

FILED

SID J. WHITE
JUN 4 1984

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 63,731

v.

The Florida Bar Case Nos.

MARVIN J. POWERS,

17C80F14 and
17F82F63

Respondent.

_____ /

INITIAL BRIEF OF THE FLORIDA BAR

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PREFACE

The Florida Bar , Complainant , will be referred to as The Florida Bar . The Respondent , Marvin J. Powers , will be referred to as Respondent .

The following symbols will be used in this brief:

- T. Transcript of January 26, 1984 hearing before the Referee , to be followed by page numbers .
- Tr. Transcript of February 13, 1984 hearing before the Referee , to be followed by page numbers .
- Ex. Exhibit , to be followed by the appropriate Exhibit number , of the exhibits introduced before the Referee .

STATEMENT OF THE CASE

A formal complaint was filed on May 27, 1983, by The Florida Bar against the Respondent, Marvin J. Powers, charging the Respondent with violations of article XI, Rule 11.02 (4) (a) , (b) , (c) , of the Integration Rule and the bylaws thereunder , article XI, Rule 11.02 (3) (a) of the Integration Rule and Disciplinary Rules 1-102 (A) (4) , 9-102 (A) , 9-102 (B) (2) and 9-102 (B) (3) of the Code of Professional Responsibility .

The Honorable John E. Born was appointed Referee in this cause on June 8, 1983.

On or about June 18, 1983, Respondent filed a motion to maintain confidential status and a Motion to Dismiss. A hearing was held on these motions on July 21, 1983 and both motions were denied by Orders dated July 21, 1983 and August 16, 1983.

On January 26, 1984, an evidentiary hearing was held and the hearing was continued on February 13, 1984.

The Florida Bar submitted its memorandum of law on February 23, 1984 and the Respondent submitted his memorandum of facts on March 5, 1984. The Florida Bar submitted its Response memorandum on March 9, 1984.

On April 6, 1984, the Referee filed his report recommending that the Respondent be found guilty and that the Respondent be suspended from the practice of law for a period of one year .

The Florida Bar files its Petition for Review and Initial Brief for Review of the Referee's recommendation of discipline .

ISSUE PRESENTED FOR REVIEW

WHETHER THE REFEREE ERRED IN ONLY RECOMMENDING THAT THE RESPONDENT BE SUSPENDED FOR ONE (1) YEAR IN VIEW OF THE SERIOUSNESS OF THE RESPONDENT'S MISCONDUCT?

STATEMENT OF FACTS

As to Count I of the complaint, Respondent had insufficient funds in his trust account, failed to maintain deposit slips and checkbook stubs and other records clearly reflecting the source and reason for all disbursements and collections of clients funds in violation of Disciplinary Rules 9-102 (A) , 9-102 (B) (2) and (3) , and article XI, Rule 11.02 (4) (a) , (b) and (c) of Integration Rule of Florida Bar and bylaws thereunder . (The Florida Bar Exs. 15 and 19, testimony of Pedro Pizarro, T. 44-46, see Report of Referee, Paragraphs II, 1-4 and III as to Count I) .

Concerning Count II of the complaint, Sand Properties, Inc. was the Respondent's corporation (T.4) . In or about April 1979, one Edith F. Barnett appointed Respondent power of attorney to handle her personal and property affairs, including depositing funds, drawing checks, executing notes, mortgages and deeds . (Exhibit 8) . Subsequently, Respondent changed the Power of Attorney, referred to above, to include the following language:

With specific authority to execute
deeds to convey title to the property
at Lot 4, Block 83, Park Section,
Croissant Park P.B.8, Pg. 39 B,
Broward County. (Exhibit 7) .

On or about April 3, 1979, Edith F. Barnett deeded the property, referenced above, to Sand Properties, Inc., a corporation solely owned by Respondent. Mrs. Barnett became upset about this transfer, and the Respondent deeded the property back to Ms. Barnett by quit claim deed on January 3, 1980 (T. 60, 65, The Florida Bar Ex. 10) .

On or about June 8, 1984, Respondent, through Sand Properties, Inc., procured a mortgage on the property, with Ozark Financial Corporation in the amount of approximately \$25,000.00. When Respondent deeded Mrs. Barnett's property back to her, Respondent retained the funds he had obtained from mortgaging the property. (The Florida Bar Ex. 11, T. 56-57).

On or about August 7, 1979, Mrs. Barnett revoked Respondent's Power of Attorney. This revocation had been brought to the Respondent's attention by September 14, 1979 (Ex. 2, Page 50 of Ex. 20, T. 67-68).

On or about January 3, 1980, Respondent transferred by quit claim deed Mrs. Barnett's property, to Sands Properties, Inc., Respondent's corporation, by virtue of the Power of Attorney previously given to Respondent by Mrs. Barnett. Prior to this transfer of Mrs. Barnett's property, Respondent had received notice of Mrs. Barnett's revocation of the Power of Attorney. (The Florida Bar Exs. 2, 13, Page 50 of Ex. 20).

At some time after January 29, 1980, Respondent sold the property referenced above, to a third party. (Exs. 5 and 6, T. 6-8).

Additionally, Respondent was served via certified mail of a formal recorded revocation of Power of Attorney by Ronald W. Houchins, Esquire, on or about March 20, 1980. (T. 8-13, The Florida Bar Ex. 16).

Although, Respondent agreed to take care of Mrs. Barnett, he discontinued paying the bills owed to the Broward Convalescent Home on behalf of Edith F. Barnett. (Ex. 3, 17, T. 31-43, 81).

Respondent testified that he incurred and paid expenses on behalf of Mrs. Barnett (The Florida Bar Ex. 23, Respondent's Ex. 1, T. 78-80). The majority of the bills concerning the home were incurred after January 2, 1980, after Respondent had deeded the home to his corporation through a Power of Attorney. (Tr. 8, The Florida Bar Ex. 23, Respondent's Ex. 1).

As to Count I, the Referee found the Respondent guilty of trust accounting violations. Regarding Count II, the Referee found that the Respondent did mortgage his client's, Edith F. Barnett's, property without her knowledge and failed to account for the proceeds of said mortgage and did, after Mrs. Barnett did revoke the power of attorney granted to the Respondent, use same said power to transfer the said property and ultimately sell and transfer said property without accounting to his client, Edith F. Barnett. (See Report of Referee Section III, Pages 4-5).

ARGUMENT

- I. THE REFEREE ERRED IN ONLY RECOMMENDING THAT THE RESPONDENT BE SUSPENDED FOR ONE (1) YEAR IN VIEW OF THE SERIOUSNESS OF THE RESPONDENT'S MISCONDUCT .

This Court has held that the penalty for fraud or misrepresentation upon a client is disbarment. The Florida Bar v. Zinzell, 387 So.2d 346 (Fla. 1980). In Zinzell the Respondent was disbarred for having a client execute a will, which in actuality was a trust conveying her property, to further his own purposes.

In this case, the Respondent had a fiduciary relationship with Mrs. Barnett, an elderly disabled woman (T.13, 57-58, 63, Pages 16-17 of The Florida Bar Ex. 20).

It is reprehensible that Respondent drafted the legal documents himself for benefits to inure to himself. (T. 47-48).

In The Florida Bar v. Delves, 397 So.2d 919 (Fla. 1981) the discipline imposed was disbarment. Wherein Respondent had misrepresented to his client that a "Satisfaction of Mortgage" was security for a loan. In fact, the satisfaction was really only a worthless piece of paper.

In The Florida Bar v. Whitney, 237 So.2d 745, (Fla. 1970), the Supreme Court held that unauthorized withdrawals from receivership and guardianship accounts warranted disbarment. Based upon the testimony and

exhibits presented, the Respondent has defrauded Mrs. Edith F. Barnett out of a portion of the proceeds of the sale of her home. Respondent admitted in his testimony before the Referee that he spent monies received from Mrs. Barnett's home for his own benefit (T. 86-87).

The Referee found that the Respondent

Did mortgage his client's, Edith F. Barnett's, property without her knowledge and failed to account for the proceeds of said mortgage and did, after Mrs. Barnett did revoke the power of attorney granted to the Respondent, use same said power to transfer the said property and ultimately sell and transfer the said property without accounting to his client, Edith F. Barnett. By reason of the foregoing, the Respondent should be found guilty of a violation of the Disciplinary Rule 1-102(A) (4) of the Code of Professional Responsibility by practicing deceit and misrepresentation on his client, Edith F. Barnett.

Certain monies were expended by Respondent on behalf of Mrs. Barnett. However, the Respondent failed to keep proper records and accountings of said expenditures. The Referee found that the Respondent's failure to keep proper records obfuscated the true picture of the funds under his control (See paragraphs 14 & 15 of the Findings of Fact at Page 3 of the Report of Referee).

The Respondent has admitted that he spent monies received from Mrs. Barnett's home for his own benefit (T. 86-87).

The Respondent's Exhibit 1 claims that the Respondent spent or was entitled to \$27,514.94 concerning the proceeds from the mortgage and sale of Mrs. Barnett's home. The Florida Bar disagrees with this figure as the majority of these expenditures were incurred after January 2, 1980, after the home was titled in the name of Respondent's corporation. Whatever repairs were made by Respondent at said point, were made for his own benefit. (Tr. 8, The Florida Bar Ex. 23, Respondent's Ex. 1) .

Further, Respondent's February 6, 1984 letter references \$3,500.00 allowance for his time and labor without an accounting of said time. Most importantly, Respondent has admitted in his testimony given before the Referee on January 6, 1984 and February 13, 1984, that he did not expect to be paid for his services and that Mrs. Barnett was unaware that he would charge her for such "handyman" type work. (T. 87, Tr. 6-7, 10-11) .

However, assuming "arguendo" that Respondent's figures in his Exhibit 1 were correct, there is still a shortage of approximately \$12,000.00 as the purchase price of the house was approximately \$39,500.00 and Respondent's figures equal \$27,514.94. (See The Florida Bar Exs. 4, 21, Respondent's Ex. 1, T. 6-8) . Moreover, Respondent admitted that he spent monies from Mrs. Barnett's home for his own benefit (T. 86-87) .

Respondent was acting in a fiduciary relationship with Mrs. Barnett and violated the trust of said fiduciary relationship. Respondent failed to

open an account on behalf of Mrs. Barnett regarding funds received on her behalf, instead the funds were deposited into Respondent's corporate account (T. 57). Respondent has admitted that he had doubts concerning Mrs. Barnett's competency (T. 60-63) and certainly should not have had such business transactions with her without a court appointed guardian watching out for her interests.

In The Florida Bar v. Whitney, supra at 746-747, the Respondent was disbarred for unauthorized withdrawals from receivership and guardianship accounts, totaling \$17,895.12. The Respondent in Whitney repaid the monies taken and was still disbarred by this Court.

In the instant case, the Respondent has not repaid any monies to Mrs. Barnett and has ceased making payments on her behalf (T. 81-84, The Florida Bar Exs. 3, 17, 37-39).

Further, the Referee found that:

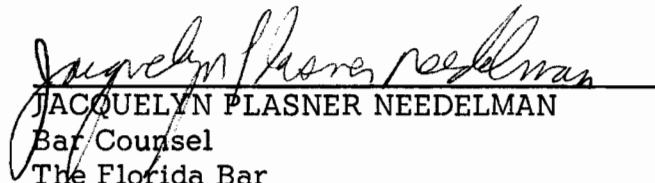
The Respondent failed to properly account for these monies; used power of attorney after the same had been formally revoked; failed to make payments on behalf of Mrs. Barnett (T.81-83) if he was in fact at that time, living up to an agreement that he outlined by letter dated August 8, 1979. (T.80, Bar Ex. 3).

The discipline to be imposed in this cause must be disbarment based upon the Respondent's conduct involving deceit and misrepresentation concerning an 85 year old disabled woman. (T. 13, 57-58, 63, Pages 16-17 of The Florida Bar Ex. 20).

CONCLUSION

Based upon the foregoing, The Florida Bar respectfully requests this Honorable Court to uphold the Referee's recommendation of guilty as to both counts of the complaint and to disbar the Respondent from the practice of law pursuant to article XI, Rule 11.10(5) of the Integration Rule of The Florida Bar and to have execution issue against the Respondent in the amount of \$2,119.31.

Respectfully submitted,

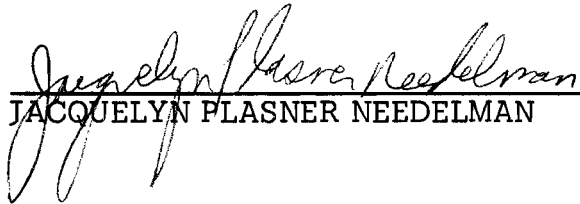

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished to Marvin J. Powers, Respondent, 6005 Bayview Drive, Fort Lauderdale, Florida 33308, by regular United States Mail, this 15th day of June, 1984.



JACQUELYN PLASNER NEEDELMAN