IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Case No. 72,653

THE FLORIDA BAR,

Complainant,

vs.

FRANK DIAZ-SILVEIRA,

Respondent.

FILED
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JUL 18 1989
CLERK, SUPREME COURT
By
Deputy Clerk

BRIEF OF RESPONDENT

FERRELL, WILLIAMS
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STATEMENT OF THE CASE

The Respondent, FRANK DIM-SILVEIRA (hereinafter, "MR. DIM-SILVEIRA') was charged in an 11-count Complaint with various acts relating to the writing of checks on an account with insufficient funds, and with trust accounting violations. At the time, MR. DIM-SILVEIRA was on probation in respect of earlier proceedings before this Court.

More paticularly, Counts I through X of the Complaint filed by The Florida Bar, as Complainant (hereinafter, "The Bar") described check insufficiencies between February of 1987 and January of 1988. The largest amount involved was $294.50; the smallest, $2.00. All checks were made payable to offices of various Clerks of Court for payment of recording fees or similar ministerial functions. All checks were made good promptly upon notification. Count **XI,** however, contained a wholesale assertion of Trust Account violations, including comingling of funds and the use of trust funds to satisfy personal and business obligations. While the unfunded checks were admitted, the Trust Account violations were vigorously and strenuously denied.

The matter came on for hearing before the Referee, the Hon. George M. Shahood, Circuit Judge of the Seventeenth Judicial Circuit, in and for Broward County, on or about March 8, 1989. At the conclusion of a day-long hearing, the Referee found MR. DIM-SILVEIRA guilty of all counts, including Count XI, and recommended a three-year probation, to be effective **nunc pro tunc** to the date of this Court's original suspension order, which had issued consequent upon the filing

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of a finding of violation of probation by the Grievance Committee involved.

STATEMENT OF THE FACTS

MR. DIAZ-SILVEIRA, a well-known and highly respected member of his community, was charged by Complaint in June of 1988. MR. DIAZ-SILVEIRA had been an active practitioner for several years, a candidate for public office, and extraordinarily active in charitable and civic affairs, particularly those relating to and benefiting the Hispanic community in the South Florida area. True, he had had a prior encounter with The Bar arising out of what unquestionably was shown to be sloppy bookkeeping and internal office management as opposed to any intentional wrongdoing; but notwithstanding that earlier encounter, resulting in his being placed on probation, he had never been the subject of any accusation, **on the part of a client,** that he had misappropriated funds, performed inadequately, or in any other way breached his obligations and responsibilities as a lawyer.

Similarly, in the case at Bar, MR. DIAZ-SILVEIRA is not accused of having caused one penny's worth of loss to any client. Rather, again, the accusations of the Complaint describe what concededly was inattentive office management, but don't come close to implicating trust accounting violations, which are "specific-intent" acts. **As** has been said above, there was never any assertion that a client was damaged, and in point of fact none ever has been.

In addition to having established those facts at the hearing before the Referee, it was similarly shown that MR. DIAZ-SILVEIRA was the "victim" of a combination of a series of bank errors

(for example, a deposit to one account was inappropriately and uncontrollably credited to another account by his bank, through no fault of his own, causing some of the insufficiencies which were asserted in the Compliant) and by his bank's having receded from an earlier understanding or convention, at which MR. DIAZ-SILVEIRA had arrived with his account officer, relating to the handling of and dealing with any minor account insufficiencies: as is common with established banking customers, the Bank with which MR. DIAZ-SILVEIRA had been dealing for years had agreed to notify him in the event any such oversight occurred, which would immediately cause MR. DIAZ-SILVEIRA to make an appropriate deposit. However, as the result of a change in bank personnel giving rise to the installation of a new account officer to service his account, MR. DIAZ-SILVEIRA found himself unknowingly "departed" from his previous agreement/ arrangement with his bank.

We would be remiss if we did not make certain observations about the Bar's "auditor," Carlos Ruga (hereinafter, "MR. RUGA"), and both the sufficiency and credibility of his testimony. MR. RUGA, of course, is The Bar's full time "auditor." He does nothing else. He is not a CPA. He is, as is apparent from the nature and tone of his testimony, both of which are easily discernible from a reading of the transcript of the hearing before the Referee, very much an advocate, and very defensive about "his" cases. **So,** for example, he testified to certain "conclusions" or opinions which, upon cross-examination, were shown to be ill-founded or ill-considered. He arrived at certain judgments which were wholly unsupported by the evidence, and then felt

constrained to attempt to justify them on cross-examination when confronted. It was his "opinion" (without there having been established any objective basis) that resulted in The Bar's submitting its proposed findings of fact concerning "check-kiting" and "commingling" which the Referee saw fit to adopt verbatim. We think that a reading of his testimony as a whole, both on direct and cross-examination, will be most illustrative.

And finally, it must be noted that MR. DIAZ-SILVEIRA presented, both by affidavit and in the form of "live" testimony, evidence from some extremely prestigious and well-regarded individuals concerning his credibility and his character and reputation. Present and past members of the State Legislature, County Commissioners, and Cabinet members, as well as sitting Circuit Judges were quick to come to MR. DIAZ-SILVEIRA's defense. Their evidence underscored the fact that *no individual* was done any harm by any of the acts ascribed to MR. DIAZ-SILVEIRA, which was further borne out by the fact that neither did The Bar receive any complaints from any individual client, nor did any individual client testify against MR. DIAZ-SILVEIRA at the hearing before the Referee: none could be found who was either objectively in a position to describe any damage suffered at MR. DIAZ-SILVEIRA's hands, nor who was possessed of a frame of mind which would have caused any such person to *desire* to become a witness adverse to him.

Nevertheless, at the conclusion of the proceedings, the Referee entered the findings and recommendations of which review is now sought; and these proceedings follow.[1]

[1]We have not made specific Record references, particularly to the Transcript: as of the time this Brief is being prepared for filing, we have not been provided with a copy as provided by the Rules.

SUMMARY OF THE ARGUMENT

I

There was no substantial, competent evidence that MR. DIAZ-SILVEIRA knowingly and intentionally engaged in any conduct which violated any of the trust-accounting rules governing the conduct of attorneys. To the contrary, the record is wholly devoid of any such evidence at all.

II

The Referee's recommendation of a three-year suspension, in light of the evidence presented at the hearing and in light of other actions by this Court, both recently and in the past, is disproportionately harsh. Lawyers who had been found to have acted intentionally, and whose clients had suffered substantial damages as a result, have received significantly less discipline than has been proposed for MR. DIAZ-SILVEIRA in these proceedings.

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ISSUES PRESENTED FOR REVIEW

1. WHETHER THE REFEREES FINDING OF "GUILT" WITH REGARD TO COUNT XI OF THE COMPLAINT IN THESE PROCEEDINGS WAS SUPPORTED **BY** THE EVIDENCE.

2. WHETHER THE REFEREE'S RECOMMENDATION OF AND WITH REGARD TO PENALTY OR SANCTIONS **IS** WARRANTED AND APPROPRIATE, BOTH ON THE FACTS AND UNDER THE LAW.

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ARGUMENT

I

THE REFEREES FINDING OF "GUILT" WITH REGARD TO COUNT XI OF THE COMPLIANT IN THESE PROCEEDINGS WAS NOT SUPPORTED BY THE EVIDENCE.

We suggest, as we have in the summary of the argument and in the Statement of the Facts, that there is no evidence whatsoever supporting the proposition that MR. DIAZ-SILVEIRA acted knowingly or intentionally, and that therefore, the finding of "guilt" with regard to Count XI was wholly inappropriate. We rely upon the same authorities cited in Point II, *infra,* which make it apparent that accusations of "commingling" or similar trust-accounting violations are analagous to "specific-intent" crimes, requiring *both* scienter and intention to do something which the law forbids, knowing it to be wrong. Past the authorities asserted in Point 11, we simply ask that this Court look at its own Standard Jury Instructions in Criminal Cases to be reminded of the kind of proof(s) necessary in order to establish the requisite type and quantum of intent, *particularly* in cases involving fraud, to which the situation at Bar is most similar.

It would be different were the Bar to be able to point to any element of damage to any of MR. DIAZ-SILVEIRA's clients. As we have said in other parts of this Brief, however, The Bar hasn't; and it hasn't, because it couldn't.

II

THE REFEREES RECOMMENDATION OF AND WITH REGARD TO PENALTY OR SANCTIONS WAS NOT WARRANTED OR APPROPRIATE, BOTH ON THE FACTS AND UNDER THE LAW.

We respectfully submit that the penalty recommended by the Referee would be exceedingly harsh, disproportionate to the evidence that the Court heard, and therefore unwarranted.

Firstly, we turn to the "FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS," found at page 118 of the current Florida Bar Journal. Initially, we observe that one of the factors that is to be considered in the imposition of sanctions is "Injury," with the lowest level being "'little or no' injury." In the event that there is "'little or no' injury," it would appear that the STANDARDS contemplate the omission of any reference to "injury" whatsoever.[2] Section "**C**" of the STANDARDS is entitled, "**Factors to be Considered in Imposing Sanctions.**" There are four enumerated. Of the four, three militate strongly in favor of the Respondent here. They are:

"(b) The lawyer's mental state;

(c) The potential or actual injury caused by the lawyer's misconduct; and

(d) The existence of aggravating or mitigating factors."

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[2] ". . . A reference to 'injury' alone indicates any level of injury greater than 'little or no' injury." Hence, if there is "little or no" injury, no reference at all should be made.

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While the Bar would argue that an aggravating factor arises by virtue of the Respondent's probationary status, we would suggest that to the extent that that might otherwise have been considered by the Referee, it is far outweighed by the mitigating factors: the Respondent's mental state was neither malevolent nor malicious; there was no injury whatsoever caused by any misconduct which is deemed to have been found; and the extensive history, established both testimonially and documentarily, of the Respondent's good reputation, good conduct, and service to his community and his country effectively nullify any argument in favor of aggravation.

We then turn to Sub-section 4.13 of Section **C:**

> "Public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes little or no injury or potential injury to a client."

In the light most favorable to The Bar, that is precisely the situation at hand. We are tempted to assert the applicability of Sub-section 4.14 instead, and only refrain from doing so because of the Respondent's probationary status at the time.

We have looked at Sub-sections 6.1, *et seq.,* which, given the subject title, would *seem* to relate most closely to the principal charge against the Respondent, a violation of Rule 4-8.4. However, a reading of Sub-section 6.1, *et seq.*, of the STANDARDS makes it apparent that they do not apply to the matter before the Referee: they all seem to deal with the knowing (i.e. intentional) making of a false *statement* or the submission of a false document, or the withholding of material information.

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In considering "Aggravation and Mitigation," in accordance with Sub-section 9.0 of the STANDARDS, the only factor which applies is found in Sub-section 9.22(a)--prior disciplinary offenses. Its counterpart under the mitigating factors found in Sub-section 9.32(a) concededly must apply, as well. However, all other *appropriate* mitigating factors (which is to say, those that do not sound in physical or mental disability or emotional problems) ***do*** apply--(b) [absence of a dishonest or selfish motive]; (e) [full and free disclosure to disciplinary board or cooperative attitude toward proceedings]; (g) [character or reputation--in which regard the Respondent is, we think, outstanding]; (j) [interim rehabilitation]; (k) [imposition of other penalties or sanctions--the Respondent has already labored under a suspension for almost **six** months]; (1) [remorse--the Respondent's demeanor at the proceedings spoke for itself]; and (m) [remoteness of prior offenses--the Respondent's prior problems arose and terminated in 19851.

We then look at only the most recent treatments accorded other Respondents, to compare severity of offense and resultant penalty. In The Florida Bar v. Titone, 522 So.2d 822 (Fla., 1988), the Respondent gravely mishandled representation in the criminal case and failed or refused to appear at the most significant judicial proceeding. In a related matter, the Respondent similarly failed to appear at a critical hearing, in consequence of which a judgment in a civil case was entered against his client. The Respondent failed to inform his client of the judgment or its significance. Unquestionably, two clients were damaged

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both economically and otherwise, and the Profession itself was dishonored. The penalty? Probation for three years.

In The Florida Bar v. Ward, 472 So.2d 1199 (Fla., 1985), the Respondent intentionally concealed from his client the fact that the adversary in civil litigation over a piece of realty had filed a Notice of Appeal from a final judgment of foreclosure in favor of the client. Thereafter, the client entered into a contract to sell that same piece of realty. At the time of the closing, neither the selling client nor the buyer (nor buyer's counsel) were informed of the pendency of the appeal. **A** title insurance company eventually learned of the original lawsuit and made inquiry of the Respondent, causing him to reply that the matter was "*res judicata*." Again, no mention was made of the pending appeal. After closing, when the purchasers learned of the significant cloud upon the title to the realty they had acquired, a lawsuit was filed, not only against the client, but against the attorney himself. He represented his client and his own interests, without ever informing his client of the conflict of interest which was patent, or of his earlier malpractice. The Referee expressly found that the conduct of the Respondent there did *not* constitute ". . . conduct involving fraud or misrepresentation." The Respondent ***was*** disciplined because of his having prepared and delivered an affidavit improperly characterizing the ownership of the realty in question (which the Referee found the Respondent knew to have been fraudulent) and because of the rife conflict of interest. The punishment? Suspension for 30 ***days.***

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In The Florida Bar v. Roth, 471 So.2d 29 (Fla., 1985), a lawyer brazenly stole more than $80,000 from clients whom he had represented for years and years. His explanations or justifications for his "use" of the funds were flimsy if not totally disingenuous. The Referee recommended disbarment. The Court overruled that recommendation, however, based upon the length of time for which the Respondent had been a member of the Bar, the extensive *pro bono* work he had done, his prior lack of disciplinary problems, and the fact that he made restitution. The Court therefore found a three-year suspension to be appropriate.

There are other, recent episodes of intentional conversion of funds, neglect of legal matters and similar transgressions which have resulted in the imposition of public reprimands or probationary periods.

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CONCLUSION

Under the facts and circumstances of this case, then, when viewed in the light of all of the foregoing and the evidence presented at the hearing before the Referee--including the Respondent's 27 years of service to his country, starting with his intelligence activities directed against several unfriendly governments (which has been documented), his military career, his public service here in the community, his contribution to the electoral and political processes at the State level, and his unimpeachable reputation in the community (as evidenced by the testimony of sitting Circuit Judges, County Commissioners, State Cabinet officers, and former members of the State Legislature), coupled with the impact which the suspension order has had upon the Respondent up to this time, it seems only fair and humane that *if* there is to be any additional period of suspension, it only be for a period of another three months, followed by a probationary period with appropriate safeguards. Those safeguards could include the mandatory hiring of a full-time bookkeeper, monthly review by an auditor selected by The Florida Bar, and perhaps, if necessary, the posting of an errors and omission bond.

Anything more, we suggest, would be excessive.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing was mailed this 17th day of July, 1989, to the Hon. Randi Klayman Lazarus, **Esq.,** Assistant Branch Staff Counsel, The Florida Bar, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida, and the Hon. George A. Shahood, Broward County Courthouse, 201 S.E. 6th Street, Ft. Lauderdale, FL 33301.

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By: ______________________
DOUGLAS L. WILLIAMS