

IN THE SUPREME COURT OF FLORIDA
[Before A Referee]

THE FLORIDA BAR,)
Complainant,)
v.)
FRANK DIAZ-SILVEIRA,)
Respondent.)

CONFIDENTIAL

The Supreme Court Case
No. 67,194

The Florida Bar
Case No. 11B84M34

REPORT OF REFEREE

FILED

SID J. WHITE

JUL 24 1985

CLERK, SUPREME COURT

By *jsl*
Chief Deputy Clerk

I. SUMMARY OF PROCEEDINGS:

1. By formal Report dated May 16, 1985, Grievance Committee "B" of the Eleventh Judicial Circuit entered a finding of Probable Cause against Respondent in the above-captioned matter. The Grievance Committee also favorably recommended that Respondent be afforded the opportunity to submit a Conditional Guilty Plea for Consent Judgment for a Public Reprimand and a structured three-year period of supervised probation. On or about May 23, 1985, Respondent, by and through counsel, tendered his Conditional Guilty Plea for Consent Judgment, same incorporating the terms and conditions mandated by the Grievance Committee. The Conditional Guilty Plea was subsequently reviewed and duly approved by Robert E. Livingston, Esq., Designated Reviewer, on behalf of the Board of Governors of The Florida Bar.

2. On or about June 18, 1985, The Florida Bar filed its Petition to Approve Conditional Guilty Plea for Consent Judgment with The Supreme Court of Florida. On or about June 24, 1985, the Chief Justice ordered the appointment of the undersigned Circuit Judge to serve as Referee in the instant cause. The Grievance Committee Report and the Consent Judgment

are appended to the Record as original exhibits to The Florida Bar's Petition.

3. The following attorneys appeared as Counsel for the parties:

On behalf of The Florida Bar: Robert D. Rosenbloom, Esq.
The Florida Bar
Suite 211, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445
TFB # 202096

On behalf of Respondent: Herbert Stettin, Esq.
1 Southeast Third Avenue
Suite 2222
Miami, Florida 33131
(305) 358-5690
TFB # 078021

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT

OF WHICH RESPONDENT IS CHARGED: After considering all the pleadings, documentary evidence, and earlier-entertained testimony, the undersigned Referee finds:

IN GENERAL

4. That Respondent, FRANK DIAZ-SILVEIRA, is and all times hereinafter mentioned, was a member of The Florida Bar subject to the jurisdiction and Disciplinary Rules of The Supreme Court of Florida.

5. That all times material to the investigation and prosecution of the various allegations giving rise to the complaint sub judice, The Florida Bar has diligently pursued its obligations and ethical responsibilities to contact the Respondent and to provide him with notice of all proceedings, pleadings, hearings, and the like.

6. That at all times material to the hearing of this cause, both The Florida Bar and Respondent have been afforded ample opportunity to argue their respective positions, and to present any and all matters bearing directly or indirectly on the instant proceedings. Further, both parties have affirmatively waived their right to appear before the Referee, instead requesting that the Referee review the earlier-filed transcript of proceedings before the Grievance Committee and all documentary matters incident thereto. The transcript of proceedings before the Grievance Committee is appended to the Record as an original exhibit to The Florida Bar's Petition to Approve Conditional Guilty Plea for Consent Judgment.

BACKGROUND

7. On or about October 11, 1983, Gladys Pinto filed a grievance complaint against Frank Diaz-Silveira alleging that Respondent caused to be issued his trust account check which was subsequently dishonored upon first deposit due to insufficient funds.

8. The complaint was investigated by the Grievance Committee Vice-Chairman, James M. Miller, who determined that the subject check was tendered in escrow subject to the transfer of funds from a partnership-investment account and that the complainant prematurely presented the check for deposit. Mr. Miller's investigation further revealed that Ms. Pinto's complaint involved a private business transaction unrelated to any attorney-client relationship. Finally, it was determined that the complainant did, in fact, receive her funds as per the operative terms of the partnership buy-out agreement.

9. As a result of the foregoing, on or about May 23, 1984, Grievance Committee "B" of the Eleventh Judicial Circuit entered an unanimous finding of No Probable Cause, advising the parties accordingly.

10. Subsequent to the entry of the Grievance Committee's findings, Mr. Gustavo Cela, husband to Mrs. Gladys Pinto (the original Complainant), advised The Florida Bar that he had information which evidenced shortages in Mr. Silveira's trust account. Mr. Cela advised Staff Counsel and the Vice-Chairman that prior to the filing of the complaint sub judice, he and Respondent had been close friends and business associates. During the course of their friendship, Respondent had allegedly confided in Mr. Cela that he was experiencing a shortage in his trust account as a consequence of his having entrusted the maintenance of the account to a secretary-bookkeeper, a situation caused by his having run for elected political office and his resulting protracted absences from his law office. Acting in reliance on this information (after having first corroborated same through independent means), the Grievance Committee subpoenaed Respondent's records and directed a comprehensive trust account audit.

THE TRUST ACCOUNT AUDIT

11. At the Committee's request, the Branch Auditor conducted a detailed audit of Mr. Silveira's trust account. The original scope of the audit covered the period July 1981 to November 1982; as a result of the auditor's initial findings, the scope of the audit was enhanced to cover the period through November 1984. In excess of two hundred and fifty (250) man hours were dedicated to this audit and investigation.

12. By Report of Audit dated November 26, 1984, the Branch Auditor advised the Committee that his examination demonstrated that Respondent was not in substantial compliance with the trust accounting requirements mandated by article XI, Rule 11.02(4), in toto, and the Bylaws adopted thereto. Although a copy of the Report of Audit is attached to and incorporated in this filing, the results of same may be summarized as follows:

a) Respondent failed to perform quarterly trust account reconciliations during the three-year period covered by the audit. His failure effectively precluded him from determining, with any degree of certainty, the precise amount of total trust liabilities and, therefore, the precise amount of funds which he was obligated to maintain on deposit in his trust account on behalf of his various clients.

b) Respondent failed to properly annotate his client ledger cards contemporaneously with each individual trust accounting transaction, often times grouping several entries into a single posting. This procedure effectively thwarted Respondent's ability to ascertain at any given time, and with any degree of precision, individual and collective trust liabilities and obligations.

c) Respondent failed to enter numerous postings to his client ledger cards and to his receipts and disbursement journals in a chronological manner. Further, he erroneously entered postings to ledger cards which were unrelated to trust account activities. The net effect of these errors and omissions was to further mire the true status of Respondent's trust liabilities.

d) Respondent failed to withdraw earned fees from his trust account on a case by case basis; rather, he withdrew earned fees by lump sum check(s) without properly annotating the client ledger cards. In addition, there were numerous transfers from and to the regular operating account, proceeds of personal loans deposited to the trust account, and instances where trust funds were deposited to the regular account with costs being paid from the same. There was no accounting prepared to reflect the charges and credits to Respondent for all such items.

13. An analysis of the relevant data indicates that Respondent essentially ignored many of the applicable requirements pertaining to the maintenance of his trust account. His failure directly contributed to his continuing inability to determine his total trust liabilities owed to clients. However, of greater concern and consequence, Mr. Silveira failed to preserve the integrity of entrusted funds, commingling same with personal and operating account monies. Indeed, he maintained his trust account as he would an office operating account, freely interchanging funds belonging to clients for purposes unrelated to those for which the funds were originally entrusted.

14. As of July 1981, Mr. Silveira's trust account reflected a negative (deficit) balance of approximately \$60,000. The Staff Auditor was able to determine that all but \$1,577 of this amount was attributable to funds which Respondent had diverted to the payment of costs incident to the operation of his law office. Although the auditor was unable to determine the pre-existing scope and nature of this shortage, one can reasonably assume that Respondent had, for some indefinite and protracted period of time, utilized trust funds to underwrite the operating costs of his law practice. As of January 1982, this negative balance had doubled; however, beginning in February 1982, Respondent was able to successfully reduce the deficit through personal contributions, earned fees, and independent loans. Indeed, as of the close of the audit, Respondent's trust account reconciled to the penny; there is no evidence of any present shortages.

15. At the specific direction of the Committee, the Staff Auditor was requested to determine the actual use(s) of the diverted trust funds. Invariably, the diverted funds were used for the exclusive purpose of paying Respondent's law office operating expenses. These expenses included payroll, rent, postage, telephone, and the like. It is significant to note

that during the period of time covered by the audit, Respondent's average annual salary was in the approximate amount of only \$20,000. In addition, there was no evidence to suggest that Respondent had incurred any extravagant operating expenses or unreasonable overhead costs.

16. Simply stated, Mr. Silveira was unable to operate his law office "in the black"; instead he operated his practice at a loss for some three to four years and financed the negative dollar flow (operating deficit) through the use of entrusted client funds. Of further significant note, there was no evidence or other indication that Mr. Silveira had used the diverted funds for "personal" matters or other investment opportunities. Finally, it is noted that at no time did any client suffer any prejudice as a result of the foregoing diversion of funds.

**III. RECOMMENDATIONS AS TO WHETHER OR NOT RESPONDENT
SHOULD BE FOUND GUILTY:**

17. Having carefully reviewed all documentary evidence, to include the Report of Audit, the transcript of the Grievance Committee hearing, the Grievance Committee Report, and Respondent's Conditional Guilty Plea For Consent Judgment, I specifically find, by clear and convincing evidence, that Respondent, FRANK DIAZ-SILVEIRA, was not in substantial compliance with the trust accounting requirements mandated by article XI, Rule 11.02(4) of the Integration Rule of The Florida Bar and the applicable bylaws thereto, and Disciplinary Rule 9-102 of the Code of Professional Responsibility, and specifically, to wit:

- a. Use of clients' trust funds for purposes other than the specific purposes for which entrusted to him, in violation of Rule 11.02(4), first sentence.

- b. Lack of trust account balance reconciliations: quarterly through June 30, 1984 (Bylaws Section 11.02(4)(c), paragraph 4.a and monthly after June 30, 1984 [bylaws Section 11.02(4)(c), paragraph 3.a(iii)]).
- c. Lack of adequate identification of all trust deposits and checks - Bylaws Section 11.02(4)(c), paragraph 2. b. and c. (Section 11.02(4)(c), paragraph 2. b. (ii) and e. after June 30, 1984).
- d. Ledger cards did not reflect, in many instances, the correct individual accountings - Bylaws Section 11.02(4)(c), paragraph 2.d. (paragraph 2.f. after 6-30-84).
- e. Lack of a cash receipts and disbursements journal after June 30, 1984 - Bylaws Section 11.02(4)(c), paragraph 2.e.
- f. Lack of compliance with Bylaws Section 11.02(4)(c), paragraph 3.d. (after June 30, 1984). However, this situation appears to have been corrected on November 8, 1984.
- g. Commingling of trust funds and lawyer's funds, in violation of Disciplinary Rule 9-102(A).

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

18. In light of the foregoing, the undersigned Referee hereby recommends that the Supreme Court of Florida finally approve Respondent's Conditional Guilty Plea For Consent Judgment, as tendered, wherein the Supreme Court shall impose upon Respondent a public reprimand, the same further conditioned upon the imposition of a three-year period of probation incorporating the following terms, safeguards, and sanctions:

- a) That for a three-year probationary period, Respondent shall be required to engage the professional services of a certified public accountant to prepare monthly reconciliations of both his trust account and his trust account bank statement;

- b) That during this period of time, Respondent will be charged with the responsibility of providing same to Staff Counsel of The Florida Bar (or his designee) within thirty days of the close of each month; all such reconciliations shall be certified by the certified public accountant as to both accuracy and validity;
- c) That absent good cause shown (as determined solely and exclusively by Grievance Committee "B" of the Eleventh Judicial Circuit), should Respondent fail to timely provide Staff Counsel (or his designee) the above-described reconciliations, upon filing of an appropriate pleading with the Supreme Court of Florida by this Grievance Committee, Respondent shall be deemed to have consented to the entry of an Order by the Supreme Court of Florida effecting his immediate suspension from the practice of law until such time as he shall be deemed by competent authority to have remedied his contemptuous conduct;
- d) That should it be demonstrated by competent evidence that Respondent is not in substantial compliance with the trust accounting requirements mandated by the Integration Rule of The Florida Bar and the applicable disciplinary rules of the Code of Professional Responsibility, then after notice and hearing before the Grievance Committee, and upon the Committee's filing an appropriate pleading with the Supreme Court of Florida, Respondent shall be deemed to have consented to the entry of an Order by the Supreme Court effecting his immediate suspension from the practice of law for a period of not less than one year; provided, however, that nothing in this provision shall estop The Florida Bar from later petitioning the Supreme Court of Florida and requesting the imposition of a more severe form of discipline; and
- e) That Respondent shall bear all expenses and costs incurred by The Florida Bar as a result of the instant investigation and disciplinary proceedings. In light of the Respondent's present financial situation, the Respondent shall be permitted to retire these costs through the establishment of a periodic payment schedule, the terms of which to be negotiated by and between Respondent's counsel and the Director of Lawyer Regulation. Lawful interest shall accrue on any unpaid balance after thirty days of the rendition of a Final Order by the Supreme Court of Florida approving this plea.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

19. After entering findings of guilt as enumerated in Section III, above, and prior to entering the recommendation for discipline as contained in Section IV, above, the undersigned Referee has considered the following personal history and prior disciplinary record of Respondent, to wit:

Age: 48

Date Admitted to The Florida Bar: June 1, 1976

Prior Disciplinary Convictions and Disciplinary Measures
Imposed Therein: None

20. It should be noted that at all times Respondent offered his full cooperation and good faith to The Florida Bar's investigation of this complaint. At the onset of the evidentiary hearing, Respondent, through his counsel, admitted to all of the substantive findings and noted violations referenced in the Report of Audit.

21. Respondent, a native of Cuba, was originally admitted to the Cuban Bar during or about 1959. Immediately subsequent to Castro's takeover, Respondent became a "freedom fighter" and a member of Cubans-In-Exile. He became an ardent anti-revolutionary and worked closely with representatives of the United States intelligence and diplomatic communities. Indeed, during or about 1961, Respondent planned and participated in a daring takeover of the Cuban Embassy in Peru; the intelligence information thus derived resulted in the majority of the members of The Organization of American States dissolving diplomatic relations with Castro.

22. For the next ten years, Respondent worked, as did many of the newly-arrived Cuban immigrants, in manual and otherwise

unpopular and unglamorous jobs. Nevertheless, he struggled to become a productive citizen of the United States, married, and raised a family. His honesty, hard-works, and patriotism during this period cannot be questioned.

23. Taking advantage of an educational outreach program designed for foreign-born citizens, Respondent attended the University of Miami School of Law; in 1976, he was admitted to practice as a member of The Florida Bar. He joined with several of his contemporaries and practiced law in a loosely organized professional association. In reality, he, along with his newly-admitted countrymen, exchanged their professional expertise for rent and secretarial services and the opportunity to advance and learn the customs of the local Bar.

24. Although Respondent's professional achievements and record of competency have never been challenged, he has never been favored with great financial success. He was, however, nevertheless able to support his family and extinguish previously incurred debts and other financial obligations. There is no evidence to suggest that pecuniary gain has ever governed his actions, his sense of fairness, or his idealism.

25. During or about 1976 and, again, 1982, Respondent vied for elective political office. He drew primarily upon his good reputation and his solid foundation of past community service. Respondent had in the past lent his time and energy to various local charities and community service organizations and activities. Although he did not succeed in either of his political ventures, he nevertheless remained resolute in his desire to serve his community.

26. Respondent extended a great amount of time and energy towards realizing his political goals. In so doing, he absented himself from his law practice for protracted periods. Although, at various times, Respondent might have relied upon an associate

to manage his law office affairs, it is apparent that the over-emphasis he placed upon his political pursuits worked to the ultimate detriment of his practice. His prolonged absences contributed to a decline in billable hours and hindered his ability to generate fees. His misplaced reliance upon secretaries resulted in confusion and fostered a breakdown in intra-office quality control.

27. Respondent testified that there finally came a time when he was no longer able to successfully cope with or manage his professional finances. Trust account reconciliations were not accomplished; bank statements were not reconciled; standard trust accounting procedures were not followed. There eventually came a time when Respondent could no longer support his law practice through earned fees; comingling of funds became a regular practice and the integrity of entrusted client trust funds was violated. Simply stated, from 1981 through 1982, Respondent lost control of the situation. Again, however, there is no evidence suggesting that Respondent diverted trust funds for "personal" matters (other than to support the operation of his law practice); nor is there evidence indicating that he diverted funds for investment or other related purposes.

28. During the most recent two years, Respondent has managed to repay all funds previously diverted from his trust account. Respondent has restored the status quo of his trust account by contributing monies derived from his personal savings, earned fees, and borrowed funds.

VI. MITIGATION:

29. During the course of the Grievance Committee hearing, the Honorable Gerald T. Wetherington, Chief Judge of the Eleventh

Judicial Circuit, testified in Respondent's behalf. Judge Wetherington first met Respondent approximately twelve years ago, at which time Respondent was one of his students at the University of Miami Law School. Judge Wetherington advised that he and Respondent had maintained a cordial, albeit professional relationship, since that time. Judge Wetherington advised that as the Chief Judge of the Eleventh Judicial Circuit, he had a unique perspective and vantage point from which to judge the competency, character, and the reputation of the members of the local bar. It was his opinion that Respondent had an outstanding reputation for truth and veracity, that he was a morally upright and honest person, and that he had always proven himself to be both an ethical and competent practitioner.

30. Aware of the underlying facts and circumstances giving rise to the instant proceedings, His Honor testified that he did not believe Respondent's conduct was motivated by a specific intent to defraud any client or other person. He further advised that the absence of direct prejudice to any client, coupled with Respondent's contrition, his restoration of the funds, and his previously unblemished record, should, in his opinion, reflect favorably upon both the quantum and quality of whatever disciplinary sanctions might eventually be imposed. Judge Wetherington characterized Respondent as a man who had contributed much to his community, who asked little in return, and who is capable of immediate and positive contribution in the future.

31. Jose A. Villalobos, former Chairman of Grievance Committee "B" of the Eleventh Judicial Circuit, appeared before the Committee and testified that he had known Respondent for approximately fifteen years. Upon their admission to The Florida Bar, he and Respondent had worked for the same

professional association. Mr. Villalobos testified to Respondent's impeccable reputation for honesty, his highly capable professional abilities, and his past contributions to the local community. Mr. Villalobos advised the Committee that he was aware of the underlying facts and circumstances giving rise to these proceedings and that he believed Respondent's course of conduct to be totally out of character. Indeed, Mr. Villalobos testified that Respondent's reputation for integrity and honesty was outstanding and that he had never once heard any complaint from within the community that Respondent had cheated or deceived any client or other persons.

32. The Committee also entertained the testimony of the following persons: The Honorable Mario P. Goderich, Circuit Judge, Eleventh Judicial Circuit; The Honorable Harvey L. Goldstein, County Court Judge, Eleventh Judicial Circuit; and Manuel A. Crespo, former President of the Cuban-American Bar Association. Additionally, several other responsible members of the community testified, all of whom knew Respondent through his service to the community and related civil organizations. All these witnesses advised the Grievance Committee in a manner consistent with the above-discussed testimony. To a person, each of the witnesses believed that Respondent was a man of honor and integrity, that he is dedicated to his clients and to his community, and that the charges of misconduct were not consistent with the manner in which Respondent had conducted his life. All of the witnesses expressed their opinion that any eventual discipline should take into consideration Respondent's past contributions and the fact that a suspension of his professional license would unreasonably deny his clients of an outstanding attorney and would inure to the ultimate detriment of the community-at-large.

33. At all times, Respondent has demonstrated remorse and genuine contrition. Although it was obvious to the Committee that these proceedings have proven emotionally draining on the Respondent, it is equally obvious that they have in a very real sense, reaffirmed Respondent's ethical and humanistic revitalization. Although it is regrettable that Respondent did not (or, perhaps, could not) come to grips with his problem at an earlier point in time, it is noted with approval that Respondent has maintained his sense of dignity and self-worth. He has accepted responsibility for his wrongdoing and has not attempted to shift the blame to others. It appears that Respondent is a man of moral and ethical substance and is capable of making an immediate positive contribution to his profession and his community.

VII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS

SHOULD BE TAXED:

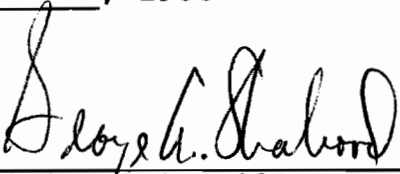
The undersigned Referee finds the following costs were reasonably incurred by The Florida Bar, to wit:

Administrative Costs at Grievance Committee Level Pursuant to article XI, Rule 11.06(9)(a)(5) of the Integration Rule of The Florida Bar.....	<u>\$150.00</u>
Administrative Costs at Referee Level Pursuant to article XI, Rule 11.06(9)(a)(5) of the Integration Rule of The Florida Bar.....	<u>\$150.00</u>
Auditing Costs.....	<u>\$5,781.19</u>
Court Reporter Costs.....	<u>\$475.70</u>
Courier Costs.....	<u>\$19.25</u>
TOTAL ITEMIZED COSTS:.....	<u>\$6,576.19</u>

It is recommended that Respondent shall bear all costs and expenses incident to these proceedings. In light of Respondent's present financial situation, it is further recommended that

Respondent be permitted to retire these costs through the establishment of a periodic payment schedule, the specific terms of which to be negotiated by and between Respondent's counsel and the Director of Lawyer Regulation of The Florida Bar, subject to the imposition of interest at the rate of 12% per annum for the balance of all costs not retired within thirty (30) days of the entry of any Final Order by the Supreme Court.

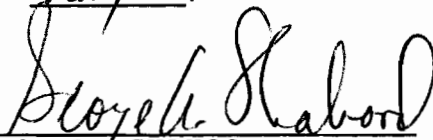
Dated this 19 day of July, 1985



GEORGE A. SHAHOOD
Circuit Judge - Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Report of Referee and the Record in this matter have been forwarded to the Clerk of the Supreme Court, and that true and correct copies of the Report of Referee have been provided to Robert D. Rosenbloom, Esquire, The Florida Bar, 211 Rivergate Plaza, 444 Brickell Avenue, Miami, Fl 33131, and Herbert Stettin, Esquire, Respondent's Counsel, 1 Southeast Third Avenue, Suite 2222, Miami, FL 33131, this 19 day of July, 1985.



GEORGE A. SHAHOOD
Circuit Judge - Referee