IN THE SUPREME COURT OF FLORIDA
(BEFORE EDWARD H. FINE AS REFEREE)

THE FLORIDA BAR,

Complaint,

vs.

STEPHEN W. TOOTHAKER,

Respondent.
_____/

CONFIDENTIAL

CASE NOS. 17F83F93
17F83F47

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of the The Florida Bar, a hearing was held on February 5, 1985. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar David M. Barnovitz, The Florida Bar, 915 Middle River Drive, Suite 602, Fort Lauderdale, Florida 33304

For The Respondent Claudette A. Pelletier, Post Office Box 383, Fort Lauderdale, Florida 33302

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to Count I

Count I alleges a violation of Disciplinary Rules 1-102(A)(4) and 1-102(A)(6) which prohibit attorneys from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation or in any other conduct that adversely reflects on an attorney's fitness to practice law. The facts surround a real estate contract, exhibit two of the complaint which was accepted by both parties as a true copy of the contract. On this contract Stephen Toothaker, Esq. is listed as having received a deposit to be held in escrow. He is listed as an attorney and as an escrow agent. The contract provides that the deposit of a check was received subject to clearance. The check was received by the Respondent on November 1, 1982 the same date that the contract for sale and purchase was executed by the buyer, his client. On November 2, 1982 the contract for sale and purchase was executed by the seller. T. 75. The property was located in Merritt Island, Florida. T. 75. Negotiations between the parties had been going on for several years (T. 75.) and the real estate broker had obtained the signature of the buyer in Broward

County and had brought the contract the next day to Brevard County to be signed by the sellers. T. 75, 76. A material inducement to signing the contract was the notation that $35,000.00 was on deposit with Respondent in escrow. In the past, lack of money had delayed the contract signing. T. 76. The sellers relied on the representation that the escrow agent was an attorney and that as an attorney could be relied upon to deal properly with the $35,000.00 deposit by negotating the check promptly. T. 77.

The contract was signed by the sellers on November 2nd. A month later, a letter dated December 1st was received by the seller stating that the check had not cleared and that there were no funds in the account. T. 78, Bar exhibit 13.

The sellers one of whom was an attorney, wrote the escrow agent, the Respondent for details concerning the problem with the check, asking when and where it was deposited and asking for a copy of the check and a copy of the slip indicating the manner in which the check had been dishonored. Exhibit 14, T. 79. Respondent did not reply. T. 80, 102, 105-107.

Getting no reply from the escrow agent, the sellers then hired an attorney who wrote Respondent for details. Bar exhibit 15, T. 81, 102. The response did not provide the details asked. T. 102, Bar exhibit 16. Other than being told that the check had not cleared and there were no funds, no details were given for two and a half months and then the answer given by Respondent hid the true facts.

The original December 1st letter claimed that the funds had been deposited "in accordance with the contract" however the funds had not been deposited promptly which in my opinion means that they were not deposited according to the contract. I find this to be a misleading statement.

Later, in the January 18th letter Mr. Toothaker, the Respondent again hid the fact that he had held the check rather than deposit it promptly. He stated that he received a check and he deposited it, which is misleading. He still did not answer the original questions asked, which specifically requested the date the check was deposited in Respondent's bank and the name of the bank where it was deposited. Another question specifically requested the date the check was dishonored. Respondent never answered these questions or any of the other questions asked by attorneys on behalf of the sellers.

The actual facts surrounding the check are found to be as follows:

Respondent represented Julian Marx a long standing client of fifteen years T. 121. who had transacted several million dollars (T. 126.) of real estate transactions with Respondent as attorney. T. 103, 112, 116.

The client, Mr.Marx wrote a $35,000.00 check to be used as a deposit on the contract in question. T. 100. Mr. Marx asked Respondent to be the escrow agent and he agreed. T. 104. I can only conclude that he preferred his attorney rather than the real estate agent because it was Mr. Marx's normal course of dealing to write a check that was not backed by cash (T. 128) and then have his attorney Mr. Toothaker hold

the check until the contract was signed by the other party. T. 103, 121 and 128. The attorney, the Respondent, was accustomed to doing this for his client. T. 103. Real estate agents are subject to discipline if they fail to promptly deposit a check entrusted to them in escrow. §475.25(1)(k) Fla. Stat. (1983). Lawyers must be held to the same standard or higher. Respondent claimed that he was in the habit of holding "contracts" but actually he did not hold the contract, he held the check.

The rationale behind escrowing a worthless check was that Mr. Marx could avoid actually putting money behind the check. T. 117. Mr. Marx testified that he did not believe that Mr. Toothaker actually knew that there was no money behind these checks at the time they were written. T. 108-110. After considering the course of dealing between Respondent and his client Respondent either did or should have realized that the purpose for holding a check rather than depositing it was that if the check had been immediately presented it would have been dishonored due to lack of sufficient funds but that by showing the worthless "deposit" in escrow the sellers would be deceitfully lead to sign the contract by wrongly believing that actual money had been put in escrow, beyond Mr. Marx's direct control which could be forfeited if Mr. Marx breached the contract.

Respondent agreed not to deposit the check (T. 100, 104, 117) until his client Mr. Marx told him that the contract had been "submitted". T.100. Mr. Toothaker, the Respondent was leaving for vacation so he gave the contract to his client Mr. Marx. T. 100, 108. Respondent never informed the real estate agent or the sellers that the deposit check was being held rather than immediately deposited. T. 101. The sellers assumed that the check had been deposited. The check was not deposited until November 23, 1982, twenty-three days late. T. 100. The check was dishonored and returned to Respondent on December 1st a month after the receipt of the check. Rather than urgently call or wire, the sellers, Respondent elected to send them a letter by regular mail informing them that the check had been dishonored. Bar exhibit 13. The letter misleadingly in my opinion, states that the funds had been deposited in accordance with the contract.

I find that Respondent acted as an escrow agent. As such he had a fiduciary relationship to the sellers. I find that he breached this relationship by favoring his own client's interest over those of the sellers and allowed his own client to gain an improper advantage. I find that the sellers were mislead to their detriment by the real estate contract. That the sellers relied upon the representation that Respondent was an attorney and that as escrow agent he would be faithful to his fiduciary relationship. I find that Respondent acted deceitfully and misrepresented the true facts to the sellers by not disclosing that the check was not being deposited promptly, by refusing to answer the questions asked in their letters specifically about the date the check had been deposited and the date it had been dishonored and by refusing to faithfully disclose to his escrow principals all pertinent facts known to him concerning the dishonor of the deposit check.

I conclude from clear and convincing evidence that Respondent breached a fiduciary relationship by misrepresentation, deceit and dishonesty, an adverse reflection on Respondent's fitness to practice law and a violation of Disciplinary Rule 1-102(A)(6) and a violation of Disciplinary Rule 1-102(A)(4).

As to Count II

Count II alleges a violation of Disciplinary Rule 6-101(A)(3), the neglect of a legal matter entrusted to an attorney. As to Count II I find that: the facts are uncontested. T. 49. The facts are as follows: in February of 1982 an heir of the estate of Ethel Clark came to see William Leonard, an experienced probate attorney. T. 13. The estate of Ethel Clark was being represented by Respondent, Stephen Toothaker. Mr. Leonard was hired to find out why distribution had not been made to the heirs. A letter from Respondent dated June 19, 1981 estimated that four weeks would be sufficient to close out the estate. In February, 1982 Mr. Leonard asked for information concerning the status of the case so that he could inform his client. He received no answer from Mr. Toothaker. Bar exhibit 1, T. 14. Mr. Leonard phoned Mr. Toothaker and wrote him again. T. 15. He received an inventory dated March 20th , but no letter. T. 16. This appeared to be an estate involving no estate taxes and in a position to allow distribution to specific designated beneficiaries. T. 17. Another heir also came to see Mr. Leonard. T.17. Again, on April 26, 1982 (Bar exhibit 5) Mr. Leonard wrote Respondent trying to move the estate along. T. 18. He continued to write and try to contact Mr. Toothaker, but nothing was really happening on the estate and he was not getting any specific information from Mr. Toothaker though he had known Mr. Toothaker for many years. Bar exhibits 1, 2, 3, 4, 5, 6, 7. Finally in July of 1982 (Bar exhibit 8) Mr. Leonard wrote that the heirs were very distrubed about their inability to get either information, an accounting or their bequests. Mr. Leonard enclosed a serious complaint letter from one of the beneficiaries stating that the assets were all cash, stocks and bonds, bills were not being paid, stock was not being disbursed, that there had been eight months delay to that point, that phone calls were not being answered and information could not be obtained even by sending certified letters. Respondent promised to wrap up the estate by September 15th, but he did not do so. Finally Mr. Leonard on September 29th scheduled a hearing (Bar exhibit 10) to attempt to get the estate closed and the assets distributed.

Mr. Leonard charged a total of $300.00 to his clients for time spent prodding Mr. Toothaker. Respondent can not explain why he took so long to process this estate. Mrs. Clark died April 3, 1981, the will was filed on April 6, 1981. T. 33, 34. Letters of Administration were issued on June 2, 1981. T. 34. Claims were filed by a funernal home, a physician and an ambulance firm, which were paid. T. 35. By September 15, 1981 all claims had been paid. T. 36. The estate consisted of all liquid assets except for a diamond and platinium ring. T. 37. The inventory was filed March 20th the following year though Respondent could not give an explanation why it was not filed within sixty days. T. 38-39. Two and a half months were needed to merely transfer ownership of stock. T. 44. The stock was ultimately distributed in 1982. T. 45. The residuary beneficiary was the American Cancer Society which did not receive its residual share until July of 1983.

In summary, Letters of Administration were issued in June of 1981, all claims were paid by December of 1981. For no explainable reason, safe deposit box assets were not obtained until March of 1982, no steps were taken to transfer the AT&T stock until August of 1982 and then it took

two and a half months. In October of 1982 a distribution to all of the beneficiaries except the residual beneficiary was made. The residual beneficiary's distribution was made in August of 1983 over two years after the Letters of Administration had been entered and a year and a half after Mr. Toothaker starting receiving letters from Mr. Leonard on behalf of the heirs. This was a case with no particular complications. T. 46.

I find that Respondent did violate Disciplinary Rule 6-101(A)(3) by neglecting a legal matter entrusted to him. I find that as a direct result of his neglect the heirs, Mrs. Beatrice Goslee and Mr. Richard Remus had to expend $300.00 in attorney's fees to Mr. William Leonard. I also find: that the heirs became extremely upset with the unnecessary delay; that the heirs were entitled to have their certified letters, inquiries from attorneys and phone calls answered; that the interested parties were entitled to be given a forthright explanation of the status of the case; and that there was no real cause for delay in the case.

It is my opinion having observed the Respondent and having listened to the testimony of this case that Respondent is capable of competently practicing law. In these two instances he failed to maintain the necessary integrity required of an ethically responsible lawyer.

III. Recommendations as to whether or not Respondent should be found guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

As to Count I

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Disciplinary Rules 1-102(A)(4) and 1-102(A)(6).

As to Count II

I recommend that the Respondent be guilty and specifically that he be found guilty of violating Disciplinary Rule 6-101(A)(3).

IV. Recommendation as to disciplinary measures to be applied: By agreement of the Complainant, the Respondent and the Referee the penalty phase was bifurcated from the fact finding phase. A hearing was scheduled for April 5, 1985 after copies of the fact finding portion of the report of the Referee were mailed to the parties. Prior to the hearing I was informed that the Complainant and the Respondent had agreed that the disciplinary measure that they would stipulate to be applied would be a public reprimand plus payment of costs incurred. I stated that I would also require reimbursement for legal fees expended by the beneficiaries under the facts in Count II. No hearing was requested on the matter and I was informed that both sides were in agreement. The Respondent added an attorney, William C. Purcell who requested additional time to submit suggested recommended changes in the fact finding portion of the report, but after having waited a month and not having received anything I assume that that request has been abandoned.

V. Personal History and Past Disciplinary Record: After a finding of guilt and prior to recommending discipline I considered the representation that there had been no prior disciplinary measures or convictions imposed, that the Respondent had been practicing law for seventeen years, that he appeared to be testifying in a forthright manner at the hearing and that he along with Bar counsel concurred in the recommended disposition.

VI. Statement of costs and manner in which cost should be taxed: The cost statement disclosed by the attached affidavit filed by the Florida Bar was not opposed. No testimony was taken on the actual costs and it was agreed between Respondent and the Bar that Respondent would pay said costs which I find to be reasonable and actually incurred and in the amount of $1,433.95 as itemized in the attached affidavit.

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

VII. Additional damages: The conduct of the Respondent as outlined in the findings as to Count II resulted in innocent parties incurring damages of $300.00 used to pay the legal fees of Mr. William Leonard, an experienced, reputable, practicing member of the Florida Bar. I recommend that the Respondent be required to remit $300.00 to Mr. Leonard and that Mr. Leonard be directed to refund to the heirs the legal fees that they had paid to Mr. Leonard in return for Mr. Leonard's attempts to get Mr. Toothaker to process and distribute the assets of the Estate of Ethel Clark.

Dated this 15 day of May, 1985.

Edward Fine

EDWARD FINE
Referee

Copies furnished:
David M. Barnovitz, Esq.
William Purcell, Esq.
John T. Berry, Esq., Staff Counsel, The Florida Bar