

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

FILED

PUBLIC

SEP 20 1985

Case No. 66,037

CLERK, SUPREME COURT (05A83C65)

(05A84C08)

By
Chief Deputy Clerk

The Florida Bar,
Complainant,
V.
Gary E. Wagner,
Respondent.

R E P O R T O F R E F E R E E

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 Florida Bar, hearings were held on April 23, 1985, June 26, 1985, and August 29, 1985. It should be noted that the parties requested the referee to review all transcripts of Grievance Hearings, and use them in rendering a decision. 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 G. McGunegle, Esquire
For The Respondent: Gary E. Wagner appeared upon his own behalf.

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 by me, I find:

As to Count I (05A83C65)

1. By Respondent's answer, Paragraph 3, there is no dispute that in June and July, 1979, Respondent, Gary E. Wagner, received \$124,783.44, from a bank in Tampa, Florida, as trustee for his client, Betty Bennett Holt. By Respondent's admissions in Paragraph 3 of the Complaint, Respondent admits to the following: Respondent was to invest these funds to earn a higher rate of interest than previously realized from the former trust arrangement. No formal trust document was executed by the Respondent and his client; however, it was agreed that Respondent would manage the money and give a certain amount to Mrs. Holt monthly. Respondent made these payments to Mrs. Holt until her death in September, 1979.
2. When deposits of the trust were placed in Respondent's trust account, \$10,000 was never deposited, and there are no receipts and Respondent has limited recollection of where that money went. (See Bar Exhibit No. 2, p. 77; April 23, 1985, Referee Hearing Transcript, p. 12 and p. 32, and following, p. 152 and following.)

3. By Respondent's admissions to Paragraph 4 of the Complaint, Respondent admits the following: Following Mrs. Holt's death, monthly payments were made to Nancy Bennett, Mrs. Holt's daughter, as a joint tenant with the right of survivorship with the trust funds. After several months, Mrs. Bennett began receiving payments on an irregular basis. She subsequently requested an accounting from the Respondent as to the use of the trust funds. Although not admitted by Respondent, the Referee finds that Respondent's accounting for the trust funds, when requested, was unsatisfactory to the trust beneficiary. (Referee Final Hearing Transcript, p. 13.)
4. The trust beneficiary, Nancy Bennett (later Naylor), obtained an attorney and eventually received an accounting from Respondent. (Bar Exhibit No. 12, Sub-Exhibit C.)
5. Questionable loans and payments from this trust were made as follows:

(a) Loans to Horace "Bud" Allen, Jr., and his corporations -

Respondent as Allen's attorney, kept Allen's records, and knew his financial condition, which was highly questionable. (Referee Final Hearing Transcript, p. 118 and 122.)

Respondent was running loans from the trust in question to Allen through Respondent's bowling alley so that Allen could accomplish creditor avoidance. (Bar Exhibit No. 1, p. 97.)

Respondent was loaning money from the trust to an Allen Corporation, A & R Contractors, Inc., which, according to Allen, was not a functioning corporation. (Bar Exhibit No. 1, p. 61; Bar Exhibit No. 12, Sub-Exhibit J.)

Respondent moved \$45,000 trust funds to Paul Osborne, for an alleged condominium sale, which the real estate records do not support, and which money allegedly returned one week later for a loan to Horace "Bud" Allen. (April 23, 1985, Referee Hearing Transcript, p. 24, and following; Referee Final Hearing, p. 141; Bar Exhibit No. 2, p. 73, and following.)

As to Count II (05A84C08)

1. In 1975, Respondent and Terry Chlanda entered into business relationship involving Sportsman's Lanes bowling alley. Chlanda had purchased Sportsman's Lanes from Robert Lee Simon and Chlanda obtained additional loans to start Crystal Bowl, a second bowling alley in which Respondent and Chlanda were to be partners in both operations. (Referee Final Hearing, p. 156, and following.)
2. Simon, upon Respondent's advice, subordinated his mortgage on Sportsman's Lanes to a new \$150,000 loan and mortgage from Citizen's Bank to Chlanda to allow Chlanda to start construction on Crystal Bowl, in which Respondent was to be Chlanda's partner. (Bar Exhibit No. 2, p. 54.)
3. The filing of a foreclosure action on Sportsman's Lanes based upon Chlanda's defaulting in certain obligations resulted in receivership in favor of Simon and return of the bowling alley to Simon. (Bar Exhibit No. 21.)

4. Respondent, as an attorney, represented Simon and prepared loan documents for Simon, establishing loans and mortgages against Simon, his wife, and Sportsman's Lanes, Inc., and Crystal Properties, Inc., of \$366,000, later increased to \$501,000. (Bar Exhibit No. 21, Referee Final Hearing, p. 172 and 199.)
5. Crystal Properties, Inc., listed all shares owned by Respondent (Bar Exhibit No. 22), making Respondent sole owner of the new bowling alley, with the guarantors listed as Simon, his wife, and the mortgagors listed as Sportsman's Lanes, Inc., and Crystal Properties, Inc. (Referee Final Hearing, p. 173; Bar Exhibit No. 11.)
6. Simon alleges he thought the new bowling alley was his property until Respondent could obtain loans to release Simon's debt, which would cause an ownership transfer to Respondent. (Referee Final Hearing, p. 173, and following; p. 215.)
7. Respondent alleges the second bowling alley was always to be in Respondent's ownership. (Bar Exhibit No. 2, p. 42.)
8. Respondent admits he does not know why Simon would be interested in encumbering Simon's properties to see the second bowling alley (Crystal Bowl) built, in which Simon would have no interest. (Bar Exhibit No. 2, p. 56, and following.)
9. Respondent alleges he advised Simon to seek independent legal advice in these loan transactions. (Bar Exhibit No. 2, p. 57.) Simon disputes that allegation. (Referee Final Hearing, p. 176, p. 183, p. 187.)
10. Respondent did act as an attorney for Simon, Sportsman's Lanes, Inc., and Crystal Properties, Inc., at a time Respondent held a financial interest to protect in Crystal Properties, Inc. (Referee Final Hearing, p. 172.)

III. Recommendations as to whether or not the 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 (05A83C65)

I recommend that Respondent, Gary E. Wagner, be found guilty and specifically that he be found guilty of violating the following Disciplinary Rules of the Code of Professional Responsibility, to wit:

Rules 1-102(A)(4); 1-102(A)(6); 5-101(A);
5-104(A); 7-101(A)(3); 9-102(B)(3);
9-102(B)(4).

It is clear that Respondent exercised the poorest of judgment in dealing with the trust monies of Betty Holt and later Nancy Naylor. Ten Thousand Dollars (\$10,000.00) was immediately missing in the initial bank transfer, and was never explained by the Respondent to the satisfaction of the Referee.

Thereafter, the transfer of \$87,000.00 to Horace "Bud" Allen, a poor investment of trust funds at best, when Respondent freely admits he knew of Allen's financial reputation in the community as Allen's attorney, totally ignored the best interests of the trust beneficiary, and caused the loss of substantial sums of monies that Nancy Naylor may never see. How can any attorney, as trustee, justify loaning monies from a trust to an individual

where the monies have to be "laundered" through a private business of that same attorney to keep the creditors of the individual away from these monies?

Respondent's recordkeeping of these trust funds, or the lack thereof, is a continuing example of an attorney's office accountings out of control, whether that was caused by personal, business, financial, or other unknown problems. An example of this was the \$45,000 loan to Paul K. Osborne, which was returned one week later, but less \$1,500, and does not correspond, by any records, to the condominium purchase Respondent alleges the money was to have been used. Thereafter, Respondent alleges somehow this money was passed on to Horace "Bud" Allen as one of Allen's loans.

Respondent also admits that trust monies did not necessarily flow on the dates alleged, but were "parcelled out" as needed by Allen.

Respondent appears to have been so irresponsible in dealing with the trust monies that he was incapable of rendering an accounting, when asked, and it required a lawsuit and a pending Order to Show Cause to obtain any half-way accurate figures.

All of these activities, in this Referee's opinion, show by clear and convincing evidence, that Respondent is guilty of the above set out Disciplinary Rules of the Code of Professional Responsibility.

Further, Respondent's handling of this trust is clearly a violation, by clear and convincing evidence of Article 11.02(4)(b), Integration Rules of the Florida Bar.

The Referee finds Respondent Not Guilty of Rule 1-102(a)(3), Disciplinary Rule of the Code of Professional Responsibility, and Not Guilty of Article 11.02(3)(a) and 11.02(4)(c), Integration Rule of the Florida Bar.

As to Count II (04A84C08)

I recommend that the Respondent, Gary E. Wagner, be found guilty and specifically that he be found guilty of violating the following Disciplinary Rules of the Code of Professional Responsibility, to wit:

Rules 5.101(A); 5-104(A); 5-105(B).

It is evident, by clear and convincing evidence, that Respondent had "too many irons in the fire", and failed to fully disclose to his client, Robert L. Simon, what Simon was doing by signing finance documents which evidently led to mortgages against Simon and his bowling alley in excess of \$500,000, to finance construction of a bowling alley, in which Respondent was the total owner, and which was of no benefit to Simon.

Respondent, himself, under oath in his grievance committee testimony, could give no reason for Simon to enter into such a business arrangement.

Respondent's efforts, if he is believed, suggesting Simon talk to a judge, who was formerly Simon's attorney, fell far short of the standard Respondent should have been exercising to insist Simon have independent legal advice before representing Simon in business transactions in which the Respondent had a substantial financial stake.

Respondent's conduct merits a finding of guilty as to the above set-out Rules of the Code of Professional Responsibility.

- IV. Recommendation as to Disciplinary measures to be applied: I recommend that Respondent, Gary E. Wagner, be suspended for a fixed period of eighteen (18) months, thereafter until he shall prove his rehabilitation and for an indefinite period until he shall pay the cost of this proceeding and making restitution to Nancy Naylor, his former client in the amount of \$35,000.00, and \$69,000.00 to Robert L. Simon, his former client, as provided in Rule 11.10(4).

I recommend that Respondent's suspension be followed by placing Respondent on probation for three (3) years, as provided in Rule 11.10(1). The terms of probation recommended are as follows: every ninety (90) days, Respondent shall be required to file with the Clerk of the Supreme Court, with a copy to Staff Counsel, The Florida Bar, a complete accounting of Respondent's trust account; further, proof of successful completion of a Bar approved ethics course within the first 180 days of practice.

This recommendation is less than requested by The Florida Bar requested but more than Respondent requests. I cannot ignore that Respondent comes from a small community, in which publicity and personal knowledge has caused Respondent to close his attorney's office and leaves him without funds to employ an attorney to represent him in these proceedings. The punishment I have recommended will deter other attorneys from similar conduct, will punish the Respondent, and will grant the Respondent the opportunity to rehabilitate himself and resubmit himself as a candidate to practice law again in Florida. Further, I find no evidence of illegal activity on Respondent's part.

- V. Personal History and Past Disciplinary Record: After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 38 years
Date admitted to Bar: 1972
Prior disciplinary convictions and disciplinary measures imposed therein: none
Other personal data:

Divorced;
Four Minor Children;
Previously served on Grievance Committee, Ocala, Florida, in the 1970's.

- VI. Statement of costs and manner in which cost should be taxed: I find the following costs were reasonably incurred by The Florida Bar.

A. Grievance Committee Level Costs	
1. Administrative Costs	\$300.00
2. Transcript of Grievance Committee Hearing January 12, 1984	\$217.50
3. Transcript of Grievance Committee Hearing April 12, 1985	\$165.25
4. Branch Staff Counsel Travel Costs	\$55.75
5. Staff Investigator Expenses	\$1,102.60

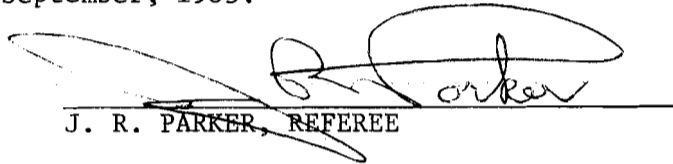
B. Referee Level Costs	
1. Administrative Costs	\$150.00
2. Transcript of Referee Hearing	\$955.13
3. Witness Subpoena Fees	\$289.00
4. Bar Counsel/Staff Expenses	\$118.16
5. Staff Investigator Expenses	\$277.78

C. Miscellaneous Costs	
1. Out of Town Witness Travel Costs	\$381.84
2. Photocopies	\$138.37
3. Production of Bank Records	\$112.00
4. Production of Corporate Records	\$ 75.00
5. Long Distance Telephone Charges	\$136.68

TOTAL ITEMIZED COSTS: \$4,475.06

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent, and that interest at the statutory rate shall accrue and be payable beginning thirty (30) days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dates this 18th day of September, 1985.


 J. R. PARKER, REFEREE

cc:

David G. McGunegle, Esquire, The Florida Bar
 Gary E. Wagner, Esquire
 The Florida Bar, Tallahassee, Florida