IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

RAYMOND J. TAKIFF,

Respondent.

_____/

CONFIDENTIAL

Supreme Court
Case No. 71,077

FILED
SID J. WHITE
APR 18 1988
CLERK, SUPREME COURT
By _____ Deputy Clerk

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.5 of the Rules of Discipline, final hearings were held on February 24, 25, 26, and 29, 1988, and March 7 and 8, 1988. All of the pleadings, notices, motions, orders, transcripts and exhibits are forwarded with this report and the foregoing constitutes the record of this case.

The following attorneys appeared as counsel for the parties:

On behalf of the Florida Bar: Patricia S. Etkin

On behalf of the Respondent: Raymond J. Takiff, pro se; James McGuirk (appearance entered at the conclusion of the final hearing before referee)

II. SPECIFIC FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED: After considering the transcripts, pleadings, and evidence before me, I find:

As to Count I

There is no clear and convincing evidence that the funds received by the Respondent were trust account funds subject to the Trust Accounting regulations of the Florida Bar. It appears that both Respondent and Manuel Vincente Gomez Romero (hereinafter "Romero"), as well as those persons acting on behalf of Romero, intended the funds to apply to a reasonable attorney's fee, but that

Respondent had the discretion and responsibility to use the money, if necessary, to procure the immediate release of Romero from jail.

a. Hernan Augusto Tascon paid Respondent $1,000, which was clearly understood by Tascon to be a reimbursement for professional services performed by Respondent for Romero at the request of Tascon. He further testified that on the night of Romero's arrest, a professional fee of $10,000 was discussed, but that he requested any further professional fee discussions be directed to Romero.

b. Joaquin Fernandez met with Romero the morning after his arrest and explained a fee of up to $40,000, with minimum of $8,000.

c. Respondent relied on Fernandez for communication on the issue of fees and costs, because of the ability of Fernandez to communicate in Spanish with Romero.

d. Respondent drafted a letter of understanding, setting forth the purpose for which the funds would be used. This letter was communicated by Fernandez to Romero in Spanish.

e. Romero admitted in his testimony before this Referee that the entire matter could be one of misunderstanding between the parties.

f. A presently serving judge, testifying as an expert with previous experience as a criminal defense attorney, testified that in his opinion, no obligation to create a trust account was created by the transaction. The evidence is sufficient to sustain that conclusion.

g. The allegation that the Respondent was holding funds as collateral for the bail bondsman was not proved. The allegation was, if anything, refuted by the following:

(1) No bail bond number, collateral affidavit, executed bond application, nor any other documentation existed in the file of the bail bondsman establishing the existence of such an agreement.

(2) The only documentation of such an agreement was a notation in the bail bond file stating that "Respondent holding collateral." The bail bonding personnel could not establish when it was so written, who wrote it, or satisfactorily explain why the other standard documentation was missing. Parenthetically it must be noted that the bond personnel are not necessarily disinterested in this issue. There is some probability that, had they agreed to write a bond without collateral, as is suggested by Respondent, they would be in violation of their own regulations. It is further noted that some evidence of personal animus between the bonding personnel and Respondent was expressed at the hearing, apparently arising from an unrelated legal matter in which Respondent represented a successful litigant against the bonding company.

As to Count II

There is no clear and convincing evidence that the Respondent failed either to account, or to return, the funds received by him or on his behalf.

a. As the transaction developed, it is clear that the Respondent in fact held no trust funds for Romero. While it is perhaps conceptually correct to characterize the sum of $750 as "trust funds" received by Respondent for the purpose of transmitting same as a bond premium or fee to a bondsman, the evidence is uncontraverted that this is exactly what he did. It was obviously the intention of the parties that this money be transmitted, directly and immediately, to the bondsman.

b. As noted, supra, $1,000 was received initially by Respondent as payment toward his professional fees. The balance of the funds received by Respondent, $5,300 by check, and $4,250 in cash, were accepted pursuant to the written and orally expressed representation that they were to be used, variously, for "fees, costs and bond," as needed. As it turned out, it was apparently unnecessary for any of these funds to be held as collateral for the bond (see report of referee, Count I g. supra).

As to Count III

There is no clear and convincing evidence that the Respondent misrepresented the legal position of his client.

a. In fairness, it is important here not to engage in "Monday morning quarterbacking." As the matter first appeared to Respondent, his client:

(1) Was a Colombian pilot;

(2) Was wanted in Texas under a federal murder charge;

(3) The name, date of birth, and general physical characteristics were a precise match;

(4) The client immediately protested his innocence as not being the right man; (There was rebuttal testimony that such representations were fairly common to criminal defendants from this background.)

b. Accepting at face value the client's representation that he was the wrong man, the Respondent undertook immediate and active efforts to secure Romero's release on bond. The record reveals:

(1) Two days after Romero's arrest, the authorities insisted on an adversarial bond hearing at which a $7,500 surety bond was imposed on Romero;

(2) Although a telex was apparently wired from Texas to Florida authorities conveying the agreement that the wrong man was in fact arrested, this telex was not communicated to the court or to the appropriate prosecuting authorities. The Assistant State Attorney charged with representing the State testified that the matter, if handled routinely and normally, would have "routinely and normally" resulted in the release of the defendant approximately 30 days after his arrest. Although Texas authorities testified to sending a second telex, the Florida authorities could not locate it according to Jonathan Clarke, extradition detective for the Florida

authorities. He testified that the Romero arrest warrant was quashed October 12, 1984;

(3) Meanwhile, Romero admits that he communicated to his counsel his "desperation" to be released immediately;

(4) The Complainant contends that Respondent misrepresented Romero's legal position in that, on October 9, 1984, he offered to fly to Texas in return for additional fees and costs, even though the telexes clearing Romero had been received in Florida and Respondent knew or should have known of them;

(5) This testimony rests on the allegations of the witness Gustavo Madrigal. Madrigal testified that he hired an investigator, Tom D'Azevedo, who routinely supplied him with the missing telex information, which Madrigal claims to have had in his possession when he talked with Respondent on October 9, 1984. However, Madrigal conceded that D'Azevedo was not even retained to commence his investigation until October 10, 1984. Such testimony does not rise to the level of clear and convincing. D'Azevedo did not testify;

(6) It is notable that during the course of their efforts to secure the release of Romero from jail, the Respondent and his co-counsel, Joaquin Fernandez, learned that part of the name of the individual wanted in Texas was "Madrigal." Although this appears now to simply be still another in a series of genuine coincidences, it lends credence to the argument of Respondent that he felt justified in treating the matter as more than "routine."

As to Count IV

There is no clear and convincing evidence that Respondent charged an excessive fee.

The Respondent provided witnesses who testified the fee charged was reasonable, particularly under circumstances where Respondent worked into or through the entire night on at least two occasions. The Complainant provided no witnesses who in fact testified the fee was excessive.

The overall chain of facts and circumstances in evidence in the Manuel Vincente Gomez Romero matter do not provide a basis for conviction.

III. RECOMMENDATION AS TO WHETHER RESPONDENT SHOULD BE FOUND GUILTY:

As to Count I

I recommend that Respondent be found not guilty of the violation of Disciplinary Rule 9-102(A) of the Code of Professional Responsibility and Rule 11.02 (4) of the Integration Rule of The Florida Bar.

As to Count II

I recommend that Respondent be found not guilty of the violation of Disciplinary Rule 9-102(B) (3) and (4) of the Code of Professional Responsibility.

As to Count III

I recommend that Respondent be found not guilty of the violation of Disciplinary Rules 1-102(A) (4) and (6) of the Code of Professional Responsibility and Rule 11.02 (3) (a) of the Integration Rule of The Florida Bar.

As to Count IV

I recommend that Respondent be found not guilty of the violation of Disciplinary Rules 2-106(A) and (B) of the Code of Professional Responsibility.

IV. SPECIFIC FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED: After considering the transcripts, pleadings, and evidence before me, I find:

As to Count V

There is no clear and convincing evidence that the funds received by the Respondent were trust account funds subject to the Trust Accounting Regulations of the Florida Bar.

a. On August 26, 1984, the husband of Angela Paulhiac (hereinafter "Paulhiac"), Jose Alzate (hereinafter "Alzate"), was arrested and held in lieu of bond far exceeding $10,000. The record is unclear, but the range appears to have been $150,000 to $250,000.

b. On August 25, 1984, Respondent says he advised Paulhiac that he required a $10,000 fee retainer. Paulhiac claims the money was supposed to be for bond. Inasmuch as bond premium at that point would have far exceeded $10,000, this portion of Paulhiac's testimony is not credible. Paulhiac admits she retained Respondent August 26, 1984.

c. Although the testimony is conflicting as to whether the payments were made in one or two installments or on which dates, it is clear that by August 28, 1984, Paulhiac had turned over to Respondent a total of $9,900.

d. On August 27, 11984, Respondent's co-counsel, Joaquin Fernandez, obtained a reduction of bond to $10,000.

e. Thereafter, it is the testimony of Respondent that because of repeated requests from Paulhiac, Respondent agreed:

(1) to pay from his retainer a $1,500 premium to the bondsman;

(2) to hold as collateral the remainder of his fee; (Respondent admits that in so doing, he not only made the balance of his initial retainer collateral for the bond, but he also obligated himself to pay an additional $1,600 out of his own pocket if the bond were estreated.)

f. Thereafter, Respondent testified, he took the balance of the retainer and placed the funds in a safe in his home, which Respondent testified, was consistent with his practice of handling funds in his criminal defense practice. Respondent testified that he kept the funds segregated in the safe from the date of receipt until January, 1987, when he returned the entire balance, plus interest.

g. In April, 1985, Alzate's criminal case was resolved and the funds held by Respondent were thereby released from any requirement they be held as collateral. Presumably at that point they reverted to either (a) legal fees, which is Respondent's contention, or (b) funds to be returned to Paulhiac, which is the Paulhiac position.

h. It is notable that Paulhiac's position makes no provision at all for the payment of attorney's fees to Respondent. When questioned at this point, Paulhiac admitted that Respondent was entitled to a reasonable counsel fee and that these funds were to be used for this purpose.

i. After Respondent obtained the release of Alzate by this novel use of retainer fees, Alzate retained different criminal defense counsel to represent him in this case.

j. Respondent agrees that the retainer fee he had received would, if and when released from the bond collateral requirement, be subject to adjustment because of Alzate's change of counsel.

k. Respondent testified he did not return the funds prior to the end of the criminal case, April, 1985, because of the bond collateral matter. He did not do so afterward because, as he characterized it, it was an unresolved fee dispute. On March 12, 1986, Respondent wrote the Florida Bar for advice on how to resolve the fee dispute, but received no answer.

l. Finally, in mid-January, 1987, Respondent transmitted the entire amount he held, plus interest, to Paulhiac apparently waiving his claim to reasonable counsel fees.

m. It is the judgment of this Referee that the funds in question were originally received as a fee retainer, and that the Respondent effectively donated use of these funds to the client in order to procure the client's release from jail. Although it is arguable that even such "donated" funds became trust funds subject to the Florida Bar Trust Accounting rules, it is the judgment of this Referee that no intentional violation of the trust accounting rules occurred.

As to Count VI

There is no clear and convincing evidence that the funds received by the Respondent were not utilized for the purpose for which they were received. For the reasons stated in Count V, the funds were in fact utilized on behalf of Alzate for Alzate's bond.

As to Count VII

There is no clear and convincing evidence that the Respondent intentionally misrepresented to the bonding company the amount of funds held by him.

a. As noted, supra, the Respondent appears to have committed the entire $9,900 received by him to the benefit of the erstwhile client, in an effort to immediately secure the client's release from jail.

b. Respondent testified he did not stop to think that, having paid $1,500 out of the funds originally given to him, he was not holding sufficient collateral.

c. Respondent testified further, that had the bond been forfeited, he probably would have been legally obligated to pay the full collateral to the bondsman.

d. Respondent explained his inattention to these rather expensive details by noting that he was at the time constantly in federal criminal trials.

It is the finding of this Referee that a misrepresentation occurred, but that it was inadvertent, not intentional.

As to Count VIII

There is clear and convincing evidence that the Respondent improperly withheld from Alzate at least part of the funds due, after April, 1985. Upon receipt of the Certificate of Discharge of the Bond, the Respondent became responsible for prompt resolution of the dispute by immediate return of the funds or by other action that terminated possession and control by the Respondent. The failure to do so constituted a violation of Disciplinary Rule 9-102(B)(4) of the Code of Professional Responsibility. (It is noted that under Count VIII (103) of the Complaint, the Respondent is charged with failure to promptly return to his client the funds which had been entrusted to him to collateralize his client's bond which funds the client was entitled to receive. A review of Rule 9-102(B) (3) and (4) reflects that under this charge the correct citation of the Rule is 9-102(B) (4). Therefore, the Referee has proceeded under DR 9-102(B)(4).

V. RECOMMENDATION AS TO WHETHER RESPONDENT SHOULD BE FOUND GUILTY:

As to Count V

I recommend that Respondent be found not guilty of the violation of Disciplinary Rule 9-102(A) of the Code of Professional Responsibility and Rule 11.02(4) of the Integration Rule of The Florida Bar.

As to Count VI

I recommend that Respondent be found not guilty of the violation of Rule 11.02(4), Integration Rule of The Florida Bar.

As to Count VII

I recommend that Respondent be found not guilty of the violation of Disciplinary Rule 1-11102(A) (4) of the Code of Professional Responsibility.

As to Count VIII

I recommend that Respondent be found guilty of the violation of Disciplinary Rule 9-102(B) (4) of the Code of Professional Responsibility.

VI. Recommendation as to Disciplinary Measures to be Applied:

As to Count VIII

I recommend that the Respondent receive a public reprimand by the Board of Governors of The Florida Bar. In addition, I recommend that Respondent be required to pay all costs incurred in The Florida Bar proceedings.

VII. Personal History and Past Disciplinary Record:

After finding of guilty and prior to recommending discipline to be recommended pursuant to Integration Rule 11.06(9) (a) (4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

(1) Age: 49 years old

(2) Date Admitted to Bar: June 1, 1976

(3) Past Disciplinary Record: None.

(4) Mitigating Factors: Under the Referee's recommendation, the Respondent will be required to pay the costs of this proceeding.

As of the date of this report, those costs total $14,562.03. It is reasonable to assume that during the approximately three and one-half years of this investigation the Respondent has been required to expend a substantial additional amount.

(5) Aggravating Factors: None.

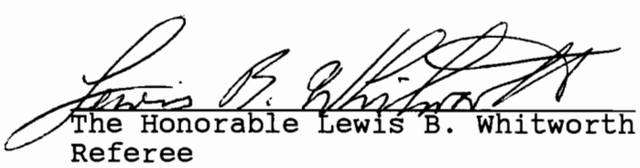
VIII. Statement of Costs and Manner in Which Costs Should Be Taxed:

I find the following costs were reasonably incurred by The Florida Bar.

Administrative Costs (Rule 3-7.5(k)(1), Rules of Discipline	
Grievance Level	300.00
Referee Level	300.00
Court Reporter	
Grievance Committee Hearings	1,384.90
Hearings Before Referee	5,686.10
Depositions	2,988.90
Spanish Interpreter Service	585.00
Witness Fees and Subpoena Service	465.50
Out of Town Witness Travel and Expenses (Manuel Romero, Augusto Tascon, Charles Vaughn and Ltd. T.C. Swan)	2,265.63
Production of Bank Records (Sun Bank)	565.00
Photocopies	21.00
TOTAL	14,562.03

It is further recommended that execution issue with interest at the rate of twelve percent (12%) to accrue on all costs not paid within thirty (30) days of entry of the Supreme Court's final order in this cause, unless time for payment is extended by the Board of Governors of The Florida Bar.

Dated this 14th day of April, 1988, at Miami, Dade County, Florida.



The Honorable Lewis B. Whitworth
Referee

Copies furnished:
Patricia S. Etkin, Esq., Bar Counsel
James McGuirk, Esq., Respondent's Counsel