IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,)

Complainant,)

v.)

ALBERT D. GREENFIELD,)

Respondent.)

_____/

Supreme Court Case
No. 68,857

On Petition to Review

Answer Brief of Complainant

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SUMMARY OF ARGUMENT

It is The Florida Bar's position that the Referee's imposition of a one year suspension was not clearly erroneous where the Respondent misappropriated approximately $20,000.00 from an Estate, without permission of the court or the heirs. Respondent's subsequent act of repaying those monies does not absolve him of his initial wrongdoing.

INTRODUCTION

The Florida Bar, Complainant, will be referred to as "the Bar" or "The Florida Bar". Albert D. Greenfield, Respondent, will be referred to as "Mr. Greenfield" or "the Respondent".

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar filed its complaint on June 6, 1986. A final hearing was conducted before the Honorable Linda L. Vitale, Referee on December 11, 1986.

The Florida Bar would adopt the Referee's summary of facts as its statement of the facts. Those findings have been included below for the court's convenience.

> Respondent, Albert D. Greenfield, was both personal representative and attorney for [redacted]. The sole heir of the Estate was the deceased's spouse, [redacted]. It is admitted that approximately $28,135.70 was withdrawn from the estate's assets by Respondent. Portions thereof, however, represent attorney's fees and personal representative's fees.
>
> There was no written agreement concerning these fees. Approximately $20,000.00, Respondent characterizes as having borrowed from the estate's assets. There was no promissory note executing evidence of the debt, no written consent from the heir of the Estate nor the Court. There was a note on the check stub for the estate checking account that it was a loan. A substantial portion of the sum was repaid prior to The Florida Bar audit in the cause and as of this date all has been repaid. Respondent misappropriated the money but at all times intended to repay same and did not conceal his actions and did in fact repay said amount.
>
> Prior to the decedent's death, [redacted] and Respondent were close personal friends for a period of 20 years. There was a will contest at the inception of the estate between Mrs. [redacted] and Mr. [redacted]'s daughter. Mr. Greenfield claims that [redacted] consented verbally to borrowing of the funds. She denies that any consent was given. [redacted] testified that her first knowledge concerning the withdrawal of the funds came from The Florida Bar.
>
> The Respondent's reason for the need of monies was due to an IRS assessment and lien upon his residence which required $130,000.00 payment to IRS. It should be noted that Mr. Greenfield ultimately received a substantial refund of

$90,000.00 from the IRS indicating that much of the money he was forced to pay was not in fact owed and that he had not generated the income for which he was being taxed.

Mr. Greenfield did not conceal any of the withdrawals upon inquiry by The Florida Bar and has repaid all sums in question. The Estate was involved in an appeal of the lower court's decision on the will contest during the period of time in question and Mr. Greenfield's actions did not delay the distribution of the estate assets.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S IMPOSITION OF A ONE YEAR SUSPENSION WAS CLEARLY ERRONEOUS?

THE REFEREE'S IMPOSITION OF A ONE YEAR SUSPENSION WAS NOT CLEARLY ERRONEOUS

It is well established that a referee's findings of facts and recommendations in attorney discipline proceedings come to this Honorable Court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). In the instant case, Respondent has not gone so far as to state that the referee's findings were clearly erroneous. Rather, he has alleged that his deeds have been "mischaracterized" as a misappropiation rather than a "borrowing" and that the sanction imposed is too severe.

Simply stated, Mr. Greenfield, as personal representative and attorney for the Estate of [redacted] removed monies from the estate without the approval of the court or the heirs for his own use. The subsequent act of replacing those funds does not diminish his initial act of misappropriation. In The Florida Bar v. Breed, 378 So.2d 783, 784 (Fla. 1980) this Honorable Court asserted that restitution as a defense or in mitigation may help client losses, but it should not mitigate the discipline in cases involving the misuse of client funds. The Breed, supra case goes on to address the issue of whether "lack of intent to deprive the client of his money" and "personal hardship" justify minor punishment. It states:

> Such excuses stand out like an invitation to the lawyer who is in financial difficulty for one reason or another. All too often he is willing to risk a slap on

> the wrist, and even a little ignominy, hoping he won't get caught, but knowing that if he is he can plead restitution, but duly contrite, and escape the ultimate punishment. The profession and the public suffer as a consequence.
>
> Breed, at 784.

Although the Breed, supra Court imposed a two year suspension the opinion gave notice to the legal profession that henceforth they would not be reluctant to disbar an attorney. In The Florida Bar v. Davis, 474 So.2d 1165 (Fla. 1985), the Respondent removed monies from an estate to cover other obligations. He later reimbursed the estate. The Referee's findings of guilt were nonetheless upheld and Davis was disbarred, [1] see also The Florida Bar v. Kavouklis, 353 So.2d 844 (Fla. 1977). The foregoing cases echo this Court's firmly established principle that a lawyer should guard his client's funds with much greater diligence and caution than his own. The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), The Florida Bar v. Ruskin, 232 So.2d 13 (Fla. 1970).

Respondent has highlighted his action of placing notations reflecting a loan on check stubs of the estate account. A very interesting, although morbid question comes to the mind of this writer. What if petitioner had met his untimely demise prior to repayment of the "loan". Surely, the sole heir would have been put in an untenable position. She would have had to institute a lawsuit against the Estate of Mr. Greenfield, causing herself to be thrust into unnecessary litigation. The foregoing reasoning

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[1] - Davis was additionally charged with three other counts of misconduct.

lends support for the motivation behind the Breed, supra decision.

Mr. Greenfield has referred to The Florida Bar v. Rhodes, 355 So.2d 744 (Fla. 1978) as support for his contention that an intent to repay misappropriated funds will be considered as a mitigating factor. The referee in Rhodes, supra found no evidence that the Respondent intended to repay the estate. Rhodes was disbarred. The Court, however, did not state what they would have done had Rhodes intended to repay the estate or had he repaid the estate. The subsequent case of Breed, supra appears to answer the question. The Court would not have viewed the repayment of misappropriated funds as mitigating and would have imposed the same sanction. In fact, in The Florida Bar v. Bryan, 432 So.2d 49 (Fla. 1983) that Respondent removed monies from an estate and later repaid the monies. A three year suspension was imposed. Also, in The Florida Bar v. Felder, 425 So.2d 528 (Fla. 1983), a case referred to in Respondent's brief involving similar facts, a two year suspension was imposed. On the other hand, in The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978) a one year suspension was imposed for removal of monies from an estate. There, however, the Bar was castigated for undue delay. Such a circumstance is not present in the case sub judice.

Respondent also argues that if he mishandled the estate then his acts are subject only to the scrutiny of the probate court. That assertion is incorrect. For instance, if an attorney is convicted of a crime and sentenced, The Florida Bar is not prohibited from seeking discipline in regard to his ability to practice law. Moreover, an attorney convicted of a felony is automatically suspended from the practice of law.

Furthermore, in The Florida Bar v. Lewin, 342 So.2d 513 (Fla. 1977) the Respondent, acting as personal representative and attorney to an estate made investments without a court order or the consent of the beneficiary. He additionally filed false receipts with the probate judge. Not only did this Court find it appropriate to uphold the referee's findings of unethical conduct, but further upheld the referee's recommendation to disbar Lewin.

More recently, this court disbarred attorney William F. Casler, Sr. for removing estate assets without the consent of the court or the beneficiaries. The Florida Bar v. Casler, ___ So.2d ___ (Fla. 1987); (Opinion filed February 19, 1987).

It is clear from an examination of the cases cited in this brief that the Respondent was given a lesser sanction as a result of the circumstances in his personal life. In fact, had those circumstances not been presented, Mr. Greenfield could have been disbarred. Thus, the Respondent's position that "the punishment does not fit the crime" is incorrect. Clearly, it was quite the contrary.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that a one-year suspension is an appropriate disciplinary sanction, and would urge this court to approve the Report of Referee.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Answer Brief of Complainant on Petition to Review was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 and that a true and correct copy was mailed to S. Melvin Apotheker, Attorney for Respondent, Brickell Bay Office Tower, Suite 2600, 1001 S. Bayshore Drive, Miami, Florida 33131, this 17th day of July, 1987.

RANDI KLAYMAN LAZARUS