

IN THE SUPREME COURT OF FLORIDA

FILED

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CLERK, SUPREME COURT

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THE FLORIDA BAR,

Complainant,

vs.

DAVID M. ANDERSON,

Respondent.

Case No. 67,803

TFB No. 08-87N78

COMPLAINANT'S REPLY BRIEF TO
RESPONDENT'S CROSS-PETITION FOR REVIEW

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STATEMENT OF THE CASE

The Florida Bar accepts the Respondent's statement of the case as presented in his Brief in Support of Cross-Petition for Review and Answer Brief as an accurate statement.

STATEMENT OF THE FACTS

In late September 1980, attorney Mitzi Austin was retained to represent the interests of Betty LeMarchand in seeking to have her father, A. E. Copeland, declared incompetent to handle her assets.

Respondent was hired by Mr. Copeland to contest the petition of incompetency. Respondent initially set up a trust for Mr. Copeland and gathered all of Mr. Copeland's assets under a corporation called Orchard Investment Corporation. The trust agreement appointed Respondent trustee for Mr. Copeland.

Simultaneously, Respondent attempted to have himself appointed guardian of Mr. Copeland before a hearing could be held on Ms. Austin's initial petition. At a subsequent hearing, Respondent failed to inform the trial judge of his position as trustee or the existence of the trust agreement.

The trial court ruled Mr. Copeland competent but in need of supervision to manage his property. The effect of the trust left no property for the guardian to manage.

Part of the assets taken over from Mr. Copeland were cash funds in the approximate amount of \$92,000. These funds were to be held by Respondent for disbursement to Mr. Copeland upon request as needed.

During the initial term of the trust agreement, Mr. Copeland had received several disbursements of these funds upon request as needed. This procedure was as provided for by the Respondent.

Mr. Copeland's brother, Melvin, was appointed guardian by the trial court and ordered to post bond. Melvin Copeland never posted bond or filed inventory documents in the guardianship.

While the initial thrust of the guardianship hearing was A. E. Copeland's competency, it is clear that once it was determined that Mr. Copeland was competent mentally, the central question was Mr. Copeland's ability to handle his financial affairs and assets.

While Respondent was given full control over all of Mr. Copeland's assets and the trial court had appointed a guardian for the same function, Respondent failed to supervise all of the affairs of Mr. Copeland and would not allow the guardian to have anything to do with any of the assets. Although Respondent failed to receive income from any of the trust assets, he did pay himself attorney fees connected with administering the trust.

During the pendency of the trust, Respondent prepared two deeds concerning realty owned by the trust for Mr. Copeland's signature. Both these deeds were prepared for Copeland's signature after the execution of the trust and the appointment of a guardian. Neither of these documents disclosed the existence of a trustee or guardian nor were they executed by the trustee or guardian.

During September 1983, Mr. and Mrs. Copeland requested \$10,000 from Respondent from the funds being held by him. At this time, Respondent refused to deliver the requested funds. Upon Respondent's refusal, the Copelands sought legal counsel to have Respondent account for the assets belonging to A. E. Copeland.

Mrs. A. E. Copeland testified that she had never seen a note from Mr. Copeland to David Anderson. She further stated that on the prior occasions when they had received funds from Respondent upon their request, there had never been talk of a loan or the production of a note. She testified that she always accompanied Mr. Copeland to Respondent's office and was always present when the funds were turned over. She also stated that Mr. Copeland had never signed a note or receipt for such funds.

After Mr. Copeland had sought legal counsel, Respondent hired temporary secretarial help after office hours to type a back dated note for \$90,000 between Respondent and A. E. Copeland. Said note made no mention of its being a duplicate nor attempted to show any set-offs for prior payments.

A former associate of Respondent testified that she had thoroughly examined all court files and office records of Respondent involving the trust in preparing for the court ordered accounting and incompetency petition. She stated she found no evidence of there being a note or loan from Copeland to Respondent and was told by Respondent that he had custody of the trust funds. She stated that

the first time she became aware of such a loan was upon examining the report she had prepared which had been amended by Respondent. At no time had Respondent ever mentioned such a loan in reviewing her work or had he instructed her to include such as an asset of the trust.

Upon filing his Report of Trustee rather than the court ordered accounting, Respondent first attempted to exert partial payment of the alleged note. Respondent initially attempted payment under the terms of the note filed in court by making the first payment upon demand by Copelands' attorney. Respondent failed to make the second payment which resulted in a suit and judgment against Respondent.

Testimony showed that the only reason for filing on the note was this was considered the only plausible means of recovering the Copelands' funds.

Respondent states that his failure to make subsequent payments on the note was due to Mrs. Copeland's refusal to give him credit for what he alleges was partial payments. Respondent even attempted to go back to the trial court to be allowed to show such payments as a set-off against the note. The trial judge stated that if such was done it would render the settlement of the parties void and would subject Respondent to any claims by the estate. Respondent failed to take any further action at the trial level and allowed the settlement to stand.

Although Mr. A. E. Copeland did not instigate the present complaint against Respondent, the evidence shows that he did obtain legal counsel against Respondent during which time he was shown to be mentally competent. This representation was to protect his assets for which he had initially sought Respondent's help.

SUMMARY OF ARGUMENT

ISSUE I

THE REFEREE'S FINDINGS ARE NOT
ERRONEOUS AND ARE SUPPORTED BY THE EVIDENCE.

ISSUE II

THE REFEREE PROPERLY DENIED
RESPONDENT'S MOTION TO DISMISS FOR LACHES.

ISSUE III

THE REFEREE ERRED IN RECOMMENDING
A SIX-MONTH SUSPENSION OF RESPONDENT.

ARGUMENT

ISSUE I

THE REFEREE'S FINDINGS ARE NOT
ERRONEOUS AND ARE SUPPORTED BY THE EVIDENCE.

Respondent has asserted in his cross petition for review that the findings of the referee were primarily conclusions supporting his beliefs and that such conclusions were unsupported by the evidence.

In reply to Respondent's arguments, the following response will address the cited violations in the same order set forth in Respondent's argument.

A. DR 1-102(A)(1)

In finding the Respondent guilty of having violated other disciplinary rules it is clear that the provisions of DR 1-102(A)(1) have been violated.

B. DR 1-102(A)(4)

Respondent argues that he is not guilty of the provisions of this particular DR for several reasons.

The referee found that Respondent was in violation of this rule for not informing the trial court of the existence of the trust during the guardianship proceedings.

Respondent argues such misrepresentation was merely an act of omission and that since the central issue was that of Copeland's mental competency, there was no requirement for such disclosure.

This argument cannot stand in light of the fact that while the initial thrust of the competency trial was Copeland's mental state, it subsequently turned on Copeland's ability to handle his financial affairs. When the court appointed Melvin Copeland as guardian of Mr. A. E. Copeland's property, Mr. Anderson sat quiet knowing that all of Mr. A. E. Copeland's assets had been transferred to a trust over which he had complete control.

Melvin Copeland was informed of the trust agreement but only after he tried to interfere with the operation of the Copeland's motel. Respondent's argument that the return was attempted under the provisions of the note begs the initial question. Respondent would have this Court believe that he had made interval payments upon A. E. Copeland's signing a note for receipt but failed to do so the last time because no one could produce the original note. If such was the fact, a simple receipt for such funds would have been acceptable.

The payment referred to by Respondent came only after he had manufactured a duplicate of an alleged note and the estate made a demand for payment on this "note" in an attempt to recover the funds. It was at this time that Respondent told the guardian to leave the property alone since it was in trust and he had no control over it. Such an attitude clearly demonstrates that Respondent knew

that the court's appointment was ineffective due to his position as trustee.

As an officer of the court, Respondent's silence regarding the trust at the guardianship hearing was in effect a misrepresentation as to the status of the assets upon which the trial judge relied.

There is no dispute that Respondent failed to return the Copelands' money upon request.

Respondent argues that he paid part of the alleged loan through prior payments. These payments were never acknowledged by Mrs. Copeland as loan payments but merely receipt of trust funds being held by Respondent.

Respondent argues that there was no deceitful or dishonest conduct concerning the note and that the referee's finding such was erroneous.

A review of the testimony shows that Mrs. Copeland never had possession of such a note and never heard of or saw such a note prior to its production by Respondent.

It is clear that Respondent cashed Copeland's liquid assets after the trust was executed and took the funds. At a later date when he was unable to produce funds upon request by Copeland, he had the note manufactured. Instead of having Mr. Copeland acknowledge

such a note, Respondent arranged for part-time secretarial help to come in after hours and transcribe this note. The note was backdated and made no mention of such being a duplicate.

In support of the Bar's position is the fact that an associate of Respondent's testified that in working up the case for trial and preparing the court ordered accounting that she had never seen evidence of such a note or loan in any of Respondent's files. She had even asked Respondent about the funds and was told on two occasions that he had them in a trust account. The first time she became aware of the existence of such a note was when she reviewed the accounting before filing with the trial court and saw that Respondent amended her work to include such a note.

Respondent claims he was the only person deceived in the matter of the note because he was not given credit for the interval payments by Mrs. Copeland. Such a position by Respondent is ludicrous. Respondent was given a clear opportunity by the probate court to amend his accounting to show credit for such monies. Respondent refused to take advantage of this opportunity because the court made it clear to him that such assertion would again open Respondent to any full claims that the estate could make against him. Respondent cannot be allowed to refuse such opportunity to make a set-off claim on one hand and then on the other hand use such payments in a beneficial argument of his having been deceived.

The evidence is clear that Respondent took the \$90,000 in cash from the trust of A. E. Copeland and asserted the existence of a loan or note only when he could not produce such funds on demand.

C. DR 1-102(A) (6)

The referee's findings as to this violation are correct and supported by the evidence.

Respondent tries to argue that his having Mr. Copeland sign two real estate transfers when there existed both a trustee and guardian having control over such property were technical and insignificant.

Respondent's actions in this area are extremely significant since these were transfers that required specific signatures for transfer and were not obtained. Respondent was clearly aware of the status of the assets being controlled under two separate instruments and did not acknowledge the legal requirements of being trustee or those of the guardianship.

Such actions by Respondent clearly show that his primary concern was to maintain a status quo with the Copelands' assets. This supports the fact that even as trustee, Respondent felt no need to oversee the financial affairs of the ward or the property he had under his control.

D. DR 5-101(A)

Testimony showed that Respondent was retained to defend A. E. Copeland in a competency proceeding began by his daughter. Mr. Copeland desired to oppose such petition since he felt all his daughter wanted was to get his property.

In beginning his representation of Mr. Copeland in this matter, Respondent initially sought to have himself appointed guardian which would acknowledge some question of Mr. Copeland being able to handle his own affairs.

Rather than protect the property of Mr. Copeland, Respondent immediately took possession of all of Mr. Copeland's property, including all the cash assets.

Respondent apparently required or had need for funds at the time of his representation of Copeland. Knowing that Mr. Copeland was a potential source of funds and his own financial needs may affect his representation, Respondent should not have accepted this employment.

Respondent argues the advantages Mr. Copeland received under the trust agreement. Under the trust agreement, all Mr. Copeland received was a loss of access to his cash assets and no security for the entire amount of assets turned over to the Respondent. This lack of security was blatantly realized when Respondent failed to transfer cash assets to Mr. Copeland upon his request.

Not only did Respondent accept representation as Mr. Copeland's lawyer on the incompetency proceeding, he undertook the position of trustee for Mr. Copeland. As trustee, Respondent was expected to use his legal skills and knowledge in this position. Respondent's personal financial and business needs would stand to conflict with the needs of the trustee.

Respondent argues the capability of Mr. Copeland in running his affairs (p. 22 of Respondent's brief) but felt it necessary for Mr. Copeland to have a trustee and guardian.

It cannot be argued that it was in the best interest of Mr. Copeland for him to have relinquished total control of all his assets, leaving him no available cash reserves. A simple explanation of the lack of security is the clearest example of for whose benefit the whole representation was for - the Respondent.

E. DR 5-104(A)

The basic thrust of the facts of this violation were addressed in the previous section.

From the facts, it is clear that Respondent had a conflict of interest with accepting any business transaction with Mr. Copeland.

The Bar's argument in this instance is to be addressed in the alternative. If it is accepted that Respondent created a valid note

for Mr. Copeland's benefit, then such was a violation. At the time of the alleged loan, Respondent was both attorney and trustee for A. E. Copeland. In making such a business decision for Mr. Copeland, Respondent was faced with protecting the assets and property interests of Copeland and obtaining the best loan arrangements for himself. These are contradictory and conflicting positions.

Respondent argues that he even counseled Mr. Copeland to seek other advice on the loan but admits he failed to disclose to Mr. Copeland the existence of an IRS lien for failure to pay taxes.

Such facts lead only to the conclusion that Respondent took advantage of a situation with his client where he failed to give prudent and legal advice to his client where there was a right by Mr. Copeland to expect the same.

Respondent again tries to justify his actions by claiming he was not given credit for prior payments. In claiming such payoffs, Respondent contradicts the settlement and final accounting in the probate court where he swore such facts and figures were true and correct.

This settlement was entered into by the Copeland estate as a means of obtaining the funds taken by Respondent, and in entering this settlement, gave up any other claims against Respondent. When asked to be allowed to amend his accounting to show credit for the claimed payments, the court informed Respondent he could do so but

that would make him liable for any future claims. Respondent failed to do so.

The Bar feels that such action reveals that Respondent did not desire to claim the set-offs because this would open him to charges and claims of misappropriation of Copeland's trust funds.

F. DR 7-101(A) (3)

In this instance, the actions of Respondent were accurately described by the referee but he referred to the wrong exhibits. Respondent did prepare two property or deed transfers after the creation of the trust and the guardianship. Respondent has admitted this fact earlier in this brief and has referred to these acts as insignificant. (page 7, brief).

Such transfers by Mr. Copeland were not valid and did not accomplish the results that Respondent claimed he desired. As set forth in Respondent's facts, one of the transfers was needed to forestall a foreclosure action. Since there was actually no transfer, Mr. Copeland's interests were prejudiced by Respondent's actions.

The need for litigation on Mr. Copeland's behalf was necessitated by Respondent's failure to account for the trust funds. The initial litigation was for the production of assets by Respondent and upon the production of an alleged note in place of the funds, the

estate moved upon what it perceived to be the only means of obtaining repayment of the funds.

G. DR 7-102(A) (3)

Respondent fails to grasp the requirements of the accounting procedures required under the probate statutes. What Respondent filed was a Report of the Trustee that made only mention of a personal loan and failed to give specifics as to existence of trust funds, how they were obtained and where they were directed.

The report filed by Respondent was inadequate under statutory requirements and was contested by Copeland's attorney.

Respondent's revelations to various parties of the existence of such a trust must be discounted as having any bearing upon his openness of this matter. All the revelations referred to by Respondent came after he was unable to transfer trust funds to Mr. Copeland and the shortage was exposed.

H. DR 7-102(A) (8)

This Court has ruled that a referee is not totally bound to remain within the cited charges if he determines that evidence reveals the existence of other misconduct.

From the evidence presented at the hearing, it is clear that Respondent took over all of A. E. Copeland's assets, including all his cash. Shortly after forming the trust and securing his authority as trustee, Respondent removed all the cash assets to his personal use. As demonstrated by past actions of the Copelands, Respondent would provide them funds on request. Respondent's problems began when he was unable to provide \$10,000 for the Copelands to purchase a car.

The evidence of the extent Respondent went to in having a duplicate note made, his nondisclosure to an associate helping prepare his accounting and the testimony of Mrs. Copeland about how the prior payments were made, clearly show that there was, in effect, no promissory note and that Respondent was attempting to cover his misappropriation under the guise of a loan transaction.

Such taking of the trust's cash assets is, in effect, stealing, and such is illegal conduct which is violative of DR 7-102(A) (8).

In hearing the evidence, the referee has found that there was also a violation of DR 9-102(B) (3). Such a finding is supported by the evidence and is not erroneous.

ISSUE II

THE REFEREE PROPERLY DENIED
RESPONDENT'S MOTION TO DISMISS FOR LACHES.

This Court has continuously held that there is no statute of limitations on disciplinary matters.

The time periods complained of herein by the Respondent are not prohibitive to due process for the Respondent. In The Florida Bar v. Davis, 419 So.2d 325 (1982), the Court found that a delay of several years in the prosecution and ultimate resolution did not deny the attorney due process.

This Court has repeatedly held that delay is not sufficient grounds to dismiss a discipline proceeding against a Florida attorney. The Florida Bar v. King, 174 So.2d 398 (Fla. 1965); The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970); The Florida Bar v. Nealy, 372 So.2d 89 (Fla. 1979).

Respondent argues prejudice in this matter citing the death of Mr. Copeland and how Mr. Copeland would have supported Respondent's position. Being Mr. Copeland's lawyer and trustee, Respondent was aware of Mr. Copeland's health. In preparing for the hearing of this case, Respondent made no effort to make any discovery which would have perpetuated Mr. Copeland's testimony.

Respondent's assertions regarding how helpful Mr. Copeland would be to his case contradicts the actions of a trusting, long term client who resorted to additional legal representation when confronted with Respondent's failing to return his funds.

The referee herein has fully heard arguments on this point from both sides and has denied Respondent's motion to dismiss. Having failed to show how such denial was an abuse of discretion by the referee, his ruling should be affirmed. The Bar also feels that Respondent should not be allowed to complain of activity that he himself practices.

ISSUE III

THE REFEREE ERRED IN RECOMMENDING
A SIX-MONTH SUSPENSION OF RESPONDENT.

Complainant has set forth its position in its initial brief on the discipline it feels appropriate and the reasons its feels justified in seeking an enhanced penalty.

The aggravating element in this case is the complete violation of trust by Mr. Anderson not only to his client but to the court.

The client in this matter came to Respondent in a situation cloaked with caution due to the alleged mental state of the client. Without awaiting judicial proceedings for determining such factor, Respondent took action which totally removed A. E. Copeland from his property and assets. His willingness to help came only after he was unable to produce trust assets and fought to the end rather than cooperating with his client and the courts.


What has been called an unblemished record is marred by the previous private reprimand for having made misrepresentations to a client. It is apparent that Respondent practices law for his benefit and not that of his clients. Such action is totally contrary to the conduct expected of a Florida attorney and should not be allowed.

CONCLUSION

Respondent has failed to demonstrate that the findings of the referee were erroneous and the findings should be affirmed.

The violations of which Respondent has been found guilty of are of such a serious nature that the penalty should be disbarment.

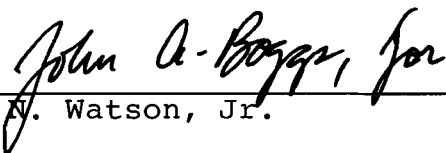
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by certified mail # P675 195 110, return receipt requested, to JOHN A. WEISS, Counsel for Respondent, Post Office Box 1167, Tallahassee, Florida 32302, this 9th day of January 1987.



James N. Watson, Jr.