IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-BA-01728-SCT

SAMUEL L. TUCKER, SR.

v.

THE MISSISSIPPI BAR

DATE OF JUDGMENT:	10/30/2019
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	COMPLAINT TRIBUNAL
ATTORNEY FOR APPELLANT:	SAMUEL L. TUCKER, SR. (PRO SE)
ATTORNEY FOR APPELLEE:	MELISSA SELMAN SCOTT
NATURE OF THE CASE:	CIVIL - BAR MATTERS
DISPOSITION:	SUSPENDED FROM THE PRACTICE OF LAW FOR SIX MONTHS - 12/03/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. In this bar-discipline appeal, attorney Samuel L. Tucker, Sr., does not challenge the Complaint Tribunal's finding he violated the rules of professional conduct and its imposition of a six-month suspension. Instead, the now-retired Tucker requests this Court automatically reinstate him to the practice of law at the end of the suspension period, alleviating the time and expense of the reinstatement process imposed by Rule 12(a) of the Rules of Discipline for the Mississippi State Bar.

¶2. As part of our exclusive jurisdiction over bar-discipline matters, this Court has the inherent authority to lift Rule 12(a)'s petition requirements or reduce Tucker's suspension to less than six months, which would lead to the same result.[1] While sympathetic to the practical reality the now-retired Tucker faces—namely, the effort and expense it would take to be reinstated when he is no longer engaged in the full-time practice of law—we decline to take either action.

¶3. This Court disciplines attorneys "not to punish the guilty attorney, but to protect the public[and] the administration of justice, to maintain appropriate professional standards, and to deter similar conduct."[2] With these purposes in mind, Tucker's six-month suspension for negligently commingling his client's funds and not maintaining a client trust account for a prolonged period of time is an appropriate sanction. And under Rule 12(a), an attorney who has been suspended for six months or more must petition this Court for reinstatement.

¶4. We affirm the Complaint Tribunal's suspending Tucker from the practice of law for six months.

Background Facts

¶5. In 2011, Tucker agreed to represent Elton Hartzler in Hartzler's dispute with his contractor. The representation contract required "a non-refundable retainer of $2500 against which the attorney will charge his time at the rate of $200.00 per hour, accounted in quarter hour increments." Tucker did not place this advance fee in a client trust account because,

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[1] ***Miss. Bar v. Gibbons***, 297 So. 3d 218, 223 (Miss. 2019) (citing ***Broome v. Miss. Bar***, 603 So. 2d 349, 354 (Miss. 1992)).

[2] ***Broome***, 603 So. 2d at 353.

going as far back as 1995, Tucker had no client trust account. Tucker testified he saw no need for one, giving that his practice mainly consisted of bankruptcy and probate work.

¶6. According to his testimony, Tucker had performed only minimal work on Hartzler's case when the two "fell out" and Hartzler came and got his file. Tucker did not maintain a record of the work he performed. And he did not return the unearned portion of Hartzler's retainer until May 2019—three years after Hartzler filed a complaint with the Mississippi Bar and months after the Bar filed a formal complaint against Tucker.

¶7. Tucker appeared before the Complaint Tribunal in June 2019. He admitted the Bar's allegations were true. He had deposited the unearned fee into his business account because he had no client trust account from 1995 to 2019. And while he did ultimately return Hartzler's unearned retainer, he conceded this occurred "way beyond" Hartzler's bar complaint.

Complaint Tribunal's Ruling

¶8. The Complaint Tribunal concluded Tucker had violated three of the Mississippi Rules of Professional Conduct.

¶9. First, Rule 1.5(a) requires a lawyer's fee to be reasonable. Miss. R. Pro. Conduct 1.5(a) And the nonrefundable retainer, when little to no work is performed, was unreasonable. *See* Miss. R. Pro. Conduct 1.5(a) cmt. ("A lawyer may require advance payment of a fee, but is obliged to return any unearned portion."); *see also* Miss. R. Pro. Conduct 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent

reasonably practicable to protect a client's interest, such as . . . refunding any advance payment that has not been earned.").

¶10. Second, Rule 1.15(a) prohibits the commingling of a client's funds, which this Court has recognized as "the 'cardinal sin' of the legal profession, whether done intentionally or not." ***Miss. Bar v. Coleman***, 849 So. 2d 867, 874 (Miss. 2002) (quoting ***Haimes v. Miss. Bar***, 601 So. 2d 851, 854 (Miss. 1992)). Rule 1.15(a) requires that a lawyer hold the property of clients and third parties separate from the lawyer's own property in a separate trust account. Miss. R. Pro. Conduct 1.15(a). The rule also requires complete records of such trust accounts to be kept and preserved by the lawyer for seven years after the representation is terminated. *Id.* Tucker did not place Hartzler's advance fee in a trust account, a *per se* violation of Rule 1.15(a). ***Miss. Bar v. Ogletree***, 226 So. 3d 79, 86 (Miss. 2015). He instead commingled Hartzler's funds with his own in his firm's operating account. Further, because Tucker did not obtain a client trust account until 2019, Tucker had potentially been commingling client funds for twenty-four years.

¶11. Finally, Rule 8.4(a) provides that it is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct. Miss. R. Pro. Conduct 8.4(a). According to the Complaint Tribunal, the above described conduct also violated Rule 8.4(a). *See* ***Ogletree***, 226 So. 3d at 86 (failure to place unearned fee in trust account a per se violation both Rule 1.15(a) and 8.4).

¶12. The Complaint Tribunal then considered the nine ***Liebling*** factors[3] and the aggravating and mitigating circumstances in determining a six-month suspension was appropriate. In particular, the Complaint Tribunal balanced the serious nature of the offense of commingling—and the reputational harm it causes upon the profession—against the mitigating circumstances of Tucker's remorse and advanced age. The Complaint Tribunal found Tucker's conduct was comparable to the attorney's conduct in ***Ogletree***, in which this Court agreed a six-month suspension was appropriate. ***Ogletree***, 226 So. 3d at 87.

Standard of Review

¶13. Tucker has appealed raising only the issue of the "extent of discipline."

¶14. This Court has exclusive jurisdiction over attorney discipline and reviews each matter de novo. ***Ogletree***, 226 So. 3d at 82 (citing ***Miss. Bar v. Shelton***, 855 So. 2d 444, 445 (Miss. 2003); Miss. R. Discipline 1(a)). "While 'no substantial evidence or manifest error rule shields the Complaint Tribunal from scrutiny,' this Court may grant deference to the findings of the Tribunal 'due to its exclusive opportunity to observe the demeanor and attitude of the witnesses, including the attorney, which is vital in weighing evidence.'" ***Id.*** (quoting ***Foote v. Miss. Bar Ass'n***, 517 So. 2d 561, 564 (Miss. 1987); ***Parrish v. Miss. Bar***, 691 So. 2d 904, 906 (Miss. 1996)). And while the Tribunal's finding of misconduct is not contested here, "[t]he burden is usually on the Mississippi Bar to show by clear and convincing evidence that an attorney's actions constitute professional misconduct." ***Miss. Bar v. Pels***, 708 So. 2d 1372, 1374 (Miss. 1998)).

[3] ***Liebling v. Miss. Bar***, 929 So. 2d 911, 918 (Miss. 2006).

Discussion

¶15. Under Rule 12(a) of the Rules of Discipline for the Mississippi State Bar, "No person disbarred or suspended for a period of six (6) months or longer shall be reinstated to the privilege of practicing law except upon petition to the Court . . . ." This Court, however, "has the inherent authority either to reduce the suspension period to less than six months or to lift Rule 12(a)'s petition requirements." ***Gibbons***, 297 So. 3d at 223 (citing ***Broome***, 603 So. 2d at 354). Tucker asks for the latter—that this Court relieve him of Rule 12(a)'s petition requirement.

I. Automatic Reinstatement

¶16. The relief Tucker requests is best stated in his own words:

> The six month term of suspension will expire on or about May 22, 2020, most likely before the Court considers these arguments. As a practical matter going forward the period of suspension will be moot. Thus, Tucker asks the Court to exercise its authority to reinstate his bar license upon the Court's review, in lieu of requiring him to petition for reinstatement. Restoration of his license will take several months beyond the six that he has served and at substantial additional expense. Immediate reinstatement by the Court would do no harm to the vindication of the Mississippi Bar which is preserved by the imposition of the sanctions already served. Tucker is now 75 years of age and has retired from practice. Tucker has closed his office with no plans to resume an office practice or full-time employment as an attorney.

¶17. As support, Tucker relies on ***Broome***. In that case, this Court automatically reinstated Attorney Broome to the practice of law at the end of his thirty-day suspension. ***Broome***, 603 So. 2d at 350. "Even though the Rules of Discipline provide[d] for reinstatement through petition," this Court held "that an order of automatic reinstatement is within the scope of this Court's exclusive and inherent jurisdiction of attorney discipline matters." ***Id.*** at 354. But

when we decided ***Broome***, suspensions for *any* length of time required a petition to be reinstated. ***Id.*** Broome had been appropriately suspended for thirty days for allowing the statute of limitations to run on his client's claim—conduct this Court found to be negligent but not unethical. ***Id.*** at 353. But under the rules as they stood then, this Court concluded Broome's one-month suspension was not really a one-month suspension. Instead, "[a]s a practical matter, his application for reinstatement and the accompanying proceedings [would] stretch his suspension into a minimum of three and possibly five months." ***Id.*** at 354. Because this was "hardly the result envisioned by the Tribunal or the rules as they now stand," this Court waived the petition requirement and automatically reinstated Broome at the end of the thirty-day suspension period. ***Id.***

¶18. Since ***Broome*** the rules have changed. Now, only suspensions of six months or more require a petition for reinstatement. Miss. R. Discipline 12(a). So the practical problem presented in ***Broome*** that led to automatic reinstatement has been remedied. Now, under the revised discipline rules, a petition is only required for reinstatement for suspensions of six months or longer. So ***Broome*** does not apply to the scenario we face here—a request for automatic reinstatement after a longer suspension period. During this time, Tucker could have taken steps to fulfill the petition requirements of Rule 12(a) for reinstatement but instead decided against doing so because he was retiring from the practice of law.

¶19. As a practical matter, we acknowledge that Tucker's retirement poses a barrier, or at least disincentive, to go through the petition process. Still, Tucker's retirement is not a reason to grant automatic reinstatement. To be clear, the intention to practice law full time

is not a requirement for reinstatement to the practice of law. But the intention *not* to practice full time cannot be used as an end-run around the rules of discipline. As we have emphasized, "there is no recognized manner for reinstatement to the practice of law on a limited basis." ***Anderson v. Miss. Bar***, 269 So. 3d 109, 113 (Miss. 2018). This is because "[t]he license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters." ***Id.*** (quoting Miss. R. Discipline Grounds for Discipline).

¶20. Requiring an attorney whose misconduct warranted a suspension for six months or longer to petition for reinstatement ensures the attorney is fit to be entrusted with a law license. So the real question is not whether Tucker should be automatically reinstated but rather whether a six-month suspension is an appropriate sanction based on Tucker's admitted conduct.

II. Six-Month Suspension

¶21. Tucker does not ask for a reduction in his suspension period, which he has already served. He solely asks this Court to exercise its authority to lift the requirement that he petition for reinstatement. Still, we review bar-discipline matters de novo and have "inherent authority . . . to reduce the suspension period to less than six months," which would essentially provide Tucker the relief he seeks. ***Gibbons***, 297 So. 3d at 223.

¶22. In imposing a six-month suspension, the Tribunal was guided by this Court's opinion in ***Ogletree***. In that case, this Court was faced with a similar scenario. Like Tucker, Attorney Ogletree did not dispute the Tribunal's finding that he had violated Mississippi

Rules of Professional Conduct 1.15(a) and 8.4(d) by commingling client funds. ***Ogletree***, 226 So. 3d at 83. So the only question was the sufficiency of the six-month suspension. ***Id.*** But unlike this case, the issue in ***Ogletree*** was whether a six-month suspension was too short, versus too long.

¶23. The Mississippi Bar had advocated to this Court that Ogletree be suspended for three years, not six months. ***Id.*** While recognizing that disbarment or a three-year suspension were the most common remedies for commingling—"the 'cardinal sin of the legal profession'"—this Court emphasized each case has depended on its own unique circumstances. ***Id.*** (quoting ***Coleman***, 849 So. 2d at 874). At one end of the spectrum are cases of "[e]gregious conduct involving 'dishonesty, misrepresentation to his client, lying to the disciplinary authorities, or systematic diversion of his client's funds for personal purposes'" that resulted in disbarment. ***Id.*** at 85 (quoting ***Pels***, 708 So. 2d at 1375). In the middle are commingling cases not so egregious to warrant disbarment but still meriting a three-year suspension due to an intentional misappropriation. ***Id.*** at 85-86 (citing ***Miss. Bar v. Sweeney***, 849 So. 2d 884 (Miss. 2003); ***Coleman***, 849 So. 2d 867; ***Miss. Bar v. Odom***, 566 So. 2d 712 (Miss. 1990)). On the other end are cases in which "this Court has been more lenient with attorneys who commingled or misappropriated client funds" because "the attorney's misconduct was the result of carelessness or negligence, rather than ill intent."[4]

[4] This Court also acknowledged more lenient discipline had been imposed in reciprocal-discipline cases. ***Ogletree***, 226 So. 3d at 86 (citing ***Miss. Bar v. Gardner***, 730 So. 2d 546 (Miss.1998) (one-year suspension for misappropriating client funds in Louisiana); ***Pels***, 708 So. 2d at 1372 (thirty-day suspension for commingling client funds in Washington, D.C.)).

Id. at 86. For example, in ***Catledge v. Mississippi Bar***, 913 So. 2d 179 (Miss. 2005), this Court imposed a ninety-day suspension for depositing trust account funds into a payroll account due to alleged problems with the bank.

¶24. In Ogletree's case, while the Bar advocated for the middle range of three-years, this Court "found Ogletree's conduct to be more analogous to ***Catledge***, although more extensive in scope." ***Ogletree***, 226 So. 3d at 86. On the one hand, "Ogletree's act of depositing a retainer check into his operating account, rather than his trust account, [wa]s a per se violation of Rule 1.15(a) and Rule 8.4[,]" and "the evidence . . . reveal[ed] that Ogletree commingled his own funds with client funds in his trust account for a prolonged period of time." ***Id.*** On the other hand, Ogletree had not intentionally paid his personal expenses out of his trust account. Rather, he had mistakenly mixed up his bank account numbers. The Court also recognized "Ogletree's mental state and life circumstances . . . as mitigating factors that at least implicitly caused Ogletree's lapses in judgment." ***Id.*** at 86-87. And Ogletree did not try to hide his actions from his clients or the Bar. ***Id.*** at 87. Under the totality of the circumstances, this Court agreed with the Complaint Tribunal that a more lenient six-month suspension was appropriate. ***Id.***

¶25. Here, the Complaint Tribunal found Tucker's conduct to be analogous to ***Ogletree***. And we agree. By not depositing Hartzler's funds into a client trust account Tucker committed a *per se* violation of Rules 1.15(a) and 8.4(a) and had likely committed other violations during his quarter century of not having a client trust account. But the Complaint Tribunal found no intention on Tucker's part to steal clients' funds. Rather, despite Rule

1.15(a)'s clear requirements, he did not think a client trust account was necessary. As in ***Ogletree***, Tucker is of advanced age and has cooperated with the disciplining authorities—both mitigating factors. Under the totality of the circumstances, we find the six-month suspension imposed, which Tucker has already served, is appropriate.

Conclusion

¶26. This Court has a duty to discipline offending lawyers "not to punish the guilty attorney, but to protect the public[and] the administration of justice, to maintain appropriate professional standards, and to deter similar conduct." ***Broome***, 603 So. 2d at 353. Imposing a six-month suspension for retaining unearned fees and commingling—"the 'cardinal sin' of the legal profession, whether done intentionally or not"[5]—fulfills these broader purposes. While the result may be that Tucker chooses not to petition for reinstatement in light of his retirement, the discipline imposed is commensurate with his admitted misconduct. Thus, we affirm.

¶27. SAMUEL L. TUCKER, SR., IS SUSPENDED FROM THE PRACTICE OF LAW IN THE STATE OF MISSISSIPPI FOR SIX MONTHS. THE COSTS AND EXPENSES OF THESE PROCEEDINGS ARE ASSESSED TO SAMUEL L. TUCKER, SR.

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.

[5] ***Coleman***, 849 So. 2d at 874 (quoting ***Haimes***, 601 So. 2d at 854).