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SID J. WHITE

JAN 7 1991

CLERK, SUPREME COURT

By  Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Case No. 76,126
TFB File No. 90-00363-04B

THE FLORIDA BAR,
Complainant,

vs.

FRANCES SEAMAN CHILDERS,
Respondent.

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On June 7, 1990, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. All of the aforementioned pleadings, responses thereto, exhibits received in evidence, and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida. All references to the transcript within this report will be cited as TR-_____.

II. FINDINGS OF FACT

A. Jurisdictional Statement. Respondent is, and at all

times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case. Based upon the Stipulation of Facts and the Respondent's answers and admissions filed in response to the Bar's request for admissions, I find the following facts pertinent:

In the summer of 1986, after graduating from law school, Respondent began working for the law firm of Selber and Selber in Jacksonville, as an associate attorney (TR-77).

In August 1989, while representing one of the firm's clients in an action for levy, Respondent forwarded to the Duval County Sheriff's Department a law firm operating account check for \$1,000.00 representing a deposit required as part of the action. On or about September 11, 1989, Respondent received a refund check from the Duval County Sheriff's Department in the amount of \$950.00 (TR-108). The check was made out to Respondent personally, it represented funds belonging to the law firm as a refund of the deposit tendered to the Sheriff's Department (TR-108). Upon receipt of the refund check, Respondent personally endorsed it and deposited it into one of her personal accounts that she had set up for her daughter's wedding expenses (TR-109). After depositing the refunded deposit into her personal account, Respondent instructed the law firm's bookkeeper to enter a credit on the client's ledger sheet for the \$950.00 refund (TR-111). As

of September 11, 1989, the client had not reimbursed to the firm any of the \$1,000.00 deposit sent to the Duval County Sheriff's Department. In preparing a statement to the law firm's client for whom the levy was to have been performed, the bookkeeper was given authorization by Respondent to show a credit for the refund on the client's behalf even though no deposit of the funds had been made to the law firm (TR-111). Subsequently, while preparing the client's statement in this matter, the firm's bookkeeper discovered that the deposit check had cleared the Sheriff's account but had not been deposited with the law firm. The bookkeeper advised one of the firm's partners of her findings. Respondent was confronted by two of the partners of her law firm, one of whom was Leonard Selber, and she admitted to having taken the \$950.00 refund (TR-122). Respondent immediately reimbursed to the law firm the \$950.00.

On or about October 1989, Respondent's employment with the law firm was terminated (TR-78). Subsequent to her termination, in early October 1989, Respondent applied for a position with HRS as an assistant district legal counsel (TR-90). When Respondent applied for the job with HRS, she never informed them about the circumstances surrounding her termination from the Selber firm (TR-123). Respondent testified that she felt like HRS should have been informed about this matter (TR-123). The Respondent was hired by HRS and began work on or about January 25, 1990 (TR-93). Respondent had worked for HRS approximately two weeks

before she informed her supervisors at HRS about the Selber incident (TR-94).

III. RECOMMENDATIONS AS TO GUILT

I recommend that Respondent be found guilty of violating article XI, Rule 3-4.3 (the commission by a lawyer of any act which is unlawful or contrary to honesty and justice), Rules 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. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the client specifically instructs, in writing, that such be done. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six (6) years after termination of the representation), 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct of The

Florida Bar.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

In determining the proper discipline to impose upon an attorney for violating a rule or rules of The Florida Bar, the starting point is to review the Florida Standards for Imposing Lawyer Sanctions. The appropriate sections of Florida's Standards for Imposing Lawyer Sanctions which should be reviewed in connection with this complaint are: 4.1 - failure to preserve client's property; and 5.1 - failure to maintain personal integrity. All of the above sections support the suspension or disbarment of Respondent. See 4.11, 4.12, and 5.11(f), Florida's Standards for Imposing Lawyer Sanctions.

Both aggravating and mitigating factors also need to be considered before a decision is made as to the appropriate sanction to be imposed. Factors in mitigation that the Respondent sets forth are: no prior disciplinary history; personal or emotional problems; cooperative attitude toward proceedings; interim rehabilitation; and remorse.

Aggravating factors that are present in this complaint are: there is a pattern of concealment (Respondent never informed law firm that she had deposited the money in her account until they confronted her, See (TR-110), nor did Respondent inform HRS about the matter when she applied for the position there, See (TR-94)); and a selfish motive (Respondent put money in a special savings

account for her daughter's wedding rather than in her personal savings or checking account, See (TR-109)). It is not apparent that Respondent would have reported the deposit of the check into her account if she would have never been confronted. See (TR-123).

I have reviewed these cases with respect to the case at hand: In The Florida Bar v. Stalaker, 485 So. 2d 815 (Fla. 1986), an associate attorney was found guilty of diverting funds belonging to the law firm into his own account. The referee recommended a 12-month suspension after taking into consideration mitigating factors. Id. at 816. The Court decided to only impose a 90-day suspension after determining that the associate believed he was acting with one partner's permission and that there was no deliberate attempt to steal from the association. Id. at 816, 817.

In The Florida Bar v. Farver, 506 So. 2d 1031 (Fla. 1987), a partner intentionally deprived the law firm he was associated with of fees. The Court disapproved of the initial consent judgment of a 60-day suspension and remanded the cause back to the referee for a full disciplinary proceeding. Id. at 1032. After reviewing the merits, the Referee found that the attorney's illegal conduct was contrary to honesty, justice and good morals, and that his conduct involved fraud and deceit which adversely reflected on the attorney's fitness to practice law. Id. The Court accepted the Referee's recommendation and suspended the

attorney for one year. Id.

In The Florida Bar v. Gillin, 484 So. 2d 1218 (Fla. 1986), the Court disciplined an attorney for diverting funds from the law firm behind the partner's back. The Court stated that it would not tolerate "misguided, irrational acts of self-help involving disputes between partners who are members of the Bar." Id. at 1219. The Court approved of the Referee's recommendation that the attorney be suspended for six months in light of the mitigating factors (no party suffered any real damage, no prior disciplinary history, active in church and civic affairs, and active in local Bar functions). Id. at 1219, 1220.

Similarly, the Respondent in the case at bar diverted funds from her law firm into her own account (TR-108, 109). Respondent never had permission from any of the partners to divert this money, and she knew that her actions were wrong (TR-128). Similar to The Florida Bar v. Farver, Respondent's conduct involved fraud and deceit (never informing bookkeeper about what really happened (TR-121) which adversely reflects on her fitness to practice law).

In The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1980), the Florida Supreme Court set forth three factors that need to be considered in administering discipline:

- 1) must be fair to society both in terms of protecting public from unethical conduct and in not denying public the services of a qualified lawyer;
- 2) judgment must be fair to attorney, being sufficient to punish a breach of ethics and at same time

- encouraging reformation and rehabilitation; and
- 3) judgment must be severe enough to deter like violations.

I believe an imposition of a 90-day suspension in the case at bar will satisfy all three factors set forth in Pahules. Hopefully, society will notice that an attorney engaging in conduct of this nature will not be tolerated by the legal system. Despite the seriousness of Respondent's intentional act, a 90-day suspension is warranted in light of the mitigating factors and the fact that no one has been hurt except the Respondent herself.

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that she be disciplined by:

- A. 90-day suspension.
- B. Payment of costs in these proceedings.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following personal history of Respondent, to wit:

Age: 45 years old

Date admitted to the Bar: October 16, 1986

Prior Discipline: None

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The

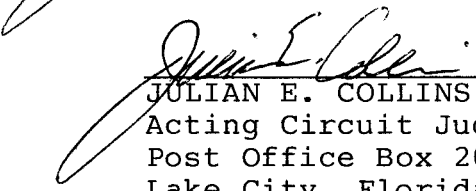
Florida Bar:

Referee Level

1. Administrative Costs	\$ 500.00
2. Court Reporter's Fees	611.18
3. Bar Counsel Travel	<u>198.00</u>
Total	\$1,309.18

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 2nd day of January, 1990 *JEC*



JULIAN E. COLLINS,
Acting Circuit Judge/Referee
Post Office Box 2065
Lake City, Florida 32056

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to SID J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. Mail to JOHN T. BERRY, Staff Counsel, c/o JOHN A. BOGGS, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; JOHN N. WATSON, JR., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and FRANCES SEAMAN CHILDERS, Respondent, in care of JOHN A. WEISS, Esquire, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32301, on this 2nd day of January, 1990 *JEC*



JULIAN E. COLLINS, Referee