

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

vs.

ARTHUR NEWMAN,
Respondent.

FILED
APR 14 1961
Supreme Court
Case No: 67,528
CLERK OF THE SUPREME COURT
By _____
Deputy Clerk

On Petition for Review

**REPLY BRIEF
and
SUPPLEMENTAL APPENDIX OF RESPONDENT
SUPPORTING PETITION FOR REVIEW**

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PRELIMINARY STATEMENT

In the Reply Brief filed by Respondent, the following
breviations will be used:

"TR" followed by the page number will refer to the
testimony taken before the Referee on January 23, March 21,
March 22, June 19, June 20 and July 26, 1986, regardless of
Volumn.

"App." followed by the page number will refer to the
Appendix attached to Respondent's Inital Brief.

"C.App." followed by the letter exhibit will refer to
the Appendix attached to Complainant's Answer Brief.

"S.App." followed by the page number will refer to the
Supplemental Appendix attached to Respondent's Reply Brief.

"CB" vollowed by the page number will refer to
Complainant's Answer Brief.

**RESPONDENT'S REPLY TO COMPLAINANT'S STATEMENT OF THE CASE
AND FACTS**

Florida Rule of Appellate Procedure 9.210(c)^{1/} describes the required contents of a Complainant's Answer Brief and specifically states that: The Statement of the Case and of the Facts shall be omitted unless there are areas of disagreement, which should be "clearly specified."

Complainant's brief does not comply with the requirements of Rule 9.210(c). Complainant does not set forth what areas of disagreement exist in the Statement of the Case and of the Facts as related in Respondent's Initial Brief supporting his Petition for Review.

Respondent, therefore, moves to strike Complainant's brief for non-compliance with the Rules of Appellate Procedure. ^{2/}

Further, Respondent takes exception with the inaccurate and incomplete statements made by Complainant in her recitation of the Statement of the Case, Statement of the Facts and Summary of the Argument (pages 1-16 of Complainant's Answer Brief). Respondent will address each matter appropriately in response to the Issues under review.

^{1/} Rule 3-7.5(f), Rules Regulating The Florida Bar.

^{2/} See: Dania Jai Alai Palace, Inc. v. Sykes, 450 So.2d 1114, (Fla. 1984); Metropolitan Life and Traveler's Insurance, Inc. v. Antonucci, 469 So.2d 952 (Fla. 1st DCA 1985).

REPLY TO ARGUMENT

ISSUE I

THE REFEREE'S RECOMMENDATION OF DISCIPLINE
IS NOT WARRANTED OR JUSTIFIED.

The basis for Complainant's argument that the Recommendation of the Referee is warranted is allegedly substantiated by exhibits of the Complainant's auditor and generalized findings in the Referee's Report (CB-17-19). The testimony is quite to the contrary. The Referee's findings and conclusions are based on the Complainant's interpretation of the auditor's exhibit rather than the actual evidence presented. There were no checks from Respondent's trust account that were returned for insufficient funds (TR-168-169). The "overdrafts" were a result of an accounting principle known as "negative balances".

In the Statement of the Facts Complainant refers to a trust account check that was returned for uncollected funds in the matter of Withers (CB-7). The Withers situation involved a trust account check for approximately \$9,000.00 that was written on uncollected funds. Additionally, the client gave specific permission, including testimony before the Bar Grievance Committee, that Respondent could utilize the funds until needed for his closing. No complaints were made regarding this transaction. However, it was the Bar's position that the client had no right to give Respondent permission to utilize these funds and thus presented testimony (TR-134-139; S.App.1-6) even

though the matter is not raised in the Complaint or Referee's Report.

Respondent recognizes that in the general findings by the Referee, the Referee utilizes the nomenclature "misappropriation" and/or "misuse" in reference to trust account checks even though no monies were actually "taken" by Respondent. In preparing the Referee's Report, the mitigation referred to is simply that "no client of the Respondent has filed a Complaint against the Florida Bar Client Security Fund for money taken by the Respondent." (App.12-13) This terminology was the result of a stipulation entered into by the Florida Bar and Respondent's attorney (TR-462-464; S.App.8-10). In fact, the Florida Bar further stipulated that the client involved in the Withers transaction gave Respondent permission to utilize those trust funds (TR-462-464; S.App.8-10) and Theodore Richardson so did testify (TR-532-541; S.App.11-20).

Nowhere in the entire 800 page record has the Referee, the auditor, or even the Florida Bar been able to show an instance where a trust account check of Respondent's was returned for insufficient funds.^{3/}

^{3/} It certainly cannot be said that the Complainant is being candid with this Honorable Court in its continuous references to misappropriated trust funds by the Respondent when such is not the case.

The Complainant's next argument concerns its personal interpretation of the cumulative effect of Respondent's misconduct in substantiating the Recommendation of the Referee for disbarment. Nowhere in the Initial Brief of Respondent did he take lightly the charges brought against him. If this Honorable Court interpreted the brief in that manner, an apology is due. Respondent has claimed at all times that he has violated certain disciplinary rules but that the two individual client complaints were of little consequence and would probably have resulted in no more than a reprimand had they been handled in 1982 and 1983 when they were commenced. At all times Respondent has accepted the responsibility of improper trust account records and has remedied the situation, even as found by the Referee's Report:

"Respondent has recently taken steps to remedy his past trust account procedures and the Respondent has a fairly good record considering the length of time he has been practicing law." (App.12-13).

Complainant looks to two prior disciplinary matters that are not part of the official "record" anymore than the correspondence between Respondent's prior counsel and Complainant.^{4/} The fact of the matter is that one of those prior disciplinary matters is dated 1970 (more than 17 years ago) and was a Grievance Committee admonishment and not a matter which was even reviewed by this Honorable Court.

^{4/} This is the argument made by Complainant in its Answer Brief as to Issue III.

Although it is the Complainant's position that:

It is the Florida Bar's position that cumulative misconduct refers to multiple instances of misconduct regardless of the nature of the misconduct or whether it occurred prior to or contemporaneously with the conduct in question. (CB-22).

The law as recognized by this Honorable Court states that "cumulative misconduct" relates to previous disciplinary history and cumulative misconduct of a similar nature. The Florida Bar v. Felder, 425 So.2d 528 (Fla. 1982). Even the Complainant's attempt to distinguish the case of The Florida Bar v. Hunt, 441 So.2d 618 (Fla. 1983) is inappropriate. In the Hunt case, there was similar unethical conduct which the Court held justified enhancement. There is no type of similar unethical conduct in the case sub judice.

In attempting to distinguish the case of The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986), the Complainant again misquotes the law of the case. Respondent relied upon the Lipman case to indicate that the Referee cannot consider "a lack of remorse" (although the complete record indicates that Respondent did not display any lack of remorse) to enhance the recommended discipline. Even so, Respondent recognizes that the Court upheld the disbarment of Mr. Lipman but not solely for trust accounting procedure violations and comingling of trust funds. Mr. Lipman's disbarment was first based on the fact he was found guilty of counterfeiting and trust violations due to shortages of monies owed to clients as well the other matters Complainant alleges to be similar to Respondent's conduct (CB-24).

Complainant's explanation as to the Referee's "frustration" with Respondent's refusal to accept responsibility is misplaced when considering the totality of the evidence and all the statements made by the Referee, especially in the light of those matters set forth in Respondent's Issue III to his Initial Brief. Prior to the commencement of formal proceedings, Respondent not only accepted responsibility but was willing to execute the necessary admission of misconduct relating to trust violations on October 10, 1984 (App.322-323).

Finally, Complainant, in setting forth the Statement of Facts, makes much of Respondent's failure to produce witnesses to disprove the auditor's determination that there were or were not overdrafts, that office checks (not trust account checks) bounced in 1982 and that the Complaints of the two clients were not well-founded. (CB-6-14). The Respondent did not cause the extensive trial for the purposes of proving his innocence in all counts of the Complaint filed by the Florida Bar. The Respondent objected to the Florida Bar's insistence that everything be tried together in order to give the appearance that he had seriously breached his responsibility to the Florida Bar and legal profession. Respondent has contested the fact that monies that were given to the bondsman in the Mills case ever intended to be trust account funds; Respondent contested any implication that he misappropriated funds belonging to clients; and contested the fact that that the various "negative balances" determined by the auditor were misappropriations and/or misuse of trust funds.

The extent and magnitude of these proceedings were the result of the procedure followed by Complainant as set forth in Issue III of Respondent's Initial Brief.

ISSUE II

THE REFEREE'S FINDINGS THAT RESPONDENT WAS GUILTY OF ALL NINE COUNTS OF MISCONDUCT IS CLEARLY ERRONEOUS.

Complainant alleges that Respondent has not specified exactly what findings of the Referee are unsupported by the evidence (CB-27). Respondent has set forth that each of the Referee's findings concerning misappropriation and/or misuse of trust account funds is inaccurate based on the exhibits and testimony of the auditor (pages 26-28 of Respondent's Initial Brief).

Complainant carefully went through the two clients' Complaints and indicated that the "assumption" made by the Referee that monies from client Mills were trust monies, was an erroneous assumption (page 30-31 of Respondent's Initial Brief).

The Complainant attempts to justify the audit of Respondent's trust account because of the "end result" of the auditor's determination that there were "negative balances" (CB-28). At no time has the Complainant faced the issue that the initial grounds for this extensive audit was based on the Florida Bar's own error (App.65, 71; Initial Brief of Respondent page 26).

Complainant unfairly took out of context Respondent's statement on page 819 of the transcript which depicted Respondent as being "livid" and uncooperative during the audit of his trust accounts. (CB-30) To fully appreciate the statements of Respondent in explaining to the Court the matters raised in Issue III, the statement must be read in light of pages 818-824 of the transcript. (S.App.21-27)

At no time during the entire proceedings did any of the evidence or exhibits indicate that Respondent misappropriated any clients' funds. In fact, the Complainant in its Answer Brief (CB-31-33) alleges a list of clients that had money in Respondent's trust account. Complainant does not fully explain to the Court that many of these clients testified that they allowed Respondent to use their monies and that the testimony of the Complainant's auditor determined a negative balance simply because he could not determine the bookkeeping entries when monies were placed into Respondent's trust account. (TR.138-151; S.App.27-41).

Although the Complainant attempts to place the burden on the Respondent, the law as set forth in The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970) and The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981) is presently the law as applied in these disciplinary proceedings. Thus, it was up to the Complainant to identify the specific sum alleged to be appropriated and not require the Respondent to put on evidence of his innocence that he did not steal client's money as alleged in the Complainant's Statement of the Case (CB-5-14).

ISSUE III

THE RECORD AFFIRMATIVELY DEMONSTRATES THAT THE ACTIONS AND CONDUCT OF THE FLORIDA BAR IN INVESTIGATING THE RESPONDENT AND PRESENTING EVIDENCE TO THE REFEREE CONSTITUTE AN ABUSE OF THE POWERS GIVEN TO THE FLORIDA BAR UNDER THE INTEGRATION RULE OF THE FLORIDA BAR, HAVE PREJUDICED RESPONDENT AND INFLICTED AN UNDUE BURDEN UPON RESPONDENT NOT CONTEMPLATED BY THE RULES OF PROFESSIONAL CONDUCT.

Complainant takes issue with the non-record documentation attached to Respondent's Initial Brief in arguing those matters raised in Issue III. Respondent realleges and adopts those arguments made in his Reply to Complainant's Motion to Strike which was filed on April 8, 1987, with this Honorable Court.

Additionally, the statement that the Motion to Suspend Respondent Pending Review is not part of the record (CB-1; footnote) is incorrect. The questions of the suspension and the confidentiality of the proceedings were brought before the Referee at page 7 of the transcript of testimony presently before this Honorable Court as part of the "official" record.

Next, on page 84 of the transcript of the "official" record (App.317) the investigator for the Florida Bar stated that the Complaint of Ms. Diaz (Garcia) involving Counts IV, V and VI was filed on February 2, 1982.

At no time has the Respondent raised the issue of "laches" as a defense to the disciplinary proceedings. Respondent also recognizes that at the time it was necessary for him to engage the services of Joel Hirschhorn because the Honorable

A. J. Cristol was appointed to the Federal Bankruptcy Bench, there were certain unavoidable extensions due to Mr. Hirschhorn's representation of some of the judges that were appointed as Referees and conflicts with his trial schedule which caused many of the delays in completing the evidentiary hearings before the Referee.

Respondent's Complaint as set forth in Issue III of his Initial Complaint relates to the numerous requests, pleas, and demands to conclude the individual Complaints by the two clients (both filed no later than mid-1983, giving the Complainant the benefit of any doubt) and the continued offer to settle the trust account violations prior to any disciplinary hearings before a Grievance Committee.

There were never, nor has there ever been any misappropriation of clients' funds and the Complainant and its staff counsel know that. The representations made by staff counsel to the Referee concerning the Respondent's refusal to cooperate unless he was assured a private reprimand is totally inconsistent with the communications and correspondence between Complainant and Respondent's counsel prior to the actual Grievance Committee hearings.

Finally, Respondent, in good faith, submits that the calculated misrepresentation of Respondent's prior efforts to resolve these matters, and the fact that there were no misappropriations of clients' funds, have prejudiced the Respondent before the Referee resulting in his unwarranted findings and recommendations.

CONCLUSION

Respondent respectfully prays that this Honorable Court will grant his Petition for Review and determine that the Referee's Findings of Fact, Recommendations of Guilt and Recommendation of Discipline are unsupported by the record and/or unjustified, erroneous and/or too severe.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Respondent was furnished, by U.S. Mail, on this 9th day of April, 1987, to the following: Patricia S. Etkin, Bar Counsel, The Florida Bar, Suite 211 Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131; John A. Boggs, Director of Lawyer Regulation, The Florida Bar, The Florida Bar Center, Tallahassee, Florida 32301-8226; and George de Poszgay, Esq., 2950 S.W. 27th Avenue, Suite 210, Miami, Florida 33133.


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