Supreme Court of Florida

No. SC00-997

THE FLORIDA BAR,
Complainant,

vs.

LAVENIA DIANNE MASON,
Respondent.

[March 14, 2002]

PER CURIAM.

The Florida Bar petitions for review of the referee's report in this case involving attorney discipline. Mason cross-petitions. We have jurisdiction. See art. V, § 15, Fla. Const. For the reasons expressed, we approve the referee's findings of fact and recommendations of guilt, but disapprove the referee's recommendation of discipline and disbar Mason.

FACTS

The Florida Bar filed its complaint against Mason, alleging that she violated rule 4-8.4(c) of the Rules Regulating The Florida Bar, prohibiting conduct involving

dishonesty, fraud, deceit, or misrepresentation, and that she intentionally violated rule 5-1.1(a), which mandates that money or property entrusted to an attorney for a specific purpose be used for that purpose.

The parties stipulated to the following facts and submitted the stipulation to the referee, who adopted them in his report: (1) as a member of The Florida Bar, Mason is subject to the jurisdiction and disciplinary rules of this Court; (2) beginning in May 1994, Mason represented Ruby Donaldson in a claim for damages against the manufacturer of breast implants; (3) in December 1996, Donaldson's claims were settled for $50,000, which was paid in three installments of $5,000, $22,500, and $22,500; (4) the first settlement check for $5,000 was dated December 30, 1996 (Mason withheld $2,264.54 in fees and costs and disbursed $2,735.46 to Donaldson); (5) the second settlement check for $22,500 was dated August 7, 1997 (Mason withheld $10,100 in fees and costs and disbursed $12,400 to Donaldson); (6) on January 8, 1998, Mason sent Donaldson two checks for $500 and $4,750, representing refunds on attorneys' fees; (7) the third settlement check for $22,500 was dated December 26, 1997 (on April 20, 1998, Mason sent Donaldson a check for $17,437.50; Donaldson returned that

check to Mason and filed a grievance with the Bar);[1] (8) on June 5, 1998, Mason wrote to the Bar, advising that Donaldson's settlement proceeds were in Mason's trust account; (9) an audit was conducted of Mason's IOTA trust account; (10) the audit revealed that the $17,437.50 due Donaldson was not in Mason's trust account on June 5, 1998, the date of her letter to the Bar (on that date, Mason's trust account balance was $14,544.27, reflecting a shortage of $2,893.23 just to cover Mason's obligations to Donaldson); (11) on June 5, 1998, Mason's total client obligations were approximately $52,532.15 (her trust account was short at least $37,987.88); (12) from January 1, 1996, through July 31, 1998, Mason made eighty-two transfers (without reference to client or matter) from her trust account to her operating account, for a total of $252,500;[2] (13) the eighty-two transfers created shortages in Mason's trust account; (14) on July 27, 1998, Mason's client obligations totaled $53,106.02, but her trust account balance on that date was $19,164.73, or $33,941.29 short; (15) Mason violated rule 5-1.1(a); however, she reserved the right to argue that trust account shortages were the result of negligence

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1. Donaldson passed away before the hearings, but her daughter testified as a mitigation witness for Mason, and stated that her mother thought that she did not have to pay Mason attorneys' fees.

2. By agreeing to this stipulated paragraph, Mason did not stipulate that all of the eighty-two transfers were improper, only that they were not designated properly.

and the Bar reserved the right to argue that the shortages were the result of intentional misconduct.

The referee held hearings on October 23, November 21, and December 19; his report was entered on December 22, 2000. Based on the stipulated facts and the evidence presented at the hearings, the referee found Mason guilty of gross negligence in violating rule 4-8.4(c), finding that there was no evidence to support the Bar's claim that Mason specifically intended to mislead the Bar about monies in her account on June 5, 1998. Furthermore, the referee found Mason guilty of intentionally violating rule 5-1.1(a) because the record showed that at least some of the transfers from the trust account to the operating account were made to cover shortages in the latter.

The referee found two aggravating factors: (1) a pattern of misconduct, in that the misappropriations occurred over a period of fifteen months; and (2) that Mason submitted false statements when she told the Bar that funds were available in her trust account when they were not. The referee found the following mitigating factors: (1) absence of prior disciplinary record; (2) personal and emotional problems because Mason was going through a bitter divorce and custody battle when the trust account violations occurred; (3) Mason made a timely good faith effort to correct the problems; (4) Mason was inexperienced in handling the

administrative responsibilities of a law practice; (5) Mason had a good reputation; and (6) Mason was remorseful about the problems that she created.

Acknowledging in his report that disbarment is the usual sanction for trust account violations, the referee nevertheless recommended suspension for two years and thereafter until Mason demonstrates rehabilitation, and the payment to the Bar of reasonable costs and expenses in the amount of $7,112.61. The referee stated that a sanction less than disbarment is warranted because of Mason's personal and family problems and her exemplary conduct as an attorney for fourteen years. The Bar petitioned for review of discipline; Mason cross-petitioned seeking review of the referee's finding of intentional violation of rule 5-1.1(a).

ANALYSIS

We adopt the referee's factual findings and recommendations of guilt, and we reject Mason's argument that the referee should not have found her guilty of an intentional violation of rule 5-1.1(a). We find that competent, substantial evidence exists in the record to support a finding of intentional conduct. The record demonstrates that some of the eighty-two unidentified trust account transfers were made to cover operating account shortages. Therefore, we approve the referee's finding that the resulting trust account shortages were the result of intentional conduct by Mason.

We do not agree with the referee's recommendation that suspension rather than disbarment is the appropriate discipline in this case. This Court has the sole responsibility to issue disciplinary orders and need not accept a referee's recommendation. See Florida Bar v. Vernell, 721 So. 2d 705, 709 (Fla. 1998).

The misuse of client funds is among those acts that do the greatest damage to the public trust. In Florida Bar v. Shanzer, 572 So. 2d 1382, 1383 (Fla. 1991), this Court held "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." See Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996). This presumption now has been codified in rule 3-5.1(f) of the Rules Regulating The Florida Bar. See Amendments to Rules Regulating Florida Bar, 795 So. 2d 1 (Fla. 2001). Furthermore, the reasoning we applied in both Florida Bar v. Travis, 765 So. 2d 689, 691 (Fla. 2000), and Florida Bar v. Korones, 752 So. 2d 586 (Fla. 2000), is applicable here.

CONCLUSION

Because of the serious nature of Mason's violations involving the misappropriation of client funds, we hold that disbarment, rather than suspension is the appropriate discipline in this case. Accordingly, Lavenia Dianne Mason is hereby disbarred. The disbarment will be effective thirty days from the filing of this

opinion so that Mason can close out her practice and protect the interests of existing clients. If Mason notifies this Court in writing that she no longer is practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the disbarment effective immediately. Mason shall accept no new business from the date on which this opinion is filed. Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from Lavenia Dianne Mason in the amount of $7,112.61, for which sum let execution issue.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, and QUINCE, JJ., concur.
LEWIS, J., dissents with an opinion, in which ANSTEAD and PARIENTE, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARMENT.

LEWIS, J., dissenting.

I respectfully dissent from the majority's decision to disbar Lavenia Dianne Mason.

While I do not condone the conduct, nor do I consider trust account violations minimal, my concern here is that the referee found significant mitigation in this case, including (1) absence of a prior disciplinary record (a fourteen-year

unblemished practice); (2) personal and emotional problems (Mason's bitter divorce); (3) timely good faith effort to make restitution; (4) inexperience in the practice of law (Mason was a new sole practitioner and without experience handling the administrative responsibilities of a law practice); (5) good character and reputation (a reputation for honesty and good character before this incident); and (6) remorse. The referee also found that rehabilitation was probable. I also conclude that there is a reasonable basis in multiple decisions from this Court to approve the referee's determination.

Under this Court's holdings, mitigation is a crucial component of a referee's determination in recommending disbarment. See Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992). Significant mitigation exists here to support the referee's recommendation, and the Bar presents no challenge to this mitigation.

"[G]enerally speaking, this Court 'will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw.'" Florida Bar v. Temmer, 753 So.2d 555, 558 (Fla.1999) (quoting Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla.1997)). The recommended discipline in this case is supported by our case law. This is another example of the trend of the Court to substitute its personal view for that of the referee.

In Florida Bar v. Corces, 639 So. 2d 604 (Fla. 1994), this Court ordered a

two-year suspension from the practice of law in Florida rather than the one-year suspension recommended by the referee, the disbarment sought by the Bar, or the reprimand requested by the respondent where the referee had found the respondent guilty of thirteen rule violations, including violations of rules 5-1.1(a) and 4-8.4(c).[3] Unlike the present case, the referee in Corces found only two mitigating factors—no client complaint or client loss and an isolated incident of trust account mishandling. In Corces, the Court relied on MacMillan,[4] as a case with similar facts and a discipline of two years' suspension where the referee had found mitigating factors, including absence of a prior disciplinary record; cooperative attitude toward the proceedings; timely good faith effort to make restitution; and good

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3. The other violations were: commingling (4-1.15(a)); failing to clearly label and designate a bank or savings and loan association account maintained by an attorney to comply with rule 4-1.15 as a trust account (5-1.1(b)); failing to preserve the records of all bank and savings and loan association accounts pertaining to clients' funds for at least six years (5-1.1(c)); failing to comply with the IOTA program (5-1.1(e)); failing to maintain a separate account, clearly labeled and designated as a "trust account" (5-1.2(b)(1)); maintain original canceled checks, numbered consecutively (5-1.2(b)(3)); failing to maintain a separate cash receipts and disbursements journal (5-1.2(b)(6)); failing to maintain statements for all trust accounts (5-1.2(b)(7)); failing to maintain bank reconciliations, monthly comparisons, and annual listings (5-1.2(c)(1)(A)–(B), (2)–(3)); committing an unlawful or dishonest act (3-4.3); and commiting a criminal act reflecting adversely on fitness to practice (4-8.4(b)).

4. MacMillan was found guilty of violating the following rules: 5-1.1(a), 4-1.15(a), 1-102(A)(1), 1-102(A)(4), 1-102(A)(6), 304.3, 4-8.4(a), 4-8.4(c), and the former Florida Bar Integration Rule 6, article XI, rules 11.02(3)(a) and 11.02(4).

character and reputation. In both MacMillan and Corces, the respondents were found guilty of using client funds to pay personal bills, then reimbursing the trust accounts for the amounts improperly withdrawn. This was not the situation here. The record supports the determination that Mason transferred trust account funds into her office operating account, but no evidence was presented that she used the operating account funds for personal use. In both Corces and MacMillan, mitigation overcame numerous rule violations, and the significant mitigation should overcome the two rule violations in this case.

This Court held in Florida Bar v. Kassier, 711 So. 2d 515, 517 (Fla. 1998), that "the extreme sanction of disbarment is to be imposed only 'in those rare cases where rehabilitation is highly improbable.'" In this case, the referee's report indicates that "[i]t can hardly be said that the rehabilitation of Respondent herein is highly improbable." In Florida Bar v. Tauler, 775 So. 2d 944, 948 (Fla. 2000), under similar circumstances, we held that the potential for rehabilitation was a significant factor in support of the referee's recommendation of suspension rather than disbarment in a case involving misappropriation of client funds. In Tauler, we adopted the referee's recommendation of a three-year suspension and one year of probation after reinstatement instead of disbarment, which was urged by the Bar. Tauler was found guilty of misuse of client funds, but the referee found in

mitigation "personal and emotional problems, positive character and reputation, timely and good faith restitution, full and free disclosure, and remorse." Id. at 945. In my view, Tauler has not been and cannot be distinguished.

The record shows that Mason recognized her accounting errors several months before the Bar contacted her and she immediately hired a part-time bookkeeper to provide assistance. When she learned the extent of the accounting problems after the Bar contacted her about the Donaldson grievance, she hired a CPA/attorney to audit her accounts and advise her on proper bookkeeping systems. She cooperated fully with the Bar during its audit. My impression is that Mason made serious mistakes, but did everything that she could once she realized the problems. I believe that a two-year suspension from the practice of law is ample discipline for this attorney as determined by the referee and as supported by multiple decisions of this Court.

Therefore, I dissent and would approve the referee's recommendation here.

ANSTEAD and PARIENTE, JJ., concur.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Staff Counsel, Tallahassee, Florida, and Vivian Maria Reyes, Bar Counsel, Miami, Florida,

for Complainant

John A. Weiss, Tallahassee, Florida,

for Respondent