RECORD, CASE LAW AND STANDARDS FOR LAWYER SANCTIONS

In The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983), this Court defined the objectives of Bar discipline as follows:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, *the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.*" (Court's emphasis)

Id. at 986.

The Florida Bar submits that the Referee's recommended discipline of a ninety (90) day suspension will not serve to protect the public or the legal system nor will it serve to deter Respondent or other attorneys from engaging in similar

misconduct in the future. This Court should instead disbar Respondent based on the serious nature of Respondent's misconduct, The Florida Standards for Imposing Lawyer Sanctions and relevant case law.

The Florida Standards for Imposing Lawyer Sanctions provides a format to determine the appropriate sanction in attorney disciplinary matters. Standard 4.11 provides that absent aggravating and mitigating circumstances, "[d]isbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." Standard 5.11(b) provides that absent aggravating and mitigating circumstances, "[d]isbarment is appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft." Standard 5.11(f) provides that absent aggravating and mitigating circumstances, "[d]isbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Standard 7.1 provides that absent aggravating and mitigating circumstances, "[d]isbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and

causes serious or potentially serious injury to a client, the public, or the legal system."

Standard 9.22 lists several aggravating factors which may justify an increase in the degree of discipline to be imposed. The aggravating factors which apply in the instant case are as follows:

(a) dishonest or selfish motive;
(b) multiple offenses;
(c) vulnerability of victims;
(d) substantial experience in the practice of law; and
(e) indifference to making restitution.

The Referee found Respondent's dishonest and selfish motive and substantial experience in the practice of law as aggravating factors. (RR p. 7) As mitigating factors the Referee found: personal or emotional problems, good-faith effort to make restitution or rectify consequences of misconduct, full and free disclosure to disciplinary board, cooperative attitude towards proceedings, good character and reputation, physical or mental disability or impairment, and remorse. (RR p. 7).

In contrast to the referee's findings of fact, this Court has recognized a broader scope of review regarding the actual discipline imposed. A referee's recommendation is presumed correct and will be followed if there is a reasonable basis in existing case law, and not "clearly off the mark". (The Florida Bar v.

Vinning, 707 So.2d 670, 673 (Fla. 1998). In this case, the Referee's recommendation is clearly not supported by existing case law, the facts of the case, and the Standards for Imposing Lawyer Sanctions. Further, the Referee has recommended discipline that is not sufficient to deter others.

The Respondent in his fiduciary capacity as the personal representative of the Korones estate, intentionally misappropriated funds and engaged in dishonest, fraudulent, and deceitful conduct that included misrepresentations to the residuary beneficiaries. Respondent prepared the Last Will and Testament of Sol Korones on or about September 3, 1988. (Tr. p. 109, L. 22-24). Respondent prepared the Will having never been admitted to practice law in North Carolina. (Tr. p. 110, L. 9-11). Sol Korones died four (4) days later on September 7, 1988. (Tr. p. 110, L. 19-21). Respondent then prepared a number of different pleadings to initiate the probate proceeding in North Carolina. (Tr. p. 111, L. 16-19). Respondent's uncle, Sol Korones bestowed his trust upon Respondent to see that all the beneficiaries of his Will were cared for after his death. Instead, Respondent betrayed his uncle's trust and misappropriated $123,752.00 from the estate. Respondent converted almost all of these funds in 1989, 1990, and 1991. However, as late as 1994 or 1995, Respondent converted an additional $2,000.00 - $3,000.00 of the estate funds in an effort to pay off the $7,000.00 demand made by his son in exchange

for not revealing the theft to The Florida Bar. (Tr. p. 102, L. 12-21, and p. 117 and 118).

In addition to the thefts in 1989, 1990, 1991, and 1994 or 1995, Respondent made deliberate misrepresentations to the beneficiaries in an effort to conceal his thefts. Respondent prepared a Memorandum to the beneficiaries dated July 22, 1994 and attached a proposed final accounting. (Florida Bar Exhibit #11, and Tr. p. 120, L. 18-24). The Memorandum attached a pleading styled, Petition to Close Estate, and a proposed Receipt and Release. (Florida Bar Exhibit #11). The purported final accounting reflected that there remained in the estate the amount of $115,291.53. (Stip. par. 6). Respondent knew that the final accounting was false and misleading to the beneficiaries, in that only a few dollars remained in the estate account and not the $115,291.53 as represented. (Tr. 122, L. 15-22). Respondent's testimony at the final hearing was that he wanted to close the estate and buy more time to cover his theft from the beneficiaries. (Tr. p. 123, L. 17-22). Respondent made efforts to conceal his thefts with the payoff of $7,000.00 to his son in 1994 or 1995, and likewise prepared false documents to deceive the beneficiaries.

Taking into consideration the nature of the multiple offenses committed by Respondent, disbarment is the only appropriate sanction that would further the

three goals of an attorney disciplinary proceeding as stated by this Court in The Florida Bar v. Lord (supra). This case does not involve an isolated instance of theft, but an ongoing misappropriation over a number of years. Likewise, there were knowing and intentional misrepresentations to conceal the thefts.

This Court has found the misuse of client funds to be an extremely serious offense. In The Florida Bar v. Knowles, 572 So.2d 1373, 1375 (Fla. 1991), this Court stated that:"[u]nquestionably, the misuse of client funds is one of the most serious offenses a lawyer can commit. Misuse of client funds in itself warrants disbarment."

Also, in The Florida Bar v. Schiller, 537 So.2d 992,993 (Fla.1989), this Court has said that "[t]he misuse of client funds is one of the most serious offenses a lawyer can commit. Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment. This presumption, however, can be rebutted by various acts of mitigation, such as cooperation and restitution. By the time of the final hearing, Schiller had replaced in his trust account all the money he misappropriated. The Court further noted that there was no indication that the misappropriations directly damaged any clients. Based upon that mitigation, Schiller received a three (3) year suspension. Such mitigation does not exist in the instant case.

For committing multiple offenses, as in the instant case, this Court has stated the following: "Disbarment is an appropriate punishment where...multiple and serious offenses have occurred."The Florida Bar v. Spann, 682 So.2d 1070, 1074 (Fla. 1991).

In The Florida Bar v. McClure, 575 So.2d 176, 177 (Fla. 1991), the Respondent wrongfully withheld funds from two estates and failed to perform trust accounting practices and procedures as required by The Florida Bar. Although McClure later made restitution to the beneficiaries of the estate, this Court found disbarment to be the appropriate disciplinary sanction, and stated as follows:

> The evidence shows that McClure mismanaged the funds to the detriment of the beneficiaries of the estate. Her misconduct pertained directly to legal work of fiduciary services performed on behalf of the estates and, therefor, directly related to the representation of the estates in probate proceedings. Although restitution has been made, it makes little difference to the beneficiaries whether money was withheld from the estates intentionally or through negligence.

Id. at 178.

Respondent's misconduct is analogous to, yet more serious than, that of McClure. Like McClure, Respondent intentionally disbursed to himself funds belonging to the estate and engaged in dishonest, fraudulent, and deceitful conduct.

Unlike McClure, as of the date of the Referee's Report, Respondent had not made restitution to those harmed.

In The Florida Bar v. Rhodes, 355 So.2d 774 (Fla. 1978), this Court stated that improper withdrawals of funds from an estate for the personal use and benefit of attorney warrants disbarment. Rhodes, who was the executor of an estate, withdrew funds from the estate in the amount of $19,990.00 over a period of time and used these funds for his own benefit. Rhodes was disbarred.

Respondent's conduct in the instant case is even more egregious than that of Rhodes. Respondent converted funds for his personal use, made a payoff to his son of $7,000.00 in an effort to conceal his thefts, made excessive distributions to himself and to his son, and caused the estate to be in debt to the state and the federal governments. Furthermore, Respondent made intentional misrepresentations to the residuary beneficiaries to conceal his defalcations by furnishing to them a bogus final accounting. In addition, he also violated trust accounting rules. Moreover, in the instant case, aggravating factors such as a dishonest and selfish motive, multiple offenses, vulnerability of the victims, and Respondent's substantial experience in the practice of law, warrant disbarment.

The Florida Bar v. Harper, 421 So.2d 1066, (Fla.1982), is another case involving misconduct similar to that of the Respondent. Like Respondent, Harper

was the executor of an estate. Harper was disbarred for making improper payments to himself, investing the estate funds causing a loss to the estate, converting the funds to his own use, and failing to make an appearance after being served with a citation to appear regarding revocation of letters testamentary. (Harper at 1066).

Like Harper, Respondent misappropriated estate funds to his own use and benefit, caused a loss to the estate, failed to comply with the Superior Court's notice and demand for final accountings, and put the estate at risk by failing to pay the state and federal taxes. Additionally, Respondent deceived the residuary beneficiaries by creating a bogus final accounting which contained various misrepresentations, and also engaged in violations related to trust accounts.

In The Florida Bar v. Golub, 550 So.2d 455 (Fla.1989), Golub, as the attorney and personal representative of the estate, without the permission of the heirs, debtors, or the Probate Court, removed approximately $23,608.34 from the estate, and used it for his own benefit. Notwithstanding mitigating factors such as Golub's extreme alcoholism, voluntary self-imposed suspension, cooperation in the bar proceeding, and his lack of a prior disciplinary record, the Supreme Court held that unauthorized removal of substantial sums from the estate warranted disbarment. This Court further stated:

> While alcoholism explains the respondent's conduct, it does not excuse it.....Although we may consider such factors as alcoholism and cooperation in mitigation, we must also determine the extent and weight of such mitigating circumstances when balanced against the seriousness of the misconduct. In this case, we believe that these circumstances do not outweigh the fact that the Respondent stole substantial sums of money over an extended period of time from a client who had bestowed his trust upon the Respondent to see that the client's beneficiaries were cared for after his death. The Respondent betrayed that trust and has subsequently failed to repay the monies he removed.

Id. at 456.

In the instant case, the Respondent's medical and emotional problems are not sufficient mitigation to warrant less than disbarment. Respondent's doctor testified that Respondent's medical condition and use of tranquilizers might affect his judgement. (Resp. Exh. 2, p. 12) and (RR, page 5) Dr. Rygorski testified that the dosage of medications was significant. (Resp. Exh. 2, p. 25, L. 24) However, Respondent did not present evidence that he abused prescription medications. In fact, when questioned about his use of the tranquilizer Xanax, Respondent stated that he used the drug as prescribed, and never exceeded the recommended dosage. (Tr. p. 113, L. 2-31). Furthermore he could not be specific as to when he took the drug, or whether he even completed the prescription. (TR p. 112-113). Dr. Rygorsky

acknowledged that the medications would not cause someone to steal. (Respondent. Exh. 2). (p. 26 L. 24 and p. 27, L.1). Notwithstanding his medical problems, Respondent candidly admitted that it was not that he did not know that he should not have taken the money out of the estate. (Tr. p. 89, L. 13-21). The mere existence of mitigating factors is not enough to warrant a sanction less than disbarment in a case involving multiple misappropriations of estate funds and subsequent attempts to conceal the misappropriations.

In The Florida Bar v. Pierce, 197 So. 2d 496 (Fla. 1967), the accused attorney, who was also the executor of an estate, misappropriated $33,500.00 from the estate and refused to account for the funds. This Court held that disbarment was the appropriate sanction for Pierce.

Respondent's misconduct is analogous to that of Pierce except that, in addition to the misappropriation, Respondent has engaged in misrepresentations and minor trust accounting rules.

In The Florida Bar v. Tillman, 682 So.2d 542 (Fla. 1996), Tillman misappropriated client funds, commingled client and personal funds, and failed to follow trust accounting rules. In aggravation, this Court found a dishonest and selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of misconduct, and lack of remorse. Lack of a prior disciplinary record and

a short period of time in practice of law were the mitigating factors. In approving disbarment as the appropriate sanction, this Court found that mitigation in Tillman was not adequate to lower the discipline. (Tillman at 543.). The Court reiterated the presumption of disbarment upon a finding of misuse of client funds or misappropriation, as set forth in The Florida Bar v. Schiller, 537 So.2d 992, 993 (Fla.1989).

Respondent engaged in misconduct that is even more egregious than that of Tillman's. Although Respondent has shown remorse in Bar proceedings, unlike Tillman, Respondent had substantial experience in the practice of law, and the vulnerability of the victims as family members are additional aggravating factors.

In the instant case, the Referee cited a number of cases in her Report for which the accused attorney received less than disbarment for misappropriation of funds. These were the same cases cited by Respondent's counsel in his proposed order, and are readily distinguishable from the instant case.

The first case cited by the Referee is The Florida Bar v. Cramer, 643 So. 2d 1069 (Fla. 1994). Cramer had been charged with three (3) transgressions. In the first instance, Cramer was to deposit $13,743.42 into his trust account pursuant to a settlement agreement for a client's civil case, but instead deposited the funds into his operating account. The funds were then used for office purposes. Cramer later

deposited his own personal funds to make up the deficit in the trust account. (Cramer, at 1070). In the second matter, Cramer received a notice of intent to levy from the Internal Revenue Service (IRS). Cramer feared the IRS would garnish his operating account, so he placed fees earned from a company he owned, into his trust account. The Court found that Cramer's knowing and deliberate misuse of the trust account was due to an attempt to mislead the IRS. In the third matter, Cramer was also charged with trust account violations. Cramer received a ninety (90) day suspension. In determining the appropriate discipline, this Court noted that Cramer had demonstrated "substantial mitigating factors." The Court found that Cramer's heart condition led to many of Cramer's problems in his practice and affected his conduct. The Court then stated that in determining the appropriate discipline, that the other factual findings were a result of negligence on the part of Cramer. (Cramer, at 1070). It is unclear from the opinion whether the Court considered the $13,743.42 designated as trust funds, but placed in the operating account, to be a result of negligence because of the trust account problems, or whether the trust accounting violations were as a result of negligence. Furthermore, Cramer's heart condition was so severe that it required open heart surgery which kept him out of the office completely for five months, after which he returned to work on a restricted basis. (Cramer at 1070-71.). This Court also found that Cramer cooperated in the

investigation and that no client suffered injury. (Cramer at 1070.).

Although Respondent cooperated with The Bar's investigation, Respondent's conversion of estate funds was intentional, and not the result of any negligence. The estate and beneficiaries were defrauded to the extent of $123,750.00, resulting in serious client injury.

Unlike Cramer, Respondent as of the date of the Referee's Report, has offered The Florida Bar no evidence of restitution to the other beneficiaries of his uncle's estate, despite the Judgement entered by the Superior Court in North Carolina on April 7, 1997. (TFB Exh. 31). Respondent represented that he had negotiated a settlement of this Judgement (TR p. 20), but has not provided The Florida Bar with any evidence that restitution has been made, or that the Judgement has been satisfied. Even if Respondent made full restitution to his relatives, under Florida Standards for Imposing Lawyer Sanctions, Sanction 9.4 (a), forced or compelled restitution is a factor that should not be considered as either aggravating or mitigating. Respondent is attempting to resolve his dispute with the victims in an effort to benefit himself vis-a-vis pending criminal charges and the Bar proceedings. (Tr. p. 99, L. 13-24).

The next case cited in the Report of Referee, The Florida Bar v. Behrman, 658 So. 2d 95 (Fla. 1995), is also readily distinguishable from the instant case. Behrman entered in to a business relationship with an individual named Hunter who had the

ability to assist people who wanted to borrow money, but were without the collateral necessary to obtain funding. Behrman agreed to act as the escrow agent for funds solicited by Hunter. Behrman then disbursed funds from escrow, contrary to the escrow agreements. Behrman claimed that he disbursed funds because he was misled by Hunter and that he could not produce the necessary records because Hunter stole his files. Behrman was given a ninety (90) day suspension. The Court accepted the referee's findings that Behrman had a duty to hold the monies in trust, and only apply those funds to the purposes for which they were entrusted. The referee in Behrman determined that Behrman did not act criminally or fraudulently. Mitigating factors cited by the referee in Behrman included his age (79), limited experience in practicing law, absence of a disciplinary record, and his military service. (Behrman at 96.). It is interesting to note, that despite Behrman's age, he had only practiced law for a short period of time due to military service in World War II and a thirty-four (34) year long career as an owner and operator of retail shops. (Behrman at 95). In addition, Behrman had already served a fifteen (15) month emergency suspension, and the ninety (90) days suspension was ordered nunc pro tunc to the date of the emergency suspension. (Behrman at 97.).

Unlike Behrman, Respondent has extensive experience in the practice of law. In addition, Respondent has stipulated that he converted $123,750.00 from his uncle's

estate (Stip para. 5), whereas Behrman was found not to have acted criminally or fraudulently.

The next case cited in the Report is The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992). In MacMillan, the accused attorney was a guardian of a minor's property. MacMillan transferred $4,000.00 from the guardianship to his personal account without prior notice to the minor or his mother. However, MacMillan then reimbursed the entire $4,000.00 from his own funds within two weeks and notified the mother of the transfer and reimbursement (MacMillan at 458.), but failed to report or include this transaction in his guardianship report. MacMillan was also unable to account for items of jewelry being held on behalf of the minor. MacMillan received a two year suspension for his misconduct.

Respondent's actions in the instant case were much more egregious than those of MacMillan. Whereas MacMillan reimbursed the guardianship within two weeks of his isolated misappropriation, Respondent has yet to show proof of restitution for his multiple misappropriations. MacMillan notified the mother of the minor of the transfer and reimbursement, unlike Respondent who fabricated a final accounting and mailed it to the beneficiaries in an attempt to hide his conversion of $123,750.00.

The next case cited in the Referee's report is The Florida Bar v. Condon, 647 So. 2d 823 (Fla. 1994), in which this Court imposed a three year suspension on an

attorney who was found to have commingled his own funds with client funds and who was unable to account for $9,500.00 of client funds placed in escrow pending resolution of a foreclosure action. (Condon at 823.). This Court rejected the referee's recommendation of disbarment and suspended Condon for three (3) years. In mitigation this Court found that Condon suffered from recurrent severe depression and had stopped taking his prescribed antidepressant medication during the time period which caused forgetfulness and emotional impairment. As a condition of reinstatement, Condon was required to obtain a report from his treating physician stating that he was competent to practice law and listing any required medications and continuing treatment required in order for him to remain competent. (Condon at 824.)

Unlike Condon, Respondent's alleged medical and personal problems do not rise to the level of the severe depression cited as a mitigating factor in Condon and Respondent should be held accountable for his actions. In The Florida Bar v. Graham, 605 So.2d 53 (Fla. 1992), this Court stated the following:

> Sadly, stressful familial and financial obligations are common problems. However, we cannot excuse a lawyer's misappropriation of a client's funds and misrepresentations to cover up any wrongdoing as a means to solve life's problems. Absent evidence casting doubt on a lawyers culpability, such as evidence of mental or substance abuse problems, a lawyer is held fully responsible for any misconduct.

Id. at 56.

In the Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991), the accused attorney argued that his depression over marital and financial problems led him to use his trust account for personal purposes. (Shanzer at 1383.). Shanzer also argued that his emotional problems, cooperation, remorse, rehabilitation, payment of restitution were mitigating factors which warranted a discipline less than disbarment. This Court found that the mitigating evidence presented by Shanzer failed to warrant a discipline less than disbarment and stated:

> Respondent argues that his depression, primarily over his marital and economic problems, led him to use his trust account for personal purposes. These problems, unfortunately, are visited upon a great number of lawyers. Clearly we cannot excuse an attorney for dipping into his trust funds as a means for solving personal problems.

(Id. at 1383-1384.). As in Shanzer, Respondent's personal and financial problems offer an insight into the reasons or motives for his conversion of estate funds and his subsequent attempts to conceal his actions. Like Shanzer, Respondent's dilemma does not offer sufficient mitigation to warrant less than disbarment.

The next case cited by the Referee is The Florida Bar v. Farver , 506 So.2d 1031 (Fla. 1987). Farver received a one (1) year suspension after depriving his law firm of $6,671.00 in fees paid by the firm's clients, and owed to the firm. Farver

made restitution to the firm after being arrested and charged with grand theft and no clients were injured. (Farver at 600.).

The Report of Referee also cites The Florida Bar v. Ward, 599 So.2d 650 (Fla. 1992) . In Ward, the accused attorney received a one (1) year suspension after he used the law firm expense account to withdraw over $12,000.00 from his law firm's operating account, and used the funds for personal obligations. Ward was not charged with misappropriating client funds, no clients were injured, and Ward made restitution by the time of the final hearing. Ward also acknowledged his offenses on the same day he was confronted. (Ward at 653). This Court chose to differentiate between the theft of client funds and those of firm monies in Farver and Ward.

The Report of Referee also cites Schiller (supra), wherein the accused attorney received a three (3) year suspension after he used trust account funds for personal purposes. Schiller borrowed money and replaced the trust deficit of $29,000 by the time of the final hearing, and there was no evidence that his misappropriation damaged any clients. (Schiller at 993). Such is not the case with Respondent. Respondent has stipulated that he converted $123,750.00 from his uncles estate. (Stip. para. 5). Respondent then sent a false final accounting to the beneficiaries of the estate in an attempt to conceal his theft. The Referee's recommended discipline of a ninety (90) day suspension is inappropriate and contrary to case law, the facts of

this case, and the Standards for Imposing Lawyer Sanctions. Considering the egregious nature of Respondent's misconduct, disbarment is the appropriate discipline. Respondent has not demonstrated sufficient mitigating factors to warrant any discipline less than disbarment. What message are we sending to the public and members of The Bar if we fail to disbar an attorney, who knowingly and intentionally stole funds entrusted to him by family members, and then lied to conceal his theft?

CONCLUSION

Pursuant to the foregoing facts and evidence, including the stipulation, the applicable Standards for Imposing Lawyer Sanctions, and the pertinent case law, Respondent should be disbarred from the practice of law in Florida. In addition, Respondent should be assessed The Florida Bar's costs in these disciplinary proceedings and be required to make full restitution to the beneficiaries prior to applying for readmission.

Respectfully submitted,

_____

David Robert Ristoff
Branch Staff Counsel
The Florida Bar
Tampa Airport, Marriott Hotel
Suite C-49
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 358576

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Initial Brief has been furnished by Airborne Express to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. Mail to Martin E. Rice, Esq. Counsel for Respondent, at P.O. Box 205, St. Petersburg, Florida 33731-0205; and a copy by regular U. S. Mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of _____, 1999.

_____
David Robert Ristoff
Branch Staff Counsel