

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JACQUELINE MARIE KINSELLA,

Respondent.

Supreme Court Case
No. SC17-55

The Florida Bar File
No. 2016-30,955(10B)

INITIAL BRIEF

Kenneth H. P. Bryk, Bar Counsel
The Florida Bar
1000 Legion Place, Suite 1625
Orlando, Florida 32801-1050
(407) 425-5424
Florida Bar No. 164186
kbryk@floridabar.org

Adria E. Quintela, Staff Counsel
The Florida Bar
Lakeshore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 897000
aquintel@floridabar.org

John F. Harkness, Jr
Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390
jharkness@floridabar.org

Joshua E. Doyle
Executive Director Designate
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 25902
jdoyle@floridabar.org

RECEIVED, 08/23/2017 03:23:27 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

SUMMARY OF ARGUMENT5

ARGUMENT6

ISSUE.....6

THE REFEREE’S RECOMMENDATION OF A TEN-DAY SUSPENSION
IS NOT SUPPORTED BY THE CASE LAW

CONCLUSION18

CERTIFICATE OF SERVICE19

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN.....20

TABLE OF CITATIONS

Cases

<u>Petition of Wolf</u> , 257 So. 2d 547 (Fla. 1972)	8
<u>The Florida Bar v. Anderson</u> , 594 So. 2d 302 (Fla. 1992)	11
<u>The Florida Bar v. Bennett</u> , 276 So. 2d 481 (Fla. 1973)	16
<u>The Florida Bar v. Bischoff</u> , 212 So. 3d 312 (Fla. 2017)	6
<u>The Florida Bar v. Brown</u> , 905 So. 2d 76 (Fla. 2005)	16
<u>The Florida Bar v. Dancu</u> , 490 So. 2d 40 (Fla. 1986)	8
<u>The Florida Bar v. De La Torre</u> , 994 So. 2d 1032 (Fla. 2008)	7
<u>The Florida Bar v. Del Pino</u> , 955 So. 2d 556 (Fla. 2007)	12
<u>The Florida Bar v. Durden</u> , 83 So. 3d 709 (Fla. 2014)	9
<u>The Florida Bar v. Herman</u> , 8 So. 3d 1100 (Fla. 2009)	15
<u>The Florida Bar v. Jowers</u> , No. SC16-1381 (Fla. Aug. 18, 2016)	10
<u>The Florida Bar v. Rohe</u> , 99 So. 3d 945 (Fla. 2012)	9
<u>The Florida Bar v. Shoureas</u> , 892 So. 2d 1002 (Fla. 2004)	17
<u>The Florida Bar v. Valentine-Miller</u> , 974 So. 2d 333 (Fla. 2008)	16

Rules

3-4.3	2
3-4.4	2
4-8.4(b)	2
4-8.4(c)	2

Florida Standards for Imposing Lawyer Sanctions

5.1	13
5.11(b)	13
5.12	13
9.22(b)	14
9.22(c)	14
9.22(d)	14
9.32(a)	15
9.32(c)	15
9.32(d)	14
9.32(e)	15
9.32(f)	15

9.32(k)	15
9.32(l)	15

PRELIMINARY STATEMENT

The Complainant, The Florida Bar, is seeking review of a Report of Referee recommending a ten-day suspension with automatic reinstatement followed by one year of probation conditioned upon entering into a new treatment contract with Florida Lawyers Assistance, Inc. and active participation in that program.

Complainant will be referred to as The Florida Bar, or as the bar. Jacqueline Marie Kinsella, respondent, will be referred to as respondent throughout this brief.

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

References to specific pleadings will be made by title. Reference to the transcript of the final hearing held on April 27, 2017 is by symbol TR, followed by the date of the hearing and the appropriate page number (e.g., TR April 27, 2017 p. 289). Reference to the sanction hearing held on May 8, 2017 is by symbol TR followed by the date of the hearing and the appropriate page number (e.g., TR May 8, 2017 p. 10).

References to bar exhibits shall be by the symbol TFB Ex. followed by the appropriate exhibit number (e.g., TFB Ex. 10).

STATEMENT OF THE CASE

On November 17, 2016, the Tenth Judicial Circuit Grievance Committee "B" voted to find probable cause in this matter. The bar filed its Complaint on January 11, 2017. The referee was appointed on January 17, 2017. On January 31, 2017, respondent filed her Answer in which she admitted the alleged facts and rule violations. The final hearing was held on April 27, 2017. The sanction hearing was held on May 8, 2017. The Report of Referee was entered on June 12, 2017, recommending respondent be found guilty of violating Rules Regulating The Florida Bar 3-4.3 for committing an act that was unlawful or contrary to honesty and justice, 3-4.4 for engaging in misconduct that constituted a felony or misdemeanor, 4-8.4(b) for committing a criminal act that reflected adversely on respondent's honesty, trustworthiness, or fitness as a lawyer in other respects, and 4-8.4(c) for engaging conduct involving dishonesty, fraud, deceit, or misrepresentation.

STATEMENT OF THE FACTS

Respondent was admitted to practice on February 16, 2016 (RR p. 2; TFB Ex. 5 p. 6). Less than three months later, on May 11, 2016, she was arrested on one count of Grand Theft, a felony, and two counts of Petit Theft, misdemeanors, for stealing money from three cash registers on three separate occasions from Kohl's Department Store where she worked as a non-attorney (RR p. 2; TFB Ex. 1; TFB Ex. 5 pp. 14-15, 44-45). On September 1, 2016, she entered a no contest plea to one Petit Larceny charge in full satisfaction of the three charges (RR p. 3; TFB Ex. 4). Adjudication of guilt was withheld (RR p. 3; TFB Ex. 4). The Court withheld the imposition of a sentence and placed respondent on probation for a period of twelve months under the supervision of the Department of Corrections, payment of costs, payment of restitution to Kohl's Department Store, performance of fifty hours of community service and completion of the Vital Life Skills Class (RR p. 3; TFB Ex. 4). Respondent was ordered not to enter or go upon the premises of any Kohl's Department Store (RR p.3; TFB Ex. 4).

Respondent admitted that she took the funds from her employer due to her financial debt problems (RR p. 3; TFB Ex. 5 p. 23). These financial problems existed at the time she applied for membership in The Florida Bar and were also the subject of inquiry by the Florida Board of Bar Examiners (RR p. 3; TR April

27, 2017 pp. 37-39, Memorandum of Law p. 4). Her financial problems continue to present (RR p. 3; TR April 27, 2017 pp. 32, 37, 41-42, 44).

Respondent was concurrently working at the call center of a legal aid organization as an attorney at the time of her arrest (TFB Ex. 5 p. 12; TR April 27, 2017 pp. 32, 47). Respondent also had her own law firm but only provided pro bono services (TFB Ex. 5 p. 12).

SUMMARY OF ARGUMENT

Respondent engaged in a pattern of serious misconduct involving fraud. Respondent stole money from Kohl's Department Store, her employer of five years, despite being aware of the security systems her employer had in place (TFB Ex. 5 p. 23). Respondent admitted that she engaged in felonious conduct (TR April 27, 2017 p. 29). Respondent testified that she stole money the third time because she was not caught after the first two thefts (TFB Ex. 5 pp. 25-26). This Court has held that a bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct. A ten-day suspension fails to meet any of the three purposes of attorney discipline. Further, it is inconsistent with the case law which calls for a suspension requiring proof of rehabilitation. A ten-day suspension fails to provide adequate time for rehabilitative treatment and the evaluation of rehabilitation obtained through a reinstatement investigation and proceeding. Protection of the public requires that respondent prove she is sufficiently rehabilitated to be entrusted with client funds.

ARGUMENT

ISSUE

THE REFEREE'S RECOMMENDATION OF A TEN-DAY SUSPENSION IS NOT SUPPORTED BY THE CASE LAW

Generally, when a referee's factual findings are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its own judgment for that of the referee. The Florida Bar v. Bischoff, 212 So. 3d 312, 318-319 (Fla. 2017). In considering a referee's disciplinary recommendation, however, this Court's scope of review is broader because this Court bears the ultimate responsibility for ordering the appropriate sanction. Bischoff, 212 So. 3d at 319.

The bar does not challenge the referee's findings of fact in this matter. The bar does, however, seek review of his disciplinary recommendation that respondent be suspended for ten days with automatic reinstatement followed by a one-year period of conditional probation. Pursuant to the case law and Florida Standards for Imposing Lawyer Sanctions, respondent's felonious conduct warrants a suspension requiring respondent to prove rehabilitation prior to being reinstated to the practice of a law. Respondent admittedly stole money from her employer and, although it did not involve the practice of law, protection of the public requires respondent make a showing in a separate proceeding that she has been fully rehabilitated.

Engaging in felonious conduct warrants suspension from the practice of law, even where adjudication of guilt is withheld. See for example The Florida Bar v. De La Torre, 994 So. 2d 1032 (Fla. 2008). In De La Torre, after considering De La Torre's mitigation, the referee recommended that De La Torre be found guilty of misconduct and be suspended from the practice of law for ninety days followed by three years of probation. De La Torre had entered no contest pleas to five criminal offenses, two of which were felonies. Adjudication of guilt was withheld. Upon review, after considering the mitigation found by the referee, this Court imposed an eighteen-month suspension from the practice of law, noting that but for the mitigation, the Court would have imposed a harsher sanction.

Respondent's misconduct is especially egregious because it involved theft. Although respondent is a newly admitted attorney (TR April 27, 2017 p. 47), stealing money is not a grey area. Respondent understood that what she was doing was illegal and understood the adverse effect being caught would have on her license to practice law (TR April 27, 2017 pp. 29, 32). Respondent's pattern of poor judgment and fiscal irresponsibility is concerning and a suspension requiring her to prove she has addressed the issues that led to her misconduct is required to protect the public. Although respondent's only legal employment did not require her to handle client funds (TR April 27, 2017 p. 32), the potential exists in the

future for this to develop and it is incumbent on the bar to ensure the unsuspecting public is protected. The license to practice law is a privilege, not a right. Petition of Wolf, 257 So. 2d 547, 548 (Fla. 1972). “The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence.” The Florida Bar v. Dancu, 490 So. 2d 40, 41-42 (Fla. 1986).

In aggravation, prior to becoming an attorney, respondent had two misdemeanor traffic cases brought against her (TR April 27, 2017 p. 16-17). Taken separately, these offenses, occurring in 2001 and 2005, were relatively minor. Taken in light of respondent’s three thefts from her employer, however, there appears to be a pattern of irresponsible behavior that is troubling for someone who now is an officer of the court. Respondent did not contest this aggravating factor. Further, respondent admitted she took the funds from her employer due to serious financial problems (TFB Ex. 5 p. 26; TR April 27, 2017 p. 46). These financial problems existed at the time she applied for membership in The Florida Bar and were a cause of concern for the Florida Board of Bar Examiners. Her

financial problems continue albeit she has made progress in reducing the non-student loan debt load (TR April 27, 2017 pp. 41-42).

In order to provide some persuasive authority in light of the few cases that are factually similar, the bar proffers some Conditional Guilty Plea for Consent Judgments which were accepted by this Court. In The Florida Bar v. Durden, 83 So. 3d 709 (Fla. 2014) (Table of Cases), an attorney entered into a Conditional Guilty Plea for Consent Judgment for a six-month suspension for pleading guilty to one count of petit theft, a first-degree misdemeanor. While the attorney was employed as an assistant public defender, he improperly accepted payment from at least one indigent criminal defendant he represented. The attorney was sentenced to twelve months of conditional probation, with one of the conditions being his agreement not to practice law for three years. In mitigation, the attorney had no prior disciplinary history.

In The Florida Bar v. Rohe, 99 So. 3d 945 (Fla. 2012), an attorney was suspended for six months, *nunc pro tunc* to the date of his felony conviction suspension, pursuant to a Conditional Guilty Plea for Consent Judgment. The attorney entered a no contest plea to Resisting Arrest With Violence, a third-degree felony. Adjudication of guilt was withheld, and the court sentenced respondent to two years of probation with various conditions, including abstention from alcohol

and/or illegal drugs and random alcohol/drug testing. The attorney had attended Bike Week in Daytona Beach and became very intoxicated while at a bar. After he became disruptive, management called the police and he was arrested. There were no aggravating factors. In mitigation, the attorney had no prior disciplinary record, had no dishonest or selfish motive, was suffering from personal or emotional problems, made a timely good faith effort to rectify consequences of his misconduct, fully cooperated with the bar, had an excellent reputation, underwent interim rehabilitation by voluntarily seeking treatment for his alcohol issues, suffered the imposition of other penalties, including adverse publicity in the news media, and was remorseful.

In The Florida Bar v. Jowers, No. SC16-1381 (Fla. Aug. 18, 2016) (unpublished disposition), an attorney was suspended for thirty days with automatic reinstatement and placed on a three-year period of probation with FLA, Inc. The attorney was arrested and subsequently charged with Driving Under the Influence Causing Damage to Person or Property and Leaving the Scene of a Crash, both misdemeanors. The attorney pled no contest to a misdemeanor charge of Driving Under the Influence and she was sentenced to probation with conditions. Thereafter, the attorney was charged with Violation of Driver's License Restriction, a misdemeanor. The court withheld adjudication and ordered

her to pay court costs. In a third criminal matter, the attorney was arrested and charged with Battery (On an Emergency Medical Care Provider), a felony. While impaired by alcohol, the attorney committed a battery on a hospital nurse who was attempting to obtain her urine sample. The attorney pled no contest to a misdemeanor charge of Battery. The court withheld adjudication and sentenced her to probation, which she successfully completed. Although attorney failed to timely notify the bar of the above-referenced criminal cases, in mitigation, she voluntarily submitted to a FLA, Inc. evaluation and entered into a three-year monitoring contract.

In The Florida Bar v. Anderson, 594 So. 2d 302 (Fla. 1992), an attorney was disbarred for misappropriating money while employed by the Tampa Housing authority. She used the money to pay her personal credit card bills. The attorney pled no contest to the third-degree felony of grand theft and uttering a forged instrument. Adjudication of guilt was withheld and she was placed on probation for three years. The attorney argued that her co-workers or superiors placed the funds in her hands surreptitiously for the purpose of removing the funds from the budget in order to prevent a reduction in the following year's budget. The attorney did not commit this crime in her capacity as a lawyer. Although the referee found this factor warranted the imposition of a three-year suspension rather than

disbarment, this Court disagreed. This Court noted, “Those who have received intensive education in the requirements of the law cast disrepute on the entire legal profession when they willfully cast aside their training and knowingly break the very law about which they have been so thoroughly trained and tested.

Accordingly, we find that a lawyer who willfully misappropriates public funds commits a disciplinary offense as serious as misuse of client funds, whether or not the misappropriation is accomplished while acting as an attorney. . . . When others see an attorney breaking the law, they may well assume that such misconduct is acceptable.” Like respondent, attorney Anderson admitted she knew the funds being placed in her possession were ones to which she was not entitled. Although respondent did not misappropriate public funds, she knowingly misappropriated funds from her employer.

In The Florida Bar v. Del Pino, 955 So. 2d 556 (Fla. 2007), an attorney was suspended for three-years after she participated in the fraudulent transfer of a condominium, which transfer led to conviction for mail fraud, and prepared and signed a false and fraudulent application for extension of time to file and pay her federal income taxes, which led to her conviction for tax evasion. The attorney pled guilty to both federal felonies and was sentenced to three-years of probation with conditions. The referee rejected the attorney’s argument in mitigation that she

had no dishonest or selfish motive due to her serious depression and anxiety issues that were the result of being married to a controlling and abusive husband.

Although the attorney argued she knowingly made a false application for the extension of time to pay her taxes, she did so because she could not deal with her taxes at that point in her life. The attorney admitted, however, that seeking the extension was a selfish motive. This Court noted that, as guardians of the law, attorneys have special obligation to honor the law themselves. Had it not been for her significant mitigation, attorney Del Pino would have been disbarred.

The Florida Standards for Imposing Lawyer Sanctions support the imposition of a suspension and even disbarment. Under Standard 5.1, Failure to Maintain Personal Integrity, Standard 5.11(b) calls for disbarment when an attorney 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. Respondent admittedly engaged in three instances of theft from her employer. Under Standard 5.12, a suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 (Standard for Disbarment) and that seriously adversely reflects on the lawyer's fitness to practice. Clearly respondent's intentional theft of funds reflects adversely on her fitness to practice

law. It calls into question her ability to be entrusted with client funds. Although respondent testified that she had made progress in her therapy under her Florida Lawyers Assistance, Inc. contract, she presented no evidence other than her own self-serving testimony (TR April 27, 2017 p. 41).

In aggravation, respondent had a dishonest or selfish motive in stealing the money for her own benefit [Florida Standard for Imposing Lawyer Sanctions 9.22(b)]. She engaged in a pattern of misconduct and engaged in multiple offenses by taking money from three different cash registers on three different occasions [Florida Standard for Imposing Lawyer Sanctions 9.22(c) and 9.22(d)] (TFB Ex. 5 pp. 25-26; TR April 27, 2017 p. 40).

It must be noted that the referee considered respondent's extensive mitigation in this matter. Respondent voluntarily entered into a treatment contract with Florida Lawyers Assistance, Inc. and has made progress in addressing the issues that led her to engage in these acts of misconduct [Florida Standard for Imposing Lawyer Sanctions 9.32(d)] (TR April 27, 2017 pp. 41, 43-44). Additionally, respondent indicated that her treatment also involves debt management/financial counseling (TR May 8, 2017 p. 6). Respondent fully cooperated with law enforcement and the bar and none of the stolen funds were related to the practice of law (TR April 27, 2017 p. 39; TR May 8, 2017 p. 7). She

fully cooperated with the bar's investigation and took responsibility for her misconduct [Florida Standard for Imposing Lawyer Sanctions 9.32(e)].

Respondent demonstrated significant remorse during her testimony at the sanction hearing history [Florida Standard for Imposing Lawyer Sanctions 9.32(l)] (TR May 8, 2017 p. 7). Her misconduct was not related to alcohol or drug abuse or a gambling addiction history [Florida Standard for Imposing Lawyer Sanctions 9.32(c)]. Respondent has no prior disciplinary history [Florida Standard for Imposing Lawyer Sanctions 9.32(a)]. Respondent is an inexperienced practitioner [Florida Standard for Imposing Lawyer Sanctions 9.32(f)]. Finally, respondent suffered the imposition of criminal penalties [Florida Standard for Imposing Lawyer Sanctions 9.32(k)] (TR May 8, 2017 p. 7).

In recent years, this Court has moved toward imposing harsher sanctions. The Florida Bar v. Herman, 8 So. 3d 1100, 1108 (Fla. 2009). Here, respondent stole money from her employer for her own personal gain.

Conduct such as that engaged in by respondent taints how the legal profession is viewed by members of the public and by people who seek the professional services of an attorney, as evidenced by the following statements from the Supreme Court of Florida.

In The Florida Bar v. Bennett, 276 So. 2d 481, 482 (Fla. 1973), this Court noted, “Some may consider it ‘unfortunate’ that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. In a sense, ‘an attorney is an attorney is an attorney’, much as the military officer remains ‘an officer and a gentleman’ at all times.”

Further, in Bennett, at 482, this Court noted that attorneys “must be on guard and act accordingly, to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing.” In The Florida Bar v. Brown, 905 So. 2d 76, 82 (Fla. 2005), this Court emphasized that “attorneys must be and are held to the highest of ethical standards and, unlike non-attorney citizens, are subject to discipline for a breach of those standards.” In The Florida Bar v. Valentine-Miller, 974 So. 2d 333, 338 (Fla. 2008), this Court noted that “[l]awyers are required to have high ethical standards because members of the public are asked to trust lawyers in their greatest hours of need. Without such standards, the entire legal profession would be in jeopardy as public trust would dissipate.”

Discipline must serve three purposes: (1) it must protect the public; (2) be fair to the respondent; and (3) be severe enough to deter other attorneys from

committing similar misconduct. The Florida Bar v. Shoureas, 892 So. 2d 1002, 1005 (Fla. 2004). Here, the public goes unprotected because respondent can open a trust account and hold client funds, but, ironically, she is prohibited from entering Kohl's Department Store. The bar's recommendation of a ninety-one-day suspension satisfies the three purposes of discipline. Further, in fairness to the members of the bar, who have not engaged in misconduct, respondent should be taxed the costs of this proceeding. Accordingly, the appropriate disciplinary sanction to impose against respondent is a ninety-one-day suspension requiring she show proof of rehabilitation before she is reinstated to the practice of law and payment of costs.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of a ten-day suspension with automatic reinstatement to the practice of law followed by a one-year period of conditional probation and instead impose as a sanction a ninety-one-day suspension with proof of rehabilitation required prior to reinstatement and payment of costs currently totaling \$2,124.95.

A handwritten signature in cursive script, appearing to read "Kenneth H. P. Bryk".

Kenneth H. P. Bryk, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal; and, copies were furnished to Jacqueline Marie Kinsella, Respondent, Post Office Box 1104, Goldenrod, Florida 32733-1104 via email to kinsella.jmk@gmail.com; and to Staff Counsel, The Florida Bar, Lakeshore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323 via email to aquintel@floridabar.org on this 23rd day of August 2017.



Kenneth H. P. Bryk, Bar Counsel
The Florida Bar
Orlando Branch Office
The Gateway Center
1000 Legion Place, Suite 1625
Orlando, Florida 32801-1050
(407) 425-5424
Florida Bar No. 164186
kbryk@floridabar.org
orlandooffice@floridabar.org

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

A handwritten signature in cursive script, appearing to read "Kenneth H. P. Bryk".

Kenneth H. P. Bryk, Bar Counsel