IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LAVENIA DIANNE MASON,

Respondent
_____/

Supreme Court Case
No. SC00-997

The Florida Bar File
No. 1998-71,527(11D)

The Florida Bar's Initial Brief

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STATEMENT OF THE CASE AND OF THE FACTS

This matter was heard by Judge Alex Ferrer, serving as a referee. The Bar and the respondent stipulated to a portion of the factual background. It was stipulated that respondent represented Ruby Donaldson and made some payments to her as a result of a settlement. Also, Ms. Donaldson rejected one of the checks forwarded to her in the amount of $17,437.00. (The reasons for the return are not material to this appeal.) Ms. Donaldson filed a complaint with the Bar.

The factual stipulations also included the following:

8. On or about June 5, 1998, respondent wrote to The Florida Bar advising that settlement proceeds due Ms. Donaldson had been deposited into her trust account and continued to remain there through respondent's writing of said letter to The Florida Bar.

9. An audit was conducted of respondent's trust account identified as L. Dianne Mason P.A., IOTA Trust Account, maintained at Metro Bank, account number 30050279000.

10. That audit disclosed that contrary to respondent's assertions, the $17,437.50 due Ms. Donaldson was not preserved in respondent's trust account. In fact, the balance in respondent's trust account on June 5, 1998, the date of her letter to The Florida Bar, was $14,544.27; that is a shortage of $2,893.23 just to cover respondent's obligations to Ms. Donaldson.

11. On June 5, 1998, respondent's obligations to clients were at least $52,532.15. The balance in her trust account was $14, 544.27; that is a shortage of at least $37,987.88 to cover her obligations to clients.

12. From the period of January 1, 1996 through July 31, 1998, respondent made eighty-two (82) transfers from her trust account to her operating account for a total of $252,500.00 with no reference as to client or matter. By agreeing to paragraph twelve (12), respondent is not stipulating that all of the eighty-two (82) transfers were improper; only that they were not designated properly.

13. The aforesaid transfers created shortages in respondent's trust account.

14. On July 27, 1998, respondent's obligations to clients were $53,106.02. The balance in respondent's trust account on that date was $19,164.73; that is a shortage of $33,941.29 to cover obligations to clients.

15. Respondent stipulates that Rule 5-1.1(a) of the Rules Regulating Trust Accounts was violated. Respondent reserves the right to argue, however, that any shortages were the result of negligence. The Bar reserves the right to argue that the shortages were the result of intentional misconduct.

In addition to the foregoing stipulations, the respondent testified both as part of the Bar's case and as a witness in her own defense. She testified that she did not know at the time that she wrote the June 5, 1998 letter, that the funds in question were not in the account. (T.42, 52). At that time she hired a bookkeeper to do trust account reconciliation. (T. 42).

Respondent transferred funds from her trust account to her operating account after January 1, 1998 when she knew of the problem . (T. 53-54). Respondent made the transfers although she lacked the benefit of a general ledger which related

the sums withdrawn to specific clients. (T. 60).

During January of 1998, seventeen (17) checks were returned. (T. 69). Transfers of funds from the trust account to the operating account occurred after the seventeen checks were returned. (T. 71).

Maggie Rosenbaum, a friend of respondent, testified in her behalf. She stated that during February and March of 1998, the respondent was in the midst of a divorce and her state of mind was tenuous. (T. 77). Respondent was faced with concerns about the divorce, the custody of the children, and physical threats according to Rosenbaum. (T. 81).

Respondent testified that during the time that the divorce was pending, she was not sleeping well, was very distracted, and was in fear of physical attacks by her husband. (T. 96-97).

The referee found that respondent had misappropriated client funds and was in violation of Count II, specifically Rule 5-1.1(a) (nature of money or property entrusted to attorney) of the Rules Regulating Trust Accounts. The referee also found that the violation was intentional.

The referee also found that respondent was in violation of Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Conduct. In regard to this

violation, the referee found that respondent's conduct was a result of gross negligence and not intentional conduct.

The referee recommended a two (2) year suspension. The Bar filed a Petition for Review of the discipline on February 22, 2001.

SUMMARY OF ARGUMENT

The appropriate discipline in this case is disbarment rather than a two year suspension. That conclusion is based upon two serious violations of the Rules Regulating The Florida Bar.

Respondent stipulated that she had violated Rule 5-1.1(a) (nature of money or property entrusted to attorney) of the Rules Regulating Trust Accounts. The respondent also stipulated to a substantial portion of the facts. Based upon the record, the referee found that the first violation was intentional.

The stipulated facts and other facts in the record, and the finding of intent, mandate disbarment as established by two similar cases. During one month, respondent issued seventeen (17) checks from her operating account which were dishonored. She subsequently indiscriminately transferred funds from her trust account to cover the deficit. Eighty-two (82) transfers were made from her trust account to her operating account during an eighteen month period.

Transfers totaled $252,500.00, with no reference to clients or matter. There was a trust account shortage of $33,941.29 on July 27, 1998. All of the foregoing pertained to the first violation.

When the Bar opened its initial file regarding the respondent, she wrote to the Bar. In a letter dated June 5, 1998, respondent volunteered the statement that

she had sufficient funds in her trust account to cover a check to her client for $17,437.50. In fact, the account was nearly $38,000.00 short on that date, and respondent could not have covered the check she issued to her client.

Respondent's misrepresentation was the basis for the finding of the second violation, namely Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Conduct. This Court, in a similar situation, involving gross negligence and trust accounts, has imposed a three year suspension for that conduct alone. Therefore, there is no rational basis for a two year suspension for these two violations.

This Court has frequently endorsed the principle that trust account violations and their negative effect upon public confidence in the legal system, will not be tolerated. Disbarment is the rational response to the violations in this case.

This Court has also held that in recent cases the presumption of disbarment for misappropriation has been given greater weight than mitigation. In view of the nature of the aggravating and mitigating factors, that principle should apply to this case.

ARGUMENT
I

THE REFEREE ERRED BY FAILING TO DISBAR THE RESPONDENT

This Court's scope of review of recommended discipline is broader than that of findings of fact because of ultimate responsibility to determine the appropriate sanction. The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000).

Some basic principles which apply to this case should be considered. When deciding upon the proper discipline, the single most important concern is the protection of the public from incompetent, unethical, or irresponsible representation. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner which will cause laymen, and the public generally, to have the highest respect for and confidence in the members of the legal profession. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). Any conduct of an attorney which brings the administration of justice into scorn and disrepute demands condemnation and the application of appropriate penalties. The Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958).

The referee found that respondent was in violation of two (2) rules, specifically misappropriation pursuant to Rule 5-1.1(a) (nature of money or property entrusted to attorney) of the Rules Regulating Trust Accounts and Rule 4-

8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Conduct. In regard to Rule 5-1.1(a), the referee deemed respondent's conduct to be intentional. In regard to Rule 4-8.4(c), the referee found that respondent was guilty of gross negligence. That gross negligence alone would support a three year suspension. The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988). Therefore, the two year suspension recommended by the referee has no rational basis, the test set forth in The Florida Bar v. Temmer, 753 So.2d 555 (Fla. 1999).

The evidence in regard to the violations must be given great weight. For a two year period, a time frame which pertains only partially to respondent's divorce, respondent was transferring funds from her trust account to her operating account. Respondent transferred funds eighty-two (82) times from her trust account to her operating account. (Stipulation # 12). These were simply indiscriminate transfers. They were made without reference to any particular client or particular case. (Stipulation # 12).

The eighty-two (82) transfers totaled $252,500.00. (Stipulation # 12). The effect of those transfers on the day that respondent wrote her letter to the Bar was substantial. On that day, when respondent claimed that Donaldson's funds remained in the trust account, the trust account was short $37,987.88. (Stipulation

11) and almost $3,000.00 short just to cover respondent's obligations to Ms. Donaldson (Stipulation # 10).

On innumerable occasions this Court has stated that there are three purposes of discipline.

> 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 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.
>
> The Florida Bar v. Cibula, 725 So.2d 360, 363 (Fla. 1998) [quoting The Florida Bar v. Reed, 664 So.2d 1357 (Fla. 1994)]

As the Court has stated previously:

> The single most important concern of this Court in defining and regulating the practice of law is the protection of the public from incompetent, unethical, and irresponsible representation. The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980). 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. (Emphasis supplied).
>
> The Florida Bar v. Dancu, 490 So.2d 40 (Fla. 1986).

The misuse of client funds is among those acts which do the greatest damage to the public trust. That principle has been explicitly set forth by this Court in The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991):

> This Court has repeatedly asserted that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment.

The respondent in The Florida Bar v. Tillman, 682 So.2d 542 (Fla. 1996) was disbarred for violating Rules 4-1.15(b) (prompt delivery of client funds), 4-1.15(d) (compliance with trust account rules); 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); 5-1.1(d) (money entrusted must be used for specified purpose); and 5-1.2 (compliance with trust account procedures and record keeping requirements). The similarity to this case is readily apparent. In Tillman this court stated again that the misuse of client funds is one of the most serious offenses an attorney can commit.

In The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986) decided under the former rules, the respondent was also disbarred. The misuse of client funds was appropriately condemned by imposition of the most serious form of discipline.

In this case the referee found that there were two aggravating factors. Those were (1) a pattern of misconduct [Standard 9.22(e)]; and (2) submission of false

statements [Standard 9.22(f)]. The Bar would submit that those two serious and substantial aggravating factors outweigh the mitigating factors.

The mitigating factors were:

1. 9.32(a) absence of a prior disciplinary record;

2. 9.32(c) personal or emotional problems;

3. 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

4. 9.32(f) inexperience in the practice of law;

5. 9.32(g) character or reputation;

6. 9.32(l) remorse.

Even if the mitigating factors were given greater weight than the aggravating factors, they are not sufficient to overcome the presumption in favor of disbarment. The holdings in the most recent cases support that conclusion. As stated in Shanzer, supra.

> In some cases we have found that presumption rebutted by mitigating evidence, and we imposed the slightly lesser discipline of suspension. See, e.g., *The Fla. Bar v. Schiller*, 537 So.2d 992 (Fla. 1989). In the overwhelming number of recent cases, we have disbarred attorneys for misappropriation of funds nothwithstanding the mitigating evidence presented. See *The Fla. Bar v. Shuminer*, 567 So.2d 430 (Fla. 1990); *The Fla. Bar v. Golub*, 550 So.2d 455 (Fla. 1989); *The Fla. Bar v. Fitzgerald*, 541 So.2d 602 (Fla. 1989); *The Fla. Bar v.*

> *Gillis*, 527 So.2d 818 (Fla. 1988); *The Fla. Bar v. Newhouse*, 520 So.2d 25 (Fla. 1988); *The Fla. Bar v. Bookman*, 502 So.2d 893 (Fla. 1987); *The Fla. Bar v. Knowles*, 500 So.2d 140 (Fla. 1986); *The Fla. Bar v. Rodriguez*, 489 So.2d 726 (Fla. 1986); *The Fla. Bar v. Ross*, 417 So.2d 985 (Fla. 1982).

It is interesting to note that Shanzer argued that his marital problems, among others, should have been considered in mitigation. This Court rejected that argument and pointed out that "these problems are visited upon a great number of lawyers".

When funds are placed in an attorney's trust account, a fiduciary relationship is established. Kenet v. Bailey, 679 So.2d 348 (Fla. 3d DCA 1996). The Third District quoted Justice Cardozo regarding the extraordinary duty of a fiduciary.

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." (Footnote 4, p. 350).

Respondent did not even remotely fulfill her obligation as a fiduciary. Furthermore, this Court declared that fiscal irresponsibility will not be tolerated. The Florida Bar v. Roberts, 721 So.2d 283 (Fla. 1998).

As stated above, one violation was intentional and one was the result of

gross neglect. Respondent's conduct displayed a serious indifference to the role of an attorney as a fiduciary. A long term pattern of trust fund misconduct was admitted. The misconduct included transfers from the trust funds to cover bad checks issued from the operating account. The referee's determination that respondent is a candidate for rehabilitation is not supported by this record.

The foregoing conclusion is particularly appropriate in view of the dual nature of respondent's violation. The respondent was in absolutely no position to provide any assurances to the Bar regarding her trust account. Nevertheless, she asserted that funds were available to cover her obligations to her client. In fact, that was not the case.

This Court is not bound by the referee's recommendation as to discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). The ultimate responsibility for discipline rests with this Court. The Florida Bar v. McCain, 330 So.2d 712 (Fla. 1976). There is no rational basis for the referee's recommendation of a two year suspension. Temmer, supra.

CONCLUSION

Respondent should be disbarred rather than suspended. The referee's recommendation as to discipline should be disapproved.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief was forwarded via Airborne Express, airbill no. 3370025024, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to John A. Weiss, Attorney for Respondent, at 2937 Kerry Forrest Parkway, Suite B-2, Tallahassee, Florida 32308, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this ____ day of March, 2001.

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

I HEREBY CERTIFY that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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