

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARZELL MITCHELL, JR.,

Respondent.

FILED  
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CONFIDENTIAL

Supreme Court Case  
No. 66,541

The Florida Bar Case  
No. 15C83F23

INITIAL BRIEF OF THE FLORIDA BAR

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## PREFACE

For purposes of this brief, the Complainant, The Florida Bar, will be referred to as The Florida Bar and Marzell Mitchell, Jr., will be referred to as the Respondent.

Abbreviations utilized in this brief are as follows:

- "T" Refers to the transcript of the final hearing held on May 1, 1985, to be followed by page numbers.
- "EX" Refers to The Florida Bar's exhibits admitted into evidence, to be followed by exhibit numbers.
- "RR" Refers to the Report of Referee, to be followed by page number and paragraph of report.

STATEMENT OF THE CASE

A formal Complaint and The Florida Bar's First Request for Admissions were filed on February 11, 1985. The Honorable Joseph E. Price was appointed Referee on February 18, 1985.

On March 4, 1985, the Respondent forwarded his Answer to the Complaint and his affirmative defenses.

On March 6, 1985, The Florida Bar filed its reply to Respondent's affirmative defenses and this cause was set for final hearing on May 1, 1985. The final hearing in this cause was held on May 1, 1985.

On May 15, 1985, The Florida Bar submitted its statement of costs. The Referee submitted his Report of Referee on December 10, 1985.

The Referee has recommended that Respondent be found guilty of violating Florida Bar Code of Professional Responsibility Disciplinary Rule 9-102 and Florida Bar Integration Rule, article XI, Rules 11.02(4)(b) and (c) and the Bylaws thereunder. The Referee recommended, as a disciplinary sanction, that Respondent be given a private reprimand and pay the costs of the proceedings.

The Board of Governors of The Florida Bar considered the Referee's findings at its meeting held January 8-11, 1986 and determined that review of the Referee's disciplinary recommendations should be initiated.

ISSUE PRESENTED FOR REVIEW

- I. WHETHER THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINE TO BE IMPOSED SHOULD BE A PUBLIC REPRIMAND AND PROBATION FOR A PERIOD OF TWO (2) YEARS IN VIEW OF RESPONDENT'S PRIOR SIMILAR MISCONDUCT.

## STATEMENT OF THE FACTS

An audit was performed by The Florida Bar regarding Respondent's trust accounts concerning the period of May 1, 1980 through May, 1983. During the period audited Respondent failed to preserve and/or produce for inspection all records pertaining to his trust accounts in violation of Florida Bar Integration Rule 11.02(4)(b) and Bylaws Section 11.02(4)(c), paragraph 2 c. Respondent did not produce any ledger cards or similar records during this audit and he failed to maintain deposit slips listing the source of all receipts of trust funds deposited into his trust account. Respondent also failed to indicate on all trust account checks the reason for the disbursements or the clients for whom the payments were made. Additionally, quarterly trust account balance reconciliations were not available for inspection (see Report of Referee, Findings of Fact).

Funds belonging to the Respondent and/or his wife were deposited into the trust account in many instances and many personal payments were made from those same accounts. (See The Florida Bar, Exhibit 2, Report, dated January 30, 1984, of Pedro Pizarro, Branch Auditor.)

During the aforementioned auditing period, several checks were issued from Respondent's trust account, number



048 258- 7, at the Mall Bank, with insufficient funds to cover said checks and the bank statements reflected several dates when said account was in over-draft status after the bank paid checks against insufficient funds. (T. 22 and The Florida Bar's Exhibit 2).

The Referee found that Respondent had trust funds in his trust account and was required to comply with the trust accounting rules. (T. 70-71).

SUMMARY OF ARGUMENT

I. THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINE TO BE IMPOSED IN THIS MATTER SHOULD BE A PUBLIC REPRIMAND AND PROBATION FOR A PERIOD OF TWO (2) YEARS IN VIEW OF RESPONDENT'S PRIOR SIMILAR MISCONDUCT.

Respondent has previously been privately reprimanded for similar misconduct and Respondent stated in his conditional admission of minor misconduct in 1978 that he had corrected his ignorance of trust accounting procedures. However, the present misconduct is similar to the previous misconduct, violations of the trust accounting rules. In light of the cumulativeness of Respondent's misconduct for similar misconduct, a public reprimand and probation for a period of two (2) years should be imposed in this cause. An attorney should not receive a second private reprimand, particularly for similar cumulative misconduct.

## ARGUMENT

- I. THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINE TO BE IMPOSED IN THIS MATTER SHOULD BE A PUBLIC REPRIMAND AND PROBATION FOR A PERIOD OF TWO (2) YEARS IN VIEW OF THE RESPONDENT'S PRIOR SIMILAR MISCONDUCT.

The Supreme Court of Florida stated in The Florida Bar v. Padgett, No. 65,653, (January 9, 1986), "(t)hat the clients suffered no real loss, however, is not the point. Attorneys owe a fiduciary duty to their clients and the trust accounting rules exist to insure that attorneys live up to the high standards expected of them." Respondent Padgett used his trust account for his personal and business expenses as well as client matters and numerous checks written on the account were returned for insufficient funds. Similarly, Respondent Mitchell used his trust account for personal and client matters and checks written on the trust account were returned for insufficient funds. (T. 17-22, The Florida Bar's Exhibit 2).

In The Florida Bar v. Byron, 424 So.2d 748 (1982), Byron failed to maintain his trust account in compliance with the minimum requirements for trust account records and procedures and received a three (3) year suspension. Byron had a prior disciplinary record. Byron said his sub-standard bookkeeping was due to his alcoholism. In the

present case, Respondent's only excuse was ignorance of the trust account requirements. However, Respondent received a private reprimand in 1978 for similar misconduct, violation of trust account record keeping rules. (Attached hereto as an appendix are copies of the grievance committee report dated May 19, 1978, in Case No. 15C78-046, Respondent's admission of misconduct in Case No. 15C78-046 and Respondent's affidavit dated May 8, 1978. Said documents were presented to the Referee T. 71-72). Respondent signed an affidavit that he had read the Integration Rule and Disciplinary Rules. Additionally, Respondent's admission in Case No. 15C78-046 states that the violation resulted from ignorance of the requirements of the Integration Rule relating to trust accounts and the violation now has been corrected. The instant cause demonstrates that Respondent's trust accounting problems were not corrected.

Respondent has commingled his trust account and personal funds as in the case of The Florida Bar v. Welch, 427 So.2d 720 (Fla. 1983). Welch failed to maintain minimum trust account procedures and commingled personal funds with funds paid by his clients. Welch received a three (3) month suspension.

Failure to comply with trust accounting standards requires more than a private reprimand. This Court stated in The Florida Bar v. Welty, 382 So.2d, 1220, 1223 (Fla. 1980), "(p)ublic reprimand should be reserved

for such instances as isolated instances of neglect or technical violations of trust accounting rules without willful intent." Id, at 1223. (citations omitted).

In The Florida Bar v. Barenz, 477 So.2d 563 (Fla. 1985), the Respondent received a thirty (30) day suspension for violations of trust accounting procedures along with other misconduct.

The case In Re Earl R. Boyce, 313 So.2d 708 (Fla. 1975), resulted in a public reprimand because the Respondent commingled his clients' funds with his personal funds.

In The Florida Bar v. Wood, 434 So.2d, 305 (Fla. 1983), the Respondent received a public reprimand and probation for a period of one (1) year regarding his trust account.

Respondent has violated Disciplinary Rule 9-102 by not maintaining accurate records of his trust account and by writing checks from his trust account for personal and business expenses. Respondent has also, by his actions, violated Integration Rule 11.02(4)(b) and (c).

Respondent will not be encouraged to learn correct accounting procedures if he receives only a private reprimand. In accepting a previous private reprimand, Respondent signed a conditional guilty plea, stating that he had corrected his faulty knowledge of trust accounting procedures. (See Appendix 1-3).

Respondent's present case is quite similar to his previous case in which he received a private reprimand in 1970 for similar misconduct. This Court stated in The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983),


(T)he Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct. Id., at 528.

Accordingly, the discipline to be imposed in this cause should be a public reprimand and probation for a period of two (2) years in light of Respondent's prior discipline for similar misconduct. During the course of his probation, the Respondent should be required to submit quarterly reports of a certified public accountant that his trust account records have been reviewed and complies with the requirements of the Integration Rule of The Florida Bar.

CONCLUSION

For the foregoing reasons, The Florida Bar respectfully requests this Honorable Court to reverse the Referee's recommendation of a private reprimand and to enter an order that the Respondent receive a public reprimand, be placed on probation for a period of two (2) years and assess the costs of these proceedings against the Respondent.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of The Florida Bar was forwarded to Marzell Mitchell, Jr., Respondent, Harvey Building, Suite 413, 224 Datura Street, West Palm Beach, Florida 33401, on this 24th day of January, 1986, via certified mail, return receipt requested, #P 578 598 298; and a copy to John T. Berry, Staff Counsel.

  
JACQUELYN PLASNER NEEDELMAN