IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

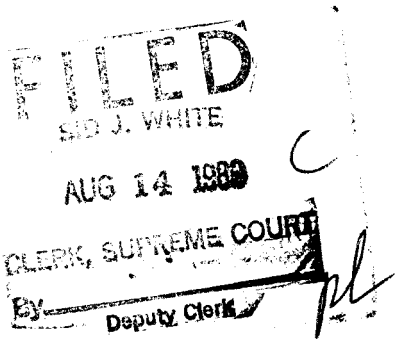
Complainant,

v.

FRANK DIAZ-SILVEIRA,

Respondent.

Case No. 72,653



Complainant's Answer Brief and Initial Brief

On Cross-Petition for Review

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INTRODUCTION

The Florida Bar, Complainant, will be referred to as the "the Bar" or "The Florida Bar". Frank Diaz-Silveira, Respondent, will be referred to as "Mr. Diaz-Silveira" or "Respondent". The symbol "TR." will be used to designate the transcript of the final hearing held on March 8, 1989.[1] All emphasis has been added.

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[1] Respondent states that he did not cite to the transcript because he was not provided a copy as provided by the Rules. Rule 3-7.5(k)(2) states that a copy of the record should be made available on request and payment of costs. At no time did Respondent request same.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar filed an XI (Eleven) Count Complaint regarding Frank Diaz-Silveira on June 30, 1988. Respondent admitted Counts I (One) through X (Ten) which alleged that Respondent issued checks from both his trust accounts and operating account which were dishonored due to insufficient funds. Count XI (Eleven), which was not admitted, charged Respondent with various acts of misconduct regarding the use of funds. A final hearing was conducted before the Honorable George Shahood, Referee on March 8, 1989. Judge Shahood's Report of Referee dated April 11, 1989 adopted all Counts of the Bar's Complaint as his findings of facts, found Respondent guilty of all Bar charges, and recommended that Respondent be suspended for three years to begin running from the date he was suspended by the Florida Supreme court for violating probation.[2] (August 25, 1988)

The Bar presented its Auditor, Carlos J. Ruga as its only witness at the final hearing. (TR. 39-76; 82-98; 109-199)

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[2] In The Florida Bar v. Diaz-Silveira, 477 So.2d 562 (Fla. 1985) Respondent was publicly reprimanded and placed on three years probation for misconduct resulting from trust accounting irregularities. The opinion provided that if competent evidence demonstrated that the Respondent was not in substantial compliance with the trust accounting requirements mandated by the Bar, Respondent was deemed to have consented to an immediate suspension from the practice of law for a period of not less than one year. On March 25, 1988 the Bar's Petition for Temporary Suspension was denied by this Honorable Court. On May 18, 1988 the Bar requested that Respondent be suspended in that he violated his probation. Respondent was suspended on August 25, 1988.

Mr. Ruga attested to the allegations contained specifically in Count XI (Eleven) of the Bar's Complaint in that all other allegations were admitted. Those charges arose from Mr. Ruga's examination and audit of Respondent's two trust accounts, and Respondent's operating account. The audit revealed that 60 (sixty) checks were dishonored due to insufficient funds in the trust accounts and 245 (two hundred forty five) checks were dishonored due to insufficient funds in the operating account. Mr. Ruga testified that Respondent had consistently used clients' funds for his own personal purposes, although later replacing said funds. He further testified to the fact that Respondent had commingled clients' funds with personal funds. The final area of Mr. Ruga's testimony regarded Respondent having engaged in "check-kiting".

Respondent presented Andres Lopez, an accountant. (TR. 208-216) Mr. Lopez attested to office procedure used by Respondent's accounts. Mr. Lopez stated that he did not trace all transactions, as did Mr. Ruga. Mr. Lopez further stated that he did not perform an audit, because he was not quaiified to do so. (TR. 214)

Raul De Cubas, Respondent's associate testified on his behalf (TR. 218-228) Mr. De Cubas explained the day to day workings of the law office. Respondent presented Mary Collins (TR. 18-27); Bennett Brummer (Tr. 27-35); the Honorable Maria Korvick (TR. 76-82) and Joseph Gersten (TR. 98-109) as character witnesses. All are illustrious and well respected members of the

community. None of these witnesses, however, were familiar with the specifics of the Respondent's misconduct. After inquiry by The Florida Bar some of those witnesses admitted that their opinion of the Respondent would be different, if they were convinced that he committed the acts he was charged with committing. Bennett Brummer's statement was particularly noteworthy.

> By Ms. Lazarus:
>
> Q Mr. Brummer, if you were able to see clear and convincing proof that Mr. Diaz Silveira used client funds for other than the purposes for which they were intended and that he engaged in check-kiting, would your opinion of him change?
>
> By Mr. Brummer:
>
> A Yes, it would have an impact on my perpective assessment of Mr. Diaz-Silveira, to a degree. To the degree that I think I know him, I would be offended by that conduct.
>
> (TR. 34-35)

The Respondent testified on his own behalf. (TR. 235-285) Respondent has petitioned this Court to review the Referee's recommendation and has filed their brief. The Florida Bar filed its Cross-Petition for Review and is seeking disbarment. This brief follows.

SUMMARY OF THE ARGUMENT

It is The Florida Bar's position that the evidence through the testimony of its Auditor as well as the Respondent amply support that the Respondent had committed the various acts of misconduct in Count XI (Eleven) of the Bar's Complaint.

Further, disbarment is the appropriate sanction where Respondent had caused nearly 300 (Three hundred) checks to be dishonored, used clients' funds for purposes other than those entrusted to him, commingled and engaged in check kiting. That extreme penalty is especially appropriate in that Respondent had been previously disciplined for the same misconduct thereby proving that rehabilitation is improbable.

POINTS ON APPEAL

POINT I

WHETHER THE REFEREE'S FINDING OF GUILT WITH REGARD TO COUNT XI (ELEVEN) OF THE COMPLAINT WAS SUPPORTED BY THE EVIDENCE?

POINT II

WHETHER DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION?

ARGUMENT

I

THE REFEREE'S FINDING OF GUILT WITH REGARD TO COUNT XI (ELEVEN) OF THE COMPLAINT WAS SUPPORTED BY THE EVIDENCE

It is well established that a Referee's findings in an attorney disciplinary proceeding will be upheld unless clearly erroneous or without evidentiary support. The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). Respondent contends that there was "no evidence whatsoever" to support the Referee's finding since there was "no evidence whatsoever" to support the finding that Respondent acted knowingly or intentionally. Respondent's proposition is hard to swallow, in light of the testimony.

The Auditor's testimony is quite enlightening. He asserted that Respondent had in excess of 300 (three hundred) checks returned for insufficient funds. Obviously, all checks did not "bounce" on the same day. This situation took place over a period of time. At what point could Respondent possibly claim he did not know what was occurring. Before the 20th (twentieth) bounced check? Before the 100th (hundreth) bounced check? Before the 250th (two hundred and fifth) bounced check? To suggest that Respondent did not know or was unintentional is almost ludicrous. Respondent testified that he had in fact been receiving letters from The Florida Bar regarding some of these checks much before October of 1987. (TR. 270).

Furthermore, Respondent's testimony regarding the fact that

he would issue checks, knowing money was not in the account borders on frightening.

> I would ask my secretary, "Please do not yo and negotiate this check yet because we do not have sufficient funds now and probably won't until next week. On Monday or Tuesday, I am expecting some funds. Please go and tell the others to do the same."
>
> I asked her and on occasion I asked the others directly, instead of sending messages, to please ask me before going to the bank.
>
> When I found out that they did on many occasions -- and I found that out much later. I went to the bank every day.
>
> But since I told that person, "I am expecting funds on Monday" -- but they would yo to the bank and negotiate the check. But there were other checks in transit, and that's why I didn't want that person to negotiate the check -- or there were not sufficient funds, but the teller would pay the check even though there wasn't sufficient funds.
>
> (TR. 278-9)

Respondent also received bank statements. Bank statements reflect activity in an account. He is charged with the duty of reviewing these statements. He either ignored that obligation or simply did not care. Further, Kespondent was on probation for precisely this type of misconduct. Was he not in fear of the possible penalties? One must wonder.

The Auditor also testified that Respondent used clients' monies for personal expenses. He signed the checks had orchestrated their use. Kespondent did not have the consent of his clients to use their monies for his own purposes. Respondent knew he had used clients monies since he obtained a personal loan

in order to replenish his trust account.

The evidence further supported the undeniably intentional act of check kiting. Mr. Ruga explained Respondent's acts of check kiting as follows:

> A Check kiting is when you have two different accounts and you write checks from one account to the other one, even though there are no funds, in order to create a balance in the account to satisfy some obligations that are outstanding.
>
> It is the same example as I referred to before, in January of 1987 when the check for $59,000 was paid to the bank, due to the fact that the bank had three deposits outstanding at that particular point in time from the other account.
>
> Q What ultimately happens?
>
> A What happens is that when the deposits are returned, it creates an overdraft in the account if the bank pays on uncollected funds.
>
> Q But does it create for a short period of time the appearance that there is money in the account?
>
> A That's correct.
>
> Q Would you explain for the Court what evidence you found of that?
>
> A As I stated before, I did the audit for the period of 1987 and I found that on several occasions there were checks issued from the operating account to the trust account at the end of the month or very close to the end of the month and those checks were issued when there were absolutely no funds to cover same in the operating account.
>
> For example, in January of 1987, there was at the end or very close to the end of the month five checks issued from the operating account to the trust account.

Q Which trust account is that?

A This what we call the regular trust account, not the Visa account, but the regular trust account where all of the client funds are deposited, except the Visa account.

For example, on January 27, 1987, Mr. Diaz Silveira issued his Check Number 1952 payable to the Diaz Silveira trust account in the amount of $12,379.70.

The bank balance on that particular date was negative $6,541.31.

(TR. 71-72)

Consequently, the Referee had enormous support for his finding that Respondent was guilty of Count XI (Eleven) of the Bar's Complaint.

ARGUMENT

II

DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION[3] (Restated)

The Florida Bar presented an extensive case to the Referee proving that Respondent had engaged in misconduct regarding funds which was severe enough to warrant disbarment.

In The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981) that Respondent misappropriated funds for his own personal use, commingled private funds with trust funds, and had been previously publicly reprimanded and was disbarred. In the case sub judice, in addition to the misconduct engaged in by Leopold, Mr. Diaz-Silveira engaged in a deliberate and consistent act of check kiting, as well as allowing 300 (three hundred) checks to be returned for insufficient funds. see also, The Florida Bar v. Van Sharman, 504 So.2d 1236 (Fla. 1987). In The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981) that Respondent was disbarred where a continuing and irresponsible pattern of conversion of clients' funds as well as failure to account for funds was proven.

This Honorable Court disbarred Eugene Gillis for misappropriating $350.00 (Three hundred and fifty dollars) from a

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[3] This argument will address Respondent's second point on appeal. It will additionally constitute Complainant's sole argument on its Cross-Petition.

client, without any other misconduct. The Florida Bar v. Gillis, 527 So.2d 818 (Fla. 1988)[4] see also, The Florida Bar v. Baker, 419 So.2d 1054 (Fla. 1982) In The Florida Bar v. Davis, 379 So.2d 542 (Fla. 1980) Davis, who had been previously suspended was disbarred for issuing worthless checks as well as other misconduct. This Court recognized that although disbarment is an extreme penalty, it should be imposed where rehabilitation is improbable. The Florida Bar would suggest that Diaz-Silveira, like Davis, cannot be rehabilitated. Respondent had been publicly reprimanded and placed on probation for similar misconduct. His subsequent actions prove that disciplining him is simply meaningless.

This Court has also acknowledged that it would view cumulative misconduct in a graver light. The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987) In Newman, supra like this case, there were numerous instances of dishonored checks, trust account liabilities in excess of assets and improper utilization of the trust account. The cumulative nature of misconduct was recognized and Newman was disbarred.[5]

The Florida Standards for Imposing Sanctions are instructive. They provide the following:

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[4] Gillis did not contest the proceedings from the onset.

[5] Newman also contended that his misconduct resulted from poor judgment and poor recordkeeping. This Court held that the evidence proved otherwise.

> 4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.
>
> 4.12 Suspension is appropriate when a lawyer knows or, should know that he is dealing impropely with client property and causes injury or potential injury to a client.

Even if Respondent's acts were found to be unintentional, the discipline may be increased where a prior disciplinary offense has been committed. Rule 9.22 Standards for Imposing Lawyer Sanctions.

Respondent's misconduct alone warrants disbarment. His prior misconduct and the cumulative nature of the instant misconduct further warrant the imposition of the ultimate lawyer sanction.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed a three year suspension, and would urge this court to disbar the Respondent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Answer Brief and Initial Brief on Cross-Petition for Review was sent Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Respondent, Douglas Williams, Attorney for the Respondent, at 1920 Miami Center, 100 Chopin Plaza, Miami, Florida 33131 on this 11th day of August, 1989.

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