

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MARK W. McFALL,

Respondent.

Case No. SC02-1350

TFB No. 2002-10,583(20D)

INITIAL BRIEF
OF
THE FLORIDA BAR

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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, Mark W. McFall, will be referred to as “Respondent”.

“TT” will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC02-1350 held on September 19, 2002.

The Report of Referee dated October 2, 2002 will be referred to as “RR”.

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

STATEMENT OF THE FACTS AND OF THE CASE

STATEMENT OF THE CASE

The Florida Bar filed a Petition For Emergency Suspension in this matter on April 15, 2002. By Order dated April 26, 2002, this Court granted the Bar's Petition For Emergency Suspension. On June 17, 2002, the Bar filed a one count Complaint. By Order dated June 28, 2002, The Honorable Janette Dunnigan, Circuit Court Judge, in and for the Twelfth Judicial Circuit, was appointed as referee in this case.

The final hearing was held on September 19, 2002. On October 2, 2002, the Referee issued a Report of Referee finding Respondent guilty of violating the following Rules Regulating The Florida Bar: Rule 4-1.15(a) (a lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons

that are in a lawyer's possession in connection with a representation); Rule 4-8.4(a) (a lawyer shall not violate the Rules of Professional Conduct); Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 5-1.1(a) (a lawyer shall hold in trust, money or other property entrusted to the lawyer for a specific purpose, and the lawyer must apply this money or other property only for that purpose); Rule 5-1.1(c) (a lawyer shall preserve the records of all bank and savings and loan association accounts); Rule 5-1.2(b)(2) (a lawyer shall maintain original or duplicate deposit slips); Rule 5-1.2(b)(3) (a lawyer shall maintain original canceled checks); Rule 5-1.2(b)(4) (a lawyer shall maintain documentary support for all disbursements and transfers from the trust account); Rule 5-1.2(b)(5) (a lawyer shall maintain a separate cash receipts and disbursements journal); Rule 5-1.2(b)(6) (a lawyer shall maintain a separate file or ledger card for each client or matter); Rule 5-1.2(b)(7) (a lawyer shall maintain all bank or savings and loan association statements for all trust accounts); Rule 5-1.2(c)(1) (a lawyer shall make monthly reconciliations of all trust accounts and a monthly comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages); Rule 5-1.2(c)(2) (a lawyer shall annually prepare a listing identifying the balance of the unexpended trust

money held for each client or matter) and Rule 5-1.2(c)(3) (a lawyer shall retain the reconciliations, comparisons, and listings for at least six years). (RR 3).

The Referee recommended that Respondent be suspended from the practice of law for a period of six (6) months, retroactive to the date of the Emergency Suspension (April 26, 2002), followed by three (3) years of probation with certain conditions, and that Respondent be assessed the Bar's costs. (RR 3-4). The five (5) recommended conditions of the probation are:

- A. Respondent shall receive psychological counseling and treatment, including taking medication as prescribed;
- B. Respondent shall authorize such treatment provider to report quarterly to The Florida Bar on Respondent's fitness to practice law;
- C. Respondent shall, at the request of The Florida Bar, and at Respondent's expense, submit to an annual evaluation by a treatment provider of The Florida Bar's choice, to insure the Respondent's fitness to practice law;
- D. Respondent shall submit to random audits of his office accounts, trust accounts, and escrow accounts

by The Florida Bar;

E. Respondent shall attend a debt management course within the year of probation at the direction of The Florida Bar. (RR 3-4).

The Report of Referee was considered by the Board of Governors of The Florida Bar at its meeting which ended on October 25, 2002. The Board of Governors voted to file a Petition for Review of the Referee's report and to seek Respondent's disbarment from the practice of law. The Florida Bar filed a Petition for Review of the Referee's report with this Court on or about November 22, 2002. Pursuant to Rule 3-7.7, this Court has jurisdiction.

STATEMENT OF THE FACTS

The Florida Bar and Respondent entered into a Joint Stipulation of Facts and Rule Violations. The following facts are set forth in the Joint Stipulation. Pursuant to an escrow agreement dated July 12, 1999 between Respondent, Amtel Group of Florida, Inc. (Amtel) and Commercial Electrical Systems (Commercial), Respondent agreed to act as the escrow agent. Respondent held \$181,750.00 in an escrow account which was funded by

Amtel, and which was to be used for renovation of property owned by Amtel. By September 19, 2001, the renovation was completed and all escrow funds that were to be disbursed had been disbursed to Commercial, leaving a balance of \$3,193.64 in Respondent's trust account that was the property of Amtel.

On September 24, 2001, Respondent sent a letter to Amtel requesting an additional fee of \$1,000.00 that he proposed to deduct from the escrow balance. That same day, without Amtel's knowledge or authorization, Respondent disbursed \$1,000.00 of the Amtel funds to himself, and he used these funds for his personal expenses.

On September 25, 2001, Amtel sent a letter to Respondent denying his request for \$1,000.00 and demanding that he disburse the entire escrow balance to Amtel. On September 28, 2001, Respondent sent another letter to Amtel in which he continued to press his request for additional fees when in fact he had already misappropriated the funds.

On October 3, 2001, Respondent disbursed another \$1,000.00 of the Amtel funds to himself without Amtel's knowledge or authorization, and he used these funds for his personal expenses.

On October 8, 2001, Amtel, through its principal, complained to The Florida Bar that Respondent refused to release the escrow balance. At that time, Amtel was not aware that Respondent had misappropriated its funds. On

November 5, 2001, Respondent again disbursed \$1,000.00 of the Amtel funds to himself without Amtel's knowledge or authorization, and he used these funds for his personal expenses.

On November 13, 2001, Respondent deposited \$2,000.00 into his trust account to partially cover the \$3,000.00 that he had misappropriated. On November 15, 2001, Respondent misrepresented to the Bar in his written response to Amtel's complaint that he was holding the \$3,193.64 escrow balance in his trust account. After Amtel rejected Respondent's offer to disburse \$2,193.64 of the \$3,193.64 that he was supposed to be holding, Respondent disbursed to himself, without Amtel's knowledge or authorization, the \$2,000.00 that he had recently deposited into his trust account to partially cover his prior misappropriations of Amtel's funds.

Respondent misappropriated escrow funds that were the property of Amtel. He then misrepresented to Amtel and the Bar that the balance of the funds were being held in his trust account pending the resolution of his demand that Amtel pay additional fees. Respondent also failed to maintain trust account records.

SUMMARY OF THE ARGUMENT

Disbarment is the appropriate sanction for knowingly converting client trust funds, misrepresenting to the client when asked for the trust balance that the money was being held in trust, and knowingly misrepresenting to the Bar that the money was still in trust.

The mitigation is not sufficient to justify imposing a sanction less than disbarment for knowingly converting client trust money and lying to conceal the theft. Respondent understood that he did not have legal entitlement to Amtel's funds.

Respondent also failed to demonstrate a causal connection between his physical and mental ailments and the theft of Amtel's funds. Respondent's multiple thefts and intentional misrepresentations warrant the presumed sanction of disbarment.

ARGUMENT

ISSUE I: DISBARMENT IS THE APPROPRIATE SANCTION FOR THEFT OF FUNDS HELD BY A LAWYER IN TRUST AND LYING TO THE BAR AND PROPERTY OWNER TO CONCEAL THE MISCONDUCT.

In attorney disciplinary proceedings “a referee’s findings of fact are presumed correct and this Court will not reweigh the evidence and substitute its judgment for that of the referee as long as the findings are not clearly erroneous or lacking in evidentiary support.” *Florida Bar v. Beach*, 675 So. 2d 106, 108 (Fla. 1996). A referee’s legal conclusions, however, are subject to broader review by this Court than are findings of fact. *Id.* This Court has broader discretion to review a referee’s recommended discipline, because it is this Court’s “responsibility to order the appropriate punishment.” *Florida Bar v. Niles*, 644 So. 2d 504, 506 (Fla. 1994). The Referee in this case has recommended that Respondent should receive a six (6) month suspension. (RR 3). However, disbarment is the appropriate sanction considering the seriousness of Respondent’s misconduct.

The discipline imposed on Respondent must correspond to the serious nature of his misconduct and serve as a deterrent to others who might be inclined toward this sort of misconduct. In *Florida Bar v. Lord*, 433 So. 2d

983, 986 (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).

The Florida Standards for Imposing Lawyer Sanctions provide a guideline for determining 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.” Clearly, the thefts committed by Respondent satisfy this Standard.

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.” The Respondent’s intentional misrepresentations to

Amtel and the Bar that the subject funds were held in trust in order to conceal his thefts justify disbarment.

Standard 9.21 defines aggravating circumstances as “any considerations or factors that may justify an increase in the degree of discipline to be imposed.” The Referee found several aggravating factors in her report.

(RR 5). The aggravating factors found by the Referee are as follows:

Standard 9.22(b) Dishonest or selfish motive. Respondent’s several thefts clearly exhibit dishonesty.

Additionally, Respondent’s motives were selfish- Respondent testified that he stole the money “out of financial need at the time.” (TT 64).

Standard 9.22(d) Multiple offenses. Respondent converted Amtel’s funds on several occasions.

Respondent made misrepresentations to both Amtel and the Bar by indicating that the funds were being held in trust. Respondent also failed to maintain the required trust account records.

Standard 9.22(f) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process. Respondent’s misrepresentation in his initial response to the Bar is a serious and significant aggravating factor.

Standard 9.3 lists several mitigating factors which may justify a reduction in the degree of discipline to be imposed. The Referee found several mitigating factors (RR 6-7), which included:

Standard 9.3(a) Absence of a prior disciplinary record.

Standard 9.3(c) Personal or emotional problems.

Standard 9.3(d) Timely good faith effort to make restitution or to rectify consequences of misconduct.

Standard 9.3(g) Character or reputation.

Standard 9.3(l) Remorse.

The Referee also found several mitigating factors which were not listed in the Standards: (1) Respondent was a self-starter; (2) his conduct was out of character and as a result of mental and physical diminished capacity; (3) the amount of money stolen was small in comparison to the total amount of money entrusted to him; (4) the thefts were short in duration, isolated in time, and limited to one (1) account; (5) Respondent has admitted all violations and has been cooperative with the Bar; (6) rehabilitation is probable; and (7) Respondent is not likely to re-offend. (RR 6-7).

“The overwhelming majority of cases involving the misuse of client funds have resulted in disbarment regardless of the mitigation present.” *Florida Bar v. Travis*, 765 So. 2d 689, 691 (Fla. 2000). Additionally, considering the serious violations committed by Respondent, the mitigation is not sufficient to justify imposing a sanction less severe than disbarment.

This Court has provided guidance regarding the appropriate sanction for the type of misconduct committed by Respondent. This Court has repeatedly held that disbarment is the presumed sanction for an attorney’s misuse of client funds held in trust. *See Florida Bar v. Travis*, 765 So. 2d 689 (Fla. 2000); *Florida Bar v. Tillman*, 682 So. 2d 542 (Fla. 1996); *Florida Bar v. Shanzer*, 572 So. 2d 1382 (Fla. 1991). *Travis*, supra, is strikingly similar to the instant case. In *Travis*, this Court held that Travis’ intentional misappropriation of clients’ funds warranted disbarment. *Travis* at 692. Travis wrote checks to himself on his trust account for payment of personal obligations. *Id.* at 690. At the disciplinary hearing, several judges and lawyers testified in support of Travis’ character and fitness, and other witnesses provided testimony regarding Travis’ contributions to the profession and community. *Id.* Additionally, Travis’ psychiatrist testified that Travis was suffering from depression. *Id.* The

referee found several aggravating factors, including that Travis knew that using his trust account for personal matters was wrong, that he exposed clients to substantial risk, that he had not yet made restitution, and that he had made a payment from his trust account to fund a vacation. *Id.* Additionally, the referee found several mitigating factors, including that Travis had no prior disciplinary record, that he had experienced personal or emotional problems, that he cooperated during the proceedings, that he provided service to the profession and the community, and that he served indigent clients for many years. *Id.*

While this Court recognized the mitigating factors of Travis' prior good works and lack of a disciplinary history, this Court stated that those factors did not overcome Travis' conduct of intentionally misappropriating client funds for his own use. *Id.* at 691. The mitigation was insufficient to reduce the presumed discipline of disbarment. *Id.* This Court further stated that "[t]he presumption of disbarment is exceptionally weighty when the attorney's misuse is intentional rather than a result of neglect or inadvertence." *Id.*

Similarly, in the instant case, Respondent misappropriated trust funds and used those funds for "living expenses." (TT 67). Additionally, many of the same mitigating factors were found to have existed in both *Travis*

and the instant case, including lack of prior discipline, personal or emotional problems, cooperation during the proceedings, and service to the profession. (RR 6-7). Despite the substantial mitigating factors recognized in *Travis*, this Court still determined that disbarment was warranted. Therefore, since the Respondent intentionally converted escrow funds to his own use and wrote deceptive letters to Amtel and the Bar to conceal the true status of Amtel's funds, the mitigation should not overcome the presumption of disbarment.

In *Florida Bar v. Tillman*, 682 So. 2d 542, 543 (Fla. 1996), the respondent was disbarred for misappropriating client funds which she used to pay personal expenses. The referee found two (2) mitigating factors, including that Tillman had no prior disciplinary history, and that she had only practiced for a short period of time. *Id.* The referee found several aggravating factors, including a dishonest or selfish motive, a pattern of misconduct, multiple offenses, a refusal to acknowledge the wrongful nature of her misconduct, and a lack of remorse. *Id.* Similarly, in the instant case, Respondent misappropriated trust funds to pay personal expenses. (TT 67). Further, the Referee in the instant case found two (2) of the same aggravating factors as in *Tillman*, including a dishonest or selfish motive and multiple offenses. (RR 5).

In *Florida Bar v. Shanzer*, 572 So. 2d 1382, 1384 (Fla. 1991), this Court disbarred the respondent for misappropriating client funds from his trust account. At the disciplinary hearing, the referee found three (3) aggravating factors, including a dishonest or selfish motive, a pattern of misconduct, and multiple offenses. *Id.* at 1383. The respondent argued before the referee that his depression led him to use his trust account for personal purposes. *Id.* This Court stated that “we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems.” *Id.* at 1384.

In the instant case, Respondent was found to have two (2) of the same aggravating factors as the attorney in *Shanzer*, including a dishonest or selfish motive and multiple offenses. (RR 5). Like *Shanzer*, Respondent testified that his depression, coupled with his physical pain and financial need, led him to steal the money. (TT 64). Respondent testified that he “was in this sort of between depression and the pain and the narcotics sort of, you know, a fog and just exercised extremely bad judgment, and the other why would be just pure desperation out of financial need at the time.” (TT 64). Respondent’s testimony about financial hardship was corroborated by the testimony of John Garner, a witness called by Respondent, who testified that he knew “that from other

conversations Mark had had a -- had had financial problems.” (TT 31). In addition to the explanations given for stealing the money, Respondent testified that he understood that he did not have the legal right to take the money and he “knew it was wrong.” (TT 63, 69). While the Respondent has suffered from physical and mental ailments, he has failed to demonstrate that his actual ailments caused him to not appreciate the wrongfulness of stealing. He stole to solve personal problems.

The instant case can be distinguished from the recently reported opinion in *Florida Bar v. Mason*, 826 So. 2d 985 (Fla. 2002). Notwithstanding significant shortages in Mason’s trust account, this Court distinguished *Mason* from *Travis* by pointing out that in *Mason*, the respondent’s errors were due to mistakes in accounting practices, and she was not attempting to intentionally steal from her clients. *Id.* at 988. Mason was found guilty of violating Rule 5-1.1(a) with regard to holding money in trust for a specific purpose. *Id.* at 987. This Court held that a two-year suspension was the appropriate discipline. *Id.* at 988. Unlike in *Mason*, in the instant case, Respondent’s misconduct was intentional and involved theft of escrow funds coupled with intentional misrepresentations to Amtel and the Bar.

In *Florida Bar v. Condon*, 632 So. 2d 70, 72 (Fla. 1994), the respondent received an 18-month suspension for his misappropriation of trust account funds. The referee recognized respondent's absence of a prior disciplinary record, remorse, depression, anxiety, and continuing medical treatment as mitigating factors. *Id.* at 71. This Court reasoned that "disbarment may be excessive discipline when mitigating evidence of mental or substance abuse problems cast doubt upon the intentional nature of the attorney's misconduct." *Id.* at 72.

Condon can also be distinguished from the instant case. Unlike in *Condon*, in the instant case, Respondent's mental and physical impairments did not cast doubt on the intentional nature of his misconduct. Respondent testified that he was not legally entitled to the money, that he "exercised extremely bad judgment," and that he knew that his behavior was wrong. (TT 63, 64, 69). Additionally, Respondent did not claim that his thefts were the result of some kind of confusion, insanity, or diminished capacity. Therefore, Respondent has not demonstrated any causation between his impairments and the actual thefts.

CONCLUSION

Respondent knowingly converted Amtel's funds for his own use, made intentional misrepresentations to both Amtel and the Bar that the funds were being held in trust, and failed to maintain the required trust account records. These multiple and serious rule violations committed by Respondent warrant nothing less than disbarment.

Dated this _____ day of December, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number _____ to **The Honorable Thomas D. Hall, Clerk**, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to **Mark W. McFall, Respondent, c/o Scott K. Tozian, Counsel for Respondent**, at 109 N. Brush St., #150, Tampa, Florida 33602; and a copy by regular U.S. Mail to **John Anthony Boggs, Staff Counsel**, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this ____ day of December, 2002.

Stephen Christopher Whalen
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief is submitted in WordPerfect 14 point proportionally spaced Times New Roman font, and the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Antivirus for Windows.

Stephen Christopher Whalen