IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellee, v. JOHN P. FITZGERALD, Respondent-Appellant.	CONFIDENTIAL Supreme Court Case No. 65,336 TFB File Nos. 15E82F11 and 15E83F06

ANSWER BRIEF OF THE FLORIDA BAR

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PREFACE

In all instances, appellant, John P. Fitzgerald, shall be referred to herein as "respondent" and appellee, The Florida Bar, shall be referred to as the "bar".

All page references shall be to the trial transcript.

SUMMARY OF ARGUMENT

The Florida Bar File No. 15E83F06 (Orr case):

All of the material and essential allegations of the bar's complaint were admitted by respondent in his answer. Respondent admitted that he induced the purchase of a condominium unit from his client upon respondent's oral representation to the buyers that the sale proceeds, together with other funds then held by him, would enable respondent to discharge all liens and encumbrances against the unit in question. Respondent admitted that at the time he made such representation and when he issued a warranty deed, settlement statement and title insurance policy, all showing free and clear title, he knew he had insufficient funds within which to discharge various open liens including a first mortgage then in foreclosure.

Such knowing and intentional misrepresentations violated Disciplinary Rules 1-102(A)(4) and 7-102(A) of the Code of Professional Responsibility prohibiting an attorney from conduct constituting dishonesty, fraud, deceit and misrepresentation and knowingly making a false statement of fact.

The fact that respondent was eventually able to discharge the many encumbrances does not constitute either a defense or substantial mitigation. Subjecting the public to the uncertainties of complex legal entanglements by fraudulently inducing their participation in the hope and expectation that outstanding problems will somehow be resolved, is not to be countenanced. The public must be protected from such conduct.

The 30 day suspension recommended will serve that purpose while at the same time demonstrate to respondent the severity of his misconduct and deter others from similar misadventures.

The Florida Bar File No. 15E82F11 (Molina case):

An attorney entrusted with client funds must deposit such funds to an identifiable bank account and abide by all trust accounting requirements required by the Integration Rule and Code of Professional Responsibility.

If the unequivocal language of DR 9-102(A) requiring all funds so entrusted to be deposited nonetheless permits an attorney to hold cash "in kind" then it is incumbent upon the attorney to document his exceptional handling of the cash so that there can and will be no doubt as to his arrangement should it be refuted by his client.

The uncorroborated and undocumented attempt by respondent to contradict his client's assertion that the monies entrusted to him were to be applied in accordance with the prescription of Canon 9 creates an appearance of impropriety damaging to respondent and to the bar.

Unintentional trust violations with no client prejudice have resulted in suspension level discipline. Under the circumstances, especially in light of the cumulative nature of the two unrelated transactions occurring within a nine month period, respondent's failure to even deposit the funds entrusted to him warrants the discipline recommended by the referee.

Costs:

As demonstrated by the appendix submitted by the bar the referee carefully examined each and every item of cost relating to the bar's witnesses making judicious modifications upon due deliberation. The costs recommended are fair.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent's statement, presented in the nature of argument, omits certain facts and colors others. It is therefore necessary that the bar present a statement of its own, first addressing the "Molina" case and then, the "Orr" transaction.

At page 10 of respondent's statement it is recited:

> ...THE BAR does not question the validity of FITZGERALD'S services for the Molinas or claim that the fee charged was excessive.

While it is accurate that the bar pursued only those breaches of the Integration Rule and Code of Professional Responsibility for which the grievance committee found probable cause, it is the height of folly and presumption for respondent to assert that the bar somehow endorses any of the shenanigans indulged in by respondent in the Molina case, including the services rendered and fees appropriated. In the bar's view, respondent's antics throughout his representation exuded an aura of impropriety reflecting poorly on himself and upon the entire legal profession.

Respondent neglected to set forth in his statement that upon conclusion of their business with the Drug Enforcement Agency and the United States Attorney, the Molinas made an attempt to see respondent so that they could retrieve the money entrusted to him (186, 186). Upon arriving at respondent's office early in the morning, they were informed

that he would be tied up all day (187). They waited the entire day because on previous appointments stretching over a two week period, respondent avoided seeing them (187).

Finally, after two weeks of trying, including all day vigils at his office (187, 188), respondent met with the Molinas on a Friday and unilaterally determined upon a $10,000.00 fee (189). At the Molinas' protest, respondent made a new appointment for the following Monday (190). When the Molinas arrived, respondent, as on previous occasions, was not present, leaving it to his secretary to conclude the refund according to respondent's dictates (191).

Respondent's assertion that he arrived at a consensual agreement permitting him to retain $10,000.00 of his client's trust funds is belied by his own letter to the Molinas in which he advised:

> The settlement negotiations which we had entered into, which you desire to reduce my fee, are hereby terminated because of your actions Friday night in which you indicated to me that the arrangements that I thought we had were unsatisfactory to you. And it appeared to me that you were rejecting those arrangements. (Bar exhibit 11).

The so-called facts recited by respondent relative to the "Orr" transaction virtually ignored the thrust of the bar's complaint. By his answer, respondent unequivocally admitted the following:

In or about January 11, 1982, Nathaniel J. Orr and his wife contracted to purchase a condominium unit from respondent's client for an agreed upon consideration (complaint, paragraph 13; admitted in answer, paragraph 13).

At the March 15, 1982 title closing, respondent represented to Orr that there were certain outstanding liens affecting title to the subject condominium unit which respondent would pay and fully discharge from the sale proceeds and from certain other funds then held by the respondent (complaint, paragraph 14; admitted in answer, paragraph 14).

In reliance upon respondent's representations the Orrs parted with the balance of the purchase price, paid the same to respondent and proceeded to close title accordingly (complaint, paragraph 15; admitted in answer, paragraph 15).

At the closing respondent issued a settlement statement to the Orrs reciting a payoff of a $40,000.00 first mortgage loan. He also delivered to the Orrs a warranty deed reciting that the subject condominium unit is free of all encumbrances except taxes levied subsequent to December 31, 1981 and restrictions, covenants of record, if any (complaint, paragraphs 16 and 17; admitted in answer, paragraphs 16 and 17).

Two days after the closing, respondent, as attorney-agent for the Lawyer's Title Guarantee Fund, prepared and issued to the Orrs an owners' title insurance policy disclosing no liens or encumbrances save for the post 1982 taxes, the Orrs' purchase money mortgage and the condominium covenants and restrictions (complaint, paragraph 18;

admitted in answer, paragraph 18).

In fact, respondent did not pay off the $40,000.00 first mortgage loan, did not pay pre-1982 due taxes affecting title to the Orrs' premises and did not satisfy and discharge various other liens constituting encumbrances against Orrs' condominium unit (complaint, paragraph 20; admitted in answer, paragraph 20).

In May, 1982, the Orrs discovered that their condominium unit was encumbered by numerous liens, pre-1982 taxes, and a first mortgage which had been in foreclosure at the time of the March 15, 1982 title closing and made inquiries of respondent concerning such items (complaint, paragraphs 21 and 22; admitted in answer, paragraphs 21 and 22).

In paragraph 19 of its complaint, the bar alleged that at the time respondent represented to the Orrs that he would pay and fully discharge all liens and encumbrances affecting title to the subject condominium unit from the sale proceeds and other proceeds then on hand as well as at the times respondent issued the deed, settlement statement and title insurance policy, respondent knew that his representations were false, that he had insufficient funds with which to discharge the various liens and that he knew such liens would continue as encumbrances. While paragraph 19 of respondent's answer appears, at first blush, to constitute a denial, upon closer scrutiny the respondent expressly admits knowledge that "there were insufficient funds to discharge the liens at the time of the issuance of the owner's title policy recited in paragraph 18 (of the complaint)."

Respondent also denied the allegations appearing at paragraph 23 of

the bar's complaint that upon Orrs' post-closing inquiry expressing concern at the discovery of the liens and mortgage foreclosure action respondent represented that all such liens had either been paid, bonded or were about to be satisfied in full with funds then in respondent's possession. Mr. Orr testified that within a day or two after his written inquiry, respondent called to state that:

> He had the money to pay the liens or he had bonded them off, so he was going to take care of them, and don't worry about them (43).

Respondent's entire presentation before the referee, below, was an attempt at mitigation and not a defense to the bar's complaint. All of the essential allegations of the bar's complaint had been admitted at the pleading stage.

ARGUMENT

I. RESPONDENT'S VIOLATIONS OF DISCIPLINARY RULES 1-102(A)(4) AND 7-102(A) OF THE CODE OF PROFESSIONAL RESPONSIBILITY WARRANT THE DISCIPLINE RECOMMENDED BY THE REFEREE.

Even without the presumption of correctness applying to a referee's findings of fact (The Florida Bar v. Hawkins, 444 So.2d 961 (Fla. 1984); Fla. Bar Integr. Rule, article XI, Rule 11.06(9)(a)) respondent's questioning of the referee's recommendation of guilt in the "Orr" case would constitute extreme hubris.

Having seemingly overlooked his express admissions of misconduct, respondent first attempts to portray the purchaser as tacitly agreeing that his newly acquired condominium unit would remain encumbered and in foreclosure unless and until respondent and his principals somehow managed to raise the requisite funds with which to discharge the many liens against the property. This flies in the face of respondent's admission in paragraph 14 of his answer that he represented to the purchasers that there were certain outstanding liens affecting title to the subject condominium unit which "respondent would pay and fully discharge from the sale proceeds and from certain other funds then held by respondent" (emphasis supplied).

Notwithstanding respondent's admission, Mr. Orr testified on cross examination in corroboration of such misrepresentation, as follows:

> Q. Mr. Orr, you were aware, were you not, when you bought your unit it was already

in foreclosure?

A. Well.. no, sir, I wasn't aware it was in foreclosure, but I understood he had enough money to pay off everybody.

Q. Your testimony here is you weren't aware at the time you bought the property that the entire project was already in foreclosure?

A. No, sir, I didn't know that. I knew they had some financial problems and that's why he was selling the property.

If I had known it was going to get into a lot of legal troubles, I wouldn't have bought the thing" (52, 53).

To insure that his oral misrepresentation would be relied upon, respondent followed it by issuing a warranty deed showing the subject property to be free and clear of encumbrances (bar exhibit 7), a settlement statement showing a payoff of the first mortgage lien (bar exhibit 6) and a title insurance policy which, like the warranty deed, disclosed no liens or encumbrances (bar exhibit 8). In paragraph 19 of his answer, respondent admitted having knowledge that there were insufficient funds to discharge the liens at the time of the issuance of the title policy.

Having admitted his misconduct in his answer, respondent attempted to mitigate his wrongdoing by asserting that he never intended to misrepresent, believing that all would end well.

Viewed in the most favorable light, respondent was content to join an unwitting player to a crapshoot using the purchaser's money as his stake and gambling that he would make his "point" before rolling a 7.

In the meantime, the purchaser had the unpleasant experience of discovering that his condominium unit was the subject of a foreclosure action that had been pending even as respondent assured him that all liens would be discharged by funds from the closing and other funds then on hand (see complaint paragraphs 14 and 21 and admissions in respondent's answer at paragraphs 14 and 21).

This willingness to subject innocent third parties to the vagaries and risks of uncertain legal entanglements was most recently addressed by this Court in a case strikingly similar to the one at bar. In The Florida Bar v. Ward, No. 64,278 (Fla. July 3, 1985) the Court approved the referee's recommendation of a 30 day suspension. There the respondent permitted his clients to misrepresent the status of title to certain realty by executing and delivering a warranty deed and affidavit of title neither of which disclosed the existence of an extant notice of appeal known to the respondent. As in the instant case where the liens were eventually extinguished, the encumbrance involved in the Ward case, supra, was likewise discharged. The fact remains, however, that in each case the respondents were content, by intentional misrepresentation, to subject members of the public to the trauma of making what is, in many instances, the most significant investments individuals make (residential purchases) only to discover that their acquisitions were stained by encumbrances.

It is respectfully submitted that the public interest will best be served by the affirmance of the referee's recommendation. The cavalier

attitude that an attorney may engage in dishonesty, fraud, deceit or misrepresentation with impunity whenever no harm results from his misconduct is dangerous to the public, anathema to the ethics of our profession and inviting to those of similar propensity who may not juggle as successfully as Messrs. Ward and Fitzgerald.

II. THERE IS NO EXCEPTION TO THE MANDATE OF DISCIPLINARY RULE 9-102(A) OF THE CODE OF PROFESSIONAL RESPONSIBILITY REQUIRING THAT ALL CLIENT FUNDS BE DEPOSITED TO IDENTIFIABLE BANK ACCOUNTS.

There is perhaps no area of greater concern to the bar than an attorney's handling of client funds. Meticulous care was taken in both the Integration Rule and Code of Professional Responsibility to ensure that client funds must be held in trust and in identifiable bank accounts. Even attorney's fees must be retained in trust and not removed in the event of a dispute. Fla. Bar Code Prof. Resp., DR 9-102(A)(2).

Here, it is undisputed that the Molinas entrusted $18,000.00 in cash to respondent. Mrs. Molina testified that her instructions to respondent were clear and unambiguous. She testified:

> Q. Was there any further -- any final discussion as to precisely where this eighteen thousand dollars was to go?
>
> A. It was supposed to be held in a trust account.
>
> Q. Mr. Fitzgerald agreed to that?
>
> A. Yes. (179)

Respondent urges that he had no obligation to deposit the $18,000.00 in an identifiable bank account claiming that the cash was entrusted to him in kind. Respondent also claims that the cash was not "paid" to him in the sense that the word "paid" is used in DR 9-102(A).

The adoption of respondent's semantics gambit regarding the word "paid" would omit from the purview of DR 9-102(A) all client sums entrusted to attorneys except those given in return for services. Settlement proceeds, purchase deposits and the like would be left for the attorney to safekeep in desk drawers or file cabinets. Nothing could do more violence to the express and clear intent of the trust provisions of the Integration Rule and Code of Professional Responsibility.

It is respectfully submitted that the mandate of DR 9-102(A) leaves no room for deviation therefrom. While other provisions of the Code make express provision for alternative approaches such as permitting certain multiple representations with appropriate consent and disclosure, DR 9-102(A) is absolute. It clearly pertains to "all funds" mandating deposit in an identifiable bank account.

Assuming arguendo that despite the injunction of DR 9-102(A) certain funds may be retained in a desk drawer or some other cache maintained by an attorney, then it is respectfully submitted that the arrangement between attorney and client must be carefully expressed with the burden upon the attorney to establish such arrangement. In The Florida Bar v. Ward, No. 64,278 (Fla. July 3, 1985) this Court addressed the unseemly area of an attorney relying upon his recollection of alleged oral disclosure and consent in a conflict milieu. The Court, sustaining the referee's recommendation of guilt, enunciated the attorney's responsibility in such case.

> The attorney in such instances is bound to avoid even the appearance of impropriety.

> Fla. Bar Code Prof. Resp., Canon 9. It is therefore incumbent upon an attorney in these straits to document his full disclosure of the conflicts and the possible ramifications of his continued representation in the matter and the client's endorsement of both the disclosure and the representation. Only by such careful documentation can an attorney refute the charge of failure to fulfill the requirements of DR 5-101. (page 5)

It is respectfully submitted that if an attorney in a conflict milieu has the duty as enunciated by the Court then, clearly, his duty in the case of refuting the charge of failure to fulfill the requirements of DR 9-102(A) must be at least as urgent and important.

III. THE REFEREE'S STATEMENT OF COSTS WAS ARRIVED AT AFTER CLOSE EXAMINATION OF EACH ITEM AND DUE DELIBERATION THEREON.

Respondent's argument regarding the referee's statement of costs is misleading. Upon respondent's application, the referee carefully and painstakingly examined each and every item pertaining to the expenses incurred by the bar in producing Mr. and Mrs. Molina, allowing some and discarding others. The extent of the referee's deliberations and review regarding this issue is contained in an appendix submitted by the bar herewith.

IV. THE DISCIPLINE RECOMMENDED BY THE REFEREE IS FAIR TO THE PUBLIC AND TO THE RESPONDENT AND WILL SERVE TO DETER OTHERS FROM SIMILAR MISCONDUCT.

Within nine months, respondent, in totally unrelated representations, misrepresented the status of title to certain realty thereby causing buyers to part with their purchase price only to receive an encumbered title and retained funds entrusted to him by another client in a desk drawer rather than depositing the same to an identifiable bank trust account.

While it is respectfully submitted that a 30 day suspension would be appropriate in either circumstance, the combination of the two matters certainly justifies the referee's recommendation.

As stated hereinabove, this Court has previously regarded an attorney's misrepresentation of title as meriting a 30 day suspension notwithstanding the fact that the encumbrance involved was eventually discharged. The Florida Bar v. Ward, No. 64,278 (Fla. July 3, 1985). Here, however, respondent is involved in two separate instances of misconduct, one involving fraud and the other trust account violations. This Court has repeatedly held that in determining appropriate discipline the cumulative nature of the misconduct is a factor to be considered. The Florida Bar v. Enright, 172 So.2d 584 (Fla. 1965); The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981).

The public reprimand suggested by respondent is inadequate. In The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), this Court observed that a public reprimand should be reserved for isolated instances of

misconduct such as neglect.

In The Florida Bar v. Moxley, No. 63,786 (Fla. January 17, 1985), this Court ordered a 60 day suspension for trust account violations not involving misappropriation, disputed fees or any acts of dishonesty. Making reference to Rule 11.02(4) this Court emphasized the seriousness with which it views trust account violations.

> We take a grim view of attorneys who fail to keep sacrosanct and inviolate their trust funds as required under this rule.

In the bar's view, the failure by the respondent in the case at bar to make any attempt to establish a trust account with the $18,000 entrusted to him is at least the equivalent of, if not surpassing, the gravity of the Moxley misconduct.

CONCLUSION

The recommendations of the referee should be affirmed in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of The Florida Bar has been furnished to Watterson & Dickenson, P.A., Attorneys for Appellant, 105 South Narcissus Avenue, Suite 810, Citizens Building, West Palm Beach, FL 33401, by regular mail, on this 5th day of November, 1985.

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