IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. 93,559

v. TFB File No. 98-00709-02

ROBERT L. TRAVIS, JR.,

Respondent.
_____/

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellee, **Robert L. Travis, Jr., Respondent**, will be referred to as Respondent, or as Mr. Travis, throughout this brief. The appellant, **The Florida Bar**, will be referred to as such, or as the Bar.

References to the Report of Referee shall be by the symbol **RR** followed by the appropriate page number.

References to the transcript of the hearing before the Referee on October 14, 1998 shall be by the symbol **TR** followed by the appropriate page number.

References to specific pleadings will be made by title.

I. STATEMENT OF THE CASE

On July 28, 1998, The Florida Bar filed its Complaint against Respondent in this trust account matter, The Florida Bar File No. 98-00709-02, accompanied by a Request for Admissions and a Motion to Consolidate this case with The Florida Bar File No. 96-01203-02, the Coble matter, a previous case involving the same Respondent. The Motion to Consolidate was granted and the case assigned to The Honorable John W. Peach as Referee. Respondent filed his Response to Request for Admissions and Answer to the Complaint admitting all of the allegations in The Florida Bar File No. 98-00709-02.

The Florida Bar then filed a Motion to Deem Matters Admitted and Motion for Summary Judgment which were granted. The parties requested that the two consolidated cases be severed, Judge Peach granted the request of the parties, and on October 14, 1998, a final hearing, dealing with discipline only, was held in the trust account matter, Case No. 93,559, TFB File No. 98-00709-02. (RR1-2). Respondent admitted the authenticity and admissibility of The Bar's audit report, (Complaint, Exhibit A) and the Referee accepted it in evidence without objection (TR8). The severed Coble matter was subsequently dismissed due to the death of the complaining

witness.

The Referee rendered his report on January 8, 1999, recommending that respondent be suspended from the practice of law in the State of Florida for a period of ninety days, commencing on the date of the Final Hearing, October 14, 1998, followed by a three year period of probation, that he make restitution, that he participate in the LOMAS program, attend a trust account course and continue with mental health care according to his physician's directions. The Florida Bar served its Petition for Review of the Referee's recommended level of discipline on February 15, 1999.

II. STATEMENT OF THE FACTS

Respondent's trust account was audited for the period of January 1, 1996, through December 31, 1997. Based upon the records, respondent's trust account was short $6,273.21 as of June 30, 1996, was short $20,419.57 as of December 31, 1996, was short $15,193.79 as of June 30, 1997, and was short $22,209.47 (TR6) as of December 31, 1997 (Complaint, Exhibit A). According to the audit report, payments of $35,850 were made to the respondent during the years 1996 and 1997 which were apparently not authorized by clients. Respondent admitted to the bar auditor that he

had violated trust account rules.

Respondent's testimony at the Final Hearing, held on October 14, 1998, established two patterns of violations involving his trust account. In the first, he shared his trust account with a space-sharing colleague, Luther Smith (TR161), who paid respondent a share of the utility and other overhead expenses of the office. Smith maintained a personal injury practice and they developed a pattern which involved respondent making direct withdrawals of Smith's overhead payments from Smith's undistributed fees on deposit in the trust account (TR163, 187). There came a point in time where Smith fell behind but respondent continued withdrawing Smith's overhead share from the trust account even though there were insufficient Smith fees on deposit (TR164, 175).

The second pattern involved respondent settling his own clients' personal injury claims and withholding settlement funds sufficient to pay off medical providers' balances owed by the client. The Respondent would then periodically negotiate a reduction of the commingled, amassed balances with the medical provider (TR174 - 175), retaining the savings thus realized for his personal use (TR175), rather than passing it along to the clients.

The Respondent testified on cross examination at the Final Hearing that he had

used trust fund monies to repay a personal bank loan (TR181) and that he had issued a check from his trust account payable to his daughter, Natasha, in the amount of eighteen hundred dollars, to fund a trip to Costa Rica for educational purposes (TR190).

The Bar audit encompassed the years 1996 and 1997, but Respondent testified that, had the audit also embraced the year 1998, there would have been additional shortages amounting to approximately fifteen hundred dollars, according to his recollection (TR189). He admitted knowing at the time of the misconduct that it was wrong (TR 185), and admitted that he had violated the trust account rules (TR172).

While respondent had made tentative arrangements for restitution to two medical providers (TR 188), as of the Final Hearing he had made no such arrangements regarding funds owed to his clients (TR 189).

The guilt aspect of the case having been predetermined by summary judgment, the Final Hearing involved discipline only. Respondent presented thirteen witnesses in mitigation and the Referee found there were mitigating factors consisting of: (1) absence of a prior disciplinary record (TR 227; RR 8); (2) personal or emotional problems - there was evidence that Respondent suffered from depression in that one of Respondent's colleagues testified that approximately one year prior to the final

disciplinary hearing one of Respondent's cases that the colleague reviewed was not up to the standard of Respondent's normal practice, however, much of Respondent's anxiety stemmed not from his depression but from The Florida Bar proceedings (TR 227; RR 8); (3) full and free disclosure to disciplinary board or cooperative attitude toward proceedings (TR 227; RR 8); (4) character or reputation - Respondent provided 28 years of exceptional service to the profession of law and to his community (TR 226; RR 8).

The referee also found aggravating factors consisting of : (1) substantial experience in the practice of law - Respondent knew that using his trust account for personal matters was wrong at the time he did it (TR 225; RR 7); (2) Respondent exposed his clients to substantial risk (TR 225; RR7); (3) Indifference to making restitution - Respondent had made no substantial effort to make arrangements for restitution to his victims at the time of the disciplinary hearing nor had he contacted his clients to whom he owed money to let them know that restitution was owed to them (TR 225; RR 7); and, (4) Respondent wrote a check out of his trust account payable to his daughter in order for her to take a trip to Costa Rica (RR 7).

SUMMARY OF ARGUMENT

DISBARMENT IS APPROPRIATE WHERE THERE IS ADMITTED, KNOWING MISAPPROPRIATION OF CLIENTS' TRUST ACCOUNT FUNDS FOR PERSONAL USE, DESPITE THE MITIGATION EVIDENCE OFFERED, AND THE REFEREE'S RECOMMENDED LEVEL OF DISCIPLINE, NINETY DAY'S SUSPENSION, IS NOT CONSISTENT WITH PREVAILING CASE LAW IN LIGHT OF THE MISCONDUCT INVOLVED

ARGUMENT

DISBARMENT IS THE APPROPRIATE SANCTION IN MATTERS INVOLVING MISAPPROPRIATION OF CLIENT FUNDS

This Court has repeatedly affirmed the proposition that, while a Referee's recommendation of discipline is persuasive, this Court has the ultimate responsibility to determine the appropriate sanction. *The Florida Bar v. Reed,* 644 So 2d 1355 (Fla. 1994). Thus, in the case at bar, the referee's recommendation that Respondent be suspended for a period of ninety days is not binding upon this Court's determination of an appropriate measure of discipline that is consistent with other disciplinary cases and the nature of the conduct which gave rise to these proceedings.

The Bar's audit of Respondent's trust account covering the years 1996 and 1997, which was unrefuted, disclosed that the account was short in varying amounts during that period, ranging from $6,273.21 on June 30, 1996, to $22,209.47 as of December 31, 1997. During this two year period Respondent made unauthorized withdrawals from the account for his personal use, amounting to $35,850.00. Respondent admitted that he had used trust account funds to pay off personal loans and to pay for travel for a member of his family. His abuse of the trust of his clients did not result from negligence, nor from the conduct of subordinates or associates.

Respondent acknowledged that he knew at the time that what he was doing was wrong, yet he was not deterred by any sense of guilt or conscience.

This Court has also repeatedly affirmed the concepts that the misuse of client's funds is one of the most serious offenses a lawyer can commit, *The Florida Bar v. Schiller*, 537 So 2d 992 (Fla. 1989), and that upon a finding of misuse or misappropriation there is a presumption that disbarment is the appropriate punishment. *The Florida Bar v. Shanzer*, 572 So 2d 1382 (Fla. 1991); *Schiller*, supra.; Fla. Stds. Imposing Law. Sancs. 4.11. Where the referee found that the misuse of client funds was intentional and clearly unauthorized, as in the case at bar, as opposed to negligent, and where the record leads to the inescapable conclusion that at times the respondent used clients' funds for his own purposes, also as in the case at bar, disbarment is warranted. *The Florida Bar v. McIver*, 606 So 2d 1159 (Fla. 1992).

In a case factually similar to this, *The Florida Bar v. Tillman*, 682 So 2d 542 (Fla. 1996), disbarment was indicated where respondent misappropriated client funds by paying personal expenses from her trust account, drew excessive and premature fees and costs and failed to pay clients' medical expenses with funds supplied to her to do so. In *Tillman*, as here, the trust account revealed a persistent and growing

shortage and the evidence showed that Tillman intentionally misused her trust account. Disbarment was also imposed in *The Florida Bar v. Benchimol*, 681 So 2d 663 (Fla. 1996) where the respondent deposited client funds in his personal bank account, commingled client and personal funds and misappropriated a client's cost refund to his own use.

In another, perhaps even more factually similar case, T*he Florida Bar v. Shuminer*, 567 So 2d 430 (Fla. 1990) the referee's recommendation of an eighteen month suspension was not accepted and the respondent was disbarred, instead. There, as in this case, Shuminer was found to have misappropriated settlement funds intended for payment of medical expenses. The referee found mitigation in the absence of a prior disciplinary history (as here), emotional problems in the form of addiction (as here, except depression here), cooperation with The Bar's disciplinary proceeding (as here), good character and reputation, including testimony from two judges (as here), and remorse (as here). Additionally, despite all of these findings of mitigation and a finding that Shuminer had made a timely and good faith effort at restitution (as opposed to here) this Court determined that he should be disbarred.

The Referee below was influenced by an impressive array of mitigation witnesses, including three sitting circuit court judges. Most of these witnesses

testified to the fact that Respondent, in earlier years, served a low-income community that would be deprived by the loss of his legal services, that he worked diligently in volunteer work in the legal and social community and that he provided significant pro bono services. These witnesses, for the most part, however, were unaware of his trust account violations and the fact that the low income clients he represented were the very ones whose trust he abused. It is of further interest to note that, as of the date of the disciplinary hearing, Respondent had made no effort to effect restitution to his clients, although he had implemented an installment payment plan with two of the doctors with whom he had a working arrangement.

The respondent's good works in the past should not nullify the harm he has caused nor the severity of the discipline to be imposed. In *The Florida Bar v. Aaron*, 606 So 2d 623 (Fla. 1992) the Court stated, at page 624

> "We recognize that Aaron has provided a valuable service to his community by rendering free legal services to people in financial need. However, Aaron's good work does not overcome his pattern of misusing client's funds, one of the most serious offenses a lawyer can commit."

Likewise, in *The Florida Bar v. Smiley*, 622 So 2d 465 (Fla. 1993), the respondent's involvement in professional and civic activities and his refusal, to his detriment, to turn away marginal cases and clients who were unable to pay, were not

sufficient mitigation to avoid disbarment for misappropriation of trust funds and lies made to evade emergency suspension, where restitution either had not been made or was not made until after The Bar's investigation began.

The referee also considered, in mitigation, the evidence that Respondent suffered from depression during the period beginning approximately one year prior to the disciplinary hearing, as testified to by a colleague who found his work in a file to be less than the quality she would ordinarily see from Respondent. The evidence of depression was also buttressed by the testimony of Respondent's psychiatrist who, though he saw Respondent for the first time only two months prior to the hearing, diagnosed depression to have begun three years earlier, based upon the uncorroborated history of symptoms furnished by the Respondent. Nonetheless, in *The Florida Bar v. Clement*, 662 So 2d 690 (Fla. 1995) the Court found disbarment to be appropriate in a case involving misappropriation of client funds ($40,000), despite evidence of respondent's impaired mental health (bipolar disorder), and in *The Florida Bar v. Horowitz*, 697 So 2d 78, (Fla. 1997), respondent was disbarred as a result of neglecting clients and failure to respond to Bar communications in spite of claimed clinical depression. This Court found that while the evidence of Horowitz's clinical depression helped to explain his conduct, it did not excuse it. Likewise, in

The Florida Bar v. Golub, 550 So 2d 455 (Fla. 1989) the Court found that, while alcoholism explained the respondent's conduct, it did not excuse it.

Respondent's claim of depression should not be used as a shield to protect him from his misuse of client funds, particularly where there is no evidence to link the effects of depression to the taking of the funds.

CONCLUSION

The Florida Bar respectfully suggests that Respondent should be disbarred from the practice of law in the State of Florida for a period of five years, with leave to reapply thereafter, and should bear the costs of these proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed by certified mail #_____, return receipt requested, to Richard A. Greenberg, Esquire, Counsel for Respondent, at Post Office Box 925, Tallahassee, Florida 32302, on this _____ day of _____, 1999.

I also certify that this brief has been printed using 14 point proportionately spaced Times New Roman font.

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DONALD M. SPANGLER, Bar Counsel

cc: Director of Lawyer Regulation

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