IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

WARREN H. JOHNSON,

Respondent-Appellee.

_____/

TFB File No. 85-15,370 (20B)

Case No. 68,596

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

Elizabeth L. Zehnder died testate on October 15, 1983 naming her husband, Robert E. Zehnder, personal representative. On November 2, 1983 Mr. Zehnder retained appellee to represent him in the administration of his wife's estate at which time, at appellee's request, appellee received $1,200.00 on account of legal fees and $60.00 on account of costs (paragraphs 2 and 3 of bar's complaint admitted in appellee's answer).

The $1,260.00 payment came from an estate asset. Prior to her death, Mrs. Zehnder had sold a parcel of real estate to an individual named "Butteri" for approximately $12,000.00, receiving $5,000.00 in cash and the balance in the form of a mortgage. At her death, there was a balance remaining from the down payment which was the source of the $1,260.00 payment to appellee (79*, 80 and bar's exhibit 9 in evidence). Appellee was aware of the source of his fee (80, 81).

On February 14, 1984, appellee received payment of the Butteri mortgage in the sum of $7,231.78. Rather than opening an estate account, appellee deposited the proceeds to his attorney's trust account and then proceeded to withdraw sums therefrom to the extent of $4,115.00, as follows:

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* All page references are to trial transcript.

DATE	CHECK NO.	AMOUNT
2/27/84	1023	$ 400.00
3/30/84	1025	400.00
5/04/84	1026	100.00
5/05/84	1038	50.00
7/16/84	1039	300.00
7/20/84	1040	350.00
8/07/84	1041	500.00
8/08/84	1043	200.00
8/16/84	1044	300.00
8/20/84	1045	700.00
8/27/84	1046	300.00
9/12/84	1049	500.00
4/04/85	1052	15.00

(Paragraphs 5 and 6 of the bar's complaint admitted in appellee's answer).

Respondent made the various payments, aforesaid, to himself without notice to or consent by Mr. Zehnder and without application to or leave of the court having jurisdiction over the estate (paragraph 5 of the bar's complaint admitted to in appellee's answer except regarding client consent; 81, 82).

Appellee maintained no trust account ledger card for the estate and didn't follow even minimum trust accounting procedures required by virtue of the Fla. Bar Integr. Rule and/or the Fla. Bar Integr. Rule Bylaws (paragraph 9 of the bar's complaint admitted in appellee's answer; 106-109).

Mr. Zehnder made numerous inquiries of appellee requesting an accounting for the $7,231.78 mortgage proceeds but appellee failed and refused to respond (bar's exhibits 3 and 4 in evidence; 83, 84, 87, 89).

The referee found the foregoing to have been established by clear and convincing evidence incorporating the same into the findings of fact set forth in his December 28, 1987 report of referee.

In fact, the $5,315.00* received and appropriated by appellee as legal fees bore no relationship to the value of the legal services actually rendered by appellee and such sum constituted an excessive fee. The total estate amounted to under $30,000.00 (bar's exhibit 9 in evidence). There were no estate tax or income tax returns required (30, 31). There were only three (3) assets consisting of cash, the proceeds from the Butteri mortgage which were recovered as soon as request was made therefor and unimproved real property (bar's exhibit 9 in evidence; 24). Appellee was unable to produce any explanation for any of the numerous payments he appropriated from the mortgage proceeds deposited to his trust account. He could not even state whether the sums he appropriated related to work allegedly performed prior or subsequent to the receipt of the mortgage proceeds (40-45). Appellee never concluded the estate. Mr. Zehnder retained the services of another attorney who arranged for the sale of the unimproved real estate, secured the appropriate court order permitting the sale thereof and rendered a final accounting (70, 71).

An expert, retained by the bar, applying each and every criterion relating to legal fees as provided for in Fla. Bar Code Prof. Resp., D.R. 2-106(B), opined that a fee ranging between $1,500.00 and $2,500.00 would have constituted a reasonable fee for the services rendered by appellee (47-61).

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* The uncontroverted evidence discloses that appellee received $1,200.00 at the outset of his representation, appropriated $4,115.00 from the mortgage proceeds deposited to his trust account and, finally, refunded $600.00 from his personal account in the form of three (3) $200.00 checks.

The referee found that a reasonable fee for the services rendered by appellee was $2,500.00 (referee's report, page 2).

After Mr. Zehnder retained new counsel to wind up the estate, the new attorney wrote to appellee requesting an accounting for any money appellee may have received on behalf of the Zehnder estate (bar's exhibit 5 in evidence). Appellee also received an inquiry from another attorney acting on behalf of one of the beneficiaries seeking the same information. Appellee responded to each inquiry, as follows:

> The only funds or property received by me on behalf of the estate was the sum of $7,231.78, representing collection of the balance due with interest on the mortgage referred to in the attached letter of T&T Title Insurance, Inc.
>
> These funds have been disbursed as follows:
>
> Warren H. Johnson
> Account of Attorney's Fees and
> Costs ---------- $ 3,516.78
>
> Robert Zehnder, Personal
> Representative
>
> | | | |
> |---|---|---|
> | 4/29/84 | $ 65.00 | |
> | 8/8/84 | 500.00 | |
> | 9/7/84 | 500.00 | |
> | 9/12/84 | 2,050.00 | |
> | 11/15/84 | 200.00 | |
> | 11/21/84 | 200.00 | |
> | 11/26/84 | 200.00 | |
> | | $3,715.00 | $ 3,715.00 |
> | | TOTAL ---------- | $ 7,231.78 |
>
> All costs of administration to date have been paid, and Mr. Zehnder has the documents concerning the three remaining lots in Port St. Lucie. I believe all other documents needed to close the estate would be in the court file or in possession of Mr. Zehnder.

(bar's exhibits 6 and 7 in evidence).

In its complaint (Count VI) the bar alleged that the information supplied to the two (2) inquiring attorneys constituted a fraud in that, in fact, respondent concealed from such attorneys the $1,260.00 he received from estate proceeds at the outset and further concealed that the three (3) $200.00 payments set forth in his letter to the attorneys came from his personal account and not from the funds deposited to his trust account. The successor attorney, relying upon appellee's representations, prepared and filed a final account (bar's exhibit 9 in evidence) which was inaccurate. It failed to recite that the estate, in fact, had an additional $1,260.00 asset. It recites that appellee received $4,716.78 from the estate when, in fact, he received $5,375.00. In finding appellee not guilty of any violation charged by the bar in Count VI of its complaint, the referee found, as fact, that "The correspondence of respondent received in evidence as the bar's exhibit 6 accurately represented the disbursement of the $7,231.78 received on behalf of the estate" (referee's report, page 2).

The bar seeks review contending that the referee's findings and recommendations regarding Count VI of the bar's complaint are erroneous and that a one (1) year suspension is an appropriate discipline under all of the circumstances.

SUMMARY OF ARGUMENT

The cumulative effect of appellee's violations including lack of trust account records and the charging of a clearly excessive fee warrants imposition of a one (1) year suspension in addition to the other discipline measures recommended by the referee. Precedent and Florida's Standards for Imposing Lawyer Sanctions justify such discipline.

In addressing Count VI of the bar's complaint the referee erred in finding that appellee's written representations to successor counsel and counsel for a beneficiary were accurate and did not constitute a fraud. The evidence clearly and convincingly establishes that appellee's representations concealed the truth and were fraudulent.

ARGUMENT

I. APPELLEE CONCEALED MATERIAL FACTS FROM INQUIRING COUNSEL WHO RELIED UPON APPELLEE'S REPRESENTATIONS.

After assuming his role as attorney for the estate, successor counsel wrote to appellee, inquiring:

> Also, kindly furnish this office with your statement for services rendered and costs incurred, to date, and an accounting of any money you may have received from the Estate (bar's Exhibit 5 in evidence).

Appellee responded to such inquiry representing as follows:

> The only funds or property received by me on behalf of the estate was the sum of $7,231.78, representing collection of the balance due with interest on the mortgage referred to in the attached letter of T&T Title Insurance, Inc.
>
> These funds have been disbursed as follows:
>
> Warren H. Johnson
> Account of Attorney's Fees and
> Costs ---------- $ 3,516.78
>
> Robert Zehnder, Personal
> Representative
>
4/29/84	$ 65.00	
8/8/84	500.00	
9/7/84	500.00	
9/12/84	2,050.00	
11/15/84	200.00	
11/21/84	200.00	
11/26/84	200.00	
	$3,715.00	$ 3,715.00
	TOTAL ----------	$ 7,231.78

> All costs of administration to date have been paid, and Mr. Zehnder has the documents concerning the three remaining lots in Port St. Lucie. I believe all other documents needed to close the estate would be in the court file or in possession of Mr. Zehnder.

(bar's exhibit 6 in evidence). Upon inquiry from an attorney representing an estate beneficiary, appellee made the same representations, forwarding a copy of his letter previously sent to the new estate attorney (bar's exhibit 7 in evidence).

Appellee's representations were inaccurate, untruthful and designed to conceal the full extent of his appropriation of estate assets. In the first instance, appellee concealed the fact that in addition to the $7,231.78 representing collection of the outstanding mortgage debt, he had also received, at the outset of his representation, $1,200.00 for fees and $60.00 for disbursements, both from estate cash. Thus, appellee's representation that "the only funds or property received by me on behalf of the estate was the sum of $7,231.78" was false. He had actually received that sum plus $1,260.00 for a total of $8,491.78. His representation that the total received by him on account of fees and costs amounted to $3,516.78 was also false. In fact, he received $1,260.00 upon being retained and thereafter appropriated $4,115.00 for a total of $5,375.00. His representation that on November 15, November 21 and November 26, 1984 he made $200.00 disbursements to Mr. Zehnder from the mortgage proceeds was also untrue. The three (3) $200.00 disbursements did not come from the mortgage proceeds or from appellee's trust account. They came from his personal account after a confrontation with the personal representative (bar's exhibit 3 in evidence; 94, 95).

As a result of appellee's misrepresentations, successor counsel, relying thereupon, prepared and filed a final accounting which was inaccurate (bar's exhibit 9 in evidence). It neglected to include the $1,260.00 originally paid to appellee as a component of beginning assets. It recited, under disbursements, that a total of $4,716.78 was disbursed to appellee as attorney's fees and costs. In fact, a total of $5,375.00 was disbursed to appellee. While it is true that appellee refunded $600.00 directly to Mr. Zehnder, such refund constituted a side deal between appellee and Mr. Zehnder and was not paid from estate funds. It is respectfully submitted that appellee's representations to the inquiring attorneys were intended to deceive and did deceive.

The referee's finding that "The correspondence of respondent received in evidence as the bar's exhibit 6 accurately represented the disbursement of the $7,231.78 received on behalf of the estate" (referee's report, page 2), is inaccurate and begs the question. It is inaccurate in that appellee's letter unequivocally recites that $600.00 of the mortgage proceeds were disbursed to the personal representative, when, in fact, they were disbursed to appellee who subsequently paid the same to his very disgruntled client. It begs the question in that even if the letter accurately represented the disbursement of the $7,231.78, it (the letter) purported to be in response to the successor attorney's inquiry which requested an accounting "of any money you may have received from the estate" (bar's exhibit 5 in evidence). The bar has alleged in Count VI of its complaint and believes that it has established by clear and convincing evidence that the response submitted by appellee to the inquiring attorneys was incomplete and deceptive and

that anyone standing in the inquiring attorneys' shoes would reasonably have concluded that appellee's representations constituted a full and complete accounting of any money he had received from the estate.

II. APPELLEE SHOULD BE SUSPENDED FROM THE FLORIDA BAR FOR A PERIOD OF ONE YEAR IN ADDITION TO THE REFEREE'S DISCIPLINE RECOMMENDATIONS.

Except for Count VI of the bar's complaint, the referee has recommended that appellee be found guilty of all charges recited in the bar's complaint. Thus, respondent has been found guilty in three (3) basic areas. One involves excessive fees, another involves misapplication of funds entrusted to him and the third involves failure to comply with trust account procedures. It is respectfully submitted that each such violation, in its own right, warrants a suspension. In The Florida Bar v. Barenz, 477 So.2d 563 (Fla. 1985) the respondent was ordered suspended for a period of thirty (30) days for failure to comply with the record keeping requirements mandated by Fla. Bar Integr. Rule, article XI, Rule 11.02(4)(c) and the Bylaws promulgated thereunder, the exact violations appellee was found to have violated in the case at bar under Counts II and III of the bar's complaint. In The Florida Bar v. Hirsch, 342 So.2d 970 (Fla. 1977) the respondent was suspended for a period of three (3) months for failure to apply funds entrusted to him for the specific purpose so entrusted, the exact same violation found by the referee in the case at bar with respect to Count I of the bar's complaint. In The Florida Bar v. Winn, 208 So.2d 809 (Fla. 1968) the

court was presented with a pure excessive fee case. No other violations were found. The court imposed a six (6) month suspension.

This court has repeatedly held that the cumulative nature of attorney misconduct warrants imposition of more severe discipline. The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983); The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981). When considering the fact that appellee has been found guilty of misapplying funds specifically entrusted to him for a specific purpose, charging an excessive fee and failing to comply with minimum trust account procedures, it is respectfully submitted that the bar's recommended discipline is warranted. When adding thereto the deception and fraud which the bar respectfully suggests was established by clear and convincing evidence it is submitted that the bar's recommended discipline is appropriate. In The Florida Bar v. Willis, 459 So.2d 1026 (Fla. 1984) the respondent was suspended for three (3) years for applying money entrusted to him by a client to a purpose other than the one intended, failing to comply with minimum trust accounting records and procedures, commingling funds and neglecting a legal matter entrusted to him.

Suspension would appear to be an appropriate discipline when measured in light of Florida's Standards for Imposing Lawyer Sanctions. Rule 4.12 provides for suspension "when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Certainly appellee knew or should have known that he was dealing improperly with estate cash by treating the same as if it were his own and withdrawing sums for his own use at his whim and caprice without consent from the personal representative or

leave of the court. The charge of an excessive fee must be deemed to constitute an injury to a client within the purview of the cited rule. Rule 7.2 provides for suspension "when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system." It is respectfully submitted that appellee's self dealing with estate proceeds constitutes a violation of a duty owed as a professional and his appropriation of excessive fees certainly constituted an injury to the estate, the public and our legal system.

CONCLUSION

This court has repeatedly held that the goals of our disciplinary process are to promote and protect the public welfare, to discipline the errant attorney and to deter others from similar misconduct. It is respectfully submitted that in applying such criteria it is essential that the court consider the perception of the public and of the bar membership in their reviews of sanctions ordered by this court. The bar urges that public confidence will be shaken and the bar's membership will be confused by a message stating that an attorney may appropriate funds entrusted to him to a purpose other than that for which such funds were entrusted to him, charge a clearly excessive fee, fail to maintain even minimum trust account records and act dishonestly and fraudulently with his brethren at the bar and be sanctioned merely by a public reprimand. The bar most respectfully suggests that a one year

suspension will best communicate a message that will assure the public and the bar that misconduct such as appellee's will not be tolerated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief of The Florida Bar was furnished to Warren H. Johnson, respondent, at his official record bar address of 945 Central Avenue, Naples, FL 33903 by regular mail on this 15th day of February, 1988.

David M. Barnovitz
DAVID M. BARNOVITZ