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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs.

PETER T. ROMAN,

Respondent.

_________________________ /

CONFIDENTIAL

CASE NO. 69,358
(TFB No. 86-16-351-06A
formerly 06A86H27)

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RESPONDENT'S ANSWER BRIEF

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Board of Governors in November, 1986

SYMBOLS AND REFERENCES

Respondent, Peter T. Roman, adopts the same designation for the parties as did The Florida Bar in its Opening Brief, to wit: Appellee herein, Peter T. Roman, will be referred to as "Respondent," and Appellant, The Florida Bar, as "The Florida Bar." Other references are to the transcript before the referee, "TR," the record in this disciplinary proceeding, "R," and The Florida Bar's Opening Brief, "BR."

STATEMENT OF THE FACTS AND OF THE CASE

Respondent accepts The Florida Bar's statement of the facts and of the case, BR. pp. 1-4.

SUMMARY OF ARGUMENT

I

In light of the isolated nature of the admittedly improper activity engaged in by Respondent, and in light of the number and extent of the mitigating factors which the referee found to exist in this Bar disciplinary proceeding, disbarment would be an excessive sanction.

Under existing case law, the ultimate penalty of disbarment has always been reserved for the most egregious conduct; disbarment is imposed most frequently in situations in which a pattern of misconduct exists. A single isolated instance, occurring during a period of serious emotional and psychological turmoil in the attorney's life, does not warrant disbarment.

In effect, The Florida Bar is arguing that _no_ mitigation should ever be permitted to lessen the severity of the presumptive sanction (disbarment) when the kind of misconduct here involved is at issue, even if the misconduct is an isolated

episode. Respondent contends that none of the sanctions recommended in the <u>Standards for Imposing Lawyer Sanctions</u> is mandatory; sanctions must be tempered by the rule permitting mitigation, including the showing of no previous disciplinary problems.

II

Cases involving acts of misconduct similar to that for which Respondent is being disciplined suggest that a three-year suspension is excessive where significant elements of mitigation exist and no pattern of improper behavior is demonstrated. Since one of the primary purposes of the <u>Standards</u> is "consistency in the imposition of disciplinary sanctions ..." the sanctions imposed in other analogous situations are relevant to the determination of the propriety of a sanction in the instant case. Respondent respectfully suggests that suspension for a period of less than three years would be appropriate in these circumstances. In addition, the purposes of Bar disciplinary proceedings do not require lengthy suspension in <u>this</u> case, in which Respondent's misconduct occurred during a period of "diminished capacity."

ARGUMENT

I

THE ISOLATED NATURE OF RESPONDENT'S MISCONDUCT AND THE SUBSTANTIAL MITIGATION PRESENTED SUPPORT THE REFEREE'S RECOMMENDATION OF SUSPENSION RATHER THAN DISBARMENT.

This Court has repeatedly held that

> [d]isbarment, being the most extreme penalty, should be imposed only in cases where the attorney has demonstrated an attitude or course of conduct wholly inconsistent with approved professional standards. Fla. Jur. 2d, Attorneys at Law, §96, and cases cited therein at note 85 (1978).

Thus, "[t]he extreme sanction of disbarment is to be imposed only in 'those rare cases where rehabilitation is highly improbable.'" The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986) (citations omitted).

A review of case law over the past year or two makes it clear that this ultimate sanction is currently imposed only under certain circumstances (or a combination of them):

1) Where there are multiple complaints or previous disciplinary actions, which demonstrate a pattern of misconduct rather than an isolated episode, e.g. The Florida Bar v. Newman, 12 FLW 470 (FSC Sept. 10, 1987); The Florida Bar v. Bartlett, 509 So.2d 287 (Fla.

1987); The Florida Bar v. Casler, 508 So.2d 721 (Fla. 1987); The Florida Bar v. Lopez-Castro, 508 So.2d 10 (Fla. 1987); The Florida Bar. v. Bryan, 506 So.2d 395 (Fla. 1987); The Florida Bar v. Holmes, 503 So.2d 1244 (Fla. 1987); The Florida Bar v. Pierce, 498 So.2d 431 (Fla. 1986); The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986); The Florida Bar v. Dreyer, 493 So.2d 1025 (Fla. 1986); The Florida Bar v. Katz, 491 So.2d 1101 (Fla. 1986); The Florida Bar v. Cruz, 490 So.2d 48 (Fla. 1986); The Florida Bar v. Rodriquez, 489 So.2d 726 (Fla. 1986); The Florida Bar v. Murray, 489 So.2d 30(Fla. 1986); The Florida Bar v. Baxter, 488 So.2d 826 (Fla. 1986); The Florida Bar v. Hotaling, 485 So.2d 820 (Fla. 1986); The Florida Bar v. MacKenzie, 485 So.2d 424 (Fla. 1986); The Florida Bar v. Swirsky, 484 So.2d 1248 (Fla. 1986).

2) Where the attorney in question fails to cooperate or to participate in the Bar disciplinary proceedings and/or has utterly abandoned his practice, e.g. The Florida Bar v. Bartlett, 509 So.2d 287 (Fla. 1987); The Florida Bar v. Bookman, 502 So.2d 893(Fla. 1987); The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); The Florida Bar v. Pierce, 498 So.2d 431 (Fla. 1986); The Florida Bar v. Cervantes, 494 So.2d 491 (Fla. 1986); The Florida Bar v. Murray, 489 So.2d 30 (Fla. 1986);

The Florida Bar v. MacKenzie, 485 So.2d 424 (Fla. 1986); The Florida Bar v. Swirsky, 484 So.2d 1248 (Fla. 1986).

3) Where no mitigation whatsoever has been offered in explanation of the misconduct, e.g. The Florida Bar v. Weinsoff, 498 So. 2d 942 (Fla. 1986); The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986).

Unless a matter falls within one or more of the above categories, this Court has virtually never disbarred an errant attorney. But cf. The Florida Bar v. Margadonna, 12 FLW 453 (FSC Sept. 3, 1987). Although The Florida Bar appears to be taking the position that Respondent's misconduct in this case was so outrageous and egregious as to warrant the maximum sanction of disbarment regardless of mitigation, the only two cases it cites simply do not support that position.

In The Florida Bar v. Breed, 378 So. 2d 783 (Fla. 1980), the lawyer in question was in fact suspended for two years in an effort to be consistent with earlier cases, and not disbarred, despite there being no evidence whatsoever of mitigation, although this Court noted that future similar conduct might result in disbarment: "henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured." Breed, supra, at 785.

Numerous cases subsequent to Breed, supra, however,

involving similar misconduct but also involving substantial mitigation, have resulted in sanctions less than disbarment, e.g. The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982); The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982); The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981); The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981); The Florida Bar v. Roth, 471 So.2d 29 (Fla. 1985); The Florida Bar v. Kent, 484 So.2d 1230 (Fla. 1986).

Thus, The Florida Bar's efforts to characterize the Breed case as somehow requiring mandatory disbarment whenever a lawyer misuses client's funds or converts such funds to his own use are unavailing.

The only other case cited by The Florida Bar is The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986). This Court stated as follows:

> Although we recognize that alcoholism was the underlying cause of respondent's misconduct, it cannot constitute a mitigating factor sufficient to reverse the referee's recommendation to disbar under the facts in this case. The misappropriations occurred continuously over a period of approximately four years. During this time, respondent continued to work regularly. His income did not diminish discernably as a result of his alcoholism. We note further that the clients from whom he stole were elderly individuals who trusted him and for whom he held powers of attorneys. Under these circumstances, we believe respondent should be disbarred regardless of his defense of alcoholism. Knowles, supra, at 142 (emphasis supplied).

As the above-quoted paragraph makes clear, the facts of Knowles

are very different from the facts herein: Knowles' proffered mitigation of alcoholism was held to be insufficient to warrant a sanction less than disbarment because the misappropriations continued over a period of four years, involved almost $200,000.00 from "several" elderly clients with whom he had direct fiduciary relationships, and resulted in eight felony counts of grand theft, for which the attorney served no incarceration time. Contrast these facts with those of the instant case, which involve substantially greater findings of mitigation, a single isolated instance of conversion from the State of Florida with whom Respondent had no direct fiduciary relationship, one felony count of grand theft of approximately $7,000.00, and a nine-month jail sentence.

Knowles, supra, was in fact recently cited for the proposition that "[t]his Court has not hesitated to find disbarment where attorneys have demonstrated a pattern of misuse of client funds." The Florida Bar v. Newman, 12 FLW 470, 471 (FSC Sept. 10, 1987) (emphasis supplied).

The Florida Standards for Imposing Lawyer Sanctions, adopted by The Florida Bar Board of Governors in November of 1986, [hereafter "Standards"] sets forth a "model" for a "comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." Standards 1.3.

The Standards propose presumptive sanctions for specific types of misconduct; sanctions in declining order of severity are

set forth depending on factors enumerated in Standards 3.0: the duty involved (i.e. the type of misconduct involved), the lawyer's mental state (i.e. knowingly as contrasted with negligently, etc.), and the potential or actual harm. A fourth element is specifically noted in Standards 3.0 (d) as an element to be considered: the existence of aggravating or mitigating factors.

The sanctions specified for each type of ethical violation in fact take into account the first three elements above (i.e. the duty violated, the lawyer's mental state, and the potential or actual harm); they do not by their own terms take into account any aggravating or mitigating factors. Rather, each rule governing a distinct substantive area of ethical violation is preceded by the phrase "Absent aggravating or mitigating circumstances...the following sanctions are generally appropriate...."

Standards 9.0 provides that after misconduct is established, aggravating and mitigating circumstances may be considered in determining the appropriate sanctions; Standards 9.32 lists factors which may be considered in mitigation, including nine (of thirteen listed) which are supported by the evidence in this case:

(a) absence of a prior disciplinary record;

(c) personal or emotional problems;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical or mental disability or impairment;

(j) interim rehabilitation;

(k) imposition of other penalties or sanctions;

(l) remorse.

Most of the above listed factors were indeed found by the referee to exist as mitigation in the present case.

It clearly does not appear that the Standards were intended to be mandatory; otherwise, the reference to "flexibility and creativity in assigning sanctions in particular cases of lawyers misconduct" would be rendered superfluous. Similarly, the sanction of disbarment is applicable only when mitigating factors do not exist which warrant a lesser sanction. In this case, more than sufficient mitigation was presented to justify the Referee's refusal to recommend disbarment; suspension of Respondent is appropriate.

II

THE NATURE AND EXTENT OF THE MITIGATION PRESENTED AND THE LACK OF ANY PATTERN OF MISCONDUCT JUSTIFY A LESSER SANCTION THAN THE THREE-YEAR SUSPENSION RECOMMENDED BY THE REFEREE.

If, as is stated in the Standards, one goal of the attorney discipline process is consistency, then we must look to other cases involving similar mitigation as well as similar misconduct. For example, in The Florida Bar v. Dietrich, 469 So.2d 1377 (Fla. 1985), a five-count disciplinary complaint and several felony

convictions nonetheless resulted in a two-year suspension, because the misconduct was offset by the attorney's serious marital problems and alcoholism, and by his total cooperation with the Bar and the Court. The Florida Bar v. Tunsil, 503 So. 2d 1230 (Fla. 1986), involving misappropriation of funds, resulted in a one-year suspension despite previous disciplinary problems, because of Tunsil's alcoholism as the root cause of his difficulties. The Florida Bar v. Pavlick, 504 So. 2d 1231 (1987), involving a criminal conviction, relied on mitigation to justify a two-year suspension.

Furthermore, in the interest of consistency, review of the disposition of the case of The Florida Bar v. James Anderson, is invited. Anderson, as the record reflects, is the "other" lawyer who participated with Respondent in the Banner Estate activity. Although the disposition of that case is yet unreported, The Florida Bar concurred in a one-year suspension for Anderson.

In this case, the evidence of Respondent's emotional and marital difficulties occurring coincident with his misconduct is extensive. Most telling is a portion of psychiatric associate Constance Frierson's letter, R.-- Letter dated March 7, 1986, who refers to Respondent's being "in and out of touch with reality" during the period from November 1979 through April 1, 1980 (the exact period during which his activities in connection with the Banner Estate were taking place). He "exhibited a disjointed thought process" as a result of his psychiatric difficulties. His "fragile mental and emotional state" during this period

allowed him to commit the crime in question, despite its being "completely out of character for him."

In light of the above explanation, albeit not excuse, for Respondent's behavior, a lengthy suspension simply fails to serve the primary purpose of lawyer discipline proceedings: to protect the public and the administration of justice. Standards, 1.1. Protection of the public from Respondent at this time is unnecessary, since the record reflects no anti-social behavior whatsoever since the 1979-80 episode in question.

Even if we take into account punishment and deterrence as other relevant goals of the disciplinary system, a three-year suspension is unnecessary to accomplish those purposes. Respondent committed his crime during a period of diminished capacity, for which his nine-month incarceration in the Pinellas County Jail is more than adequate punishment. And actions undertaken by one who at the time is "in and out of touch with reality" are certainly not deterrable.

In sum, Respondent agrees that suspension from the practice of law is fully warranted in his case, but that such suspension should be for less than three years.

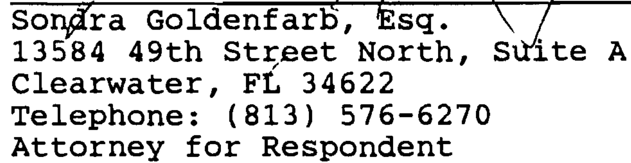
CONCLUSION

For the reasons stated and in light of the authorities cited, Respondent respectfully suggests that suspension rather than disbarment is an appropriate sanction for his professional misconduct, and that such suspension should be for a period of

less than three years.

Respectfully submitted,

TANNEY, FORDE, DONAHEY, ENO & TANNEY, P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Answer Brief has been furnished by regular mail to Bonnie L. Mahon, Esquire, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, FL 33607 and to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 600 Apalachee Parkway, Tallahassee, FL 32301-8226, this 28 day of October, 1987.

Sondra Goldenfarb