

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ELENA C. TAULER,

Respondent.

Supreme Court Case
No. 94,239

The Florida Bar File
No. 97-70,655(11F)

Complainant's Initial Brief

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar filed a complaint against the Respondent dated November 3, 1998. The parties submitted the following stipulation of facts to the Referee on April 12, 1999:

Comes now, The Florida Bar, by and through the undersigned attorney, and offers this Court the following Statement of Facts, stipulated and agreed to by The Florida Bar, Complainant, and Elena C. Tauler, Respondent, in this matter:

1. Respondent is and was, at all times material herein a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.
2. Respondent was a partner in the law firm of Tauler & Shearin (hereafter referred to as the "Firm"), although there was no formal partnership agreement or incorporation.
3. In or about May, 1996, the Firm was dissolved.
4. At the time of the dissolution, Shearin left the office, and left Respondent with the control and responsibility of most cases and trust funds of the firm, including \$35,522.54. (hereinafter identified as "Olivia [sic] Medicaid Funds")
5. On or about June 4, 1996, Respondent opened a trust account identified as, Elena C. Tauler, Esq. & Associates Trust Account #606104994-06 maintained at Totalbank (hereinafter identified as "New Account")
6. New Account was opened with the transfer of \$38,194.13 from the Firm's Account, as well as \$18,177.26 from the trust account identified as, Elena C. Tauler & Associates, Inc., Escrow Account #606104444-06, maintained at Totalbank (hereinafter referred as "Old Account"), for a total of \$56,371.39.

7. Included in the funds transferred from Old Account was \$14,064.80, held in trust for Manuel and Vilma Gomez (hereinafter identified as "Gomez Funds")
8. During the months of June and July, 1996, Respondent issued three checks from the New Account. The total of said checks was \$39,500.00.
9. Said checks were made out to Respondent or Respondent's Operating Account.
10. Respondent used said funds to satisfy personal and business obligations unrelated to the Olivia [sic] or Gomez matters.
11. On or about September 9, 1996, Respondent deposited \$3,250.00 into New Account. Said funds pertained to Respondent's client, Angel Armas. (hereinafter identified as "Armas Funds")
12. On or about October 8, 1996, Respondent issued a check in the amount of \$17,128.45 from New Account.
13. On or about October 8, 1996, New Account had a zero balance.
14. On or about October 8, 1996, New Account should have had a balance of at least \$51,654.01, reflecting the Olivia [sic] Funds, the Gomez Funds, and the Armas Funds.
15. On or about November 30, 1996, Respondent deposited in New Account a cashier's check in the amount of \$28,000.00, received from her husband Joaquin E. Tomas.
16. On or about December 3, 1996, Respondent deposited \$9,000.00 in cash into New Account.
17. On or about December 3, 1996, the balance in New Account was \$37,000.00.

18. On or about December 4, 1996, Respondent disbursed the \$35,522.54 Medicaid/Olivia [sic] Funds to Olivia [sic] at Olivia's request.

19. On or about January 31, 1997, Respondent disbursed \$2,066.67 to Armas. The source of the funds used to reimburse Armas was a check for \$32,000.00 from a corporation owned by Respondent's husband.

20. In February, 1997, Respondent disbursed \$14,064.80 to Manuel and Vilma Gomez. The source of the funds was recently earned attorney's fees.

In addition to the stipulated facts, the Bar introduced the testimony of witness Judy Heren (T. 4/12/99, p. 40 ff) and entered twelve exhibits into evidence (TFB Exhs. 1-12, p. 63). The Bar's exhibits included a letter dated January 12, 1996, addressed to Ms. Elena C. Tauler, 3939 Ponce de Leon Blvd., and attorney John J. Phillips, 230 Catalonia Avenue. The letter advised the recipients of the "perfected Medicaid lien" and provided a copy of the same. (TFB Exhs. 1 and 2). Alan Hodin, Esquire, transferred the medicaid funds by a check dated March 18, 1996, to the Tauler and Shearin Trust Account. The check bore the notation, "Dalia Oliva v. Amoco, Funds held for Medicaid Lien." (TFB Exh. 3). Tauler's partner, Robert Shearin, acknowledged the lien on behalf of the firm in a letter dated March 18, 1996 (TFB Exh. 4). Medicaid rejected Shearin's request for reduction of the lien and demanded the full amount of \$35,522.54 in a letter dated April 25, 1996 (Exh. 5). On December 3, 1996, one month after the Bar received a complaint about the Medicaid

funds (TFB Exh. 12), Tauler prepared a release and indemnity agreement. Tauler gave \$35,522.35 to Dalia Oliva, pursuant to the release and indemnity agreement, in which the client “assumed responsibility for any alleged lien ... from Medicaid or any other party.”

More than a month prior to the execution of the release and indemnity agreement, Robert Shearin, Tauler’s former partner, wrote to Tauler and stated:

As you are aware, when I left the firm in May, I turned the trust account funds over to your P.A. trust account which included \$35,224.54 to cover the above lien. I was told the lien would be paid immediately. I am astonished that it has not been paid.” (TFB Exh. 11).

At the conclusion of the hearing, the Referee found that the Respondent violated Rule 4-1.15(a) (safekeeping property, client’s and third party funds to be held in trust), Rule 4-1.15(b) (prompt delivery of client funds), and Rule 5-1.1(a) (money entrusted must be used for specific purpose) of the Rules Regulating The Florida Bar.

The Referee found that there were two aggravating factors: selfish motive and multiple offenses (Florida Standards for Imposing Lawyers Sanctions, 9.22(b) and (d)). He found mitigation to include: personal and emotional problems, positive character and reputation, timely good faith restitution effort, and full and free disclosure, and remorse (Florida Standards for Imposing Lawyer Sanctions, 9.31(c), (d), (e), (g) and (h)).

The Bar sought disbarment. The Referee recommended a three year

suspension. The Bar filed a Petition for Review, seeking review of the recommendation of discipline.

SUMMARY OF ARGUMENT

Respondent stipulated to the basic facts of the case. The stipulation established that the Respondent depleted her trust account by issuing checks to herself. She misappropriated the funds of three clients.

Based upon the stipulation, witness testimony, and documentary evidence, the Referee determined that the Respondent was guilty of the following violations: Rule 4-1.15(a) (safekeeping property, client's and third party funds to be held in trust), Rule 4-1.15(b) (prompt delivery of client funds), and Rule 5-1.1(a) (money entrusted for a specific purpose must be used only for that purpose) of the Rules Regulating The Florida Bar.

The Bar submits that based upon those violations, the Respondent should be disbarred. The Shanzer, and Shuminer cases, discussed in detail in the Argument portion of the brief, are disbarment cases involving the same rule violations, aggravating, and mitigating factors.

The finding of timely good faith restitution as a mitigating factor cannot be justified in view of Florida Standard for Imposing Lawyer Sanctions, 9.4(a), which states that forced or compelled restitution cannot be utilized as mitigation. Restitution was made in the instant case only after the Bar began its investigation. Therefore, there is, in fact, less mitigation in this case than in the Shanzer, and Shuminer¹, which

¹ See, however, The Florida Bar v. Kassier, 711 So.2d 515 (Fla. 1998).

both call for disbarment.

POINT ON APPEAL

**WHETHER DISBARMENT IS THE APPROPRIATE
DISCIPLINE FOR THE RESPONDENT?**

ARGUMENT

DISBARMENT IS THE APPROPRIATE DISCIPLINE FOR THE RESPONDENT

This Court's scope of review of recommended discipline is broader than that afforded to findings of fact because this Court has the ultimate responsibility to determine the appropriate sanction. The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1999). The Bar recognizes that disbarment is the ultimate penalty. The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977). However, there is a presumption in favor of disbarment in misappropriation cases. The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990); The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987).

At least one case is virtually identical to the instant case from the standpoint of violations, mitigation, and aggravation. Disbarment was ordered in The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991). Shanzer was also guilty of misappropriation of funds and causing trust account shortages. The aggravating factors were virtually identical, namely, dishonest or selfish motive, a pattern of misconduct, and multiple offenses. The mitigation was also virtually identical. The Referee found emotional problems, full cooperation, remorse, rehabilitation, and the payment of restitution.

This Court held that:

In the case before us, we likewise fail to find that the mitigating evidence submitted warrants a discipline less

than disbarment. 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 of solving personal problems. We recognize that mental problems as well as alcohol and drug problems may impair judgment so as to diminish culpability. However, we do not find that the referee abused his discretion in not finding this to be one of those cases.

We are not unmindful of Respondent's cooperation with the Bar and restitution efforts, and these efforts should be considered upon any reapplication for membership in The Florida Bar. (At 1383-84; emphasis supplied).

The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990), is another misappropriation case in which this Court ordered disbarment. The Referee found that nine mitigating factors were applicable. All five of the mitigating factors in this case were among those nine. In Shuminer, there were no aggravating factors. Nevertheless, this Court rejected the Referee's recommendation of an eighteen month suspension. The ruling stressed that the mitigating factor of the Respondent's emotional problems were not significant enough to impair Respondent's performance as an attorney. In this case as well, there is no apparent causal relation between Respondent's emotional problems and the nature of her conduct.

This Court stated in Shuminer that:

We find this case to be nearly identical to that

presented in The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986), another instance of misappropriation of trust account funds. There, even though Knowles made full restitution, had no prior disciplinary records, and had successfully completed an alcoholic rehabilitation program, we found that disbarment was appropriate. We pointed out that during the period when the misconduct occurred, Knowles had continued to work regularly and his income did not diminish discernibly as a result of his alcoholism. So too here, Shuminer has failed to establish that his addictions rose to a sufficient level of impairment to outweigh the seriousness of his offenses. He continued to work effectively during the period in issue, and he used a significant portion of the stolen funds not to support or conceal his addictions but rather to purchase a luxury automobile. “In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list.” The Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla. 1996). Accordingly, we disbar Jeffrey Shuminer for a period of five years ... (at 432-33; Emphasis supplied)

This case is characterized by a dual misuse of the Oliva funds. First, the funds were used for personal and business purposes, then after the trust funds were replaced, they were transferred improperly to the client while subject to a Medicaid lien. Thus, the violations were more extensive than two otherwise comparable cases, Shanzer, supra and Shuminer, supra, which resulted in disbarment. Additionally, in this case, the misappropriated funds belonged to not just one, but three clients. Therefore, disbarment is clearly appropriate.

In addition, disbarment is appropriate because the mitigating factor of timely

good faith restitution was improperly invoked. The evidence in regard to restitution is uncontradicted. The funds were transferred to Respondent's new trust account in June of 1996. (TFB Exh. 12). The trust account was relatively small and the \$35,522.54 was the major part of the account which had also received a transfer of \$18,177.26 to the "Elena C. Tauler and Associates Trust Account." (TFB Exh. 12).

The trust funds of the firm including the \$35,522.54 identified as Oliva/Medical Funds were deposited in an account by the Respondent. (Stip. Para. 4, 5). Respondent Tauler issued three checks to herself or her operating account to satisfy personal and business obligations (Stip. Para. 8, 9, 10). There were also funds belonging to other clients, Gomez and Armas, in the account prior to its total depletion (Stip. Para. 7, 11, 13).

What evidence has the Respondent furnished which established timely good faith restitution? The Gomez and Armas trust account funds were not paid to the clients until after a delay of at least eight months for Gomez, and four months for Armas. (Stip. 11, 19). There is no evidence that the funds restored to the depleted trust account were furnished in a timely manner. Furthermore, forced or compelled restitution cannot be used in mitigation. Florida Standards for Imposing Lawyer Sanctions, 9.4(a).

The \$35,522.54 demanded by the agency for Health Care Administration of the

State of Florida, the lien holder, in April of 1996 (TFB Exh. 1), was delivered by the Tauler firm in December of 1996 (TFB Exh. 12), and was never delivered to the Agency.

Furthermore, what evidence has the Respondent furnished of “good faith”? The funds restored to the trust account were delivered to the former client, Oliva, and not to the Agency that held the lien.

In addition, the restoration and delivery of funds in respect to all three clients did not take place until after the Bar commenced an investigation. (TFB Exh. 12). Restitution under those circumstances, i.e., compulsion, cannot serve as evidence of good faith mitigation. Standard, 9.4(a), supra.

Clearly, there is no proof of either timely or good faith restitution.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that the Respondent be disbarred.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Initial Brief was forwarded Via Airborne Express to DEBBIE CAUSSEAUX, Acting Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to SCOTT W. SAKIN, Attorney for Respondent, 1411 N.W. North River Drive, Miami, Florida 33125, on this _____ day of October, 1999.

CYNTHIA ANN LINDBLOOM
Bar Counsel

CERTIFICATE

I HEREBY CERTIFY that this brief is typed in Times New Roman, 14 Point type.

CYNTHIA ANN LINDBLOOM
Bar Counsel